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The Paradoxes of National Self-Determination

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The Paradoxes of National Self-Determination

Abstract

Some have argued that the right of national self-determination gives every national group the power to decide for itself whether to remain part of an existing state or to secede unilaterally and form its own state. Such a theory underpins the claim that Quebec is entitled to decide on its own whether or not to leave Canada. This paper examines the main philosophical arguments for the theory and finds them one-dimensional and inadequate; they fail to take account of the full range of complex issues arising in actual cases of proposed secession. If the right of national self-determination is understood as involving a right of unilateral secession, it cannot be attributed to national groups across the board. It arises only in specific historical circumstances, usually involving oppression or other forms of grave injustice.

Keywords

Self-determination, National; Québec (Province)

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THE PARADOXES OF NATIONAL SELF-DETERMINATION©

BY BRIAN SLATTERY*

Some have argued that the right of national self-determination gives every national group the power to decide for itself whether to remain part of an existing state or to secede unilaterally and form its own state. Such a theory underpins the claim that Quebec is entitled to decide on its own whether or not to leave Canada. This paper examines the main philosophical arguments for the theory and finds them one-dimensional and inadequate; they fail to take account of the full range of complex issues arising in actual cases of proposed secession. If the right of national self-determination is understood as involving a right of unilateral secession, it cannot be attributed to national groups across the board. It arises only in specific historical circumstances, usually involving oppression or other forms of grave injustice.

Certains ont dit que le droit d'auto-détermination nationale donne à tout groupe national le pouvoir de décider pour lui-même s'il veut rester à l'intérieur d'un état qui existe ou s'il veut sécéder unilatéralement et former son propre état. Une telle théorie soutient la revendication que le Québec a le droit de décider s'il veut quitter le Canada ou non. Cette dissertation examine les arguments philosophiques principaux de cette théorie et les trouve unidimensionnels et insuffisants; ils ne prennent pas en consideration toute la gamme des questions compliqués qui surviennent dans les cas actuels de sécession proposée. Si, par le droit d'auto-détermination nationale, on entend un droit de sécession unilatérale, ce droit ne peut pas être attribué à tout groupe national qui existe. Il ne survient que dans des circonstances historiques spécifiques qui comprennent d'habitude de l'oppression ou d'autres formes de grave injustice.

> Freedom and not servitude is the cure of anarchy; as religion, and not atheism, is the true remedy for superstition.
>
> —Edmund Burke, Speech on Conciliation with America, 1775

> The only liberty I mean, is a liberty connected with order; that not only exists along with order and virtue, but which cannot exist at all without them.
>
> —Edmund Burke, Speech at his arrival at Bristol, 1774

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I. INTRODUCTION

Many years ago, while visiting the city of Ottawa for the weekend, I happened across a parade making its way down a major thoroughfare, with bands, majorettes, and columns of marchers bearing embroidered standards and banners. It was a rather modest parade, as parades go. But in the warm summer sunshine, it had attracted a fair number of spectators, who lined the sidewalks to watch and applaud. I stopped for a while and was struck by the fact that some of the marchers seemed a little down on their luck, a little grim about the mouth. And then I began scrutinizing more carefully the standards that they carried. Some of them bore inscriptions like: ONE QUEEN, ONE COUNTRY, ONE FAITH, ONE LANGUAGE. It suddenly dawned on me that this was a parade of the Orange Order, the intolerant "English first" society born in Ireland during the late 1700s. I was startled, but also intrigued. As a native of Montreal, I had never before witnessed such a parade. For me, Orangemen were a feature of distant disputes in Northern Ireland or perhaps nineteenth-century Ontario—certainly not a part of the contemporary political scene in Canada. And then I noticed another remarkable fact. Most of the spectators around me happened to be francophone who, caught up in the spirit of the occasion, were cheerfully applauding the efforts of the bands and commenting to one another in French on the costumes and floats. Perhaps they were not paying much attention to the inscriptions on the standards. Or perhaps, like good Canadians, they were just being polite.

Since that time a number of things have changed in Canada. For one, I am not sure that Orange parades are still being held in Ottawa. Perhaps they have finally found their way to the burial grounds of political white elephants. But observing the drift of events in anglophone Canada over the past decade, I occasionally imagine that I am watching an updated version of the same parade. Only now the wording on the banners is a little different. It still reads: ONE COUNTRY and ONE LANGUAGE. However, ONE QUEEN is now in much smaller

letters, and ONE RELIGION has become ONE CHARTER OF RIGHTS AND FREEDOMS.

In my imagined scenario there is another important difference. Many of the francophone spectators are no longer there, turning a blind eye to offensive slogans. Alienated, or just plain bored, they have moved on to other things. And, not unexpectedly, some of them have been attracted to other parades, where the banners are emblazoned with similar inscriptions, reading ONE COUNTRY, ONE LANGUAGE, and so on. The difference, of course, is that the country they have in mind is not Canada, but Quebec.

To many Canadians of all backgrounds, both sorts of parades must seem strange and disheartening spectacles. For they represent a species of political fundamentalism that seems untrue to our history and shared political morality. For one thing, a lot of people are left out of both parades. In the end, I do not think that most thoughtful Canadians, whether anglophone or francophone, subscribe to the exclusivist slogans on either set of the banners, except in moments of frustration and forgetfulness. So these parades are not representative of our best and most profound feelings although, like parades everywhere, they attract a lot of attention.

Moreover, the parades tend to shut out an important sector of our population—the indigenous peoples. They are neither English nor French in their origins and cultural identities. Neither are they new immigrants, who might perhaps be expected to adapt eventually to either linguistic community. They are Canada's original peoples, whose time-lines on this continent so greatly exceed those of incoming groups as to dwarf them completely. Aboriginal peoples were once the sole stewards of the land that they now share with other Canadians. And they are not even invited to the parades, except perhaps to provide a little local colour.

Another point comes to mind. The simple slogans on the banners fly in the face of the complex realities of Canadian history, which speak of continuous (if often difficult) accommodations among different national groups, of long-standing inter-societal commitments and responsibilities, of bargains and compromises, of being bound together by a multitude of common interests, common undertakings, common memories, common sentiments, even common terms of disagreement. Canadians of all backgrounds have travelled a long way together during the past several centuries and, through hard experience, have learned something (although perhaps not enough) about accommodating a variety of national cultures and languages within a flexible federal framework. The incongruous juxtaposition of peoples

and attitudes at that Ottawa parade and the fund of good humour and tolerance among the spectators, so far removed in spirit from the bristling slogans on the banners, were perhaps not so atypical of our political culture after all.

I think about these sorts of things when I reflect on the right of national self-determination—the subject of our inquiry here. As commonly understood, this right gives certain national groups the power to decide whether or not to secede from the states they belong to. Although I appreciate the force of the abstract arguments favouring such a right, when I consider these arguments in a concrete context (such as that of Canada and Quebec) they often seem too simple and schematic to cope with the complex web of reciprocal rights, commitments, and responsibilities that history and human interaction have conspired to weave. In other words, in concrete situations the attractive simplicity of the theory seems to dissolve into a sea of contradiction and paradox. It is this sense of paradox that I would like to convey here.

But first, a few clarifications. When speaking of the right of self-determination in its most general sense, I mean the power of a group to determine its own international status—whether to become, remain, or cease to be an independent state. According to this definition, both existing states and sub-state groups are capable of holding a right of self-determination. In this paper, however, we are concerned only with a branch of this topic, what may be called the right of *national* self-determination. This is the right of a national group contained within a state to decide whether or not to secede from that state and form its own state. So, in our terminology, the right of national self-determination is a subdivision of the general right of self-determination. Let me highlight some features of this approach.

First, I assume that the general right of self-determination refers in its most obvious sense to the right of independent states to determine their status freely under international law.[1] While the right of self-determination may also extend to certain sub-state groups that aspire to full international statehood (as in the case of national self-determination), such groups only claim for themselves the right that independent states already possess. By contrast, there is a tendency in the literature to use the term "self-determination" as if it referred exclusively to a right held by sub-state entities. The tendency is a natural one, given that the latter entities present most of the difficult questions and attract the most attention. However, the larger meaning of the term

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[1] Compare J. Crawford, *The Creation of States in International Law* (Oxford: Clarendon Press, 1979) at 84-102.

is worth keeping in mind, as it has a certain bearing on our subject.

Second, according to the theory considered here, the right of national self-determination is *unilateral* in nature—it can be exercised without the consent of any other group, whether that be an existing state or a sub-state group. However, we should remember that the right of national self-determination can also be couched in more moderate terms. According to one view, for example, the right is normally "interdependent" or "mutual" rather than unilateral and requires the participation and consent of other groups whose vital interests are at stake. While this paper does not discuss such viewpoints directly, it may help to clear the way for their consideration. For our present limited purposes, where a national group holds a right of self-determination, it can exercise it without the consent of other groups and over their objections.

Third, the term "national group" is used here in a somewhat narrow and specialized sense. It refers to any sub-state group that feels strong and pervasive bonds of culture, language, religion, or historical origins (and often a combination of these), and that constitutes a substantial majority of the population in a territory forming part of one or more existing states. It can be seen that this definition excludes groups that are dispersed amidst a larger population and do not form a substantial majority in any territory. Whether such a dispersed group might, in certain circumstances, have the right to acquire a territorial base of its own is a difficult question that cannot be considered here.

Fourth, national self-determination involves a decision whether or not to gain full independence. In some discussions, the term is used in a broader sense to include decisions to gain a measure of regional autonomy, short of independence. However, that subject raises a range of distinct issues, which require separate treatment. So, for the sake of clarity, we will distinguish here between the right of national self-determination proper and what might be described as a "right of national autonomy." Only the former subject will be addressed in this paper; however, our discussion will also have some indirect implications for the latter.[2]

Finally, we will focus on some basic questions of principle that arise when national groups advance claims of self-determination. That is, the inquiry is broadly moral and jurisprudential in nature rather than strictly legal. I will not attempt the difficult and controversial task of ascertaining how far international law currently attributes rights of self-

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2 See, for example, the valuable discussion in S. J. Anaya, "The Capacity of International Law to Advance Ethnic or Nationality Rights Claims" (1990) 75 Iowa L.R. 837.

determination to national groups. However, the latter question is deeply rooted in fundamental considerations of justice and morality, so our inquiry may help to shed some light on its resolution.

II. FREEDOM AND AUTHORITY

We begin with a pair of contrasting viewpoints. The first is voiced in an article written by William Dunning some seventy years ago on the topic of liberty and equality in international relations:

> The importance of liberty in the scheme of human social existence has been greatly exaggerated in modern political science. With equality as the characteristic attribute of liberty, social existence becomes inconceivable. Authority is what makes any form of human society possible. It is as indispensable to a society of peoples as it is to a society of individuals. It is incompatible with absolute equality and with absolute liberty; but it is an indispensable guaranty of proportional equality and of qualified and practicable liberty. No aggregate of individuals or of peoples has ever existed or ever can exist without some institutional expression of the relation of ruler and ruled. Recent political science has tended to lose sight of this fact and to centre its attention on the units that make up the political group rather than the group as a whole. The doctrine that is needed to explain and to guide the international relations of the twentieth, or for that matter any other, century must rest on these dogmas: Peoples, like individuals, are not by nature free; peoples, like individuals, are not by nature equal. Authority is prior to liberty and makes liberty possible. Self-determination for peoples is what anarchy is for individuals.[3]

To contemporary sensibilities, this passage seems a trifle conservative in tone and content. Why, we may ask, should authority be given such priority over liberty? When appraised from a vantage point at the close of the twentieth century, the credentials of authority may seem somewhat tarnished. They bring to mind the claims of the French government in Algeria, of the British in India and Kenya, of Portugal in Mozambique, of the Soviet Union in Lithuania, of the Chinese in Tibet. Appeals to authority, in this context, have served all too often as screens for national or racial oppression.

More attuned to the contemporary spirit, perhaps, is an approach that takes freedom as its central theme. As framed by Allen Buchanan in a recent study of secession, this "liberal" argument runs as follows:

> If we begin with a general presumption in favor of liberty, it seems to carry with it a presumption in favor of a right to secede. Even the most fervent advocates of liberty admit, however, that it must respect limits. The Harm Principle has been proposed to

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[3] W.A. Dunning, "Liberty and Equality in International Relations" (1923) 17 Am. Pol. Sci. Rev. 1 at 15-16. This paper was the Presidential Address to the annual meeting of the American Political Science Association in 1922.

> specify the proper limits of liberty. According to the Harm Principle, it is impermissible to interfere with an individual so long as her choice does not harm others. But if it is impermissible to interfere with the liberty of an individual so long as her choice does not harm others, then it seems impermissible also to interfere with a group of individuals' efforts to secede, if these efforts do not harm others.[4]

According to this view, the fundamental value of liberty presumptively supports a group right of secession, subject to limits flowing from the harm principle. Buchanan develops this point in the following passage:

> The case for secession based on the presumption of liberty can be elaborated and deepened, at least if a liberal point of view is granted. A liberal values the freedom of individuals and groups and seeks to safeguard it by according priority to certain basic legal rights of the sort found, say, in the U.S. Constitution's Bill of Rights or in Rawls' Principle of Greatest Equal Liberty. ... Upholding these rights allows many different sorts of communities to coexist peacefully within the liberal framework. But what if there remain some forms of social life that cannot flourish there, or what if the members of some communities simply do not wish to remain within the liberal state? Should they not be allowed to free themselves of the political authority of the liberal state if they wish to do so (at least so long as their doing so harms no one else in the relevant sense)? Seen in this way, the right to secede is the logical extension of a principle of toleration thought to be central to the liberal point of view.[5]

When we compare the contrasting approaches of these two authors, we might be led to believe that the basic issue separating them is the relative weight to be assigned to authority and liberty, with Dunning favouring the former and Buchanan the latter. However, this contrast does not survive closer examination. In the context of national self-determination, what appears at first to be a simple claim of liberty turns out to harbour a claim of authority in disguise. The reason is simple: to assert the presumptive liberty of a group to secede from a state is to assert the group's authority to determine the basic political status of its members and to govern them, even against the wishes of some of them. The claim of a secessionist group against the state is in fact a competing claim to ultimate governmental authority.

Consider, for example, the case of Quebec. According to the liberal argument, there is a presumption favouring the liberty of Quebec to separate from Canada, subject to any limits flowing from the harm principle. Whether or not this argument is correct, it must in practice stand for the view that the people of Quebec presumptively have the

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[4] A. Buchanan, *Secession: The Mortality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Boulder, Colorado: Westview Press, 1991) at 29. It should be noted that while Buchanan seems to favour the argument, he does not clearly indicate what ultimate weight it carries in his overall scheme.

[5] *Ibid.* at 30-31 [footnotes omitted].

collective right to override the wishes of dissenting individuals and groups within Quebec and to oust the authority of Canada in favour of that of an independent state. Even if a high margin of popular approval is required, such as a two-thirds majority in a referendum, the argument must envisage the ability of Quebec to separate with less than the unanimous consent of the populace. To require unanimity would be to pose a standard that could hardly ever be met.

Suppose, for example, that a separatist government in Quebec holds a referendum asking in effect whether the Province should declare independence from Canada, and roughly two-thirds of those voting reply in the affirmative. Let us also assume that this margin represents more than one-half of the entire pool of adult citizens, both voting and non-voting. By most standards, this would represent a high level of popular support for separation. On this basis, the Quebec government sets a date for independence and proposes to open negotiations with the Canadian government to ensure a smooth transition. It seems clear that the Quebec government's assertion of the right to secede from Canada entails a claim to speak and act authoritatively in this matter on behalf of all Quebec residents, including the large bloc of people (one-third of all voters) that actively dissented. It also involves a broader claim to hold ultimate governmental authority over the territory of Quebec and all its residents, even if implementation of this claim is postponed pending negotiations.

Suppose, however, that a very high margin of Aboriginal voters in Quebec (say eighty percent) cast their ballots against independence. Native peoples have always formed distinct social and political groups in the Province, with their own languages, cultures, territories, and special constitutional status. In certain parts of Quebec, they form a strong majority of the population. When the Confederation of Canada was formed in 1867, the Constitution assigned the subject-matter "Indians, and Lands reserved for the Indians" to the Federal Parliament.[6] And in 1982, the Aboriginal and treaty rights of Aboriginal peoples were explicitly entrenched.[7] So, under our scenario, questions would arise as to the legitimacy of a separatist government's claim to ultimate authority over Aboriginal peoples and their territories. That claim would not rest on the consent of those peoples, since they voted strongly against independence in our hypothetical referendum. What then would it be

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[6] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 91(24).

[7] Section 35(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 provides: "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

based on? Would it find support in the particular history of Quebec, its territories, population, and government? Or would it invoke principled arguments concerning the legitimacy of majority rule?

Whatever answers we give to these questions, we have clearly drifted into troubled waters. What seemed at first a relatively straightforward claim of national self-determination turns out to involve an assertion of governmental authority over dissenting individuals and groups, authority whose legitimacy may be open to challenge.[8] For, unlike the Canadian state, the aspiring state of Quebec would not possess the advantage of long-standing and peaceable existence, and so could not wrap itself in the cloak of established custom and practice. Neither, on the other hand, could it claim to be grounded in the consent of all the peoples concerned, a fact that at first blush seems at odds with a full-blooded notion of self-determination.

However, it could be argued that the existence of dissident groups within Quebec would not necessarily undercut the consensual claims of a separatist government. Such a government would likely give residents the option of moving elsewhere in Canada, and the Canadian government would probably feel obliged to go along with such a plan. So long as the Quebec government offered this option, it arguably would not be claiming the authority to rule dissenters without their consent. Rather, those that object to independence could leave of their own free will, while those that remain would tacitly accept the new arrangements.

Now it is true that a resettlement scheme would broaden the options available to Quebec residents who are troubled by the prospect of separation. As such, it would soften the impact of separation on certain individuals, particularly those who are young and mobile. However, it does not seem plausible to argue that dissenters that remain in Quebec necessarily *consent*, even tacitly, to the new government's authority. Consider again the position of Aboriginal peoples. Under a resettlement scheme, they would be afforded the choice of staying in

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[8] As Buchanan, *supra* note 4 at 78, aptly remarks:

> [T]o the extent that the exercise of a group right entails a political structure within the group (i.e. a structure consisting of leaders or representatives, or other official bodies), group rights encourage hierarchy and create the possibility of opposition between the interests of those who control the exercise of the right and the interests of other members of the group. ... [Further] some individual or subset of the group has the ultimate say as to whether to exercise the right. Even if others decide on the basis of a sincere commitment to doing what is best for that individual or subgroup, they are the ones who are in control.

See also his comments on minority group rights at 39-40 and 57-58.

Quebec or else abandoning their ancestral homelands for an uncertain future elsewhere in Canada. For most Aboriginal peoples, this would be no real choice at all. To say that those who continue to live in their traditional territories actually consent to the authority of the new government rather stretches the point. In reality, secession would alter the status of Aboriginal peoples and their territories without their consent.

Nevertheless, a second, more powerful argument might be given in reply. This argument maintains that, just as Quebec has the presumptive liberty to secede from Canada, so also dissenting groups, such as Aboriginal peoples, are equally at liberty to break away from a secessionist Quebec and attach themselves to Canada or else establish their own independent states. While this approach should be given full marks for logical consistency, it does not escape from the difficulty we have been considering. While the majority of an Aboriginal group might support separating from Quebec, a minority would likely dissent from this view. And so the fundamental question again arises: what authority does a local majority have to alter the political status of a dissenting minority?

In short, what we see here is not so much a contest between the claims of liberty and authority, on the model of an individual standing against the state, as a contest between two *rival claims of authority,* advanced respectively by an existing political unit and an aspiring new polity. This point does not, of course, speak to the relative merits of these opposing claims; it simply shows that they have a similar moral structure. Both the original state and a secessionist government assert the ultimate authority to represent and govern a certain group of people, *including any dissenters.*

The same point may be made in a slightly different way. In practice, the liberal principle that favours the liberty of the individual operates within the context of civil society. As such, it tacitly assumes the existence of certain basic bonds among the citizens. These bonds provide the foundation for governmental structures and bolster the claims of the state to the allegiance of its members. Liberalism has, with some success, drawn attention to the need to limit the power of government to interfere with the freedom of citizens. It aims to shape the society's public morality and to set limits on the coercive powers of its institutions. However, liberalism has been less successful in explaining the nature and origins of the bonds to which those institutions owe their existence. Classical liberal arguments from contract and consent, as advanced by Locke and others, are subject to well-known difficulties. Faced with the daunting task of showing that individual

citizens have actually consented to the exercise of governmental authority, these arguments usually resort to the concept of "tacit" consent which, however ingeniously developed, barely serves to disguise an effort to shore up the status quo.

Even if this obstacle can be overcome, liberal thinkers have to show that an individual's consent to the authority of the state is generally binding, that consent cannot be withdrawn at the individual's pleasure. Of course, it is possible to invoke a principle under which certain expressions of consent are taken to bind the person making them, at least in the absence of unusual circumstances—a variant on the ancient maxim, *pacta sunt servanda.* But the legitimacy of this principle cannot itself depend on consent; otherwise, we are led into circularity. Rather, the principle seems to operate as a fundamental norm of justice, which takes us well beyond the framework of consensual liberalism and points in the direction of natural law.

Underlying the debate about the legitimacy of secession, then, is a more fundamental—yet largely suppressed—debate about the legitimacy of authority. In brief, it could be said that secession from a state is justified if and only if, for one reason or another, the authority of the state over a seceding group is not legitimate, or at the least is significantly *less* legitimate than the authority of the aspiring secessionist government. But when is authority legitimate? To the extent that liberalism has failed to provide a coherent and persuasive answer to this question, it cannot help us resolve the debate over secession.

A further point can be made. As ordinarily understood, the liberal principle does not support the right of particular individuals to withdraw themselves *and the territories they occupy* from the civil society to which they belong. For example, liberalism is not generally understood as favouring an individual's right to set up an independent enclave in the heart of Montreal or even on a small island in a northern lake. At the very least, strong arguments would have to be supplied to show how liberalism supports such surprising claims. So, even if we assume that the move from the individual to the group is legitimate in this context, the principle favouring individual liberty would at most recognize the right of a group to act freely *within the territorial framework of the civil society to which it belongs.* It would not support a group's right to secede, taking with it the territories it occupies.

So, when a group asserts that it is entitled to secede from an existing state, this claim tacitly involves a claim of territorial title and not

just a claim of political autonomy.[9] At a minimum, it entails a claim that the seceding group has a better title to the contested territory than the original state or any other group of citizens. In this respect, then, the right of secession differs from the right of groups to emigrate freely from a country. The right of emigration does not threaten the territorial integrity of the original state or present a rival territorial claim.

So, for example, an assertion by Quebec of the right to separate from Canada necessarily entails the claim that it has international title to the whole of the territory presently comprised in the Province. That title must presumably be superior to the international title currently held by Canada; otherwise Canada would have the right to block the secession. The asserted title must also be superior to territorial claims that might be advanced by other groups, such as Aboriginal peoples. It can be seen that the issues raised by this point involve complex historical considerations, the resolution of which is far from self-evident.

The position of Northern Quebec poses particular difficulties. In 1912, this area was transferred to the Province from the Northwest Territories, where it had been under exclusive Federal jurisdiction. The effect of this transfer was to establish a territorial and jurisdictional *condominium.* On the territorial side, Quebec gained a beneficial interest in the soil, subject to Aboriginal title and other existing interests; neverthless, the international territorial title remained with Canada. On the jurisdictional side, the transfer inaugurated a regime of joint authority, characterized by a constitutionally-entrenched division of powers between the federal and provincial governments, arguably in tandem with inherent Aboriginal powers of self-government.[10] These new arrangements represented a significant departure from the former regime, under which the federal Crown had possessed full legislative jurisdiction and territorial rights in the region, subject to Aboriginal jurisdiction and title.

Nevertheless, a tacit premise of the transfer was that

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[9] See discussion in L. Brilmayer "Secession and Self-Determination: A Territorial Interpretation" (1991) 16 Yale J. Int'l. L. 177, and Buchanan, *supra* note 4 at 9-11, 32, and 60-64.

[10] On the latter point see, for example, Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Minister of Supply and Services Canada, 1993); J.J. Borrows, "A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government" (1992) 30 Osgoode Hall L.J. 291; P. Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill L.J. 382; S. Nakatsuru, "A Constitutional Right of Indian Self-Government" (1985) 43 U. T. Fac. L. Rev. 72; B. Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) 36 McGill L.J. 308; and B. Slattery, "First Nations and the Constitution: A Question of Trust" (1992) 71 Can. Bar Rev. 261.

international title to the region would remain with the Canadian state, and that jurisdiction over certain aspects of the region's affairs would continue to be held by the Federal government under the standard division of powers laid down in the *Constitution*. In particular, jurisdiction with respect to Aboriginal peoples and their lands would rest with the Canadian Parliament. More recently, the matter has been complicated by the conclusion of a land claims agreement with the Aboriginal peoples of the region, which recognizes a range of rights inhering in those peoples in exchange for a surrender of their Aboriginal title.[11] Given this complex historical background, the multiple dimensions of which are only suggested here, it is far from evident which party would in principle have the better claim to Northern Quebec in the event of secession—Canada, Quebec, or indeed the Aboriginal peoples. It can be seen how far removed we are from a simple assertion of liberty under a model of individual rights.

There is yet another reason why the liberal-based analogy between individuals and groups is misleading in this context. Individuals are distinct spiritual and biological entities, whose autonomy and internal coherence are, for the most part, not in doubt. The same can hardly be said of groups, where questions of membership, identity, allegiance, and legitimacy are endemic. So, while it is often convenient to talk about groups as if they were individuals, this habit can be deeply misleading. In the case at hand, it can lull us into assuming that groups have the same natural and self-evident identity as individuals, forgetting just how problematic the question of group identity can be.

In reality, once we probe beyond the abstract references to "groups," we find historical processes at work. Groups do not come ready-formed; they are the result of complex social, cultural, religious, and political transformations extending over long periods of time. There is no way of identifying in advance the precise factors that will predominate in the formation of group allegiances. Is commonality of language more important than commonality of religion, culture, politics, or ethnicity? Different answers have been given in different times and places. The situation in contemporary Canada, for example, where language and culture are usually more significant to group allegiances than religion, is very different from that prevailing in the nineteenth

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11 The James Bay and Northern Quebec Agreement (Quebec: Éditeur officiel du Québec, 1976), as enacted in S.C. 1976-77, c. 32, and S.Q. 1976, c. 46. For discussion, see, for example, W. Moss, "The Implementation of the James Bay and Northern Quebec Agreement" in B.W. Morse, ed., *Aboriginal Peoples and the Law: Indian, Métis and Inuit Rights in Canada* (Ottawa: Carleton University Press, 1985) at 684.

century, when religious affiliation still played a prominent role.

Underlying any assertion of a right of national self-determination, then, is an assertion of group legitimacy. That is, the group tacitly maintains that it is an appropriate unit for purposes of exercising the right. Not only that, it must assert in effect that it is more appropriate than the unit composing the existing state and also more suitable than any rival groups that might wish to assert equivalent rights. The liberal analogy between individual rights and group rights tends to paper over these fundamental issues.

We have seen, then, that the right of national self-determination differs in at least three important respects from an individual claim of liberty. First, the right of national self-determination potentially involves not only a claim of liberty against the existing state, but also a claim of authority with respect to the residents of the seceding territory, namely, the authority to decide their international status and ultimately to govern them to the exclusion of other states. This claim extends to any dissenting residents and competes with the similar claim of authority advanced by the existing state. Second, unlike an individual liberty claim, the right of national self-determination potentially involves a territorial claim. A secessionist national group necessarily asserts that it has international title to the territory concerned, a title that is superior to that of the existing state. Finally, the liberal approach assumes that national groups have the same natural and self-evident identity as individual human beings. It does not acknowledge the extent to which identities of national groups are problematic, often involving complex issues of allegiance.

So, a claim of national self-determination is a far cry from a simple claim of liberty on the model of individual rights. It is a rather more tangled affair, one that raises some of the most puzzling questions of political and legal theory—to wit, the three basic issues of authority, territorial title, and group allegiance. Perhaps, however, these questions can be handled by a different approach, one that moves beyond the framework of liberalism and frankly acknowledges the communal nature of a claim of national self-determination. This is the subject of the next section.

III. THE VALUE OF SELF-GOVERNMENT

A sophisticated version of the communal approach to self-determination is presented in a recent paper by Avishai Margalit and

Joseph Raz.[12] In a nutshell, the authors argue that the right of national self-determination finds its moral grounding in the value that self-government has for certain kinds of communities, whose prosperity is central to the welfare of their individual members. While this argument, as we will see, does not seem strong enough to support a general right of national self-determination, it serves the purpose of clarifying the basic issues at stake and showing how deeply problematic the subject is.

Margalit and Raz maintain that the self-identity and well-being of many individuals are grounded in their membership in groups. The significance of such communal ties varies greatly. Membership in voluntary organizations such as sports clubs or charitable groups may be enriching and worthwhile, but generally is not fundamental to a person's life. By contrast, membership in certain ethnic, cultural, or religious groups is often central to an individual's sense of self-identity and well-being. Such groups are generally distinguished by the fact that they have rich, multifaceted cultures, which are transmitted down the generations and affect many important aspects of people's lives. In the authors' terminology, a group that plays this central role in the lives of its members is an "encompassing group." The authors observe:

> The way things are in our world, just about everyone belongs to such a group, and not necessarily to one only. Membership is not exclusive and many people belong to several groups that answer to our description. Some of them are rather like national groups, e.g., tribes or ethnic groups. Others are very different. Some religious groups meet our conditions, as do social classes, and some racial groups. Not all religions or racial groups did develop rich and pervasive cultures. But some did and those qualify.[13]

This description of an "encompassing group" comes close to the concept of a "national group" developed at the start of the paper, and so we will use the two terms interchangeably.

The importance of encompassing groups to the lives of their members means that there is a strong, if indirect, link between communal prosperity and individual well-being. To lack membership in a pervasive culture is often to experience serious limitations on one's opportunities and abilities. Moreover, where the group's culture suffers from decay or repression, the options and opportunities available to its members may correspondingly shrink and their dignity and self-respect may be adversely affected.

This link between individual and communal well-being lies at the heart of the authors' case. In their view, any group that qualifies as an

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[12] "National Self-Determination" (1990) 87 J. Phil. 439.

[13] *Ibid.* at 447.

encompassing group has the right to determine the status of a territory where it constitutes a substantial majority of the population.[14] In particular, such a group is entitled to decide whether the territory should form an independent state. That is, it possesses a right of self-determination.

The authors back up this thesis in the following way. The right of self-determination, they say, is justified by the broader value of *self-government,* which is the value of entrusting a group with general political power over its own affairs.[15] This distinction between the concepts of *self-determination* and *self-government* is central to the authors' analysis and bears closer examination.

In their terminology, the *right of self-determination* is an exclusive power to determine the international legal status of a certain territory; in particular, it is the power to decide whether the territory should become or remain an independent state.[16] By contrast, in its core sense, *self-government* involves the substantive right of a group actually to *govern* itself as an independent state with its own territories; in a word, it entails political sovereignty.[17] As the authors remark, self-government speaks of "groups determining the character of their social and economic environment, their fortunes, the course of their development, and the fortunes of their members by their own actions ... ."[18] The *value* of self-government is the good that would flow from the exercise of such a right. In assessing that value, one must have regard not only to the group itself, but also to any others that might be affected.[19]

So, according to this approach, the right of self-determination is a power of "self-adjudication," which allows encompassing groups to decide on their own future, rather than the substantive right of self-

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[14] *Ibid.* at 457. The authors later speak of "the vast majority of the population in the relevant territory" (at 461), which perhaps suggests a somewhat higher standard than a "substantial majority."

[15] *Ibid.* at 440-41. The authors initially use the term "national self-government," but later abandon this for the simpler term "self-government" (at 447 ff.). Since nothing seems to turn on the matter, the simpler term is used here.

[16] *Ibid.* at 440. The authors mention that the decision whether a territory should enjoy autonomy within a larger state may possibly also fall within the right of self-determination. However, they conclude that, given the current international state system, independence is naturally regarded as the main way of realizing the ideal of self-determination; so their discussion centres on the latter possibility (at 440-41).

[17] *Ibid.* at 440-41 and 450.

[18] *Ibid.* at 440.

[19] *Ibid.* at 454-55.

government as such. Of course, exercising this right might give rise to the substantive right of independence and self-government, but it need not necessarily do so. For example, in implementing its right of self-determination in a referendum, an encompassing group might reject the option of independence and decide to remain part of the existing state. Note, however, that the right of self-determination is apparently not a single-shot affair but one open to repeated exercise. So a group would always be free to change its mind on some future occasion.

How, then, does the value of self-government serve to justify a right of national self-determination? Margalit and Raz present their argument in two stages. First, they maintain that self-government potentially holds a special value for encompassing groups. Second, they hold that this value is substantial enough to give such groups the exclusive right to determine whether they should constitute independent, self-governing states.

In addressing the first proposition, the authors consider the merits of two sorts of arguments. The most ambitious of the two maintains that self-government is intrinsically valuable to the members of encompassing groups, as an end in itself; the second argument holds, more modestly, that self-government is justified instrumentally, as a means to other desirable ends.

According to the first argument, people's membership in an encompassing group is a significant aspect of their personalities and as such requires full expression in the public life of a community. Such expression must include the opportunity to carry on political activities in the name of the group as an important avenue for self-fulfilment. However, full political expression cannot be achieved in the absence of self-government. Without the possibilities afforded by independent statehood, the opportunities for political self-expression are limited. In sum, self-government is inherently valuable, since it is needed to provide the group with a political dimension and to allow for individual self-fulfilment in political action.[20]

The authors do not find this argument convincing. They point out that not everyone has to participate in politics in order to achieve personal well-being. In normal circumstances, politics is but one option among many for finding self-fulfilment in the social sphere. True, the opportunity to fight for political causes associated with one's encompassing group must remain open, and such political activity may have instrinsic value for those who engage in it. But there is no reason why political activity has to be carried on within a constitutional

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[20] *Ibid.* at 451-52.

framework exclusive to one's group or dominated by it. As the authors justly observe, "[t]here is nothing wrong with multinational states, in which members of the different communities compete in the political arena for public resources for their communities."[21]

Despite the failure of the first argument, the authors consider that a strong instrumental case can be made for self-government. This second line of argument holds that in certain situations the well-being of an encompassing group requires that it have the right to govern itself, since group members are generally better positioned than outsiders to make decisions on matters affecting the group's own welfare. Sovereign independence enables a group to conduct its own affairs in a way conducive to its prosperity. The authors acknowledge that, in reality, groups do not always prosper upon the achievement of statehood. In fact, sometimes independence may usher in a period of cultural, social, or economic decline. So, the case for self-government is an instrumental one, which varies according to the particular circumstances and is sensitive to counterarguments pointing out the potential drawbacks of independence. Self-government is not intrinsically valuable for encompassing groups; its value depends on the historical context.[22]

Nevertheless, in the authors' judgment, the potential value of self-government for an encompassing group is substantial enough to give the group the exclusive right to decide whether the circumstances justifying self-government are present. It is for such a group to determine whether, given the particular historical context, its territory should form an independent, self-governing state. This right is subject to several provisos.[23] It must be exercised for the right reasons, namely, to advance communal well-being and self-respect, rather than, for example, to secure exclusive control over valuable natural resources. Further, the new state must respect the fundamental human rights of all its inhabitants. And finally, measures must be taken to avoid damaging the just interests of other countries. Subject to these qualifications, an encompassing group possesses a right of self-determination. We have arrived, then, at the final destination of the argument.

But why should encompassing groups have this far-reaching right? The authors explain:

> In our world, encompassing groups that do not enjoy self-government are not infrequently persecuted, despised, or neglected. Given the importance of their prosperity

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21 *Ibid.* at 453.

22 *Ibid.* at 450-53.

23 *Ibid.* at 457 and 459-60.

> and self-respect to the well-being of their members, it seems reasonable to entrust their members with the right to determine whether the groups should be self-governing. They may sacrifice their economic or other interests for the sake of group self-respect and prosperity. But such a sacrifice is, given the circumstances of this world, often not unreasonable.[24]

From this conclusion there follows a strong corollary. Since encompassing groups have the exclusive right to determine their own political future, they can in practice exercise that right in either a wise or a foolish fashion. Thus they can opt for independence even if, in the judgment of a detached observer, the circumstances warranting self-government are lacking. As the authors observe:

> A group's right to self-determination is its right to determine that a territory be self-governing, regardless of whether the case for self-government, based on its benefits, is established or not. In other words, the right to self-determination answers the question 'who is to decide?,' not 'what is the best decision?.' In exercising the right, the group should act responsibly in light of all the considerations we mentioned so far. It should, in particular, consider not only the interests of its members but those of others who may be affected by its decision. But if it has the right to decide, its decision is binding even if it is wrong, even if the case for self-government is not made.[25]

In effect, the right of self-determination makes encompassing groups judges in their own cause. The authors agree that it would be preferable if an international tribunal could be entrusted with making decisions about these questions. However, they consider it unlikely that adequate international machinery will be available for this task in the near future. So, in their view, a right of self-adjudication is the only practical alternative.[26]

How should the right be exercised? According to the authors, a simple majority vote is not sufficient. Given the long-term implications of the decision and the difficulty in reversing it, the desire for an independent state must be shared by the overwhelming majority of the group. The authors remark that the precise manner in which the decision is made will vary with the circumstances of particular national and ethnic groups.[27] They seem to assume, nevertheless, that in Western-style democracies the decision would ordinarily be made by referendum.

This, then, is the basic structure of the "communal" theory, as framed by Margalit and Raz. What can we say about its merits? Clearly,

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[24] *Ibid.* at 457.

[25] *Ibid.* at 454.

[26] *Ibid.* at 457-58.

[27] *Ibid.* at 458.

the argument represents a significant advance over the liberal argument considered at the start. In particular, it acknowledges the special character of a claim for group freedom, which distinguishes it from a claim for individual autonomy. The close link between group membership and individual self-identity is emphasized, as is the relationship between collective and individual welfare. However, despite these advantages, the communal theory has difficulties of its own. Not surprisingly, these relate to the three basic issues identified earlier—authority, territorial title, and allegiance. We will consider each one in turn.

A. *Authority*

The communal theory attributes to an encompassing group a far-reaching authority, which enables it to determine unilaterally the international status of the territory it occupies as a majority population and, at the same time, the future make-up of the state it currently belongs to. This authority holds good against all the residents of the territory in question and also, more generally, against the citizenry of the larger state. What justifies this authority? According to Margalit and Raz, the right of national self-determination is grounded squarely in principled considerations that give effect to the value that self-government holds for encompassing groups and their members.[28] As they state in a crucial passage:

> The right to self-determination derives from the value of membership in encompassing groups. ... It rests on an appreciation of the great importance that membership in and identification with encompassing groups has in the life of individuals, and the importance of the prosperity and self-respect of such groups to the well-being of their members. That importance makes it reasonable to let the encompassing group that forms a substantial majority in a territory have the right to determine whether that territory shall form an independent state in order to protect the culture and self-respect of the group ... .[29]

So, the whole argument hinges on the importance that membership in encompassing groups holds for the individuals concerned. This factor is so important, the authors suggest, that it justifies awarding the group the unilateral right to determine the future of the territory in question, even as against the rights and interests of the existing state and its population. At first blush, the reasoning seems somewhat curious. If generalized, it might suggest that the party with

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[28] *Ibid.* at 456-57.

[29] *Ibid.*

the greatest potential stake in the outcome of a dispute should have the right to rule on its merits. Were this generally the case, international conflicts could be resolved simply by awarding a right of self-adjudication to the state most interested in the end result. To the contrary, of course, the stronger the interest a party has in a dispute, the less qualified that party normally is to decide it, because the chance of bias is correspondingly higher. So, the significance that self-government potentially holds for encompassing groups does not seem to offer a convincing argument for making them judges in their own cause; if anything, it would support an argument to the contrary.

Perhaps, however, what the authors have in mind is not so much the ideal qualifications of an adjudicator, but the likelihood of a desirable outcome. On this view, self-government is potentially of such importance to encompassing groups that the process should be structured to favour strongly the realization of self-government. Awarding encompassing groups the authority to judge the merits of their own cause does just that.

Is this rationale a convincing one? Clearly, much turns on the value that self-government presumptively holds for encompassing groups. Here we need to distinguish three different kinds of self-government.

In some contexts, self-government carries the meaning of "democratic government," in the sense of a government in which supreme power is vested ultimately in the people and exercised by them under a free electoral system. Democratic self-government contrasts with any form of government in which the people cannot participate by free elections.

Self-government also carries another, more specific meaning. A country lacks self-government in this second sense when it is ruled by an imperial power in whose governmental institutions the local inhabitants do not play a significant role. Self-government is attained when most or all of the powers of government are transferred to the colony, which becomes largely or totally autonomous. Note that, in this context, self-government does not necessarily mean democratic government because, for example, a colony might attain independence under the rule of an indigenous monarchy.

These two meanings of self-government must be distinguished from a third, which is the only one relevant in the present context. It relates to situations in which a national group is not in a position to dominate the government of the state it belongs to, due to its minority position or other factors, even though group members enjoy ordinary rights of citizenship and the country is not subject to imperial rule. In

such situations, a national group may be said to attain self-government when the state is restructured or sub-divided so as to allow the group to achieve political ascendancy. Here self-government means "national government," in the sense of a government in which the national group in question plays a dominant role. Note again that a national government need not be democratic, but may take a variety of shapes.

In invoking the value of "self-government," the communal theory is using the term in its third sense. That is, the theory is concerned with situations where an encompassing group is not positioned to control the government of the state it belongs to, whether these situations be democratic or non-democratic, colonial or non-colonial. The point is important to keep in mind, for the arguments in favour of both democratic government and non-colonial government are quite different from (and often much stronger than) those favouring national government. In other words, the communal theory is not entitled to invoke in its favour the distinctive features of non-democratic and colonial situations, for the argument extends well beyond those contexts.

We are now better equipped to assess the theory's strength. Clearly there are circumstances in which it is crucial for encompassing groups to achieve national self-government in order to ensure their survival, let alone their prosperity and self-respect. Cases of ethnic and religious oppression are, unfortunately, no rarer in our times than in any other. However, the communal theory is not content to make this sound, if somewhat limited, point. It attributes a right of self-determination to all encompassing groups that lack full national self-government, regardless of their actual circumstances. It is this *universality* that gives the theory its distinctive bite. The issue, then, is not whether a right of national self-determination can be justified on a selective basis (for it clearly can), but rather whether the right can be given universal application.

A number of considerations suggest a negative answer. First, the communal theory takes little account of the wide variety of circumstances in which national groups find themselves. The situation of an encompassing group that already enjoys a large measure of autonomy within a democratic federal state is very different from that of a group that has experienced long-standing ethnic oppression at the hands of a dictatorial central government. Beyond the observation, quoted earlier, that national groups lacking self-government are "not infrequently persecuted, despised, or neglected,"[30] the authors provide little evidence to support the global attribution of a right of national self-

[30] *Ibid.* at 457.

determination.

Second, the theory does not consider the range of political options short of independence that might satisfy a national group's need to advance its welfare while avoiding the risks and disruptions associated with the breakup of a state. Such measures as regional autonomy or constitutional protection of communal rights would seem, in many cases, a more satisfactory way of handling the interests at stake than secession. The value of national self-government does not seem to justify a right of self-determination unless these other, less extreme options are shown to be inadequate.

Finally, in focusing almost exclusively on the welfare of encompassing groups, the communal theory does not clearly acknowledge that the prospect of national self-determination calls into play at least two sets of competing interests: those held by the national group, and those held by the larger body of citizens making up the existing state (which, of course, includes the members of the national group in another capacity). To establish a universal right of national self-determination, it is not enough to show that self-government is valuable for national groups in some or even many cases. It is necessary to show that, at a global level, this interest substantially *outweighs* the interests of citizens in maintaining existing states intact.

However, such a case is not easy to make on a universal basis. There is good reason to think that, in a world of serious periodic disorder, stable boundaries often carry substantial benefits for citizens, as frameworks within which they may lead their lives in relative peace and security. It is surely paradoxical that a theory that places such value on communal welfare should pay so little attention to the needs of existing and emergent multinational communities (to say nothing of the international community as a whole) and, in so doing, ignore the close links that exist between the well-being of those larger communities and the well-being of the groups and individuals that compose them. In short, the theory seems to attribute little significance to the relative order and stability represented by existing state structures.

The point is not merely of theoretical interest. Given what history and contemporary events tell us about the potential for inter-communal conflict, any principle that permits ethnic, cultural, and religious groups to attempt the restructuring of existing state boundaries by unilateral fiat would often lead to extensive turmoil and bloodshed, as various groups struggled with state governments and one another to achieve the most advantageous definition of their homelands.

To summarize, then, it does not appear plausible to argue that the value of self-government for national groups is sufficiently greater

overall than the value of current governmental arrangements for the citizens of existing states as to justify a universal right of national self-determination. The best that can be said is that, in certain specific circumstances, the interests of a national group in governing itself substantially outweigh the interests of the larger collectivity in keeping the state intact. In such cases, the national group may gain a right of self-determination. It is not easy to enumerate the instances in which such a right may arise. But situations of serious injustice, as where a group is being oppressed or exploited by the central government, would surely constitute the central case.

B. *Territory*

Under the communal theory, an encompassing group that exercises its right of self-determination in favour of independence gains title to the territory that it occupies, so long as it forms a substantial majority of the resident population. This title is good in international law and prevails over that held by the former state.

What is the foundation of this new title? Margalit and Raz do not devote much attention to the point. They appear to think, however, that the title arises from the conjuncture of two factors: the value that self-government holds for the group, and the group's factual occupation of the territory as the majority population.[31] The underlying reasoning seems fairly straightforward. An encompassing group needs a territory in order to realize the value that independent statehood potentially offers. The fairest and most practical solution is to recognize that the group holds a title to the territory in which it forms the predominant population.

The communal theory thus offers a strikingly simple solution to the vexed territorial question. However, as closer examination reveals, this simplicity is achieved at substantial cost. Issues of territorial title have traditionally been thought to be deeply rooted in history. In most disputes over territory, the claims of the parties are bolstered by detailed historical evidence that attempts to show an unbroken chain of title extending as far back in time as is necessary to defeat rival claims. For this preoccupation with the past, the communal theory offers a simple substitute: head-counting. An encompassing group is entitled to the territory in which it forms a substantial majority. As the authors remark,

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[31] We leave aside here the distinct case in which an encompassing group wishes to claim back a territory from which it was unjustly expelled, as briefly discussed in *ibid.* at 459.

"numbers count in the end."[32]

As a result, little significance is attached to existing territorial boundaries, whether these be international or domestic. The relevant territorial unit for purposes of self-determination is decided largely by the demographic configuration of the encompassing group.[33] It is noteworthy that, in this respect, the theory is at odds with the decolonization process carried out in Africa, India, and South-East Asia after World War II, a process that is generally thought to provide the main modern examples of self-determination. Decolonization was usually implemented on the basis of existing colonial boundaries, boundaries that showed little respect for the niceties of ethnic, cultural, or religious homogeneity. Under the communal theory, for example, the relevant units for purposes of self-determination in East Africa would presumably not have been the colonial territories of Tanganyika, Zanzibar, Kenya, and Uganda, but rather the numerous tribal and ethnic groups that inhabited these territories and spilled untidily across their boundaries into adjacent countries.

Likewise, according to the communal theory, the existing Province of Quebec would probably not constitute a self-determining unit, since it does not correspond to the boundaries of any single encompassing group. Rather, the appropriate unit would appear to be the territories occupied by the francophone population of southern Quebec and eastern Ontario, with the possible addition of the Acadians of northern New Brunswick (who, on the other hand, may qualify for their own right of self-determination). It is a significant and telling fact that this viewpoint does not correspond to the political programme of any substantial group of francophones in Canada today.

This situation is not entirely surprising. However artificial and inconvenient territorial boundaries may be, they are often the result of long-standing historical compromises that are difficult to reverse without considerable human cost. Consider, for example, the southern sector of the boundary between the Provinces of Quebec and Ontario, which dates back more than two hundred years. This line was the result of a decision taken in 1791 to split the Old Province of Quebec into two parts, so as to allow Upper Canada to develop as a predominantly English-speaking and Protestant Province, while Lower Canada remained largely French and Catholic. This decision had important

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[32] *Ibid.* at 458.

[33] As noted earlier, an encompassing group is entitled to the territory in which it constitutes a substantial majority. However, the authors also mention that in some situations "historical ties" will prevail, as limited by the principle of prescription: see *ibid.* at 458-59.

historical ramifications. In particular, it shielded the French community in Quebec from the impact of the United Empire Loyalists who had flooded across the border during the American Revolution. As such, it played a major role in the subsequent development of Quebec and indeed of Canada as a whole. Over the past two centuries, the areas on either side of the border have been settled and developed on the understanding that the line was permanent and served to delimit the separate spheres of two distinct legal, political, and social systems. Yet, according to the communal theory, these historical considerations should be set aside in favour of the simple demographics of culture and language.

This indifference to history manifests itself in another way. The communal theory tacitly treats the territory of a state as a kind of *terra nullius,* in which existing territorial title counts for nothing in the face of the claims of national groups. This approach, of course, ignores the fact that the existing state has a recognized international title to the territory in question and, further, that its citizens may have strong collective and individual interests in the maintenance of that title. The wealth and future prospects of a state and its population are intimately connected with its territory—its natural resources, geographical configuration, access to rivers and seas, strategic location, agricultural wealth, industrial potential, and so on. The territory of a state is not a homogeneous space that can be divided and subdivided at will without regard to any factors other than the number of people that happen to occupy it, as if it were a large, uniformly drab dormitory. The natural and acquired assets of a territory are often distributed quite unevenly, with some areas more favoured than others. So long as a state remains intact, the varied advantages offered by its regions are shared to some extent by the entire population, through redistributive taxation, commercial and employment opportunities, and so on. However, secession brings this situation to an end. The seceding territory ceases to be the joint patrimony of the populace as a whole and becomes the exclusive preserve of its immediate residents. Moreover, the residual state finds itself with new boundaries not of its own making, ones that may have significant drawbacks.

So, in many cases, the threatened secession of a region gives rise to serious and justified concerns on the part of the existing state and its inhabitants, concerns that are directly related to the territorial question. It is not a matter of indifference to the people of Canada that Quebec happens to sit astride the St. Lawrence River and Seaway, and that it also separates the eastern part of Canada from Ontario and the West. Likewise, the people of Quebec can hardly overlook the fact that the

northern parts of the Province are rich in hydro-electric potential when they contemplate the prospect that the Aboriginal peoples of Northern Quebec might assert their own rights of self-determination.

These reflections suggest a more general point. The communal theory assumes in effect that the question of territorial title has little autonomy in its own right, but is decided by the same considerations that give a national group the authority to determine its international status. In other words, if the group has a valid right of self-determination, it automatically has the potential to acquire a valid territorial title. But this seems to confuse and possibly reverse the order of priorities. A significant factor in determining whether a national group has a right of self-determination should surely be the merits of its territorial claim as compared to that of the existing state. At the least, it should be recognized that the two questions are autonomous, even if closely intertwined, and that the answer to one does not necessarily determine the answer to the other.

To sum up, the connection between the right of self-determination and territorial title is far more complex than the communal theory concedes. A claim of national self-determination presents in effect a territorial claim that rivals that of the original state, a claim that needs to be assessed on its own merits and not simply as a function of other questions. Moreover, it would appear that the interests of the existing state and its population in maintaining the integrity of its territory are sufficiently strong to justify awarding presumptive priority to its existing title, a title that could be defeated only by strong countervailing considerations.

C. *Allegiance*

The communal theory attaches great significance to the bonds between individuals and national groups, bonds of a cultural, linguistic, religious, or historical character. In its view, the importance of these communal bonds is such that the national group has the right to protect and reinforce them by opting for independence. This approach could perhaps be criticized for its tendency to portray people primarily as group members and to downplay their status as autonomous individuals. However, that criticism will not be advanced here. Rather, the communal theory will be faulted, not for any supposed disregard of individual rights, but for being in a sense *insufficiently communal.*

Far from encouraging the cultivation and growth of extensive and multilayered communal bonds, the theory tends to promote a

telescoping of communal horizons and a narrowing of shared allegiances. In effect, the theory fails to take proper account of the wide range of overlapping communities that may properly have claims on our loyalties, from the family, the kin group, the neighbourhood, the school, the church or temple, the workplace, and the club, on upwards to the ethnic nation, the province, the state, the religious denomination, and the universal community composed of humanity as a whole. In considering the multiplicity of these allegiances and the varying importance they may have for individual self-identity and well-being, we may begin to doubt whether the claims of any single "encompassing group" should be privileged to the extent suggested, and to wonder in any case how such a group might be identified.

Some of these doubts are reinforced when we attempt to apply the theory in concrete factual contexts. Take the relatively common situation where national groups nest within other national groups like Russian dolls. In Canada, for example, anglophones constitute a substantial majority of the country's population as a whole, francophones are the strong majority in the Province of Quebec, and various groups of Aboriginal peoples predominate in certain parts of the Province. Under the communal theory, *all* of these groups arguably qualify as "encompassing groups" and so all alike hold rights of self-determination. However, if these rights were to be exercised concurrently, they might well lead to contradictory results. For example, a Canada-wide referendum might reject the option of Quebec independence, while a Quebec-wide referendum supports it. Or a Quebec-wide referendum might reject a proposal for the independence of Northern Quebec, while a referendum in Northern Quebec endorses it. How should such conflicts be resolved?

The logic of the communal theory seems to be that the smaller unit takes precedence over the larger. The potential value of self-government for a national group is such that it is entitled to opt for secession notwithstanding the wishes of a larger national group that enfolds it. Thus, while anglophone Canada may have a right of self-determination, it has no right to prevent francophone Quebec from exercising its corresponding right, and Quebec in its turn has no right to negate the rights held by various Aboriginal peoples in Quebec—and so on. Indeed, there seem to be few effective limits to the fragmentation permitted by the theory. So long as a group possesses a pervasive culture that is central to the self-identity and well-being of its members, that group is entitled to determine the political future of its territory. Thus, Mennonite communities in Ontario, Doukhobor settlements in the Western Provinces, as well as anglophone communities in Quebec

and francophone communities throughout the rest of Canada (to identify only the most obvious cases) would presumably all qualify for a right of self-determination.

In apparent recognition of this difficulty, Margalit and Raz attempt to put a brake on the theory's divisive tendencies. They affirm that the right of self-determination cannot vest in small face-to-face groups whose members are known personally to all other members. For a group to qualify, it must be an anonymous entity in which mutual recognition is secured by the possession of general characteristics, such as distinctive manners or a special vocabulary, rather than personal knowledge.[34] However, in the context of the authors' general approach, this limitation is not convincing. While small, face-to-face communities no doubt differ from larger, more anonymous groupings, there does not seem to be any cogent reason why personal familiarity among the members should prevent a right of self-determination from arising, at least according to the theory's own criteria. To the contrary, the importance of group membership to individual self-identity and well-being may be significantly greater in some small face-to-face groups than in larger ones, so that, in the theory's own terms, the case for self-government is correspondingly stronger. In short, there do not appear to be any grounds *within* the communal theory for resisting the splintering that it permits. Such grounds can only be found by looking beyond the theory to a range of values and allegiances that it does not consider.

More generally, then, in its concern to further the welfare of encompassing groups, the theory underestimates the need to safeguard and advance the welfare of mixed and multinational communities, to say nothing of the international community as a whole. In particular, the theory does not permit a finer-grained analysis that takes account of the multiple allegiances, commitments, and responsibilities that people have, the varying weights to be assigned to these bonds, and the need to preserve and foster the growth of governmental and international structures that permit these multiple allegiances to coexist and flourish, each within its proper sphere.

The political system best able to satisfy this need is one that recognizes multiple centres of authority and erects strong barriers against their invasion and suppression. In many cases, this would suggest some form of federal system. However, the communal theory is unfriendly to such systems. Under its principles, federations would be inherently unstable, always open to fragmentation at the hands of a

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[34] *Ibid.* at 447.

single national component, and highly vulnerable to political blackmail in the form of secession threats. Not only would the theory promote the dissolution of multinational federations, it would discourage their formation from the start, for the incentive to enter into federal unions would greatly diminish, given their inherent instability.

IV. CONCLUSION

In summary, then, the communal theory suffers from three basic deficiencies. First, it gives a rather one-dimensional account of the complex factors that enter into any assessment of the rival claims of authority advanced by states and secessionist national groups. In particular, the theory downplays the values of stability and order represented by existing arrangements, and ignores the widespread disorder likely to result from awarding encompassing groups the right to alter those arrangements unilaterally. Second, the theory does not deal adequately with the question of territorial title or take proper account of the legitimate interests and expectations that territorial title stands for. Third, in its concern to further the welfare of national groups, the theory underestimates the need to safeguard and advance the welfare of mixed and multinational communities, and to encourage the emergence of governmental structures that permit various communal allegiances to hold sway within their several spheres.

Our inquiry also suggests a more general conclusion. The concept of a universal right of national self-determination, on the model of universal human rights, fails to reflect adequately the complex issues that arise in concrete cases of proposed secession, and suppresses awareness of the wide range of competing values and interests at stake. In this area, "rights-talk" tends to produce simplified, somewhat schematic portrayals of what are in reality highly complicated human problems, with multiple historical, political, legal, and moral dimensions.

For example, as noted earlier, the stability of existing constitutional and territorial arrangements has a certain worth in itself, even if this clearly needs to be weighed against other considerations, such as the basic demands of justice. However, the importance of stability is difficult to express convincingly in the language of rights. To say that people have a "right" to a certain measure of constitutional stability in their lives seems false or exaggerated, or somehow does not strike the right note. It seems more natural to say that people have a certain *interest* in the existence of stable arrangements, or that such arrangements have a certain *value*. This interest must, of course, be

assessed alongside other factors. But it should clearly figure prominently in any discussion of a proposed secession. Remaining within the charmed circle of "rights-talk" tends to prevent this.

As this example suggests, then, the concept of a universal "right of national self-determination" seems inadequate to the task of capturing the full range of historical, political, legal, and moral considerations that arise whenever a national group asserts the right to secede from an existing state. In a word, the right of national self-determination should not be viewed as a universal right, on the model of basic human rights; it is a right that arises only in specific historical circumstances, the precise configuration of which cannot readily be determined in advance.

Looking back now at the words of William Dunning, quoted at the beginning of this paper, we may regret our haste in dismissing them out of hand. Perhaps, after all, there is something to be said for the view that authority is prior to liberty and equality, if by that we mean that a modicum of domestic and international order (and the authority needed to support it) is the necessary precondition of any worthwhile forms of individual and communal flourishing. However, more fundamental than the issue of authority is the question of what bonds unite us as human beings and members of the universal society, and how these bonds can be reconciled and harmonized with our ties to the range of particular communities that nurture and sustain us, from the family and local neighbourhood to the church, the linguistic group, the ethnic nation, and the state. Here, it seems fair to say, we still have much to learn. However, history provides at least one important lesson. The human need for community can never be fully satisfied by a single, all-encompassing group, no matter how rich or pervasive its culture. Indeed, such a group would stifle the deep-seated need for a broad and varied range of communal bonds that overlap and intersect, jostling among themselves for our allegiance. In a word, community demands communities.