Articles

Practicing Internal Self-Determination Vis-a-Vis Vital Quests for Secession

By Natalija Shikova[*]

Abstract

It would be unrealistic to reject secession from the doctrine of self-determination and limit the doctrine to the colonialism context. Nevertheless, the question is: What principles do states need follow in response to secession movements? Democratic principles are not the best—or only—options to address these requirements, but the secession doctrine's development and state practice has made such principles legally and practically relevant, according to many scholars. This Article proposes that the focus of the debate should be transferred to the internal dimension of the right to self-determination. The possibilities that can come from the realization of this aspect of the right to self-determination can be further explored. Certainly there is a very wide and flexible range of options and measures for addressing, protecting, and promoting diversity, and thus overcoming identity conflicts and providing a balance of social power. Those political arrangements, though imperfect, can help to avoid secession, thereby providing stability, harmony, and prosperity of democratic societies. But practice has shown that there are exceptional cases in which the current conditions on the ground make the application of tools for internal self-determination impractical. In these exceptional cases, internal self-determination fails to achieve the desired goal. This Article examines the legal arrangements for realization of internal self-determination through the examples of Basque Country and Scotland as vital quests for secession in countries with long democratic traditions.

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A. Introduction

Outside of the context of decolonization, international law has not approved demands for secession.[1] Nevertheless, there are some signs that this could be changing. An indication of this shift is the diplomatic response to secessionism. International law is clear on this point: According to positive law, the principle of territorial integrity of the state is *jus cogens* and rejects any right to secession.[2] The rejection of secession from the doctrine and limiting this political phenomenon only in the context of colonialism is unrealistic for many scholars.[3]

Still, the universe of demands for separation and independence is broad and varied. Some of these quests for independence are severe and bloody, others are hidden and calmer, but still potentially explosive, and very rarely there are secessions claims that attempt to be accomplished through democratic means.[4] After the decolonization period,[5] with exception of East Timor,[6] there were no cases of self-determination until the dissolution of

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[1] International law neither allows nor prohibits secession. Yet, the international response towards unilateral secession is strong and that can be seen in the recent example of Crimea. See, for example, UNGA Res. 68/262 from March 17, 2014 in which the General Assembly relied upon resolution 2625 (XXV) of October 24, 1970 and the UN Charter to affirm its commitment to the sovereignty, political independence, unity, and territorial integrity of Ukraine within its internationally recognized borders.

[2] *See* Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331 (defining the peremptory norms of international law (*jus cogens*)); U.N. Charter art. 2 (placing territorial integrity or political independence of any state as principle and proclaiming that threat or use of force against the territorial integrity or political independence as inconsistent with the Purposes of the United Nations).

[3] *See, e.g.*, ANTONIO CASSESE, SELF-DETERMINATION OF THE PEOPLES, A LEGAL REAPPRAISAL (1995); LEE C. BUCHHEIT, SECESSION, THE LEGITIMACY OF SELF-DETERMINATION (1978); Stanislav V. Chernichenko & Vladimir S. Kotlyar, *Ongoing Global Legal Debate on Self-Determination and Secession Main Trends*, *in* SECESSION AND INTERNATIONAL LAW: CONFLICT AVOIDANCE AND REGIONAL APPRAISALS (Julie Dahliz ed., 2003); KRISTIN HENRARD, DEVISING AN ADEQUATE SYSTEM OF MINORITY PROTECTION (2000); KAMAL *S*. SHEHADI, ETHNIC SELF-DETERMINATION AND BREAK UP OF STATES (1993); Diane F. Orentlicher, *International Response to Separatist Claims*, *in* SECESSION AND SELF-DETERMINATION (Stephen Macedo & Allen Buchanan eds., 2003); ALFRED COBBAN, THE NATIONAL STATE AND NATIONAL SELF-DETERMINATION (1969); ALLEN BUCHANAN, SECESSION: THE MORALITY OF POLITICAL DIVORCE FROM FORT SUMTER TO LITHUANIA AND QUEBEC (1991); ANTHONY H. BIRCH, NATIONALISM AND NATIONAL INTEGRATION (1989).

[4] For example, the movements for Scottish independence from UK and for independence of Flanders from Belgium can be considered peaceful movements compared with the movement for independence of Xingjian from China or Somaliland from Somalia. For more, see SEPARATIST MOVEMENT AROUND THE WORLD, UPPSALA CONFLICT DATA PROGRAM (2013).

[5] Connected with the issuing of the Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), U.N. GAOR, 15th Sess., Supp. No. 2, U.N. Doc. A/RES/1514(XV) (Dec. 14, 1960).

[6] East Timor (Port. v. Austl.), 1995 I.C.J. 90, 102 (June 1995). East Timor was administered by Portugal. Portugal sought to establish a government, but fighting broke out between supporters of independence and those who

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communist federations in Yugoslavia, the USSR, and Czechoslovakia. Before this period, it seemed that the ability of a state to embark on a quest for self-determination was foreclosed at the end of colonization. But the colonial period has ended and there are nonetheless still cases of foreign domination or occupation or the cases of nontraditional domination or occupation, and many quests for the creation of independent states all over the world.[7]

Because international law offers little in the way of accommodating different expectations based on the need to protect and promote so-called separate nationalities, in efforts to promote security and peaceful coexistence, some academics have proposed that it may be better to examine the problem from another angle and try to find a solution through measures that are part of the state's democratic traditions.[8] More precisely, the international documents have suggest using existing mechanisms to realize an internal right to self-determination. Using that line of thinking, the right to self-determination is seen not only in the external context of obtaining a new independent state, but also in an internal context as protecting the self-realization of a certain community within an existing state.

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wanted integration with Indonesia. Portugal withdrew and Indonesia incorporated East Timor as its twenty-seventh province. In 1982, Portugal and Indonesia began negotiations for the status of East Timor. After the agreement, the UN Secretary got the power to start the consultations in order to determine the true will of the people of East Timor—independence or autonomy status within Indonesia. The will of the people was independence, but the Police that was pro integrative, supported by Indonesia, launched a violent campaign in which many people were killed and displaced. UN re-established peace, Indonesia withdrew, and since 1999, the UN took charge of running East Timor by establishing international administration. East Timor became independent in 2002 and was admitted to the UN membership.

[7] Halim Moris distinguishes military domination, economic domination, and cultural dominance in *Self-Determination: An Affirmative Right or Mere Rhetoric?*, 4 ILSA J. INT'L & COMP. L. 201 (1997). According to Marc Weller, self-determination as a positive entitlement to secession has been applied only to classical colonial entities and closely analogous cases as cases of armed occupation, racist regimes (South Africa), and alien domination (Palestine), in addition to instances of secondary colonialism (Western Sahara, East Timor). *See* Marc Weller, *Settling Self-Determination Conflicts: Recent Developments*, 20 EUR. J. INT'L L. Vol. 1 (2009).

[8] *See generally* MORTON H. HALPERIN, DAVID J. SCHEFFER & PATRICIA L. SMALL, SELF-DETERMINATION IN THE NEW WORLD ORDER (1992); ANTONIO CASSESE, SELF- DETERMINATION OF THE PEOPLES, A LEGAL REAPPRAISAL (1995); Emilio J. Cardenas & Maria Feranda Canas, *The Limits of Self-Determination*, *in* SELF-DETERMINATION OF PEOPLES, COMMUNITY, NATION, AND STATE IN AN INTERDEPENDENT WORLD (Wolfang Danspeckgruber ed., 2002); HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION, THE ACCOMMODATION OF CONFLICT RIGHTS (1990); Dinah Shelton, *Self-Determination and Secession: The Jurisprudence of the International Human Rights Tribunals*, *in* SECESSION AND INTERNATIONAL LAW, *supra* note 3; JOSHUA CASTELLINO, INTERNATIONAL LAW AND SELF-DETERMINATION (2000); Richard Falk, *Self-Determination Under International Law*, *in* SELF-DETERMINATION OF PEOPLES, COMMUNITY, NATION, AND STATE IN AN INTERDEPENDENT WORLD (Wolfang Danspeckgruber ed., 2002).

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There are arguments for and against recognizing an internal right to self-determination. On one hand, irrespective of some success on the ground—that is without doubt very important—and the theoretical superiority of the proposed concept, reality has shown that there are exceptional cases in which the ground conditions requiring separation of the groups make this alternate approach inapplicable for long-term success. On the other hand, the models for realization of internal self-determination as an alternative to secession are often proposed and adopted as a part of conflict resolution strategies in many secessionist regions all over the world.[9]

This Article focuses on two examples to illustrate the separation and creation of an independent state from within democratic European Union (EU) countries. These examples show that sometimes the variety of tools for realization of internal self-determination are not always successful in suppressing secessionist claims. The examined examples are relevant for the Balkan countries[10]—that strive to be democratic EU countries but often struggle with applying democratic principles—because they represent EU experiences, have well-applied mechanisms for self-rule and have the protection of separate identity.

In this regard, this Article examines the legal arrangements for realization of internal self-determination in the examples of Basque Country and Scotland. The Article considers aspects such as: Power sharing; promotion and protection of identity; economic relationships; common and separate institutions; law enforcement and different aspects of self-government and self-rule; the influence of the political environment on the implementation of the legal arrangements and confrontations in this regard. These two examples differ in many respects. For example, Scotland is a country and Basque Country is an autonomous region. Despite their differences, the two selected examples illustrate possibilities for achieving measures of self-determination within differing factual scenarios. On one hand, Scotland followed a "velvet way" of achieving independence through existing legal provisions and mutual agreements with the United Kingdom (UK). On the other hand, the Basque Country struggled with a violent past, experienced multiyear division among the population regarding independence and autonomy, and has tried to achieve independence in the absence of a legal means to realize an act acceptable for the Spanish state. Although there are clear differences between these two examples, both

[9] One of these arrangements can be the autonomy arrangements pioneered in Western Europe, starting with the Åland Islands. This trend continued into the Cold War years, ranging from the South Tyrol agreement, through devolution in Spain and the United Kingdom, to special provisions in Belgium, Denmark, and Portugal. Recently, autonomy was negotiated successfully in Eastern Europe, particularly in relation to Ukraine (Crimea) and Moldova (Gagauzia). Enhanced local self-government was also deployed as a substitute for formal autonomy in the Ohrid Agreement addressing the conflict in Republic of Macedonia in 2011, for more see Weller, *supra* note 7.

[10] Almost all of these countries have experienced related potential conflicts, namely, Bosnia and Herzegovina, Macedonia, Kosovo, etc. *See* SEPARATIST MOVEMENT AROUND THE WORLD, *supra* note 4.

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demonstrate that there is an impressive level of democratic debate and attempts to find methods to solve the self-determination problems through democratic mechanisms. The level of political and legal process in these examples provides important context to those coming from permanently unstable societies, such as the Balkan countries, and strengthens democratic problem-solving as a counter argument to the violence, wars, and blood that we have seen resulting from similar issues in the past.[11]

This Article presents the existing legal framework for: Dealing with the secessionist clams; the interaction of the existing secessionist legal frame work with the people's right to self-determination; the theoretical framework for envisaging the possibilities of an internal right to self-determination; and other different theoretical grounds for justification or possible legitimation of secession acts. In this frame, this Article examines the examples of internal self-determination in Scotland and in Basque Country. The Article proposes democratic mechanisms for dealing with secessionist claims as a model that can be applied more broadly. These two examples of internal self-determination can show that internal self-determination, even though it has limited scope for now, is the best possible solution for addressing secession demands.

B. The Legal Framework

The political phenomenon of secession is closely related to self-determination, at least at its external context, although the concept of self-determination is much broader. The idea of self-determination as the need to govern in accordance with the will of governed has been a part of major upheavals throughout human history, but the idea formed its recognizable shape following World War I in U.S. President Wilson's 14-point concept for post-war peace presented at the Versailles Peace Conference in 1919.[12] Nonetheless, the concept of possessing one's own government (a base for self-determination) dates back much further to the ideas envisaged during the Enlightenment and the French Revolution.[13] The concept of self-determination was fully integrated in the United Nations

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[11] *See* Wayne Norman, *Domesticating Secession*, *in* SECESSION AND SELF-DETERMINATION, 194 (Stephen Macedo & Allen Buchanan eds., 2003) (proposing constitutional provisions for secession to be put in the constitutions of advanced democracies such as Canada, Belgium, and France, with the possibility to apply possible outcomes or solutions in divided societies such as the ones often found in the Balkans).

[12] *See* President Woodrow Wilson, *Fourteen Points*, AVALON PROJECT (Jan. 8, 1918), http://avalon.law.yale.edu/20th_century/wilson14.asp.

[13] *See* Wolfgang Danspeckgruber, *Self-Determination and Regionalization in Contemporary Europe*, *in* SELF-DETERMINATION OF PEOPLES, COMMUNITY, NATION, AND STATE IN AN INTERDEPENDENT WORLD (Wolfang Danspeckgruber ed., 2002); Thomas M. Franck, *Emerging Right to Democratic Governance*, 46 AM. J. INT'L L. 86 (1992); A. RIGO SUREDA, THE EVOLUTION OF THE RIGHT OF SELF-DETERMINATION: A STUDY OF UNITED NATIONS PRACTICE (1975).

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(UN) system, where all people are recognized and guaranteed the right to self-determination. Although there are still debates about the legal nature of the concept of self-determination, from practice, jurisprudence, and theory one can conclude that self-determination is a collective right, established as part of the catalogue of human rights in prominent international instruments.[14]

The UN Charter enumerates a right to self-determination among the principles of the UN in Article 1 paragraph 2. Article 1 states, "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."[15] Furthermore, self-determination is envisaged in Article 55 as condition for stability and wellbeing.[16]

General Assembly Resolution 1514, "Declaration on the Granting of Independence to Colonial Countries and Peoples," upon which the whole process of decolonization was framed, again stresses self-determination as a main basis for the creation of conditions for stability and well-being, as well as peaceful and friendly relations among nations.[17] Resolution 1541, "Principles which should guide members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter," establishes methods for achieving measures of self-government for non-self-governing territories in the Annex to Principle VI. These methods include: "Emergence as sovereign

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[14] *See, e.g.*, U.N. Charter; G.A. Res. 1514, *supra* note 5; Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for Under Article 73e of the Charter, G.A. Res. 1541 (XV), U.N. GAOR, 15th Sess., Supp. No. 2, U.N. Doc. A/RES/1541(XV) (Dec. 15, 1960); International Covenant on Civil and Political Rights, Dec. 22, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, Dec. 22, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 18, U.N. Doc. A/Res/25/2625 (Oct. 24, 1970).

[15] U.N. Charter, art.1, ¶ 2.

[16] *See* U.N. Charter, art. 55.

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: higher standards of living, full employment, and conditions of economic and social progress and development;-solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and-universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

[17] G.A. Res. 1514, *supra* note 5.

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independent State; Free association with an independent State; or Integration in independent State."[18]

But the principle for self-determination is not applicable only to mandatory or non-trust territories subject to decolonization, but to all people. In that regard, the Article 1 of the International Covenant on Civil and Political Rights (ICCPR), as well as Article 1 of International Covenant on Economic, Social and Cultural Rights (ICESCR), again proclaim what is stated in the UN Charter: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[19]

In this set of international instruments, the most problematic is General Assembly Resolution 2625, "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations," because, to some scholars and practitioners,[20] it opens the door for so-called legitimate secession or implicit secession, especially in paragraph 7:

> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color.[21]

Reading this resolution in certain contexts suggests secession is legitimate if specific conditions are met and the state acts contrary to the principle of equal rights and self-determination of people. For example, if the government does not represent the whole

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[18] G.A. Res. 1541, *supra* note 14.

[19] *See* ICCPR & ICESCR art. 1.

[20] *See, e.g.*, HENRARD, *supra* note 3; BUCHHEIT, *supra* note 3; CASSESE, *supra* note 3; EYASSU GAYM, PEOPLE, MINORITY AND INDIGENOUS: INTERPRETATION AND APPLICATION OF CONCEPTS IN THE POLITICS OF HUMAN RIGHTS (2006); Ved. P. Nanda, *Self-Determination Outside Colonial Context: The Birth of Bangladesh in Retrospect*, *in* SELF DETERMINATION: NATIONAL REGIONAL AND GLOBAL DIMENSIONS (Yonah Alexander & Robert A. Friedlander eds., 1980).

[21] G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 18, U.N. Doc. A/RES/25/2625 (Oct. 25, 1970).

nation. If this is so, it means that state violates the principle of self-determination, and this illegitimacy can trigger "legitimate action" that aims to dismember or impair, totally or in part, the territorial integrity or political unity of a sovereign and independent state.[22] But it should not be forgotten that this resolution also underlines the principle of territorial integrity as inviolable.[23]

Despite this presumed notion that the legitimacy of secession is grounded in some harm to a group's right to self-determination, the relationship between secession and self-determination is much more complex and nuanced. The right to self-determination can be realized through many forms besides gaining independent statehood, such as: The right of people to freely define their political status; civil and political rights; the right of people to freely exercise their economic development; permanent sovereignty over natural resources; the right of people to freely practice their social development; or the right of people to freely determine their cultural development.[24] Although political self-determination without economic and cultural self-determination may be superfluous, usually the theoretical discussion surrounding self-determination is centered on political self-determination and the right of particular group to freely determine its political status. In the UN context, the right to self-determination in its external context is applicable to people[25] but not to national ethnic and religious minorities whose rights are recognized in Article 27 of the ICCPR[26]—or to nations in the cases of colonial context or situations of foreign domination or occupation.[27]

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[22] *See* BUCHHEIT, *supra* note 3.

[23] The territorial integrity and political independence of the State are inviolable. *See* G.A. Res. 2625, *supra* note 21.

[24] *See* Aurelieu Cristescu, *The Right to Self-Determination, Historical and Current Development on the Basis of United Nations Instruments*, U.N. Doc. E/CN.4/Sub.2/404/Rev.1 (1981).

[25] The title of the right of self-determination are the people, and this right has been recognized although in theory and in international instruments what falls under the category of "people" is not yet defined. In the context of colonialism, the people—as the holders of the right to self-determination—were considered colonial countries and people, and, later, people subjected to foreign domination or occupation. In regard to this question, the particularly important debates were held in the UN in the middle of the last century, although no consensus was reached. Although some argue that the term "people" should be understood in the most general sense, according to the elements that emerged from the U.N. debates, the term "people" means: (a) A social entity possessing a clear identity and its own social characteristics; (b) implies relation to a particular territory, even if the people in question were expelled from it and replaced by another population; and (c) the term "people" should not be replaced with ethnic, religious or linguistic minorities whose existence and whose rights are recognized in article 27 of the ICCPR. See more in Cristescu, *supra* note 24.

[26] *See* ICESCR art. 27.

[27] *See* G.A. Res. 2625, *supra* note 21.

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In contrast to the concept of legitimate secession, international law does not contain a rule that guarantees socio-cultural groups a right to secede and become a separate international entity, but, significantly, international law does not expressly prohibit secession. International law's influence in this field has been limited;[28] at this stage of legal development, international standards cannot give more than a set of general guidelines that should be applied pragmatically.[29] Although there is no clear right to secession, international law takes secession into account in two situations: First, when a people in the state freely decide to secede, which means the entire population of the state, not only the residents of the region that want to secede and, second, after an armed conflict when national borders are redrawn as part of a peace agreement.[30]

Because international law does not have firm standards for dealing with secession, some of the international law scholars[31] propose the debate should shift to the internal aspect of the right to self-determination. These scholars find the legal basis for internal self-determination in ICCPR Article 25[32] and General Assembly Resolution 2625,[33] as well as in regional documents.[34] A right to internal self-determination is still not established as law,

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[28] *See* Rafael Domingo, *The Crisis of International Law*, 42 VAND. J. TRANSNAT'L L. 1543 (2009).

[29] *See* CASSESE, *supra* note 3.

[30] *See* Johan D. Van Der Vyver, *Self-Determination of the Peoples of Quebec Under International Law*, 10 J. TRANSNAT'L L. & POL'Y 1, 26 (2000).

[31] *See, e.g.*, HALPERIN, SCHEFFER & SMALL, *supra* note 8; JAMES SUMMERS, PEOPLES AND INTERNATIONAL LAW, HOW NATIONALISM AND SELF-DETERMINATION SHAPE A CONTEMPORARY LAW OF NATIONS (2007); CASSESE, *supra* note 3; HANNUM, *supra* note 8; CASTELLINO, *supra* note 8; Falk, *supra* note 8, at 38.

[32] *See* ICCPR art.25.

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country.

[33] *See* G.A. Res. 2625, *supra* note 21, § 1 (noting "[e]ach State has the right freely to choose and to develop its political . . . system" does not necessarily include secession and independence).

[34] *See, e.g.*, The Final Act of the Conference on Security and Cooperation in Europe (Helsinki Final Act), Aug. 1, 1975, 14 I.L.M. 1292; Concluding Document of the Vienna Meeting of Representatives of the Participating States of the C.S.C.E., Jan. 19, 1989; O.S.C.E. Charter of Paris for a New Europe, Nov. 21, 1990; Universal Declaration of the Rights of Peoples, Charter from Algiers, July 4, 1976.

but the case law in this regard is in *statu nascendi*.[35] In addition, internal self-determination offers a wide and flexible range of options and measures for addressing, protecting, and promoting diversity for overcoming identity conflicts, and for providing a balance of power.

C. The Theoretical Framework

I. The Basis for Internal Self-Determination

Even though secession movements can, in some cases, gain independence and even international recognition, there is still the threat that the parent state will try to re-establish control.[36] And If the secession is successful, what will happen with the groups within the secessionist state? Will they follow the same pattern and ask for separation? And If so, where is the natural conclusion of these claims? Is the conclusion a global society of different tribes fighting over territory and resources?[37]

There are no doubts that globalization has reshaped national identities, strengthened national feelings, and consequently promoted quests for secessions. Contrary to that trend, it seems that the secession and the creation of "independent" states is not the ultimate award for achieving national self-rule. In this modern time and in the context of the EU, the traditional state is losing some its previously established powers and full sovereignty is only a myth.[38] Although global processes go in many directions, almost every quest for self-determination is connected with a quest for secession. It is clear, however, that secession rarely results in a homogenous nation-state. Rather, the resulting borders only re-form the pattern and the size of the groups that moved for secession.[39]

Furthermore, self-determination does not have a collectivistic and exclusive effect on the realization of unique national character. On the contrary, democratic self-determination has an inclusive effect that can be realized through legislation that affects all citizens equally. This right is not only inclusive, but also integrative—not just for those who are suffering from discrimination, but also for those who are marginalized and oppressed by

[35] "In the phase of creation." *See* CASSESE, *supra* note 3, at 312.

[36] *See* Moris, *supra* note 7.

[37] *See generally* YAEL TAMIR, LIBERAL NATIONALISM (1993).

[38] *Id.* at 240–44.

[39] *See* WILL KYMLICA, MULTICULTURAL CITIZENSHIP (2004).

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the domination of the majoritarian community.[40] The traditional line of thinking that has dominated modern understanding of the "nation state," which has more or less supported the equation of the terms "state" and "nation," does not pass the test of time. Today there is almost no national homogeneous state and there is no more overlap between the "nation" and the "state."[41]

The forms for the realization of the internal aspect of the people's right to self-determination include different types of territorial and minority rights. The list includes special parliamentary and poly-ethnic rights and the rights of representative government. The internal self – determination covers power-sharing systems and in that line autonomy, decentralization, regionalism, federalism are the possible models. Not less important are the democratic settings that encourage consensual and deliberative democracy. This list does not end here and includes all sorts of hybrid tools capable of managing differences in a manner acceptable to all—or at least to most—segments of society. All of these models for practicing internal self-determination have advantages and disadvantages, but all of them give opportunities to the groups to keep their separate characteristics. In other words, they create systems that tend to promote integration without forced assimilation.[42]

Although the models of internal self-determination are effective ways of problem solving, the application of certain internal self-determination tools can sharpen groups' secession quests. This is because there is no natural point where the requirements for protection and promotion of separate nationality stop. In addition, there is a general consensus that the states that accept the rights stemming from the models of internal self-determination seem to be inherently unstable.[43]

Despite the undoubted benefits of democracy—especially in terms of promotion and protection of human rights—some scholars[44] find that, in certain circumstances, especially

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[40] *See* JURGEN HABERMAS, THE INCLUSION OF THE OTHER (1998).

[41] ERIC HOBSBAWM, THE NATIONS AND NATIONALISM AFTER 1780 (1993).

[42] *See* HENRARD, *supra* note 3.

[43] *See* KYMLICA, *supra* note 39. Notable examples include Macedonia, Kosovo, Transdniestria, Cyprus, Bosnia, and Herzegovina and many more that were considered to be sufficiently unstable and dependent on the warrant of external guarantee powers.

[44] *See, e.g.*, KYMLICA, *supra* note 39; Rein Mullerson, *Sovereignty and Secession: Then and Now, Here and There*, *in* SECESSION AND INTERNATIONAL LAW: CONFLICT AVOIDANCE AND REGIONAL APPRAISALS, *supra* note 3; Atul Kohli, *Self-Determination Movements in India*, *in* SELF–DETERMINATION OF PEOPLES, COMMUNITY, NATION, AND STATE IN AN INTERDEPENDENT WORLD, *supra* note 8.

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in developing countries, democracy encourages greater demands and aspirations for independent statehood of sub-groups in the country. Compared to class or economic groups, ethnic and regional groups in a particular phase of a conflict will demand attainment of the right to self-determination because they perceive themselves as complete societies and as social groups with enough complex division of labor and greater ambitions for territorial sovereignty. Shared cultural heritage further encourages such imagination.[45]

In addition, multinational and multilingual democracies have certain group of questions or issues that are difficult to articulate through the language of democracy. Many of these issues come from the fact that these countries have more than one "self" in terms of self-determination and self-governance. Although it is possible in some states to weave different identities into one identity—such as in the United States or Australia—it is just a dream for countries with historically ethno-cultural groups,[46] such as the Basque Country in Spain or Scotland in UK.

The national identity is the one of most powerful types of collective identities that people have. Consequently, it is obvious that globalization has not completely destroyed the concept of nationality, but has removed it from the monopolistic position that it held for the first half of the twentieth century.[47] So far, evidence has shown that, as state borders become more open, communities start to put their own borders between themselves and the "others."[48] The paradox is that because of the "opening" instigated by globalization, national communities have become more self-conscious and the differences that separate them from "others" has become more precious to preserve. But reinventing new identities and closing communities' "doors" are not evil actions. These actions can be a response to globalization and the fear that equality and mixture of cultures will lead to a community's death as a result of increasing weakness and the corresponding inability protect the community from the attack of a so-called global culture.[49] Maybe the real challenge is not to protect communities from the melting pot of global culture—because they will find ways to protect themselves—but instead to find ways to deal with intensified growth of different identities and conflicts that arise among them.

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[45] *See* Kohli, *supra* note 44.

[46] *See* Norman, *supra* note 11, at 220.

[47] *See* ANTHONY D. SMITH, NATIONAL IDENTITY (1998).

[48] MICHAEL WALZER, SPHERES OF JUSTICE 259 (1983).

[49] *See* JEAN BAUDRILLARD, PROZIRNOST ZLA: "NASILJE GLOBALNOG" (1991).

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These conflicts can be handled through the varied array of political and legal tools available to achieve internal self-determination. In liberal democracies, one of the key mechanisms for acceptance of cultural differences is equal protection of civil and political rights of individuals—regardless of ethnicity. There is a tendency, however, to protect certain forms of cultural differences through special legal or statutory measures beyond the common rights of citizenship. Those measures often include group-specific rights and external safeguards.[50] But what if this process is unsuccessful? Can we consider the division of the existing state as a normal outcome acceptable under international law?

II. Attempts for Justification/Legitimization of the Secession

Although a "right to secession" is not formally recognized under international law, there are many theories that attempt to explain this political phenomenon, penetrate into its core, or even justify the act of secession. These theories fall under a number of broad categories.[51] All of these theories can provide numerous reasons for the appearance of secession movements in a wide spectrum of scenarios ranging from the repression, discrimination, and subordination of a particular group and the continuous denial of its political demands, to primordialism and the need to protect a special culture and unique identity.[52]

One category is explanatory theories, for example, which refer to the beliefs and wishes of the leaders and supporters of the secessionist movement and try to explain why and how different social phenomena can initiate a secessionist tendency.[53] A second category includes economic theories, which consider economic rules or economic variables as the most important factors in shaping the secessionist aspirations. According to economic theorists, secession happens in regions with relatively high income or in regions with lower growth than average when compared to the parent state, although some of these theorists

[50] *See* KYMLICA, *supra* note 39.

[51] For division of theories, see ALEKSANDAR PAVKOVIC & PETER RADAN, CREATING NEW STATES, THEORY AND PRACTICE OF SECESSION (2007).

[52] According to Ivo Duchacek, there are stages in the development of reasons for secession. The first stage is the injustice and alienation of the territorial region from the center. The next stage is the start of the independence movement. These stages are propelled further by the driving forces of emotions and nationalism. *See* IVO DUCHACEK, COMPARATIVE FEDERALISM: THE TERRITORIAL DIMENSION OF POLITICS (1970).

[53] *See, e.g.*, John R. Wood, *Secession: A Comparative Analytical Framework*, 14 CAN. J. POL. SCI. 109 (1981); ANTHONY D. SMITH, THE ETHNIC REVIVAL (1981); Anthony D. Smith, *Towards a Theory of Ethnic Separatism*, 2 J. ETHNIC & RACIAL STUD. 21 (1979); DONALD L. HOROWITZ, A RIGHT TO SECEDE? SECESSION AND SELF-DETERMINATION (2003); Michael Hechter, *The Dynamic of Secession*, 35 ACTA SOCIOLOGICA 267 (1992).

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admit that some secession movements are not primarily economically motivated.[54] A third category includes normative theories, which are based on the explicit or implicit assumption of the existence of a right to secession, although each theory establishes a different basis for this assumption and conditions under which this right might be exercised.[55] Some of these are theories of choice or fundamental rights, while others consider secession as a last resort. For example, according to choice theories, a group has the right to have its own state if it is territorially concentrated within the existing state. Choice theorists see the state as a voluntary association that the citizens and the groups of citizens can enter and exit. The Anarcho-capitalist theory is similar to the choice theory. According to this theory, individuals can choose their state through free agreement with other individuals.[56] Similar to them are democratic theories—by which group decision-making is a valid procedure and gives legitimacy to secessions.[57] According to these theories, the number of countries in the world should not be fixed, but should be constantly changing. Unlike the theories that justify the right to unlimited choice, there are *ascriptive group* theories that restrict the populations that possess this "right" to certain groups that have certain characteristics or features that exist independently, regardless of the presence of injustice in the state.[58]

Last resort secession theories are arguably the most intriguing and have the highest possibility of acceptance into international law. These theories consider secession as remedying the injury perpetrated by the state against a people's rights. According to these theories, the right to secede is similar to the right of revolution and is reserved for citizens who suffer injustice. These theories that base the "right" on some injustice or characteristic of a group run parallel to moral theories of secession. According to these theories, secession is permissible if the state fails to perform certain functions or to protect the interests of citizens, the interest of the groups, or human rights. The moral theories of secession predicate the existence of a right to secede on whether there is good reason,

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[54] *See, e.g.*, MILICA ZARKOVIC BOOKMAN, THE ECONOMICS OF SECESSION (1992); PAUL COLLIER & ANKE HOEFFLER, THE POLITICAL ECONOMY OF SECESSION (2002).

[55] *See* Allen Buchanan, *Theories of Secession*, 26 PHIL. & PUB. AFF. 31 (1991).

[56] *See* Murray N. Rothbard, *Nations by Consent: Decomposing the Nation-State*, 11 J. LIBERTARIAN STUD. 1, 10 (1994) (creating this theory).

[57] *See* Harry Beran, *A Liberal Theory of Secession*, 32, POL, STUD. 20 (1984); Harry Beran, *A Democratic Theory of Political Self-Determination for a New World Order*, *in* THEORIES OF SECESSION (Percy B. Lehning ed., 1998).

[58] *See* Avishai Margalit & Joseph Raz, *National Self-Determination*, 87 J. PHIL. 439 (1990).

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such as the need to protect a special culture even in the absence of discrimination or injustice.[59]

There are different opinions about secession's justification or legality, that range from finding it utterly inadmissible, unacceptable, and illegal, to permitting secession in certain circumstances, arguing that international law should accept and codify certain limited, qualified rights for secession. Different authors propose numerous conditions or circumstances that could give legitimacy to secessionist movements.[60] In contemporary legal doctrine, most international lawyers believe that it is necessary to discuss the codification of some limited right to secession, with a criteria and standards that can give legitimacy to a secessionist movement or to an act of secession.[61] Such a standard will inevitably involve an investigation of the nature of the secessionist group, its position within the state, the possibility for its survival without secession, and the effect of the separation on the rest of the population and on the world community as a whole. Nonetheless, most agree that a right to secession should depend on a factual, case-by-case analysis.

D. Scotland and Basque Country, Examples of Realized Self-Rule in Democratic Surroundings

I. The Example of Scotland

Scotland has a population of about five million inhabitants and occupies the northern third of the island of the United Kingdom. English, Scottish, and Scottish Gaelic are the three official languages of Scotland. Scotland has its own national symbols and anthem. The Scottish educational system differs from the education system in the rest of the UK, and its healthcare system is self-financed by the Scottish and their government directorates. Scotland is represented in the British Parliament and in the European Parliament.

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[59] *See* Antony H. Birch, *Another Liberal theory of Secession*, 32 POL. STUD. 596 (1984); Alan Buchanan, *The International Institutional Dimension of Secession*, *in* THEORIES OF SECESSION (Percy B. Lehning ed., 1998); YAEL TAMIR, LIBERAL NATIONALISM (1993).

[60] *See, e.g.*, Beran, *supra* note 57; BIRCH, *supra* note 3; BUCHANAN, *supra* note 3.

[61] In this respect, Antonio Cassese thinks that it is necessary to reassess the international law, because the rejection of secession from the doctrine is extremely unrealistic. *See* Cassese, *supra* note 3, at 348–49. For Buchheit, there are two paths; one is to leave the question to some future, wiser generation, and the other is to try to examine the validity of secession by developing the methods for assessment of certain kinds of requirements—or at least to determine which groups can meet such requirements. *See* Buchheit, *supra* note 3, at 223.

Although it is located within the UK, Scotland has limited self-government and the constitutional status of Scotland is the subject of a lasting debate. The Kingdom of Scotland grew as an independent sovereign state in the early Middle Ages and existed until 1707. Scotland first entered into a personal union with the Kingdom of England and then, in 1707, into political union as well, creating the Kingdom of Great Britain. The union was formalized in both the Treaty of Union 1706 and the Acts of Union adopted by the parliaments of both countries, despite the resistance of the anti-unionists.[62] In 1801, the Kingdom of Great Britain entered into a political union with the Kingdom of Ireland and together they created the United Kingdom of Great Britain and Ireland (hereinafter referred to as Great Britain).

Despite the fact that Scotland was part of the United Kingdom for more than 400 years, the Scottish legal system has remained separate from those of England, Wales, and Northern Ireland. Scotland has always been a distinct jurisdiction with regard to public and private law. Through the centuries, the existence of separate legal, educational, and religious institutions—other than those in UK—contributed in extending the Scottish culture and creating a separate identity. This independence was also reflected in relation to public services. Furthermore, for many decades, the Scottish legal system was unique because it was the legal system without a parliament. Additionally, Scotland has always had a separate currency.

Scotland developed the desire for greater autonomy as a result of a cultural and economic renaissance. A proposal for devolution of the British jurisdiction was included on the referendum in 1997, and in 1998, the UK Parliament adopted the Scotland Act[63] (the Act), thereby restoring the Scottish Parliament. In 1999, elections were held and the Scottish Parliament and Government came into power. But even when the Scottish Parliament acts in accordance with its jurisdiction under the Act, it is restricted by the European Convention of Human Rights and EU law.

The Scottish Parliament has jurisdiction in many areas relating to Scotland as well as over most Scotland-specific laws. The Act specifically established provisions for the election of Members of Parliament (MPs) and the internal procedures for the work of the Parliament. The Act granted the UK Parliament jurisdiction to adopt legislation that applied to Scotland and reiterated the concept of Westminster parliamentary sovereignty. The Act also provided for the creation of the Scottish executive order, transferring executive power away from the UK. The Act set out the legislative competences for the Scottish Parliament, but rather than outlining which issues the Scottish Parliament controlled, the Act listed the

[62] Based on this agreement, the Scottish and English Parliaments were united and together formed the Parliament of the United Kingdom in Westminster Palace London. *See* Act of Union, 1707, 6 Ann., c. 11 (U.K.).

[63] *See* Scotland Act, 1998, c. 46.

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issues that are not part of the Parliament's competences. Thus, the Parliament of the United Kingdom, according to the Act, retains the power to determine the fiscal matters—including taxes, social security, defense, international relations, and TV broadcasting.[64]

The Act established mechanisms for resolving disputes regarding jurisdiction between the Scottish Parliament and executive power, but final decisions regarding these issues are made by the Supreme Court of the United Kingdom. The Act also provided for the adoption and modification of the powers of the Scottish Parliament and Scottish Government with an agreement between both Parliaments.[65]

The Scotland Act of 2012[66] (the 2012 Act) transmitted additional powers to the Scottish Parliament, among them particular fiscal powers. Unsatisfied, the Scottish National Party attempted to block the 2012 Act. While the Scottish National Party agreed with certain parts of the 2012 Act, it ultimately opposed it, especially the tax legislation proposals. Through negotiation, an agreement was reached, jurisdiction remained intact, and compliance was achieved.[67] In 2012, the UK Government and the Scottish Government also executed an agreement—the Edinburg Agreement—where they agreed that both governments would accept referendum results and continue to work together regardless of the outcome.[68] The Scottish National Party subsequently announced its plan for a referendum on Scotland's independence, which took place in September 2014. After a huge campaign, the number of votes for no independence for Scotland won by a very small margin.

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[64] BBC Scotland is a constituent part of the British Broadcasting Corporation, publicly financed medium of Great Britain. Scotland has its own printed media and radio.

[65] *See* Act of Union, 1707, 6 Ann., c. 11 (U.K.).

[66] Scotland Act, 2012, c. 11.

[67] The Parliament of the United Kingdom did not agree to pass this Act without the prior consent of Scottish Parliament. Before the Scotland Act of 2012, the Scottish Parliament (Constituencies) Act from 2004, the Constitutional Reform Act from 2005, and the Scotland Act from 1998 were amended and the institutions of Scotland underwent procedural reforms. *See The Scotland Act,* THE SCOTTISH PARLIAMENT, http://www.scottish.parliament.uk/visitandlearn/Education/21139.aspx.

[68] *See Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland*, SCOTTISH GOV'T (Oct. 15, 2012), http://www.gov.scot/About/Government/concordats/Referendum-on-independence [hereinafter Agreement].

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II. The Example of Basque Country

With a total population of just under three million, the first thing most people associate with the Spanish Basque region is the ETA[69] and its violent resistance against Spain. This area—the Autonomous Community of the Basque Country and Navarra Community[70]—is below the European average in terms of economic and social development. It enjoys the highest level of self-government compared to any other entity that is part of a state in the EU but, nevertheless, political confrontations regarding the region's scope of autonomy are still part of everyday life.[71]

Through the centuries, the Basque Country has succeeded in protecting features of its special identity and today, a large part of the population shares a collective consciousness and wishes for a self-government emulating past forms of Spanish political framework—absolute monarchy, the first and second Spanish Republic, and today's parliamentary monarchy. The Basque Country has succeeded in having separate fiscal systems and its own provincial parliaments. Tensions concerning the exact form of the relationship between the Basque Country and Spain have existed since Spain's founding.[72]

In the contemporary period, the introduction of regional autonomy contributed to the democratization of Spain. Spain is a parliamentary monarchy and the Spanish Constitution from 1978[73] (the Constitution) guarantees regional autonomy.[74] The Constitution reflects

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[69] ETA (Euskadi Ta Askatasuna—"Basque Country and Freedom") started as an idea that evolved into a violent movement, and, ultimately, into a political party.

[70] Although the term Basque Country traditionally is used to refer to the geographical area from both sides of the Pyrenees that extends between the frontier among the territories of Spain and France, the Basque Country is referred to in government documents as the Basque Provinces in Spain, Basque Autonomy region. Currently, the historical and cultural area of the Basque Country is divided into three political structures two in Spain, the Autonomous Community of the Basque Country composed of three Basque provinces (Alava, Guipúzcoa, and Vizcaya) and the Community Navarra, that have their own administrative structures while the third province, which is significantly smaller and composed of three municipalities, is in France and does not have own structure. S*ee* Agreement, *supra* note 68.

[71] *See* Gorka Espiau Idoiaga, *The Basque Conflict: New Ideas and Prospects for Peace*, UNITED STATES INSTITUTE FOR PEACE SPECIAL REPORT (Apr. 1, 2006), http://www.usip.org/publications/the-basque-conflict-new-ideas-and-prospects-peace.

[72] *Id.*

[73] *See* C.E., B.O.E. n. 1–3, Dec. 29, 1978 (Spain).

[74] The Spanish Constitution was formally approved by a national referendum and Spain became a democratic state that guaranteed the protection of the nationalities and regions within their borders and historic rights. But despite these safeguards, the Constitution did not fully satisfy the Basque nationalists who felt that they were left out of the process of participating in political decision-making. Basque national parties convinced the voters not

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the unitary character of Spain as an indivisible country for all Spanish people. According to the Constitution, Castilian is the official language of Spain, along with the other Spanish languages that are also official in the autonomous communities.[75] The Constitution also provides for economic balance among different areas of the Spanish territory.[76]

According to the Constitution, the autonomous regions are established with the autonomy statutes, approved by the Spanish Parliament. The autonomy statutes also regulate the jurisdiction of the autonomous regions, although, in cases of conflict, the law of the Spanish state prevails. In all other cases, Spanish state law is supplementary to the law of the autonomous regions. The autonomous unit's constitutionality is controlled by the state Constitutional Tribunal.[77]

The Constitution established a system of divided power and determined the areas where the Central Government retained exclusive jurisdiction, such as: Immigration; foreign affairs; national defense and army; the execution of justice, customs and labor penal legislation; international trade; monetary regulations; coordination of the general economic planning; intellectual property; and the basic conditions that guarantee all Spaniards realization of their rights and fulfillment of constitutional obligations. Everything else is in the jurisdiction of the local government and is governed by the Statute of Autonomy.[78]

The Basque Autonomy Statute[79] (the Statute), also referred to as the Statute of Autonomy of Guernica, established the autonomy of Basque community in the Basque Country. The Statute was adopted in 1979 by the Basque people through referendum.[80] It established the basic institutional arrangements and is a part of the Spanish legal system. The

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to vote on the referendum, which led 55.4% of the Basque Country electorate to abstain from voting. *See* Idoiaga, *supra* note 71.

[75] *See* C.E., B.O.E. n.3, Dec. 29, 1978 (Spain).

[76] *See* DOCUMENTS ON AUTONOMY AND MINORITY RIGHTS (Hurst Hannum ed., 1993) [hereinafter Documents].

[77] *See* C.E., B.O.E. n. 1–3, Dec. 29, 1978 (Spain).

[78] *Id.*

[79] Statute of Autonomy of the Basque Country, (L.O.P.J. 1979) (Spain).

[80] Only fifty-three percent of the population of the Basque Community voted on the referendum for acceptance of the Autonomous Statute, while forty-one percent abstained. *See Satisfacción con el Estatuto de Autonomía y evolución futura del mismo*, EUSKOBAROMETRO, (May 2005), http://www.ehu.es/cpvweb/pags_directas/euskobarometroFR.htm; Idoiaga, *supra* note 71.

Autonomous Community geographically covers Basque's historical territories that extend into four Spanish provinces.[81]

According to the principle of autonomy guaranteed by the Constitution and by the Statute, the Autonomous Community of the Basque Country (the Autonomous Community) has its own flag and it is officially recognized. The language of Basque people, Euskara,[82] alongside with Spanish, is considered an official language and is promoted and protected. Discrimination based on language is prohibited.[83]

According to the Statute of Autonomy (the hereinafter referred Statute), the Autonomous Community has the exclusive jurisdiction to determine: The boundaries of municipal territories; the organization and function of all government institutions that exist in accordance with the Statute; internal electoral legislation concerning the Basque Parliament and provincial councils; creating statutes for regulating local administrations; the protection, modification, and development of traditional, regional laws and special civil rights that are applicable in the territory of the Basque Country; the development procedural rules and regulations pertaining to the economic and administrative procedures of the Basque Country; management of the public domain and property owned by the Autonomous Community; natural resources as well as the use of fisheries; agriculture; hydraulics projects; social work; foundations and associations that have educative and artistic characteristics; culture; institutions for the promotion and teaching of fine art; historical, archaeological monuments and heritage; and libraries and archives. The Autonomous Community of the Basque Country also has jurisdiction to: Establish and regulate TV, media, radio, and press; the establish, organize, and run institutions protecting children, as well as centers for social rehabilitation; pharmaceutical control; consumer protections; conduct technological and scientific research; and run professional organizations and chambers. The Autonomous Community of the Basque Country has its own public sector and promotes economic development in the general economy framework. It maintains an internal market, industry, housing, railways and transport,

[81] An agreement similar to the Statute of Autonomy was approved in 1982 without a referendum in the Navarra, which has different historic links with Spanish monarchy. *See* Idoiaga, *supra* note 71.

[82] The Basques are a very old culture, and they believe that they are one of the original European cultures. The Basque language is one of the few European languages in Europe that does not have Indo-European roots. It is incredibly complicated, and its concentration in Basque Country makes it a basic identity symbol for the Basque people. The Basque Country is very hilly, which helped the Basques to remain relatively isolated from the rest of Europe. Even today, the Basque separatist movement differs from many other ethnic conflicts because it is focused on language rather than religious differences. *See* Anthony T. Spencer & Stephen M. Croucher, *Basque Nationalism and the Spiral of Silence: An Analysis of Public Perceptions of ETA in Spain and France*, 137 INT. COMM. GAZETTE 70 (2008).

[83] *See* Statute of Autonomy of the Basque Country, (L.O.P.J. 1979) (Spain).

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public works, tourism, sport, casinos, as well as the development of the Autonomous Community, and focuses, in particular, on improving conditions for women, children, and the youth.[84]

In relation to jurisdiction, the Autonomous Community has the unique responsibility of establishing procedures for the organization and functioning of its institutions and drawing up and approval of their own budgets. In addition to the areas where the Autonomous Community has exclusive jurisdiction, the Basque Country has the authority to develop legislation within a basic state legislation framework regarding environment and ecology, government contracts and concessions, planning and fishery, banking and credits, and mining and energy. In certain areas, however, the legislation of the Spanish state applies, particularly in the area of labor relationships, airports, and other areas that are of special interest of the Spanish Country. [85]

Furthermore, the Statute provides for the establishment of an autonomous police force, which keeps the public order in the Autonomous Community, but also performs additional work in promotion of the national interest.[86] The Statute prescribes the rules and procedures for establishment, organization, and functioning of the Parliament of the Basque Country (the Basque Parliament), the Government, and the President of the Basque Country, the procedures for the execution of justice, mutual relations between Spain and the Autonomous Community, and the restrictions that exist in relation to autonomy as well as the conditions for the possible change and amendment of such relations.[87]

To ensure a functional division of power, the Statute requires common bodies able to determine the competencies of institutional mediators in a dispute between competitive institutions and to assist in strengthening cooperation in significance areas, such as culture, language, police, and financial quotas.[88] Concerning finances, the Autonomous Community has its Autonomous Treasury. The relationship between the Autonomous Community and the State is regulated by economic agreements that determine how large a percentage of tax revenue collected within the Autonomous Community's jurisdiction, and other

[84] *Id.* art. 10.

[85] *Id.* art. 11–13.

[86] *Id.* art. 17.

[87] *Id.* art. 25–33.

[88] Documents, *supra* note 76.

incomes, need to be passed on to Spain in the form of quotas based on the principle of solidarity.[89]

Despite the wide autonomy that the autonomous Basque region enjoys, the state of Spain retains a large portion of the power. For example, in the case of a dispute between national and local law, national law prevails, even though national law is technically intended to supplement the law of the autonomous regions. In the same way, if an autonomous region fails to meet its obligations under the Constitution and relevant laws, or acts in a manner which violates the general interests of Spain, an absolute majority of the Senate—in which the provinces and autonomous regions are represented—may take the necessary measures to ensure compliance. If necessary, Parliament also has the power—with an absolute majority in each house—to harmonize regional legislation with the general interest, even in areas that are part of exclusive regional competence.[90]

Despite its autonomy arrangements, the Basque people have been divided about the region's degree of autonomy since the founding of the Spanish state. Some citizens are satisfied with the scope of autonomy and some advocate for its increase, but a large part of the population aims to achieve independence for the Basque Country. The support for autonomy varies during different time periods and with differing intensity and radicalism. Due to the diversity and the division of the political environment in the Basque Country, there are no uniqueness connections even among the similar movements.[91] Some political parties have advocated for the territorial integrity of the Spanish state and a federal autonomous status for the Basque Country within, while others—primarily the ETA—advocate for secession, independence, and uniting the Basque Country with the three Basque Provinces in France.[92]

In order to achieve a change in the Statute by legal and political means and methods, as opposed to radicalism, the Basque Parliament in 2004 supported a proposal—known as

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[89] *See* Statute of Autonomy of the Basque Country art. 40–42 (L.O.P.J. 1979) (Spain).

[90] *See* Documents, *supra* note 76.

[91] *See* Eduardo Ruiz Vieytez, *A New Political Status for the Basque Country?*, 12 J. ETHNOPOLITICS & MINORITY ISSUES EUR., 79–105 (2013).

[92] The Basque nationalism in France is supported by a very small group. Only a few rural municipalities are led by Basque nationalists and the movement has no significant political representation at the regional level. The Basque language does not have the status of an official language. The Basque separate identity is reflected through the recognition of Basque culture and language within the institutional framework of France. It is interesting to note that, in the French Basque Country where the political framework provides relatively few opportunities for the political expression of the separate identity, most of the people do not see the Basque identity as active and potentially innovative, in contrast to the much more dynamic environment in Spain. *See* Zoe Bray, *Basque Nationalism at a Political Crossroads*, WORLD POLITICS REVIEW (May 9, 2012).

Plan Ibarretxe—for a new statute based on "free association" and "shared sovereignty" with Spain.[93] This plan sought to expand the autonomy of the region but also to determine the possibility of eventual independence. The Spanish Parliament challenged the proposal as an act that was outside of the constitutional limits for regional autonomy and overwhelmingly refused it. Following the failure of Plan Ibarretxe, the Basque Country Government has requested negotiations with the Spanish Government in pursuit of a compromise. The Basque Country Parliament has sought to establish a path that, regardless of the outcome of the negotiations with the Spanish Government, should result in a referendum that will determine the right of the Basque people to determine their own future.

III. Analysis

Generally, from a doctrinaire and practical perspective, quests for secession typically arise out of history of systemic social discrimination and denial of participatory rights.[94] But there are exceptions, as demonstrated by the contemporary political examples of the Basque Country and Scotland. These are examples of communities that enjoy the widest form of autonomy as compared to other entities in EU countries. Their separate identity, culture, and rights are promoted, expressed, and safeguarded by democratic institutions within their parent state and their community.

In the example of Scotland, despite extensive legal arrangements and—as a matter of fact—having the status of a country, the collective will for independence is strong despite the outcome of the 2014 referendum. Regardless of the internal division in the population concerning the secession question, before the election took place, there was no question as to the legitimacy of the election and that all parties would accept the results. Even the Unionists knew that if voting was in favor of independence for Scotland, this result would be accepted as the will of the Scottish people, who must be allowed to continue their own way. But, even if Scotland succeeded in achieving independence, we must consider that this accomplishment could have been seen more as act of devolution than as an act of real secession.[95]

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[93] The plan carries the name of the President of the Basque Government who submitted it to the Basque Parliament in 2002 and defended in front of the Spanish Parliament in 2005 as a new political pact for co-existence. *See* Alberto Lopez Basaguren, *The Fundamental Points of the Plan Ibarretxe: The Right to Self-Determination and Example of Quebec*, *in* FUNDACIONPARA LA LIBERTAD 41 (2008).

[94] *See* HENRARD, *supra* note 3.

[95] *See* Mure Dickie, *Scotland: Breaking the Bonds*, FIN. TIMES (Nov. 27, 2013), http://www.ft.com/intl/cms/s/0/e470e410-576a-11e3-9624-00144feabdc0.html#axzz44gCyyZSz.

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The example of Basque Country is different in that there is no legal provision for secession predicted in domestic law. Although the Basque people have broad autonomy, the legal arrangements for power sharing through the existing Statute of Autonomy[96] are very complex and in some areas ambiguous. From a practical point of view, a large part of what is determined as the jurisdiction of Basque autonomy region has been the subject of numerous hearings before the Spanish Constitutional Court. The complex economic arrangements between the Basque Country and the Spanish government envisage that the charges need to be distributed according to an agreed formula between regional and central government; the formula granting greater benefits for the Spanish government. Although the substantive powers guaranteed to the autonomous communities are relatively broad, there are obvious limitations, which, in the name of national imperatives, establish the preeminence of the Spanish government. The procedure for modifying the statutes of the autonomous regions, including the Basque Country, is difficult, and some of the serious conflicts between the autonomous regions and the Spanish government arise because the autonomy does not automatically lead to social and economic progress.[97] Furthermore, in the Basque Country, an important segment of the population still supports the ETA.[98]

Nevertheless, for the majority of the observers outside of Spain, the autonomy arrangements adopted in Basque Country and in the other sixteen regions within Spain are considered a success. This system has resulted in the revival of regional identities, cultures, and languages of many different ethnic communities in Spain. In this way, from a centralized state twenty years ago, Spain has moved towards federalism and successfully adapted to it.[99]

The examples of Scotland and the Basque Country, analyzed in light of positive international law, do not satisfy the conditions for unilateral secession that in some forms can be accepted as "remedial rights" because there are no instances of discrimination, negation of participatory rights, colonization, or foreign occupation.[100] There is an equal distribution of economic resources, and some circumstances that can be viewed in favor of

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[96] *See* Statute of Autonomy of the Basque Country, (L.O.P.J. 1979) (Spain).

[97] *See* HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICT RIGHTS (1990).

[98] *See* Vieytez, *supra* note 91.

[99] *See* Documents, *supra* note 76.

[100] For a review of potential conditions proposed by different scholars that could give legitimacy of possible secession, see Simon Caney, *National Self-Determination and National Secession, Individualist and Communitarian Approaches*, *in* THEORIES OF SECESSION (Percy B. Lehning ed., 1998).

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secession, such as the existence of separate cultural characteristics, separate administrations, separate legal system, different jurisdiction, and separate identity. This is not enough, however, to give legitimacy to a possible unilateral act. Moreover, the other non-majority groups have the similar rights not to follow the rest of the community in the secessionist adventure.[101]

In the Basque Country, as in Scotland, aside from the other external factors and legal obstacles, the main obstacle to successful independence is the internal divisions of the societies that allow for the simultaneous existence of parallel rights, making the logistics of any contemplated secession extremely complex.[102] There are, of course, differences in the nature of the secession movements between the Basque Country and Scotland. The peaceful nature of the secession movement in Scotland is distinguishable from the occasional violence associated with the Basque Country ETA activists. And Scotland has always been referred to as a separate country within the United Kingdom, perhaps easing secessionist goals, while the Basque Country has not always been an officially recognized autonomous region.[103] In both countries, there are emotional arguments for independence, but also distinct rational economic facts important to consider.

Both entities have at their disposal different ways to practice distinct identity and control over political decision-making. Their rights are guaranteed under established social institutions with a long democratic tradition. In both examples, it is important to stress the democratic way of problem solving—dialogue—and use of democratic means to secede and establish independence. We must take into account that this is happening in two of the oldest states in Europe. But what is the possible implication of the eventual secession of the Basque Country or Scotland on countries with less prominent democratic traditions?

E. Future Applicability/Possible Implications

If we consider the experiences of Scotland and the Basque Country and we place them in Balkan context, the question becomes: Is the democracy in development, especially the democracy in multicultural societies, capable of accommodating ethnic nationalism to accept regional differences and promoting a dialogue-driven independence process?

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[101] *See* Basaguren, *supra* note 93.

[102] *Id.*

[103] Moreover, if Scotland and Basque Country achieve independence, then every community that wants autonomy will try to follow the same path. For more information, see http://www.dw.com/en/who-else-may-follow-in-scotlands-footsteps/a-17919333.

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It is clear that more sociocultural or ethnonational groups exist in countries with developing democracies, and in these countries, more movements for self-determination are likely to occur.[104] Because of the complexity and the obstacles to achieving internal self-determination, attempts made by some multicultural communities—such as in Bosnia and Kosovo—did not take root and almost completely failed.[105]

The current effect of democracy and democratization in the political composition of developing countries is encouraging for ethnic demands. A well-institutionalized state may put certain limits upon such requests. Of course, if the state is not well institutionalized, then democracy and multi-ethnic demands may cause major political problems.[106] If a state does not accommodate ethnic requests, then feelings of exclusion and injustice can lead groups to try to realize them with military action. Therefore, because democracy in developing countries can encourage ethnic conflicts, it also must provide a framework for dealing with them.[107]

But if internal self-determination is a cure for secessionist demands—part of many quests for determination after the Cold War[108]—why are the quests for separation so strong and vital in two prominent democracies within the EU, where all the Balkan countries tend to be? This question has many possible answers. It is likely that some forms of unequal distribution of economic resources exist, and that these, according to the affected groups, fiscally overload certain populations. From a broader perspective, the trends for separate statehood could be driven by the modern, highly contrasting political and economic conflicts between the global and local power. If the various internal self-determination tools utilized in the examples of Scotland and Basque Country have not achieved the desired or expected results, but has instead resulted in opposite effects, secession without mutual agreement between secessionist entities and parent countries will become a real consideration, not only in these areas, but beyond.[109]

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[104] *See* Kohli, *supra* note 44, at 33.

[105] Will Kymlica discusses the trend of repressive policies of multiculturalism. because states fear for their survival in the geopolitical sense—which Kymlica believes is misplaced, especially with the establishment of NATO and the EU) and because individuals fear being subject to self-governing institutions run by the minority. *See* WILL KYMLICA, MULTICULTURALISM: SUCCESS, FAILURE, AND THE FUTURE (2012).

[106] *See* Kohli, *supra* note 44, at 314.

[107] *Id.*

[108] *See* Mark Weller, *Settling Self-Determination Conflicts: Recent Developments*, 20 EUR. J. INT. L. 111 (2009).

[109] *See* Peter Apps, *Could Scottish Independence Vote Reshape Europe?*, GLOBAL POLICY (Feb. 1, 2013), https://www.globalpolicy.org/nations-a-states/emerging-states--claims-to-autonomy-and-independence/scotland/52266-could-scottish-catalan-independence-votes-reshape-europe.html.

As a unilateral act, secession is seen as a non-popular option in the international community. But in both of these analyzed examples, and from a legal point of view, in terms of international law, there is no reasonable "excuse" not to accept the possibilities for democratically-realized secession as a possible way to accommodate the struggle between the superiority of the principle of territorial integrity of the states and, real quests for secession that are at the other end of the spectrum. Notably, a large number of self-proclaimed secessions are internationally recognized, legalized *post festum*—after the event—and proceed to act as independent states.

F. Concluding Remarks

Although this is not always a "magic cure" against secession, internal self-determination, in effect and in practice, diminishes quests for external self-determinations and softens the tendencies for secession. Self-governance actually helps sociocultural groups keep their distinctive features. As illustrated in the two examples of Scotland and the Basque Country, internal self-government has allowed these countries to maintain their unique features throughout the centuries. It is now up to the present generation to share the collective consciousness with an expressed desire for independence, which besides the historical narrative, among other things, is based on the original sovereignty arising from the status of their recognized rights. The centuries-old history of separate administration, separate legal systems and jurisdictions, and separate educational and religious institutions, may help this generation to strengthen and maintain their separate identity.

Still, for ultimately avoiding secession and violent separatism, there is a need for the accommodation of group rights through internal self-determination and, at the same time, the protection of democracy and universal human rights. There are proposals for accepting a limited type of secession in international law. This secession can be a remedial or dialogue-driven democratic secession—closer to devolution than to secession—contrary to the unilateral act of secession, but this limited form of secession has not yet been established as practice and is far from being established as law.

In closing, it is important to stress that, regardless of the internal self-determination tools' lack of "success" in fully suppressing the secessionist clams in these two analyzed examples, addressing the secessionist clams in democratic surroundings differs from addressing secessionist claims in non-democratic surrounding. The key differences are mainly in political rhetoric, public deliberation of the question, and the use of democratic non-violent means for possible realization of the act of secession. And those differences are the true benefits from applying the tools for realization of the internal aspect of the right of self-determination. This aspect of the self-determination makes countries more

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democratic and society more open and conscious about the existence of different groups and priorities within their borders.

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