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Constitutional Secession

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I. Introduction

Should the right of secession be incorporated into modern constitutions? If so, how should the right be structured to respect the right of self-determination while still maintaining stability and territorial integrity? Can a constitutional provision on secession promote national unity and prevent human rights violations?

The resolution of these questions could have a dramatic effect on the international community. Most secessionist movements are marked by violence, destruction, and retaliation.¹ These violent movements are directly linked to the deaths of millions of people and to systematic human rights violations perpetuated by both the secessionist groups and the governments resisting them.² Further, these movements are widespread, appearing in both developing countries (e.g. Burma & Ethiopia) and developed countries (e.g. Spain & the United Kingdom).³ Given the wide spread nature of secessionist movements, much research and debate has developed on who has a right to secession or how that right is or is not justified under international law. However, little has been done to develop a method to directly address secession within the domestic framework.

The traditional view within democratic governments has been that democracy and secession cannot coincide. This idea was embodied in Lincoln's Inauguration Address when he stated, "Plainly, the central idea of secession, is the essence of anarchy."⁴ However, there has been a shift in modern judicial opinions, which recognize that democracy must acknowledge

¹ David S. Siroky, *Explaining Secession in The Ashgate Research Companion to Secession*, 45, 45 (Peter Radan, Aleksandar Pavkovic ed., 2011).

² *Id.* at 45 – 46.

³ *Id.* at 46.

⁴ President Abraham Lincoln, Inauguration Address, (Mar. 4, 1861)

the right to self-determination.⁵ This principle has been encompassed in several Constitutions, both old and new.⁶

According to the International Court of Justice, the right to self-determination has become “one of the essential principles of contemporary international law.”⁷ This right was incorporated into Article 1.2 of the United Nations Charter, which upholds the “respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.”⁸ The foundation of self-determination was best described in Principles 2 and 3 of the Atlantic Charter.⁹ In the Charter, President Roosevelt and Prime Minister Churchill declared that “they desire to see no territorial changes that do not accord with the freely expressed wishes of the people concerned”¹⁰ and “they will respect the right of all peoples to choose the form of government under which they will live.”¹¹ Espoused in this understanding of self-determination is the idea of external self-determination, or secession.¹² External self-determination encompasses not only the right to autonomy within a

⁵ See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, pp. 31 – 32, ¶52-53; Western Sahara, Advisory Opinion, I.C.J. Reports 1975, 12, 32 ¶ 54-59; East Timor (Port. v. Austl.), Judgment, I.C.J. Reports 1995, 90, 102, ¶ 29

⁶ 1868 Const. of Lux., art. 37(5) (Lux.); La Constitution, 2012 Const. art. 167 § 1 (Belg.); 1994 Const. of the Fed. Democratic Republic of Eth., art. 39 (Eth.)

⁷ East Timor (Port. v. Austl.), Judgment, I.C.J. Reports 1995, 90, 102, ¶ 29

⁸ U.N. Charter art. 1, para. 2.

⁹ Max Planck Encyclopedia of Public International Law (MPEPIL online), Self-Determination, B.1.5 <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e873>

¹⁰ The Atlantic Charter: Declaration of Principles issued by the President of the United States and the Prime Minister of the United Kingdom, U.S.-U.K., Principle Two, Aug. 14, 1941

¹¹ Id. Principle Three

¹² 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. A/RES/25/2625 (Oct. 24, 1970).

state, but also the creation of a new nation-state or the integration into another nation-state.¹³

Under international law

Based on the above understanding of self-determination, this essay will attempt to provide a workable constitutional model that protects human and civil rights of minorities by including a provision allowing for secession. Part II will discuss the current approaches to secession found in various constitutions. This section will also attempt to provide an evaluation of the effects these approaches have on secession and domestic law. Part III puts forth the assertion that constitutionally recognized secession should be adopted in order to strengthen internal self-determination and domestic governance. Further, this section will provide a model for implementation of secession into modern constitutions.

II. Constitutional Approaches To Secession

The concept of secession is as old as the nation-state, having been included in constitutions dating back to the 19th Century.¹⁴ Countries have taken one of three constitution approaches to secession. A few have embraced the principle and clearly outline how the principle should be approached within domestic law. On the other end of the spectrum are the countries that have denounced secession through constitutional provisions. Most countries fall in between, with an implied right or denial, which is not stated until the question is raised.

a. Expressed

¹³ Salvatore Senese, *External and Internal Self-Determination*, Social Justice Vol. 16, No. 1 (Spring 1989) p. 19 – 25, p 19.

¹⁴ 1868 Const. of Lux., art. 37(5) (Lux.); La Constitution, 2012 Const. art. 167 § 1 (Belg.)

Under the expressed approach, some countries have clearly acknowledged the right to self-determination and provided a constitutional framework to reach this principle. This approach has been adopted by modern constitutions as well as much more established constitutions. At least 18 countries allow for secession within their constitutional framework. This essay will look at Belgium and Ethiopia in order to demonstrate how this right has been incorporated into constitutions since the 19th century.

BELGIUM

Belgium is one of the oldest nations with an expressed right to secession granted in their constitution. Originally joined with the Northern Netherlands (Holland) at the Congress of Vienna in 1815, however, Belgium declared independence in 1830 from the Netherlands.¹⁵ As a nation created through secession, Belgium realized the importance of self-determination and included a provision to ensure future Belgians would have the opportunity to exercise this right.¹⁶ Written in 1831, the Belgian Constitution provides that “cession, exchange or expansion of territory can only take place by virtue of a law.”¹⁷ Belgium developed into a federal state, comprised of three distinct regions, the Flemish Region, The Walloon Region, and the Brussels-Capital Region.¹⁸ Each region has its own legislative and executive governing body.¹⁹

¹⁵ Christopher K. Connolly, *Independence in Europe: Secession, Sovereignty, and the European Union*, 24 *Duke J. Comp. & Int'l L.* 51, 62 (2013)

¹⁶ *Id.*

¹⁷ *La Constitution*, 2012 *Const. art.* 167 § 1 (Belg.)

¹⁸ Belgian Federal Government, *Portal Belgium Government, The Regions*, Portal Belgian Government http://www.belgium.be/en/about_belgium/government/regions/ (last visited Dec. 10, 2014)

¹⁹ *Id.*

Belgium currently faces a separatist movement from the Flemish region. However, the movement is mainly political, with no violence.²⁰ While the divisions in Belgium are ethnic and linguistic, the separatist movement is based on economics rather than ethnic differences.²¹ The main effect this movement has had on Belgium is the inability to form a working coalition government.²²

At the creation of the monolingual regions, the Walloon region enjoyed economic dominance.²³ However, through modernization and industrialization in the Flanders region, the Flemish GDP per capita has now surpassed that of France and Germany.²⁴ Unfortunately, the Walloon region has not had such economic success, suffering from a declining coal and steel market, the region's GDP is comparable only to some of the poorest regions of other European states.²⁵

This huge disparity in economic stability, coupled with the social and cultural differences of the two regions has lead Flanders to reconsider its position within Belgium.²⁶ Beginning in 2007, the Flemish have called for more autonomy.²⁷ Aside from more autonomy, the biggest concern among the Flemish is the amount of economic support provided to the Walloon

²⁰ Martin Euwema & Alain Verbeke, Negative and Positive Roles of Media in the Belgian Conflict: A Model for De-Escalation, 93 Marq. L. Rev. 139, 149 (2009)

²¹ Thomas Wagner-Nagy, "European Disintegration? Separatist Movements Across the Continent Are Gaining Momentum" Online: Peace and Conflict Monitor http://www.monitor.upeace.org/innerpg.cfm?id_article=1072 (last viewed Dec. 10, 2014).

²² Id.

²³ Euwema & Verbeke, *supra* note 20, at 143

²⁴ Id.

²⁵ Id.

²⁶ Id. at 150.

²⁷ Id.

region.²⁸ Some see this as an execration towards de-integration, which given Belgium's view of secession could lead to the peaceful creation of a new state. The continued decentralization of power in Belgium is effectively moving towards secession achieved in stages.²⁹

ETHIOPIA

Much like Belgium, Ethiopia is a multiethnic federal republic made of ethnic and linguistic defined states.³⁰ Apart from that, Ethiopia's experiment with constitutional secession has not been as peaceful. Ethiopia is currently fighting against several separatist groups and the controlling political party is more concerned with maintaining the status quo than upholding the secession provision.³¹

Ethiopia's federal system is similar to the United States, in that each state has its own constitution and governing bodies. Also like the United States, the Ethiopian states reserve all powers not granted to the federal government.³² However, Ethiopia is unique in its approach to secession. The Constitution clearly endorses the right of self-determination through both internal and external means³³. The right of secession empowers the "Nations, Nationalities, and Peoples" to either create new states or to secede from the nation.³⁴ Further, the Constitution

²⁸ Id.

²⁹ Susanna Mancini, *Rethinking the Boundaries of Democratic Secession: Liberalism, Nationalism, and the Right of Minorities to Self-Determination*, 6 Int'l. J. Const. L. 533, 580 (2008).

³⁰ 1994 Const. of the Fed. Democratic Republic of Eth., art. 46 (Eth.)

³¹ Jure Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice*, 325 (Hart Publishing, 2012).

³² 1994 Const. of the Fed. Democratic Republic of Eth., art. 52 (Eth.)

³³ 1994 Const. of the Fed. Democratic Republic of Eth., art. 39, 47 (Eth.)

³⁴ Id.

provides a democratic process for the realization of the right of self-determination.³⁵ This process requires:

1. When a demand for secession has been approved by a two-thirds majority of the members of the Legislative Council of the Nation, Nationality or People concerned;
2. When the Federal Government has organized a referendum which must take place within three years from the time it received the concerned council's decision for secession;
3. When the demand for secession is supported by a majority vote in the referendum;
4. When the Federal Government will have transferred its powers to the Council of the Nation, Nationality or People who has voted to secede; and
5. When the division of assets is effected in a manner prescribed by law.³⁶

Finally, the constitution defines “Nation, Nationality or people” as “a group of people who share a large measure of common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory.”³⁷ During the three year period, the federal government and other regional governments can attempt to negotiate a solution short of secession.³⁸

³⁵ Id.

³⁶ Alem Habtu, *Multiethnic Federalism in Ethiopia: A Study of the Secession Clause in the Constitution*, 35 *Publius* 313, 327-28 (2005).

³⁷ 1994 Const. of the Fed. Democratic Republic of Eth., art. 39 (Eth.)

³⁸ Alem Habtu, *supra* note 36 at 329

Why does Ethiopia have such a unique approach to secession? The current system of government and constitution were created after the overthrow of a military regime.³⁹ That regime was toppled by strong ethno-nationalist organizations.⁴⁰ Recognizing the dangers that ethno-nationalism can pose to a government, the framers decided to create a state based on ethnic pluralism.⁴¹ In fact, many of the ethno-nationalist groups would not have joined the new federation without this approach.⁴²

While this provision has never been used, there have been several separatist movements in Ethiopia. The first, and only successful movement was that of Eritrea, which voted for independence in 1993, under the auspices of the UN (Eritrea's secession took place under a transitional government, before the constitution officially took effect).⁴³ Currently, the Ethiopian government is battling several separatist groups that have been denied the right to implement this provision. Ethiopia's ruling coalition, the Ethiopian People's Revolutionary Democratic Front (EPRDF), was been accused of voting fraud, exclusion of political parties, and attempting to maintain control through its influence over satellite regional groups.⁴⁴ The government's commitment to self-determination has been called into question, and while the provision has "symbolic value", "it is unlikely that any Ethiopian government would allow secession to take place."⁴⁵

³⁹ *Id.* at 322

⁴⁰ *Id.*

⁴¹ *Id.* at 323

⁴² *Id.* at 324

⁴³ Jure Vidmar, *supra* note 31 at

⁴⁴ *Id.* at 325

⁴⁵ Alem Habtu, *supra* note 36 at 313

b. Denied

Some countries have decided that self-determination is not an inalienable right. These countries have included constitutional provisions forbidding secession. This approach has been adopted by many countries that have systematic human rights violations, discrimination, and/or totalitarian governments. This section will look at the Constitutions of China and Myanmar to illustrate this approach.

CHINA

China has a long history of fractured states fighting for power. Under the dynasties, rebellions and uprisings continuously threatened the unification of China. The 1931 Constitution of the Chinese Soviet Republic recognized the right of self-determination of minorities in China⁴⁶. Article 14 clearly stated that minorities “shall enjoy the full right to self-determination, i.e. they may join the Union of Chinese Soviets or secede from it and form their own state⁴⁷.” However, once the Communist Party officially controlled mainland China, this provision was lost. The first Constitution written under the People’s Republic of China in 1954 removes the 1931 Article 14 right to self-determination. Instead, Article 3 of the 1954 Constitution affirms China’s existence as a “unitary multinational state” of which the “national autonomous areas are inseparable” parts of the state.⁴⁸

⁴⁶ Anonymous, China and the Principle of Self-Determination of Peoples, 6 St. Antony's Int'l Rev. 1, 79, 79-102 (2010).

⁴⁷ Xianfa art. 14, (1931) (China)

⁴⁸ Xianfa art. 3, (1954) (China)

To solidify the state's view on secession and separatist movements, China's 1982 Constitution includes a prohibition against "any acts that undermine the unity of the nationalities or instigate their secession⁴⁹." This shift in theory has been linked to China's claim over Tibet, the rejection of the Nationalist government running Taiwan, and other separatist movements within China.⁵⁰ China's refusal to recognize the right of secession and limits on self-determination has created domestic instability and international friction. China currently faces uprisings from suffragists in Hong Kong and from Uyghur separatist in Xinjiang.

Hong Kong, once under British control, is now a largely autonomous region. However, recent moves by China to limit the electoral power of the Hong Kong citizens has led to widespread protest. Following the announcement that the State would chose the candidates and then approve the winner of elections, protesters took to the streets to decry the decision.⁵¹ Many of the protesters have claimed that the new process goes against universal suffrage and self-determination.⁵² In response, the Hong Kong government, following China's guidance, has deployed thousands of police, using riot control tactics against the protesters.⁵³ More recently,

⁴⁹ Xianfa art. 4, (1982) (China)

⁵⁰ Anonymous, *supra* note 46 at 81.

⁵¹ Alex Kleiderman, Khanim Javadova et al., *As it Happened: Hong Kong Protests 29 September*, BBC News (Sep. 29, 2014), <http://www.bbc.com/news/world-asia-china-29405576>

⁵² Larry Ong, *Umbrella Movement to 'Shopping Revolution': Interactive Timeline of the Occupy Protest Key Events*, Epoch Times (last updated Dec. 3, 2014) <http://m.theepochtimes.com/n3/1109920-umbrella-movement-to-shopping-revolution-an-interactive-timeline-of-the-occupy-protests-key-events/>

⁵³ *Id.*

several businesses, some of which are aligned with a Chinese state-owned corporation, have filed and won injunctions against the protesters.⁵⁴

This restriction on self-determination has long been the reality in Xinjiang region. While the Constitution recognizes autonomous rule for many regions, it leaves the power to “annul those local regulations or decisions... that contravene the Constitution, the statutes, or the administrative rules and regulations.”⁵⁵ The Uyghur are an Islamic, Turkic speaking people located in the Xinjiang province.⁵⁶ This region has undergone growing oppression under the Chinese government’s war on separatist and terrorism.⁵⁷ Following the September 11th attacks, China highlighted the Uyghur’s Islamic roots to justify its increased hostility towards the region.⁵⁸ Under these policies, China does little to distinguish between political activist and terrorist.⁵⁹ And as political activism continues to rise in the region, China continues to accuse activist, journalist, and scholars of terrorism in an attempt to suppress the separatist views.⁶⁰

BURMA

⁵⁴ Anonymous, Hong Kong Protests; What’s Changed at Mong Kok?, BBC News (last updated Dec. 3, 2014) <http://www.bbc.com/news/world-asia-china-29054196>

⁵⁵ Xianfa art. 67 §8 (2008) (China)

⁵⁶ Amnesty International, Uyghur Ethnic Identity Under Threat in China, (ASA 17/010/2009), *available at* <http://www.amnesty.org/fr/library/asset/ASA17/010/2009/en/e952496e-57bb-48eb-9741-e6b7fed2a7d4/asa170102009en.pdf>.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Dru C. Gladney, Response to Chinese Rule in Xinjiang: Patterns of Cooperation and Opposition, 10 *The Mongolian Journal of International Affairs*, 102 (2003) *available at* <http://www.mongoliajol.info/index.php/MJIA/article/view/122>.

⁶⁰ *See*, Amnesty International, Hasty Executions in China Highlight Unfair Xinjiang Trials (Nov. 10 2009) *available at* <http://www.amnesty.org/en/news-and-updates/news/hasty-executions-china-highlight-unfair-xinjiang-trials-20091110>; *See also*, Preeti Bhattacharji, Council on Foreign Relations, Uighurs and China’s Xinjiang Region, (May 29, 2012) *available at* <http://www.cfr.org/china/uighurs-chinas-xinjiang-region/p16870>.

Much like the original Chinese Constitution, the first Constitution of Burma had an expressed guarantee of secession.⁶¹ This Constitution was written prior to the end of British colonial rule and was officially adopted in 1948, when Burma gained independence.⁶² Following the military takeover in 1973, a new Constitution was adopted in 1974.⁶³ This Constitution omitted the right of secession and instead prohibited regions from undermining national unity or the stability of the State.⁶⁴ The final Constitution, drafted under the military junta, expressly states that “no part of the territory... shall ever secede from the Union.”⁶⁵

Even before the removal of the secession provision, the central government was actively combating almost 20 ethnic separatist groups numbering over 60,000 armed insurgents.⁶⁶ Some of these groups never moved for secession under the original constitution, choosing rather to engage in armed insurrection against the central government.⁶⁷ When the central government denied another group their constitutional right to secede and then attempted to install Buddhism as the state religion, several other groups joined the armed insurgency.⁶⁸ In response, the central government began making agreements with the groups, granting them economic and local control.⁶⁹

⁶¹ 1947 Const. of Myan. art. 10 (Myan.).

⁶² Human Rights Watch, *Chronology of Burma's Constitutional Process*, available at <http://www.hrw.org/sites/default/files/reports/burma0508chronology.pdf> (last visited Dec. 10, 2014).

⁶³ *Id.*

⁶⁴ 1974 Const. of Myan. (Myan.)

⁶⁵ 2008 Const. of Myan., art. 10 (Myan.)

⁶⁶ Renaud Egretreau, *Case Study 5: Myanmar/Burma: Secession and the Ethnic Conundrum in The Ashgate Research Companion to Secession*, 475, 475 (Peter Radan, Aleksandar Pavkovic ed., 2011).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

Since the 2010 elections, Burma has been under a democratic parliamentary government, however, the military guaranteed their continued influence by reserving 25% of parliament seats for military appointment.⁷⁰ Under this system, the government has continued its crackdown on activist and ethnic minorities.⁷¹ Several ethnic insurgent groups are currently fighting against the central government for independence or increased autonomy.⁷²

Both China and Burma continue to face violent separatist movements.⁷³ The conflicts with these groups have caused continued human rights concerns and have isolated both countries. The expressed denial of the right to secession has limited or nullified other constitutional protections.

c. Implied

When the constitution is mute on secession, the issue is only addressed when a people within the state makes a claim for the right. Under the traditional view, the muteness negates the existence of a right to secession. Nonetheless, the modern application of this approach has recognized the right as long as it is accomplished within the legal framework of the constitution. For a better understanding of this approach, this section will look at the

⁷⁰ Min Zin, Can Burma's Civil Society Find Its Voice Again?, ForeignPolicy.com, (Nov. 26, 2014) *available at* <http://foreignpolicy.com/2014/11/26/can-burmas-civil-society-find-its-voice-again/>.

⁷¹ John Sifton, Old Wars in New Burma, HuffingtonPost.com (Nov. 3, 2014) *available at* http://www.huffingtonpost.com/john-sifton/old-wars-in-the-new-burma_b_6096018.html

⁷² *Id.*

⁷³ *See*, Elizabeth Van Wie Davis, Asia-Pacific Center for Security Studies, Uyghur Muslim Ethnic Separatism in Xinjiang, China (Jan. 2008) *available at* <http://www.apcss.org/college/publications/uyghur-muslim-ethnic-separatism-in-xinjiang-china>; *See also*, John Sifton, *supra* note 71

movements in Quebec and Scotland and how the domestic democratic process not only recognized, but encouraged self-determination.

QUEBEC

The Quebec movement, much like the Flemish is rooted in linguistic and economic concerns.⁷⁴ As a whole, Canada is mainly an English speaking nation, with 90% of the population speaking English.⁷⁵ However, in Quebec, 81% of the population speaks French.⁷⁶ The language distinction carries over into cultural and religious aspects, with English Canadians being predominantly Protestant and French Canadians being Catholic.⁷⁷ French Canadians have continuously taken steps to protect their unique culture and ensure economic equality.⁷⁸

There have been two referendums on Quebec's independence, one in 1980 and another in 1995, both of which failed.⁷⁹ Following the 1980 referendum, substantial changes were made to the Canadian Constitution.⁸⁰ These revisions curtailed some of Quebec's powers and did not provide a means for Quebec to opt out of the amendments.⁸¹ However, Quebec has yet to

⁷⁴ Rudy Fenwick, *Social Change and Ethnic Nationalism: An Historical Analysis of the Separatist Movement in Quebec*, 23 *Comparative Studies in Society and History*, 196, 199 (1981).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 196

⁷⁹ Montserrat Guiberran, Francois Rocher, & Elisenda Casanas Adam, *Introduction: A Special Section on Self-Determination and the Use of Referendums: Catalonia, Quebec and Scotland*, 27 *Int. J. Polit. Cult. Soc.*, 1 (2014).

⁸⁰ *Id.* at 2.

⁸¹ Office of the Minister Responsible for Canadian Intergovernmental Affairs, *Quebec's Political and Constitutional Status; An Overview*, 20 (1999).

ratify these revisions.⁸² The 1995 referendum was followed by case before the Supreme Court of Canada to determine the legality of unilateral secession by Quebec.⁸³

In its opinion the Court found that a majority vote, no matter how large the majority, could have legal effect on its own.⁸⁴ However, the Court also stated that the “constitutional order could not be indifferent to a clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada.”⁸⁵ While refusing to define the process, the Court did hold that negotiations addressing the other provinces, minorities (both inside and outside of Quebec), and Canada as a whole would be required for secession to follow the rule of law and have effect under the constitution.⁸⁶ In spite of these events, the Quebec movement remains a peaceful democratic movement aimed at the realization of self-determination.

SCOTLAND

The democratic process exercised by Scotland and the United Kingdom provides a functional model of an implied right of secession. Unlike Quebec, Scotland was an independent state until 1707 when it entered into the Treaty of Union with England.⁸⁷ Under the treaty, Scotland’s parliament was dissolved, but it retained its legal, education, and social welfare programs as well as its own church.⁸⁸

⁸² Gregory Millard, *Secession and Self: Quebec in Canadian Thought*, 94 (McGill-Queen’s University Press 2008).

⁸³ Montserrat Guiberran, Francois Rocher, & Elisenda Casanas Adam, *supra* note 79, at 2.

⁸⁴ Reference re Secession of Quebec [1998], 2 S.C.R. 217 (Can.).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Christopher K. Connolly, *supra* at 60.

⁸⁸ *Id.*

Scotland and the United Kingdom mutually benefited from this arrangement with little challenges to the status quo until the Labour Party began working towards devolution in the 1970's.⁸⁹ In 1998, the Scotland Act was introduced, which reinstated a local Scottish parliament.⁹⁰ In 2012, Alex Salmond, the leader of the Scottish Nationalist Party (SNP) announced plans to hold a referendum on independence in 2014.⁹¹ The Edinburgh Agreement of 2012 ensured that this referendum would take place and would be effective under the rule of law.⁹² The referendum was held September 19, 2014, but failed to achieve the majority vote required. However, a proposed deal between Scotland and the United Kingdom was reached on November 27, 2014 that could greatly increase Scotland's power to raise and spend funds.⁹³ At the time of this writing, a vote has not been held, however, it has been reported to have the backing of "major political leaders" on both sides.⁹⁴

Through effective use of the democratic process and the rule of law, Scotland and Canada have been able to avoid violent protest. The frameworks provided for each movement clearly established how the struggle for independence would be fought. And through this framework, the secessionist in each movement continue to work towards a peaceful realization of their right to self-determination.

⁸⁹ Id.

⁹⁰ Id. at 61

⁹¹ Id.

⁹² Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland, Scot.-U.K., Oct. 15, 2012, [hereinafter Edinburgh Agreement]

⁹³ Stephen Castle, Panel Details Plan to Give Scotland More Powers, *New York Times*, (Nov. 27, 2014) *available at* http://www.nytimes.com/2014/11/28/world/europe/scotland-should-get-increased-powers-including-over-taxation-commission-says.html?_r=0.

⁹⁴ Id.

III. Which Approach If Any?

Any approach adopted must recognize the principle of self-determination, while balancing the principle of territorial integrity. Further, a good model would appreciate the impact a constitutional provision on secession can have on domestic affairs. Consent of the people seeking secession and that of the host state are important to consider in this analysis.⁹⁵ Finally, it must include a democratic process that is attainable. The standard should not be so low to allow a splintering of the state, but at the same time, it should not be so high or burdensome that it defeats the purpose of the provision.⁹⁶

d. Proposed Model

One could create a workable constitutional provision, by borrowing from the Ethiopian framework and the Canadian process. But first, a working definition of “peoples” must be ascertained in order to determine who could hold a right of self-determination under international law. It must also be determined if this right will be subjected to some sort of qualifying “triggering” condition.

The United Nations Educational, Social, and Cultural Organization (UNESCO) defined a “people” as a group holding some if not all of the following common features:

1. Common historical tradition;
2. Racial or ethnic identity;
3. Cultural homogeneity;
4. Linguistic unity;
5. Religious or ideological affinity;

⁹⁵ Peter Radan, *Secession in Constitutional Law in The Ashgate Research Companion to Secession*, 333, 342 (Aleksandar Pavkovic ed., 2011).

⁹⁶ Susanna Mancini *supra* note 29 at 580.

6. Territorial connection; and
7. Common economic life.⁹⁷

UNESCO further stated “the group must be of a certain number” that is “more than a mere association of individuals within a State.”⁹⁸ As well as “the will to be identified as a people or the consciousness of being a people – allowing that groups or some members of such groups... may not have that will or consciousness.”⁹⁹ As a final element, “the group must have institutions or other means of expressing its common characteristics and will for identity.”¹⁰⁰

Based on this definition, the wording of “Nation, Nationality and People” found in Ethiopia would be unnecessarily cumulative for the purposes of this essay. A “people” under UNESCO would easily qualify as a nation or nationality. Since a “people” will be moving for secession, the group should also meet the first three qualifications of a state found in the Convention on Rights and Duties of States. These qualifications are a permanent population, a defined territory, and a government.¹⁰¹

While there should be some qualifying measures for who can secede, it should not reach the level of remedial secession, or a last resort provision. If the standard is too low it could lead to destabilization. However, if the standard is set too high the constitutional provision would be moot as unattainable.¹⁰² There must be a level that looks for discrimination, violation of rights (civil and/or human), or denial of internal self-determination, while also

⁹⁷International Meeting of Experts on Further Study of the Concept of the Rights of Peoples, Final Report and Recommendations, UNESCO, Paris, Nov. 27-30, 1989, SHS-89/CONF.602/7 23, *available at* <http://unesdoc.unesco.org/images/0008/000851/085152eo.pdf> (last visited Dec. 10, 2014).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ The Montevideo Convention on Rights and Duties of States art. 1, Dec. 26, 1933, 165 L.N.T.S. 19 (1933) [hereinafter Montevideo Convention].

¹⁰² Susanna Mancini, *supra* note 29 at 580.

acknowledging that some movements can be obtained through mutual agreement in the absence of any unjust actions on the part of the state.

Now that “people” has been defined, it can be applied to the Ethiopian framework and the Canadian process. However, application presents four questions that must be addressed:

1. who calls for the referendum;
2. who can vote;
3. how is the referendum worded; and,
4. what type of majority will be required?¹⁰³

These questions will be addressed throughout the explanation of the proposed model.

Under the requirements outlined above, a people must have a government. This body representing the secessionist group must call for a referendum. This body should be representative of not just the group seeking secession, but all of the people living within the territory that is being sought. The Ethiopian standard of two-thirds majority of this governmental body will be maintained.

Next, rather than allowing the federal government to schedule the referendum anytime “within three years,” a three year “cool off” period would be required. As suggested by the Supreme Court of Canada, negotiations, aimed at achieving something less than secession, would be mandatory for the federal government and the group seeking secession.¹⁰⁴ Only after a failure to reach a mutual solution should the referendum be brought to the ballot.

¹⁰³ Peter Radan, *supra* note 95 at 335 – 36.

¹⁰⁴ *Supra* note 84.

Once the referendum is presented to the public, a clear majority of the population seeking secession must vote in favor of the referendum.¹⁰⁵ All competent persons of the territory belonging to the group seeking secession should be allowed to vote in this referendum. A competent person is any person of voting age that is not precluded from voting because of a mental or health defect that would prevent him or her from appreciating the matter being voted on. No other restrictions should be applied. This will ensure that the will of the entire territory is known. Further the question presented in the referendum must clearly ask the voter “whether the territorial unit on which they live is to become a separate state.”¹⁰⁶ To be considered successful a referendum must have a voter turnout and positive vote significant enough to attribute legitimacy on the referendum.

Upon a successful referendum, another round of negotiations would be held between the group seeking secession, federal government, and the groups not seeking secession. This round of negotiations would address the “potential act of secession,” the interests of all concerned groups, and the protection of the rights of minorities within the area seeking representation.¹⁰⁷ Only after these negotiations should steps be taken towards the finalization of the secession.

a. Application of This Model

A constitutional approach to secession based on the above model “provides the best means of averting the worst dangers and excess.”¹⁰⁸ The introduction of such a provision would

¹⁰⁵ Id.

¹⁰⁶ Peter Radan, *supra* note 95 at 337.

¹⁰⁷ Id.

¹⁰⁸ Susanna Mancini, *supra* note 92 at 579.

subject an extremely delicate process to the rules of democratic logic and enable forms of external control over the whole process” therefore ensuring that secessionist do not “pursue their goals in the absence of rules.¹⁰⁹ As stated by the Supreme Court of Canada, “the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes.”¹¹⁰ Further, a movement for secession carried out under such a model would be more likely to be accepted by the international community.¹¹¹

When compared to current models of internal self-determination, secession through a democratic process does more for stability and national identity. The modern trend is towards “a quasi-federalist” model, where minorities are given some level of territorial autonomy.¹¹² This trend highlights rather than reduces ethnocentric or other divisive ideas.¹¹³ Under the quasi-federal model, minorities groups are forced to live separately in order to maintain control over their culture, language, and other ethnic ideas. This leads autonomous regions to pursue more power from the central government.¹¹⁴ The federal government gives up more and more of its power, relying instead on the minority entities to address the local needs and issues specific to their group.¹¹⁵ As seen in Belgium, this model does little to establish a national

¹⁰⁹ Id. at 572.

¹¹⁰ Supra note 84.

¹¹¹ Susanna Mancini, supra note 92 at 574.

¹¹² Id. at 564.

¹¹³ Id.

¹¹⁴ Id.

¹¹⁵ Id.

identity and only increases the ethical, cultural, or linguistic divides between the different groups.¹¹⁶

By including such a provision, the constitution can actively protect the stability of a state and minority civil and human rights. A constitutional provision on secession motivates the majority groups to work with minorities and to honor their obligations under international and domestic law. This motivation to collaborate with minority groups would be an effective method of protecting minority groups from civil and human rights violations. When faced with separatist movements, governments may begin to give incentives to rectify some of the grievances, rather than launching campaigns to suppress the movements.¹¹⁷

This model is not without its own dangers. First, a government that has actively exploited a group or violated a group's basic rights is not likely to give up its control over them. The current situation in Ethiopia is a prime example of this danger.¹¹⁸ Ethiopia has the broadest constitutional provision on secession, yet the federal government and police are continuously taking measures to suppress secession movements from ethnic organizations.¹¹⁹

Second, the existence of a provision on secession can be exploited by either the government or minority groups to extract concessions from the other side. This exploitation has been seen repeatedly during periods of nation building.¹²⁰ Many developing governments have held out a provision on secession to encourage groups and other states to submit to the

¹¹⁶ Id. at 576.

¹¹⁷ David D. Speetzen and Christopher Heath Wellman, *Choice Theories of Secession in The Ashgate Research Companion to Secession*, 413, 423 (Peter Radan, Aleksandar Pavkovic ed., 2011).

¹¹⁸ Alem Habtu, *supra* note 36 at 329.

¹¹⁹ Id.

¹²⁰ Susanna Mancini, *supra* note 29 at 567.

emerging government. Recall, for example, that China's 1931 Constitution included a right to secession. However, after the Communist Party solidified control over mainland China and areas like Tibet, a new constitution declared inalienability of territory. This process was also employed in Burma between the 1947 and 1974 Constitutions. This fear was also expressed when the exit option was included in the European Constitutional treaty.¹²¹ The article was seen as a method for Member States to force the hand of the Union and a possible threat to stability.¹²²

Another fear presented by critics of constitution secession is that governments will be less willing to decentralize the government. This would result in reducing the amount of autonomy held by minority groups.¹²³ This could also lead to governments becoming increasingly oppressive of cultural diversity in an attempt to counter regional or ethnical aspirations of autonomy or statehood.¹²⁴

However, all of these concerns can be rebutted. International law requires States to protect minority rights and internal self-determination. There is some support for the notion that systematic violations of human rights and denial of internal self-determination can give rise to a "claim of external self-determination or separation from the State."¹²⁵ When a state's actions reach this level, the consequences are greater than just internal instability. Under these situations, a state faces isolation, diplomatic pressure, and possible United Nations action.

¹²¹ Id. at 570.

¹²² Id.

¹²³ David D. Speetzen and Christopher Heath Wellman, *supra* note 117 at 423.

¹²⁴ Id.

¹²⁵ Kosovo Opinion para. 12. See also; Quebec Opinion.

The idea that minority groups can coerce the government can be flipped on its head and viewed as a method to protect the minority groups from coercion by the dominating group or government. This is easily seen in authoritarian states like China and Burma. However, even in states that have all the elements of democracy and fairness, minority groups are exposed to domination by a more powerful group.

Our own history offers an indisputable illustration of this concern. Following the Civil War, widespread gerrymandering ensured that African Americans would be under-represented in both Congress and state legislatures.¹²⁶ At the same time municipal elections were switched from local-ward based elections to at-large elections. This increased the cost of elections and made African American candidates dependent on white voters.¹²⁷ More common practices include ballot access regulations, personal campaign contribution requirements, and fundraising regulations.¹²⁸ While these practices are justified as being neutral and administrative in nature, they still have the effect of maintaining domination.¹²⁹ Under this view, it is easy to view the threat of secession as defense mechanism rather than one of coercion.

IV. Conclusion

While a constitutional provision on secession has not been completely successful in under minding separatist movements, it has been shown that they can reduce the risk of

¹²⁶ John McGarry and Margaret Moore, *Secession and Domination in The Ashgate Research Companion to Secession*, 427, 434 (Peter Radan, Aleksandar Pavkovic ed., 2011).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

violence and human rights violations. If a model that is based on the rule of law, aimed at protecting minorities as well as maintaining the State can successfully be implemented, the nature of many of the world's separatist movements may also evolve. Global views on democracy and a movement away from territory being unavoidable is needed before this model could have any effect. Further, any country that implements this type of provision must be one that is committed to civil, political, and human rights, a country that unfortunately does not exist at this time.