6

The National Question, Secession and Constitutionalism: The Mediation of Competing Claims to Self-Determination

Abdullahi Ahmed An-Na'im

For better and for worse, the nation state[1] is now the funamental reality of both domestic and internationl political organization, and is likely to continue to be so for the foreseeable future. Yet, to think of a "nation" as a people of single ethnicity and culture, as is often, done limits our understanding of what a nation is, and forecloses the possibility of thinking realistically about the status of minorities within nations; it is very rare for the population of a nation state to consist of one nation in this sense. In the vast majority of countries, especially in Africa, the population of the nation state consist of several "nations"; a description of these entities as nation states tends to express an ideal of total national integration and unity, which may not be as desirable as it is often assumed. The nation state usually subsumes many "nations," some of whom dominate and oppress others; and the ideal integration and unity often imply the assimilation of the minority peoples (who may be, in aggregate, the numerical majority of the population of the state as a whole) into the dominant culture.

One of the most problematic aspects of constitutionalism throughout the world is the status and rights of minorities: ethnic, religious, and/or linguistic. It may be useful to see the relevant questions in terms of the principle of self-determination in order to provide some theoretical framework and to generate comparative analysis. I submit that the core issue is whether it is possible, within a unified state, to achieve mediation and resolution of the competing claims of the majority and minority (or minorities) to self-determination. If resolution is not possible in a given situation, would the minority be justified in seeking secession and the establishment of a separate nation state? The principle of self-determination can illuminate the positions of both (or all) sides, even if they are not articulated as such in political discourse.

On can also see the status and rights of minorities as fundamental rights under a domestic constitutional order. If a minority's claim to self-determination

through secession is unjustified or unsuccessful, how can the collective rights of such a minority, and the individual rights of its members, be protected under the constitutional order of the particular country? I characterize this approach as the domestic or internal dimension of the right to self-determination.

It is ironic that the independent nation state, once perceived as the essential prerequisite for the achievement of the peoples' right to self-determination, is now seen by many people(s) as a major obstacle to the realization of that right. Unless the present nation states of Africa redress this situation by responding to legitimate demands for self-determination, they should expect to be treated by their peoples as colonial states to be combatted in struggles and wars of liberation.

My basic thesis is that *national unity is desirable* because it is normally conducive to greater security, political stability, and social and economic development. The economic and political interdependence of the modern world requires movement toward greater unity and integration, not toward separation and disintegration. Several successful examples of national unity built among diverse populations exist, and even the old and historically antagonistic nation states of western Europe are progressing toward greater regional unity to the best advantage of their populations. Nevertheless, *national unity should not be pursued at any cost*. The constitutional framework of the nation state must provide for equality and justice for all segments of the population, equality in sharing political power economic and social development, and the enabling of each "nation" or "people" within the nation state to maintain and develop its distinctive cultural identity. Failing that, the right to secession by an aggrieved minority may have to be granted, albeit not lightly and only as an ultimate resort. In this way, the threat of secession reinforces the obligation of the nation state to allow its population the maximum degree of internal self-determination; at the same time, the difficulty of achieving secession strengthens the cooperation of all segments of the population in building national unity.

A discussion of the issues raised by this thesis must be preceded by a brief statement of the underlying conception of constitutionalism. In my view, constitutionalism is government in accordance with a constitution that maintains a proper balance between the need of the individual for complete personal freedom and the need of the community for total social justice. Constitutionalism is committed to the establishment and maintenance of mechanisms and processes of governmental structure, economic activity, and social organization conducive to the preservation and enhancement of the life, liberty, and dignity of every person, individually and in association with others.

Historical notions of constitutionalism had their source in the need to limit the powers of rulers and safeguard individual persons and groups against arbitrary and despotic government; from this perspective, constitutionalism refers to those principles, rules, institutions, and practices that regulate the functioning of government so as to ensure the liberty and human diginity of those subject to its jurisdiction. It was realized in due course, however, that the achievements of these objectives require positive action of, as well as negative

limitations on, powers of government. To my mind, therefore, constitutionalism encompasses what the state must do, as well as that it may not do, to achieve and maintain this proper balance.

This expectation of positive action on the part of the state to fulfill its proper constitutional role leads me to expect state involvement in the provision of social security and essential services, such as health, education, and housing. Traditional liberal perceptions of constitutionalism would not agree with this view, but I believe that it is supported by the underlying moral premise of liberalism itself as evidenced by the evolution of social democratic models in Western Europe.

Certain principles and practices, such as competitive representative government and separation of powers, have been successfully employed by some countries in their efforts to implement constitutionalism. Those experiences are helpful to many countries, but they should not be used as a presumption for a rigid model of constitutionalism. Under different sociololgical and cultural conditions, other methods of political and legal accountability may be more appropriate. The universal principles and institutions of constitutionalism should be adapted to the economic, political, and social realities of each country.

With this conception of constitutionalism as the context for the discussion of the issues and questions raised earlier, I begin with an overview of the principle of self-determination and its internal and external implications. Questions regarding the identification of the claimants of the right to self-determination and the options they may have for satisfying their claim will then be discussed. The final section offers an outline of a model for evaluating experiences in forging national unity out of diverse populations; we must learn from both the successes and failures of these efforts to devise a workable strategy for mediation and resolution of current and future situations of majority/minority conflicts in Africa. A workable strategy in the context of constitutionalism in Africa is proposed in this final section; this African focus does not preclude the applicability of the analysis and proposal advanced here to other parts of the world, including the developed countries of the North where, for example, the status and rights of indigenous groups raise similar issues.[2]

The Principle of Self-Determination

Self-Determination and the Nation State

"If history were a chronicle of the voluntary association and disassociation of human groups," suggests L. Buchheit, "there would be no need for a doctrine of self-determination."[3] This comment may be a useful approach to the essential meaning and moral justification of the principle of self-determination, the collective manifestation of the universal human need to identify with a group and to have control over one's fate. If a person were free to associate with or disassociate from a group, and the group as a whole were free to associate with or disassociate from other groups, then both the individual amd collective needs

for self-determination would be satisfied, making any discussion of the nature and scope of a "right" to self-determination redundant. But life is never that simple: neither the individual nor the group can have such freedom in the absolute and unfettered sense. *To maximize this freedom in practice is, in my view, one of the most vital functions of constitutionalism.* This chapter, however, is concerned with the collective aspect of self-determination, particularly in the context of the modern nation state in Africa.

The moral justification and the political force of the principle of self-determination are linked to the notion that government should be based on the consent of the governed: that people have a right to associate freely into an entity organized to govern itself, thereby giving expression to "the consent of the governed."[4] People need not, and do not in fact, belong to a single entity or group; they belong to different entities or groups for different purposes. Moreover, not all functions of government need be vested in a single entity. The right to self-determination can be satisfied through a variety of entities exercising different functions of government. Much of the confusion surrounding the meaning and implications of the right to self-determination is due to the conception of the right as vested in a single entity, a "nation," which constitutes the nation state.

In common usage, the term "nation" is used interchangeably with the term "political state," thereby assuming the desirability, or even the inevitability, of identifying the political state with a nation unified by common culture. This leads to two contradictory approaches to the nation state.[5] The ideal of the identification of nation and political state encourages the state to make the facts fit the ideal, regardless of the rights or liberties of those citizens who do not belong to the majority or dominant "nation" within the nation state; this line of thinking denies the possibility of a multicultural state, thereby justifying governmental action to accelerate the process of cultural assimilation as a means of legitimizing the state by unifying its cultural and political identities.

The same line of thinking supports the contradictory view that every culture must be a state in embryo. Minorities who are oppressed through the majority's tendency to assimilate them find in that tendency justification for seeking to break away and form their own nation state. Once they achieve their own statehood, two sources of further tension and conflict may arise. First, the population of the new state may demand that people who constitute part of their "cultural nation" who happen to be citizens of another state be allowed to join the new state. Second, minorities within the new state may also be oppressed by the new majority, and demand their own right to self-determination.

I suggest that the conflict between these contradictory approaches to the nation state can be avoided if the right to self-determination is preceived as exercisable *within*, as well as through, the nation sate. The "nations" or peoples constituting the Nation of the nation state need not challenge and overthrow that state to satisfy their right to self-determination. Nevertheless, it must remain conceivable that such challenge with a view to establishing a separate nation state may be justified under certain circumstances.

The International and National Dimensions of Self-Determination

As the collective manifestation of the powerful individual desire to have control over one's affairs and to ensure one's economic and social well-being, the political idea of self-determination must be as ancient as organized human society itself; as a doctrine of international law, it is a recent and somewhat controversial principle.[6] Although external self-determination, in the sense of liberation from traditional colonialism, is firmly established and largely achieved, internal self-determination within existing nation states, and against what might be called "local colonialism," remains problematic, especially in the African context.

Because states are traditionally taken to be only "proper" subjects of international law, self-determination has generally been thought to be realizable only through the establishment of nation states for the people claiming the right. According to this view, only "a state or the community of states forming the United Nations [or the Organization of African Unit] can seek performance of a state's obligation to accord self-determination to its people, not the people of that state... What is involved here in terms of international law is the international obligation of a state and not the right of its people."[7]

Leading scholars maintain that this is an inaccurate, or at least a dated view of the subjects of international law;[8] it will be shown, self-determination is now firmly established as a human right of "peoples," not states. I believe that peoples within a nation state are entitled to assert their rights to self-determination against the states, and I adopt D.B. Levin's formulation of the position under national law:

> When a nation exercises its right to self-determination, form[s] an independent state, voluntarily remains in a multinational [multicultural] state or joins another multinational [multicultural] state, its right to the free determination of its further internal political, economic, social and cultural status passes to the sphere of state law of the state to which the nation now belongs. But this holds good only as long as the conditions on which the nation became part of the given state are not violated by this state and as long as the nation's desire to stay within it remains in force, and it is not compelled to do so by coercive means. As soon as one of these phenomena occur, the question again passes from the sphere of state law into the sphere of international law.[9]

An existing nation state should normally have the opportunity to honor its obligation to guarantee genuine self-determination to all its peoples, both minority and majority alike. A variety of constitutional devices, including appropriate internal arrangements regarding the autonomy and self-governance of its constituent parts in some situations, can fulfill this obligation. Under international law, a state may make whatever internal constitutional and structural arrangements it deems fit, so long as the state as a whole continues to be capable of exercising its rights and honoring its obligations in relation to other states. Thus, acceptance of the above-mentioned restriction of nation states' right to self-determination does not preclude internal arrangements that give

aspects of the substance of self-determination to various peoples within the state while maintaining the sovereign unity of the state for the purposes of international law.

Self-Determination as a Human Right

Although the Charter of the United Nations provided for the right of peoples to self-determination,[10] the 1948 Declaration of Human Rights did not recognize it as a human right; this omission was rectified in subsequent human rights treaties. The right to self-determination is now firmly established as a human right by virtue of Article 1, common to both the International Convenant on Economic, Social, and Cultural Rights and the International Covenant on Civil and Political Rights.[11] The right is expressed in this common Article 1.1 as belonging to "all peoples," so that they can "freely determine their (political status and freely pursue their economic, social and cultural development." Furthermore, Article 1.2 of both covenants provides that States party to either Convenant "shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."

The African Charter on Human and People's Rights of 1981 not only affirms, in Article 20.1, the right of "all peoples" to "the unquestionable" and inalienable right to self-determination," but also specifies some of the implications of that right in a number of articles.[12] This is particularly significant for our purposes here because, as a document drafted and adopted by all of the members of the Organization of African Unity, the African Charter on Human Peoples' Rights should carry political and moral weight all African states, regardless of whether they are legally bound by this Charter through formal ratification.

Despite its formal recognition as a human right, the right to self-determination needs further specification before it can be implemented in practice. For example, the formulations of self-determination as a human-right in the Covenants and African Charter contain significant elements of ambiguity. Though attributing the right to "peoples," none of these human rights instruments addresses the question of whether this right is exhausted or satisfied by the achievement of independence from colonial rule and the establishment of a nation state, or whether the right continues to exist within the framework of such a state.[13] Is it reasonable to deem a "people's" right to self-determination exhausted with their incorporation into a nation state, even against their will or without consulting them? And if they were consulted and did consent to being so incorporated, at the initial formation of the state or at a subsequent stage, will a people have no right to self-determination regardless of what happens to their status and rights within the nation state?

If a people's right to self-determination does persist within a nation state, its scope and implications remain uncertain. How can such a right be satisfied short of secession? Does it ultimately extend to justifying secession? Under what circumstances? Who are the "people" entitled to self-determination, whether through secession or other means short of secession? In other words, what

constitutes the "self" of self-determination, and how can it be identified? What is the scope of the "determination" to which that self is entitled, and how can it be realized?

Some scholars and the delegates of some governments at international fora cite these ambiguities in support of the view that it is not appropriate to think of collective rights, such as self-determination, as human rights;[14] other scholars accept the possibility of developing collective or "solidarity" human rights while sounding strong warnings against the abuse of this new concept.[15] A third group of scholars maintains that it is meaningful and constructive to speak of collective human rights.[16] As T. van Boven pointed out, opponents of collective human rights "are inclined to take predominantly legalistic approach to human rights in the sense of legally enforceable rights. Leading instruments, such as the ... Universal Declaration of Human Rights and the African Charter on Human and Peoples' Rights, are more than legal instruments. They are also instruments of liberarion .... The struggles for human rights and people's rights are not only settled in the courts but also and *perhaps more decisively in political fora.*"[17]

I concur with van Boven's view of collective human rights. I believe it is desirable to think of some collective rights, such as the right to self-determination, as a human right because of the power of the idea of human rights and its utility in political discourse. Such *collective rights are an essential framework for realizing most human rights of the individuals*; individuals are the direct beneficiaries of collective rights, and, further, cannot exercise most of their traditional human rights except as members of a collectivity. I also believe that it is possible to formulate and implement such collective rights in a meaningful way. In so doing, valid differences between individuals and collective human rights must be recognized; it is particularly important to identify the claimant of the collective right, the entity against whom the right is held and the means of satisfying the right in any given case.

The Claimants and Respondents of the Right to Self-Determination

Who Has the Right to Self-Determination and Against Whom

The charter of the United States, the two Covenants, the African Charter of Human and Peoples' Rights, and other Principles of International Law Concerning Friendly Relations,[18] speak of "peoples'" right to self-determination. It can therefore be said the international law recognizes this right belonging to peoples and not states; it can also be said that the underlying assumption of these instruments is that people are represented by their states in the international arena. In other words, whereas people are the holders of the right, *states are the entities charged with the obligation to ensure the satisfaction of the right at both the domestic and international levels.* For this interpretation to be acceptable, people must have some recourse should the state fail to honor its obligation. Before elaborating on this aspect, the notion of "people" as holders of the right to self-determination must be clarified.

Neither the U.N. Covenants nor the African Charter define the term "people"; drafters of international instruments sometimes prefer that a central concept or term be defined by subsequent practice and jurisprudence rather than impose their own definition. For example, the International Law Commission declined to define "state" in its draft Declaration of the Rights and Duties of states, preferring the term to be interpreted in accordance with international practice.[19] Nevertheless, we must here attempt a working definition of the term "people" for the purposes of the present discussion.

According to Y. Dinstein, peoplehood can be seen as contingent on two separate elements: an objective element of being an ethnic group with a common history, a cultural identity, and a subjective element indicating itself as a people.[20] I. Brownlie defined "people," in terms of a core of meaning, for the purposes of applying the principle of self-determination.

> This core consists in the right of a community which has a distinct character to have this character reflected in the institutions of government under which it lives. The concept of distinct character depends on a number of criteria which may appear in combination. Race (or nationality) is one of the more important of the relevant criteria, but the concept of race can only be expressed scientifically in terms of more specific feature, in which matters of culture, language, religion and group psychology predominate.[21]

These and similar definitions of the term "people" emphasize the attributes of commonality of interests, group identity, distinctiveness, and a territorial link. As R. Kiwanutka notes, "It is clear, therefore, that 'people' could refer to a group of persons within a specific geographical entity (e.g., the Alur of Uganda or the Amandebele of Zimbabwe) as well as to all the persons within that entity (e.g., Ugandans or Zimbabweans)."[22]

In mentioning these attributes in a report prepared for the U.N. on the right to self-determination, Aurelieu Cristescu stated that a people should not be confused with ethnic, religious, or linguistic minorities whose existence and rights are recognized in Article 27 of the International Covenant on Civil and Political Rights.[23] This distinction does not appear to me to be valid; it seems to have been prompted by the author's conception of self-determination as achievable only through the establishment of a separate state. I submit that an ethnic, religious, or linguistic minority are a "people" entitled to its right to self-determination, within an established state or through secession under certain circumstances.

Another approach to defining a "people" that focuses the last point is one that distinguishes a people from their state.[24] Again, Kiwanuka: "This view, by separating the people from their state, does for collectivists what civil and political liberties do for individuals. It seeks to reserve a certain amount of political and economic space for peoples qua peoples. This space, or peoples' sovereignty, becomes critical where the interests of the people and those of the state diverge."[25]

One of the objections to the recognition of collective rights as human rights is the alleged uncertainty of the entity against which such rights are to be asserted. Provided that it is appreciated that the term "rights" is used in a broader sense

than mere "legal" rights enforceable in a court of law, I can see no particular difficulty in this regard because all rights are activated and asserted against the source of challenge, denial or threat, be it the nation state of the same people, another people within that state, any other state, and so forth.

The Manner of Exercising the Right to Self-Determination

The vast majority of the new nation states seem to think that the right of their populations to self-determination has been satisfied through the achievement of formal independence from colonial rule;[26] in particular, African states have individually and collectively resisted claims for secession by various peoples as a means to achieving self-determination.[27] This resistance is perhaps understandable because, given the arbitrary boundaries drawn by colonial powers at the time of independence, almost every existing African state risks complete disintegration if the integrity of its international boundaries is questioned. The states fear that if the right to secede and establish an independent state is granted to one people within a state, other peoples might claim similar treatment, leading to dismemberment of the existing state, and probably to its total disintegration. Moreover, since another part of the same people who are demanding secession from an existing state may be within the boundaries of a neighboring state, granting the demand of the first part may encourage the other part to demand to join their people, thereby threatening the territorial integrity of the neighbouring state as well.

Another realistic consideration involves the political and economic viability of any proposed new state.[28] From the political point of view, tribal and ethnic diversity in Africa makes it almost certain that the territory of the proposed secessionist state would include minority groups who could feel threatened by the dominance of the majority group;[29] these groups could create political difficulties similar to those that led to demands for secession by the majority group from parent state in the first place. Ethnic or other identity of the population of a given territory does not necessarily mean that such territory could support an independent state in material terms; conversely, the secession of one part of an existing state could diminish, or even completely eliminate, the economic viability of that state.

Although these considerations may present a powerful argument against the realization of the right to self-determination through secession and the establishment of an independent state in some cases, arguments, explained below, in favor of secession under appropriate circumstances can override them. Moreover, the above arguments do not necessarily apply to alternative arrangements short of secession. I would therefore suggest that each situation be considered in light of some general criteria for the validity of claims for secession; if secession appeared justified in a given case, the principle of self-determination would require granting secession and recognizing the new state; where secession is clearly not justified, or is at least of doubtful validity, it may be appropriate to consider alternative arrangements for satisfying claims for self-determination.

Justification of Secession

When may secession be justified? This question is deliberately formulated in this way because, as is clear from the following formulation of possible criteria for judging the validity of claims for secession, each element of the ultimate decision is open to a variety of interpretations, rendering it vulnerable to criticism and rejection by one side or the other. It is therefore imperative that those claiming, or called on to adjudicate among competing claims to self-determination, try to see the issues from both (or all) points of view. The next section will address the circumstances and mechanisms of the "adjudication."

Because there are competing policy arguments with corresponding conflicting evidence of state practice, both in favor and against self-determination through secession,[30] the following criteria have been suggested for judging the validity of claims for self-determination: (1) the degree of internal cohesion and self-identification of the group claiming self-determination, (2) the nature and scope of their claim, (3) the underlying reasons for the claim, and (4) the degree of deprivation of basic human rights for the people in question.[31] The higher the degree of the internal cohesion and self-identification of the people, the greater their historical claim to separate identity; the more they are deprived of their basic human rights under their present "nation" state, the stronger would be their case for secession.

This analysis, in my view, is consistent with a reasonable interpretation of the Declaration of Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations.[32] This Declaration is one of the most authoritative international pronouncements; it "codifies" the relevant principles of international law and addresses the issues in the postcolonial context. Although this Declaration affirms the principle of the territorial integrity of existing states, it does not make it absolute. Principle (e), paragraph 7 of the Declaration reads as follows:

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

As clearly indicated by the words I have italicized, the territorial integrity or political unity of existing states is guaranteed only when the state in question respects the equal rights and self-determination of the people subject to its jurisdiction.

Other considerations for judging the validity of claims for self-determination exist. First, the people seeking secession must not only constitute a clear majority in a geographical unit that is capable of sustaining an independent state in economic and political terms, but due regard must be given to the status and rights of other minorities within the region. The establishment of the new state

by a previously oppressed minority should not create problems of self-determination for others within the new state.

Second, it should be considered whether it is appropriate for a strong minority capable of achieving secessions to do so and leave other minorities within the existing nation state vulnerable to greater oppression. It may be better for all concerned for the stronger minority to remain within the existing state and struggle for the protection of the rights of all minorities than selfishly to seek an answer to its own problems through secession, abandoning other minorities to a worse fate. After all, although political independence, when justifiable and achievable, may be a right, it is not an imperative duty.

Finally, it should be recalled that external factors may strongly influence, if not effectively decide, the situation one way or the other. The establishment of Bangladesh in 1971 may serve as an instructive example of how external forces can make secession possible. V. Nanda demonstrated how Bangladesh's claim to secede was helped along by specific circumstances: the physical separation of East from West Pakistan, the total domination and brutal suppression of the former by the latter, the nature of the ethnic and cultural differences between the populations of the two parts, the disparity in their economic growth to the disadvantage of East Pakistan, the electoral mandate to secede, and the viability of both regions as separate entities.[33] Nevertheless, It is extremely unlikely that the secession of Bangladesh would have materialized except for the fact that the "humanitarian" intervention of India presented both West Pakistan and the international community with a *fait accompli.* In contrast, the insufficiency of external sponsorship contributed significantly to the failure of the Biafran bid for secession from Nigeria in the late 1960s.

The Circumstances and Mechanisms of Mediation

Observers may reasonably differ on the relative significance of each element in the circumstances that "legitimized" and effectuated" the secession of Bengladesh, and on whether any of them is present in sufficient magnitude in any given situation; the participants in a majority/minority conflict will normally disagree more drastically in their evaluation of these elements. Moreover, in the heat of confrontation and historical antagonism, their perception and discourse about the issues and considerations will no doubt be seriously influenced and distorted by passionate and irrational components of concrete situations. It must also be noted that perceptions and discourse about these matters are played out in a world of local and international power politics. These complicating factors are relevant to both the internal dynamics of perception and discourse and the processes of mediating and adjudicating between competing claims to self-determination.

A theoretical argument must recognize the presence and power of the irrational components of these situations. The irrational can be at least as influential as the rational in shaping the attitudes the position of participants in a conflict, diminishing each's willingness and ability to appreciate and deal with the attitudes and positions of the other side. Without such appreciation little

chance for compromise exists, and the use of force to "subdue the enemy" becomes almost unavoidable. This situation is the antithesis of the constructive scenario of dialogue and peaceful mediation of competing claims.

A hypothesis for peaceful adjudicating must also take account of the realities of regional international power politics and their impact on the participants in the conflict. Majority/minority conflicts often attract involvement of outsiders, who deliberately exploit the conflict to further their own self-interest. The case of Bangladesh cited above is a clear illustration of the sometimes decisive impact of external factors. Nevertheless, it is the attitudes and positions of the participants in the conflict that provide opportunities for external interference and exploitation.

Without understanding the power of the irrational and the role of power politics, I maintain that it is useful to make the sort of theoretical argument I am advancing. The irrational components of the positions of participants can be overcome only through a clear explanation of the consequences of those positions and exploration of realistic alternatives of them. I believe that participants to a conflict would usually prefer a peaceful settlement of their dispute, and can be brought to an appreciation that dialogue and negotiation can achieve that end; the fact that each side to these conflicts usually claims this to be their position supports my thesis, and can be used by mediators to induce the parties to negotiate. As indicated earlier, the framework for negotiation and mutual compromise is the ultimate threat of secession, on the one hand, and the difficulty of achieving secession, on the other.

The logic of the theoretical exposition of the issues presented here can promote the willingness to negotiate; it should not be difficult to devise the necessary mechanisms and safeguards. International and regional organizations, such as the United Nations and the Organization of African Unity, or other mutually acceptable mediators, can provide or devise the forum for negotiations. If needed, the personnel of these organizations or other third parties acceptable to both or all sides of a conflict can then act as mediators or facilitators of dialogue and negotiation. I submit that the willingness to negotiate, and the prospects of a successful peaceful resolution of majority/minority conflicts, will be greatly enhanced by appreciating that the substance of self-determination can be achieved through means short of complete secession.

Internal Self-Determination

Assuming that secession is either undesirable or unattainable, (or until that is the case), much can be done at the internal domestic level to guarantee the legitimate collective rights of minorities within an existing nation. What are these minorities and what are their legitimate collective rights?

It should first be recalled that we are concerned with the collective rights of peoples, are briefly defined above, and not any random or transitory group of people. Its historical link and subjective identification make a group into a people. In usual practice, the group of people with whose collective rights we

are concerned are referred to as "ethnic, religious, and/or linguistic minorities." Space does not permit elaboration of each of these features of identity, but we must clarify the term "minorities" in the following ways.

With the glaring example of the Republic of South Africa, it should be clear that the sociological minority is not necessarily the political majority. Even when the minority is a numerical one, and ethnic, religious, or linguistic group may be a majority in the state as a whole and a clear majority within a specific region or district, with the countrywide majority constituting a minority in that region or distric. When these districts enjoy a high degree of autonomy, it is the rights of the countrywide majority that have to be protected qua minority rights in the specific area. It may therefore be appropriate to speak of protecting the collective rights of ethnic, religious, and linguistic groups in general.[34]

We must also avoid lumping all minorities, whether sociological or political, together; different models or regimes may have to be developed to fit the situations of specific minorities, depending on their demographic composition, affiliations, and preferences.[35]

With respect to the rights of these minorities, we are concerned with the collective human rights to be "afforded to human beings *communally*, that is to say, in conjunction with one another or as a group, people or a minority ... The group which enjoys them communally is not a corporate entity and does not possess a legal personality. The nature of these human rights require, however, that they shall be exercised jointly rather than severally."[36] Although there is often an individual dimension to the rights in question, that dimension derives its significance for our purposes because of its implications to the collectivity; discrimination on the grounds of race, religion, or language is usually experienced by individual persons. Without minimizing in any way the gravity of such discrimination to the individual, I wish to focus here on the implications of such discrimination for the people or minority to which that individual person belongs, that is, on the collective right to be protected against such discrimination.

According to the Permanent Court of International Justice, the predecessor of the present International Court of Justice, the international system for the minorities between the two world wars had two objectives: to achieve complete equality between the nationals of the state regardless of race, religion, or language, and to ensure for the minority (or minorities) suitable means for the preservation of their racial peculiarities, traditions, and national characteristics.[37] The Court perceived these two objectives as interlocked; no true equality would exist between the majority and minority if the latter were deprived of the means of preserving its special characteristics.

A contemporary authoritative formulation of the rights of minorities is Article 27 of the International Covenant on Civil and Political Rights:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

The African Charter on Human and Peoples' Rights contains a member of detailed provisions relating to the rights of peoples, which presumably apply to minorities within nation states. Article 22, for example, provides that

> 1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
>
> 2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

These formulations suggest that strict adherence to the "melting-pot" concept, presumed to be prevailing in the United States and other countries with high immigration rates, may defeat the right of minorities to preserve their separate identity.[38] However, such separate identity has to be balanced against the equally legitimate claims of national integration. In other words, ways must be found for reconciling the two competing claims, countrywide cohesion and integration, and diversity of radical/ethnic, religious, and linguistic identities.[39] Whether through formal federalism or some other form of regional or functional autonomy, the basic objective is to afford the minority (or minorities) *equality* in political participation and economic and social development at the national level and *equality* in pursuit of cultural identity. If these objectives are achieved, neither subjective motivation nor objective justification for secession will exist because the secession is not an end in itself, but a means to these objectives. The precise formula may vary from one situation to the other, but the basic criterion is the *golden rule of reciprocity*: one should place the self in the position of the other person; whatever the self expects or demands must be conceded to the other person. Once this fundamental appreciation of the nature of the legitimate collective rights of minorities is achieved, the appropriate constitutional measures can easily be articulated and implemented.

Strategy for Mediation of Conflicts in Forging National Unity

No given formula for forging national unity exists that should be automatically applied by others. The first point to note is the importance of clarity about the meaning of national unity. As emphasized above, national unity is not necessarily cultural unity; cultural diversity is seen as desirable and compatible with national unity. I believe that an appropriate degree of cultural unity is most likely to evolve naturally over time through the processes of education and social and economic interaction, but it should never be forced through coerced assimilation into the dominant culture. Coercion breeds resentment and resistance; respect for cultural diversity induces a sense of solidarity and vested interest in genuine and lasting national unity and integration.

To assess experiences with the forging of national unity, I would therefore apply the dual criteria of the maintenance of national unity with the encouragement of cultural diversity. Categorical judgments are unlikely to be valid or particularly constructive: impediments to making an objective categorical

judgment include the difficulty of ascertaining the lack of verifiable and reliable information, and the emotional, and therefore controversial, nature of the issues. The time frame of the experience is also problematic; one must also consider how long the elements of the above-mentioned criteria have been satisfied in a given case, and how long they are likely to remain in a state of equilibrium. It would be useful to learn from the experiences of various countries what is conducive and what is counterproductive to the forging of national unity as defined here; in so doing, it would be important to extrapolate from the details of each country some general principles and guidelines applicable to other situations.

Although the established states of Europe and North America have had rather favorable conditions for forging national unity, these states continue to experience problems with the rights of minorities. When their constitutional models were adopted by Third World countries (e.g., India, which enacted extensive constitutional provisions for minority rights in an effort to anticipate and preempt likely causes of ethnic, religious, and/or linguistic conflicts), such conflicts nevertheless arose in practice. One should not conclude therefore that national unity, as defined above, cannot be achieved. The key to a successful creation of national unity, in my view, is the ability to mediate among the various segments of the population and reconcile competing claims to self-determination.

I suggest a dual strategy for this mediation and reconciliation, one at the domestic national level and the other at the regional or international level. The failure of reconciliation at the domestic national level may lead to civil wars, which are likely to have serious consequences for the security and stability of neighboring and other states. Domestic conflicts therefore usually implicate other states, despite demands for, or pretense to comply with, the principle of nonintervention in the domestic affairs of other states.

The Domestic Level Strategy

Assuming the desirability of maintaining the national unity and territorial integrity of existing African states, the primary level of action should be at the domestic national level. Many economic, social, structural, and other factors are relevant at this level, but I will confine my remarks to the constitutional aspects.

Internal self-determination can be realized through the operation of the three interrelated and mutually supportive principles of empowerment, participation, and accountability. Contemporary experience seems to support this view. The population at large, and each segment or group thereof, must be empowered to articulate and demand their individual and collective rights; such empowerment is developed through popular participation in all facets and levels of the processes of government. To maintain the effective empowerment of the people, the mechanics and processes of accountability of all elected and appointed officials must be established and implemented; this accountability, in turn, will be sanctioned by the empowerment of the people and their participation. In terms of constitutionalism, these principles of empowerment require the

establishment and maintenance of a strong constitutional order, not merely a formal constitution. A constitutional order includes institutions of political participation and accountability and balanced and carefully worked out governmental structures, judicial organs, and so forth: it provides for and effectuates a decentralized system of government that allows the various peoples the maximum degree of autonomy compatible with national unity and territorial integrity of the state; and it articulates, verbally and institutionally, collective and individual rights and ensures their effective implementation.

But no constitutional order can provide these guarantees unless it enjoys genuine legitimacy among the population at large; nor can the constituent aspects or institutions of the constitutional order play their role without such legitimacy. Legitimacy provides the political will that supports constitutional institutions and sanctions their functioning. For example, an independence judiciary is one of the primary mechanisms for safegaurding individual and collective rights; as African experiences clearly show, no judiciary can function without the support of an enlightened and effective public opinion.

To achieve and maintain legitimacy for the constitutional order, the whole population must be educated and socialized into safegaurding and implementing it. Political accountability is the essence of any constitutional order; no political regime can maintain power without the cooperation, or at least the acquiescence, of the population. If the populace realizes that it has the ultimate political power, that it can exercise that power by withdrawing its cooperation, or refusing to acquiesce, even the most brutal dictatorship can be terminated. Such realization develops only through education, literature, the arts, and all other means of communication among the whole population, especially rural and nomadic peoples who constitute the vast majority of the population in all African states.

Mediation Strategy

Realistically speaking, those who control the machinery of the state are far more likely to be responsive to political and other forms of pressure than to ethical considerations or abstract notions of justice and higher interests. The domestic constitutional order outlined above will have a better chance of success if it is supported by international political accountability and economic pressure on offending governments and majorities. It is in the best interest of the international community to impress on national governments that they cannot get away with denying their own populations internal self-determination; such denial leads to conflict and civil war, which endangers the vital interests of other states, increasingly independent regionally and internationally. No civil war can be relied on to remain within the boundaries of any state. The fundamental choice facing the international community is a simple one: ensure the satisfaction of peoples's right to internal self-determination or risk the widepsread conflict and war that might result from demands for secession.

In advocating a more active role for the international community, I am *not* advocating direct, *unilateral* intervention in the internal affairs of other countries. Unilateral intervention would probably be counterproductive and prejudicial

to the interest of all parties, including those of the oppressed minority. I am suggesting concerted and coordinated efforts at mediation and influence through *multilateral action of regional and international organizations*, such as the United Nations and the Organizations of African Unity, to achieve and maintain internal self-determination for all the peoples of each country. Peaceful collective international support for the mediation and reconciliation of competing claims to internal self-determination is the most effective way to preempt military, or other aggressive, intervention by other countries. Nevertheless, I would not deny an oppressed minority their right to external self-determination through secession if all efforts to achieve internal self-determination fail.

Conclusion

This chapter utilized the principle of self-determination as a theoretical framework for discussing issues of constitutionalism in relation to the status and rights of minorities. This approach is useful because I believe that the collective rights of minorities are integral to the rights of individuals and worthy of protection as such. Collective rights should therefore be protected under domestic law even where existing national constitutions do not recognize them as such. Further, I maintain that states are charged with the international legal obligation to protect the collective rights of minorities; in my view, the right of "peoples" to self-determination (in the above-cited provisions of the Charter of the United Nations, the two Covenants, and the African Charter of Human and Peoples' Rights) means internal self-determination for minorities at the domestic level, as well as the right of colonized people to formal political independence.

Moreover, I argue that the underlying logic and moral rationale of traditional decolonization cannot end by the achievement of formal independence. As colonized people(s) are entitled to the self-determination of formal independence from a colonial power, so they should be entitled to self-determination through secession from the new independent state if they are denied internal self-determination. In this way, the international legal right of minorities to secession can arise if they are denied internal self-determination at the domestic constitutional level.

But to have an international legal right to secession does not mean it is necessary. My primary concern is to avoid secession. I perceive my argument for the possession of this right as a necessary means for *avoiding* its exercise by guaranteeing internal self-determination through appropriate constitutional means. As indictaed earlier, the combination of an ultimate threat of secession and the difficulty of its achievement is the incentive to all parties to a majority/minority conflict to develop and implement the necessary constitutional mechanisms to achieve substantive internal self-determination for all segments of the population. Self-determination can be achieved within the nation state through varying degrees of regional and local autonomy which guarantee meaninfgul political participation and equitable economic and social development while allowing the various peoples of the county to preserve their cultural identity.

Emphasis should be placed on the essence and substance of self-determination rather than the political form of a nation state.

National unity is desirable, because it is normally conductive to greater security, political stability, and social and economic development. In my view, however, national unity should not be pursued at any cost and certainly not at the cost of achieving personal liberty and economic, political, and social justice for all segments of the population, or at the cost of securing collective and individual rights. These legitimate aims must be protected under the constitutional order of the state. A right to secession should be maintained for use as a last resort when all efforts at establishing the appropriate constitutional order have failed.

I have set forth my view of constitutionalism in the introduction to this chapter and indicated the main features of a suggested model for achieving internal self-determination. Here I wish to emphasize that the constitutional balance between the need of the individual for complete personal freedom and the need of the community for total social justice must apply to every individual and every community within the state, without discrimination on grounds of race or ethnicity, religion, and/or language. Further, each country must adapt the general principles and institutions of constitutionalism to its own circumstances and, although there must be flexibility about the forms and structures of constitutionalism, there can be no flexibility with respect to its substance of individual and collective rights and justice for all. The principle of self-determination, external and internal, utilized in the above discussion, is a shorthand reference to the substance of constitutionalism in the modern world.

Notes

1. For a brief history and meaning of the term nation state, see Alfred Cobban, *The Nation State and National Self-Determination* (London: Collins, the Fontana Library,1969), Chs. II and VII.

2. See, for example, Hurst Hannum, "The Limits of Sovereignty and Majority Rule: Minorities, Indigenous Peoples, and the Right to Autonomy," in Ellen L. Lutz, Hurst Hannum, and Kathryn Burke, eds., *New Directions in Human Rights* (Philadelphia: University of Pennsylvania Press, 1989), p. 3.

3. Lee C. Buchheit, *Secession: The Legitimacy of Self-Determination* (New Haven: Yale University Press, 1978) p. 3.

4. Harold S. Johnson, *Self-Determination within the Community of Nations* (Leyden: A. W. Sijthoff, 1967), pp. 25–30.

5. Alfred Cobban, note 1, pp. 108–109; Rupert Emerson, *From Empire To Nation* (Cambridge, MA: Harvard University Press, 1960), p. 299.

6. Michla Pomerance, *Self-Determination in Law and Practice* (The Hague: Martinus Nijhoff, 1982), pp. 1–13, 72–76. There is a useful select bibliography in this book on pp. 130–138. See also sources cited in Ved. P. Nanda, "Self-Determination under International Law: Validity of Claims to Secede," 13 *Case Western Reserve Journal of International Law* 257–280 (1981), notes 8 and 9 on 259.

7. S. Prakash Sinha, "Self-Determination in International Law and Its Applicability to the Baltic Peoples," in A. Sprudz and A. Rusis, ed., *Res Baltica* (1968). pp. 256–257, as quoted in Lee C. Buchheit, note 3.

8. G. Ezejiofor, *Protection of Human Rights Under International Law* (London: Butterworth, 1964), pp. 15–32; H. Lauterpacht, "The Subjects of International Law," 63 *Law Quarterly Review* 438–460 (1947); 64 *Law Quarterly Review* 97–119 (1948).

9. D. B. Levin, "The Principle of Self-Determination of Nations in International Law," *Soviet Year Book of International Law 1962* 45–48, p. 46.

10. Articles 1.2 and 55 of the Charter of the United Nations.

11. The International Covenant on Economic, Social, and Cultural Rights was adopted by the General Assembly of the U.N. on December 16, 1966 (Annex to G.A. Res. 2200, 21 GAOR, Supp. 16, U.N. Doc. A/6316, at 490); and entered into force on January 3, 1976. The International Covenant on Civil and Political Rights was adopted by the General Assembly of the U.N. on December 16, 1966 (G.A. Res. 2200, 21 GAOR, Supp. 16, U.N. Doc. A/6316 at 52); and entered into force on March 23, 1976.

12. The African Charter was adopted by the Organization of African Unity on June 27, 1981, and came into force in October 1986.

13. On this controversial question see, for example, Rupert Emerson, "Self-Determination," 65 *American Journal of International Law* 459–475, 463–465 (1971).

14. See, for example, Paul Sieghart, *The International Law of Human Rights* (Oxford: Clarendon Press, 1983), p. 368; Jack Donnelly, "Human Rights, Group Rights, and Cultural Rights," *Universal Human Rights in Theory and Practice* (Ithaca: Cornell University Press, 1989), pp. 143–154.

For misgivings by some delegates at the U.N. about the appropriateness of including the right of peoples to self-determination in the Covenants, see Annotations on the text of the draft International Covenants on Human Rights in U.N. Doc. A/2929, chapter V, paras 4 and 8–10.

15. See, for example, Philip Alston, "A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights?," 29 *Netherlands International Law Review* 307–322 (1982).

16. Yoram Dinstein, "Collective Human Rights of Peoples and Minorities," 25(1) *The International and Comparative Law Quarterly* 102–120 (1976); Theo van Boven, "The Relations between Peoples' Rights and Human Rights in the African Charter," 2(2–4), *Human Rights Law Journal* 183–194, 191–192 (1986).

17. Theo van Boven, note 16, pp. 191–192. Emphasis added.

18. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXXV 1970), adopted by the U.N. General Assembly without a vote on October 24, 1970. 25 U.N. GAOR (No. 28), 121, 123–124, U.N. Doc. A/8028 (1970).

19. See, 1949 *Yearbook of the International Law Commission*, 289.

20. Yoram Dinstein, note 16, p. 104.

21. Ian Brownlie, "The Rights of Peoples in Modern International Law," 9 *Bulletin of Australian Society of Legal Philosophy* 104 at 107–108 (1985).

22. Richard N. Kiwanuka, "The Meaning of 'People' in the African Charter on Human and Peoples' Rights," 82:1 *American Journal of International Law* 80–101, 88 (1988).

23. A. Cristescu, *The Right to Self-Determination, Historical and Current Development on the Basis of United Nations Instruments*, para. 279, U.N. Doc. E/CN. 4/Sub. 2/404/Rev. 1 (1981).

24. This is the approach adopted by the Universal Declaration of the Rights of Peoples (the Algiers Declaration of July 4, 1976), a populist document adopted by a group of Lawyers, economists, politicians, and men and women in liberation struggles. For the test of the Declaration see Antonio Cassese, ed., *UN Law/Fundamental Rights: Two Topics in International Law* (Alphen aan den Rijn, The Netherlands: Sijthoff & Noordhoff, 1979), p. 219. This book also contains commentary and discussion of the Declaration by two of its authors, Francois Rigaux and Richard Falk, pp. 211 and 225, respectively.

25. Richard N. Kiwanuka, note 22, p. 81.

26. Harold S. Johnson, note 4, pp. 51–53. A few states have expressed a wider view of self-determination. See, for example, comments of the representatives of Belgium and the United Kingdom during the 1987 secession of the U.N. Human Rights Commission. E/NC. 4/1987/SR. 10, at 4; and E/NC.4/1987/SR. 13, at 8–9. It seems very doubtful, however, that even those states would allow their own minorities, such as the Scottish or Welsh peoples, of the United Kingdom, to secede if that were the wish of those minorities.

27. Rene Lemarchand, "The Limits of Self-Determination: The Case of the Katanga Secession," 56 *American Political Science Review* 404–416 (1962); Umozurike O. Umozurike, *Self-Determination in International Law* (Hamden, CT.: Archon Books, 1972), pp. 186–187, 230–235; Onyeonoro S. Kamanu, "Secession and the Right of Self-Determination: An O.A.U. Dilemma," 12(3) *The Journal of Modern African Studies* 355–376 (1974); M. G. Kaldharan Nayar, "Self-Determination Beyond the Colonial Context: Biafra in Retrospect," 10 *Texas International Law Journal* 321–345 (1975); S. K. N. Blay, "Challenging African Perspectives on the Right to Self-Determination in the Wake of the Banjul Charter on Human and Peoples' Rights," 29 *Journal of African Law* 49–55, 147 (1985). See also O.A.U. Charter, articles 2(1) (a) and (c) and 3(2) (3) and (5). In O.A.U. Res. AHG/16/1 (1964) the Assembly of Heads of States and Governments "declares that all Member States pledge themselves to respect the frontiers existing on the achievement of national independence." For the text of this Resolution see Ian Brownlie, *Basic Documents on African Affairs* (Oxford: Clarendon Press, 1971), pp. 360–361.

Numerous constitutions of African states reiterate the unity and indivisibility of their territories. See, for example, Article 4 of the Angola Constitution and Article 2 of the Senegal Constitution. See also A. Blaustein and G. Flanz, eds., *Constitutions of the Countries of the World* (Dobbs Ferry, NY: Oceana Publications 1971).

28. On the problems posed by the creation of ministates, see T. Frank and Paul Hoffman, "The Right of Self-Determination in Very Small Places," 8 *New York University Journal of International Law & Politics* 331–386 (1976).

29. For example, some of the equatorial tribes of southern Sudan might feel threatened by the dominance of Nilotic tribes in a separate state in present day southern Sudan.

30. Ved P. Nanda, note 6, pp. 263–274; and Onyeonoro S. Kamanu, note 27, pp. 356–362.

31. Ved P. Nanda, note 6, pp. 275–278; and Onyeonoro S. Kamanu, note 27, pp. 360–362.

32. This Declaration was adopted unanimously by the General Assembly of the United Nations in its twenty-fifth session. See, generally, C. Don Johnson, "Toward Self-Determination—A Reappraisal in the Declaration on Friendly Relations," 3 *Georgia Journal of International and Comparative Law* 145–163 (1973).

33. Ved Nanda, "Self-Determination in International Law: The Tragic Tale of Two Cities—Islamabad (West Pakistan) and Dacca (East Pakistan), 66 *The American Journal of International Law* 321–326 (1972).

34. Yoram Dinstein, note 16, p. 112.

35. See the example of various minorities within Poland and other European countries between the two world wars discussed by Yoram Dinstein, note 16, pp. 112–117.

36. Yoram Dinstein, note 16, pp. 102–103. Emphasis added.

37. *Minority Schools in Albania* (AB/64) 17 (1935).

38. Josef L. Kunz, "The Present Status of the International Law for the Protection of Minorities, " 486 *American Journal of International Law* 282–287, 282–283 (1954).

39. For an excellent analysis of the experience of the United States in this regard see Kenneth Karst, "Paths to Belonging: The Constitution and Cultural Identity," 64(2) *North Carolina Law Review* 303–377 (1986).