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Towards a comprehensive theory on self-determination? Some remarks starting from a recent book by Pau Bossacoma Busquets[*]

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ABSTRACT: The essay aims at reflecting upon the multifaced issue of secession and self-determination, starting from the reading of the recent volume *Morality and Legality of Secession* by Pau Bossacoma Busquets. Having blurry boundaries among academic disciplines, secession is analyzed (both separately and jointly) through different perspectives: political philosophy, international law, and constitutional law. However, the goal of the book is not only to offer a comprehensive perspective on the matter but also to propose an alternative theory on secession based on a hypothetical multinational contract, building upon Rawlsian contractualism. The main features and principles of Bossacoma's theory *Justice as multinational fairness* permeate the entire book, sewing together the moral as well as the legal aspects of secession. Moreover, the "ideal" and "non-ideal" contexts are always in dialogue, with the support of multiple real-world examples.

SUMMARY: 1. Introduction. – 2. A few preliminary definitions. – 3. Justice as multinational fairness: a hypothetical contract between nations. – 4. Secession under international law: the right to self-determination of peoples. – 5. Constitutionalizing secession: constitutional reforms, referendum, and the principle of democracy. – 6. Conclusive remarks: secession is all around us.

[*] Lavoro sottoposto a referaggio secondo le linee guida della Rivista.

1. Introduction

Secession has an inherent capacity to blur the borders of disciplines. Studying the matter from a single perspective, thus not adopting an interdisciplinary approach, will inevitably leave the research incomplete. This is mainly due to the sort of Janus-faced nature of secession, which Mancini defined as "the most revolutionary and the most institutionally conservative of political constructs".[1] In fact, the challenge to sovereignty advocated by secessionist groups is aimed at reinforcing the virtues at the core of sovereignty itself. To integrate both the revolutionary as well as the conservative sides, Mancini adopted a comprehensive approach to secession and self-determination, blurring the lines between international and constitutional law. Such a comprehensive approach has multiple advantages, among which it confers higher coherence to the overall debate, and it is more capable of grasping the multifaced and flexible nature of secession. To a similar end, in his recent volume, Bossacoma aims at approaching jointly the *morality* as well as the *legality* of secession, diving into a multidisciplinary journey among political and legal theory, international law and practice, and comparative constitutionalism.[2] However, the author aspires to go even further, as the explicit goal of the book is to contribute to the debate by providing an alternative normative framework on secession and self-determination of minority nations. The reading of *Morality and Legality of Secession* makes it evident why public law scholars and policymakers should care about a more systematic study on secession. In fact, it is clear how secessionist claims, based on both moral and legal grounds, are deeply intertwined with the reality of European (and world) affairs. Catalonia, Scotland, Northern Ireland, Kosovo, Republika Srpska, just to name a few, are all different instances of how secession plays a crucial role in defining the political agenda of the European Union, as well as the internal affairs of the singular States, all of which are current, former, or prospective Members. For example, currently, five EU Member States[3] do not recognize the independence of Kosovo. Among them, Spain still objects to the legality of the 2008 unilateral declaration of independence, being aware of the possible implications that such action could have on its independence movements in Catalonia and the Basque Country.

[1] S. MANCINI, *Secession and Self-Determination*, in M. ROSENFELD, A. SAJÓ (edited by), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, Oxford University Press, 2012, 481.
[2] P. BOSSACOMA BUSQUETS, *Morality and Legality of Secession*, Cham, Palgrave Macmillan, 2020.
[3] Spain, Slovakia, Cyprus, Romania, Greece.

Furthermore, the recognition of Kosovo is one of the key issues in the integration process of perspective Members as Serbia and Bosnia and Herzegovina, since reconciliation and peaceful regional cooperation are two pillars of the EU enlargement policy.

There are two main questions at the core of the book: is there a moral right to secede? Should the right to secede be constitutionalized, and how? To answer these questions, Bossacoma organized the book into three parts. The first part tackles the philosophical foundations of his theory (the *morality*), starting from a critical perspective on contractualism, and discussing concepts such as justice, legitimacy, and nationality. It is in this first part that the author lays the ground for his theory called *Justice as multinational fairness*, which will be further developed in the next two parts addressing the legal bases (the *legality*) of secession. Part II and part III focus respectively on international law and constitutional law, addressing the recurring issues concerning secession in the public law domain, such as the value of international recognition in case of unilateral declarations of independence, the nexus between the principle of democracy and secession, and the constitutionalization of secession through constitutional reforms or referendum.

2. A few preliminary definitions

Overall, the book analyzes with utmost precision distinct notions, such as the difference between internal and external self-determination, between consensual and unilateral secession, or between ethnic and national minorities. Indeed, offering such clarifications is a reasonable starting point for a comprehensive research, to immediately offer the reader some guidance. First, the author defines secession as "a separation of parts of the territory and population of a State with attributes of sovereignty in order to create another State with similar attributes of sovereignty".[4] Then, the author further distinguishes between *internal* and *external* self-determination: the former refers to the creation of a new Member State within a federation, while the latter to the creation of a new

[4] BOSSACOMA, 3. On the contrary, Buchanan claims that the concept of secession includes also the separation of a territory to become part of a pre-existing sovereign State (see A. BUCHANAN, *Secession. The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec*, Boulder, Westview, 1991, 10). A related concept is the one of *redemption*, meaning the transfer of a territory and population from one State to another. An historical example of irredentism can be traced back to the Italian irredentist movement in the XIX century, claiming territories inhabited by Italian-speaking population in neighboring countries as Austria and France.

sovereign State from the parent State.[5] For this reason, Bossacoma claims that secession could be seen as one way to define the right to external self-determination.[6] Moreover, the author includes in his definition of secession both peaceful and violent processes, as well as both unilateral and consensual secession. Such view contrasts with the one of other scholars, as Crawford, who defines secession as a process characterized by the threat of violence and by the absence of consent from the former parent State.[7] However, Bossacoma claims that such a definition "confuses means and ends",[8] and that it is sounder to include in the definition both the desirable and the undesirable means. Furthermore, the author specifies that his research refers strictly to the secession of a minority, thus excluding the secession of the majority. This choice is due to the fact that the concept of "secession of the majority" tends to overlap with the one of *expulsion* of the minority, and therefore the right to secede should be carefully distinguished from the one to expel. A further specification of the concept of secession is the one between the secession of the *periphery*, meaning a territory at the edge of the State's borders, and the secession of the *center*, meaning a territory that would be surrounded by the parent State.[9] A final preliminary distinction made at the end of the introductory chapter is the one between secession and *dissolution*. In fact, in the case of one or multiple secessions, international law provides that the parent State remains as the continuator State.[10] On the contrary, a case of dissolution is verified in the event of multiple secessions leading to the creation of successor States from the former parent State.[11] Although, it is evident how the two concepts sometimes overlap, and, for this reason, Bossacoma refers to the broader concept of *dismemberment*, to include both events in which secession leads to the recognition of a continuator State or the creation of successor States.

[5] BOSSACOMA, 4.

[6] On the right to external self-determination, see A. CASSESE, *Self-Determination of Peoples: A Legal Reappraisal*, Cambridge, Cambridge University Press, 1995, 67-100.

[7] J. CRAWFORD, *The Creation of States in International Law*, Oxford, Oxford University Press, 2006, 330.

[8] BOSSACOMA, 5.

[9] Buchanan defined such last option as "hole-of-a-donut secession" (see BUCHANAN, 14-15). Moreover, this specification is strictly interconnected with the principle of territoriality, which will be further discussed in the next section among the other principles of *Justice as multinational fairness*. However, Bossacoma adds that there could be instances of secession of the center, as the cases of enclaves, which have to be considered exceptional and examined case-by-case (see BOSSACOMA, 6).

[10] For example, it is recognized that the Russian Federation is the continuator State of the USSR.

[11] This is the case of Yugoslavia. Starting from 1991, a number of secession referenda were held within the Federation, declaring the independence of the former Republics. Thus, the former Yugoslav republics became successors States, even though Serbia claimed to be the continuator State of the former Yugoslavia in the aftermath of the independence referenda.

3. Justice as multinational fairness: a hypothetical contract between nations

Before delving into *Justice as multinational fairness*, it is necessary to start from the different theories justifying secession. In fact, without a theoretical overview of such theories, it is difficult to fully appreciate Bossacoma's proposal and the related issue of the *morality* of secession.[12] The literature distinguishes between two main sets of theories: primary and remedial. Primary theories argue that a right to secede exist *per se*, and it should be recognized independently of previous violations of rights. Remedial theories, on the contrary, build the right to secede as a remedy for previous injustices, thus as derivative upon the violation of other fundamental rights.[13]

Starting from primary theories, it is possible to further identify two distinct types of theories: nationalistic (or ascriptive), and democratic (or choice). On the one hand, ascriptive theories posit that "there is a moral value in the nation",[14] due to the cultural homogeneity of a community,[15] and rest the legitimacy of secession on the pre-existence of a nation and of a relationship between such nation and a territory.[16] On the other hand, choice theories focus on principles such as democracy, popular sovereignty, political self-determination, and freedom of association, all serving as legitimizing factors of the right to secede.[17] In fact, choice theorists claim that the right to secede is derived from the right to "voluntary choose associations",[18] thus emphasizing the idea of the right to political association as the ground of every legitimate government based on consensus.

[12] On a related note, it is worth to draw attention to another recent contribution on secession, namely C. CLOSA, C. MARGIOTTA, G. MARTINICO (edited by), *Between Democracy and Law: The Amorality of Secession*, London and New York, Routledge, 2019. In such collective work, the term *amorality* must not be confused with *immorality*, rather it should be considered the overall approach adopted by the editors. In fact, Closa, Margiotta and Martinico argue that the domain of morality can be avoided in addressing the issue of secession, going beyond the traditional approaches characterizing secession (see BUCHANAN). However, Bossacoma would object that the moral argument becomes especially important since the law is often partial when regulating secession, and as such it cannot be ignored.

[13] MANCINI, 483; BOSSACOMA, 48-61.

[14] MANCINI, 483.

[15] See J. RAZ, A. MARGALIT, *National Self-Determination*, in *Journal of Philosophy*, vol. 87, n. 9, 1990, 439-461.

[16] Of course, these two conditions can give rise to competing claims of different groups on the same territory, as well as they may lead to the frustration of other nationalities' aspirations. Moreover, nationalist theories tend to ignore the effects of globalization, since liberal nationalist scholars as Miller legitimize secession when the borders of a State and of a nation do not overlap. This overlooks the current reality of facts, where multinationalism and diversity are the norm and not the exception (see MANCINI, 484; D. MILLER, *On nationality*, Oxford, Oxford University Press, 2004; C. MARGIOTTA, *L'Ultimo Diritto. Profili Storici e Teorici della Secessione*, Bologna, Il Mulino, 2005).

[17] BOSSACOMA, 48.

[18] MANCINI, 484.

Consequently, if the individuals no longer consent to the State's authority, they should be granted the right to withdraw their association, i.e., the right to secede.[19]

Moving to remedial theories, secession is justified on a completely different ground. Remedial theorists do not recognize a primary right to secede, rather a right subjected to a series of restrictions to be exercised. In fact, the basic assumption is that well-functioning liberal democracies already provide for the instruments and the procedures to reach collective and shared decisions, obviating the need to secede.[20] Therefore, secession is accepted as a remedy for injustices[21] suffered from a particular group, for example resulting from a past annexation, violations of fundamental individual and collective rights, persistent discriminations, or violation of federal arrangements.[22]

Bossacoma's theory identifies with primary nationalistic theories, as it assigns "a general, primary and democratic right to secede to national communities",[23] with no need for prior injustices. In particular, the construction of Bossacoma's theory begins with an overview of how contract theories justify political authority, arguing that such theories have the tendency to underestimate the process through which borders are drawn and that the (re)drawing of frontiers

[19] It should be noted that choice theorists do not make any distinction in terms of nationality, nor they require cultural homogeneity or the existence of territorial claims, since defining nationalities is difficult and subject to a sensible margin of uncertainty. The right to secede must be granted irrespectively of these conditions, and what matters is the desire to create its own State. However, if it is true that the focus is not on the actors eligible to exercise the right to secede, it is also true that such right is not unqualified. It should be exercised only in viable conditions, such as the desirability of a territorially concentrated group that can provide the essential political functions, and that does not jeopardize the remaining State from doing the same. Nevertheless, the same objection made for nationalist theories could be arisen in this case as well. In fact, democratic theories tend to ignore the fluidity of populations, subject to migration and globalization (see MANCINI, 484-486; C. H. WELLMAN, *A Theory of Secession: the Case for Political Self-Determination*, Cambridge, Cambridge University Press, 2012; H. BERAN, *A Liberal Theory of Secession*, in *Political studies*, vol. 32, n. 1, 1984, 21-31; C. CLOSA, *A Critique of the Theory of Democratic Secession*, in C. CLOSA, C. MARGIOTTA, G. MARTINICO (edited by), *Between Democracy and Law: the Amorality of Secession*, London and New York, Routledge, 2019, 49-61).

[20] MANCINI, 486.

[21] The issue of defining what constitutes injustice is reasonably one of the problematic questions that arise from remedial theories. For example, it might be difficult to draw the lines that identify the difference between economic exploitation and asymmetrical redistribution of resources, depending on the perspective adopted (i.e., whether the subnational entity or the central government). Another even more delicate issue is the assumption that the status quo is considered as fair and thus acceptable in principle. However, existing borders are not necessarily the result of a fair and democratic process.

[22] See A. BUCHANAN; W. J. NORMAN, *Negotiating Nationalism: Nation-Building, Federalism, and Secession in the Multinational State*, Oxford and New York, Oxford University Press, 2006; R. BAUBÖCK, *Why Stay Together? A Pluralist Approach to Secession and Federalism*, in W. KYMLICKA, W. NORMAN (edited by), *Citizenship in Diverse Society*, Oxford, Oxford University Press, 2000, 366-394.

[23] BOSSACOMA, 54-55.

still remains an open question.[24] What the author highlights is that liberalism assumes that States are uninational,[25] and that, conversely, minority nations support *demotic pluralism*, thus opposing *demotic monism* and challenging liberal constitutionalism.[26] Therefore, starting from Rawlsian contractualism, Bossacoma proposes a third kind of hypothetical contract aside from the contract between persons[27] and the one between peoples,[28] namely a contract between nations. Again, the author observes that Rawls generally refers to nation-States,[29] either for contracts in the domestic affairs or in the international scene, without being too concerned about the nature of the *demos* within such States.[30] This is the gap that Bossacoma intends to fill, by applying the contract method to multinational States.[31] Thus, the contracting parties would be the nations, as they are considered to be the best judges of their interests. They would agree on a contract behind a "thick veil of ignorance",[32] without knowing the different political, economic, and social weights they actually have. For this reason, the hypothetical multinational contract would be constituted of two main articles: the first regulates the conditions under which every nation should comply with the constitutional pact, while the second provides the requirements for minority nations to unilaterally secede.[33] Therefore, minority nations are not required to be victims of a previous injustice to unilaterally secede, rather fulfill the requirement of the multinational contract.[34]

Aside from the exact wording of the articles,[35] several principles can be identified to better frame the conception of *Justice as multinational fairness*. In fact, the first article can be traced back to the

[24] BOSSACOMA, 9-11.
[25] W. KYMLICKA, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Oxford, Oxford University Press, 1995, 128.
[26] BOSSACOMA, 11.
[27] J. RAWLS, *A Theory of Justice*, Cambridge, The Belknap Press of Harvard University Press, 1999.
[28] J. RAWLS, *The Law of Peoples*, Cambridge, Harvard University Press, 2001.
[29] KYMLICKA, 128.
[30] BOSSACOMA, 17.
[31] BOSSACOMA, 18-33.
[32] BOSSACOMA, 28.
[33] BOSSACOMA, 31-32.
[34] BOSSACOMA, 38.
[35] *1. Every nation which forms part of a multinational State shall act in accordance with the constitutional pact insofar as:*
(1) Non-discriminatory treatment of members of the national minorities is guaranteed.
(2) Equal opportunities for the members of national minorities and equal recognition of those minorities are promoted.
(3) Multinational solidarity is established. Multinational solidarity shall be arranged in ways compatible with national solidarity and shall not be discriminatory towards national minorities.
(4) A reasonable minimum of internal national self-determination
is permitted.

principle of constitutionality, encompassing principles as non-discrimination, equal opportunities and of equal recognition, multinational solidarity, and internal self-determination. Then, the second article encompasses the principle of external self-determination, including the principles setting substantive and procedural limits to the right to secede, namely principles of democracy, agreement and negotiation, liberal nationalism, respect for human rights and protection of minorities, territoriality, viability, and compensation, and avoiding serious damage to third parties. Bossacoma intends these principles as public, general, and universal in application, but neither ordered nor final.[36] In conclusion, such a contract identifies some principles of justice which are acceptable by the communities within multinational States, defining more comprehensively the principle of external self-determination.

After having drawn the lines of the hypothetical multinational contract, Bossacoma focuses his attention on the principles of nationality[37] and liberal nationalism[38] as requisites for secession, arguing that States are neither "non-national" nor capable of ignoring nationalism. In fact, according to the author, the concepts of statehood and nationality are deeply intertwined, and therefore it is reasonable that the principle of nationality (in conjunction with the principle of democracy) is used to (re)draw territorial borders. While further exploring the concept of

2. A minority nation which forms part of a multinational State may secede unilaterally if all the following requisites concur:

(1) Unilateral secession shall be the result of a democratic process within the minority nation with clear majorities and extensive, intense and reasonable deliberation.

(2) Agreed ways shall be sought under the obligation of principled negotiation.

(3) The claim for secession shall be consistent with liberal nationalism.

(4) Respect for human rights and protection of minority rights shall be guaranteed during the secession process, during the constituent process and once the powers of the new State have been constituted.

(5) The minority nation shall be concentrated in a specific territory located on the confines of the multinational State.

(6) As a result of secession, both the newborn State and the parent State shall become territorial units objectively capable of pro- viding sufficient public authority to exercise effective and inde- pendent sovereignty over their territory and to survive in a global context. The wealth of the parent State shall not be substantially altered. If the parent State has no duty to bear the costs and dam- ages caused by the secession, these shall be repaired, compensated for or subsidized by the new State. If reparation, compensation or subsidization is not possible, it may be fair to impede secession.

(7) As a result of secession, no serious damages shall be caused to third parties which have no reasonable duty to bear them. If the third parties have no duty to bear such damages to their legitimate interests, the damages shall be repaired or compensated for. If rep- aration or compensation is not possible, it may be fair to impede secession.

[36] BOSSACOMA, 33.

[37] BOSSACOMA, 38-47, 71-121.

[38] Bossacoma also attempts at defining liberal nationalism in order to grasp the complexity of such context (see BOSSACOMA, 39-40).

nationalism, Bossacoma revives the debate on liberal nationalism,[39] and how it is compatible with democracy.[40] In particular, the two principles are conditional to "prevent secession being used as a means to revoke liberal democracy".[41] In fact, Bossacoma argues how liberal democracies would be legitimately allowed to block the secession of illiberal nations and nationalisms. Moreover, as *Justice as multinational fairness* provides that only minority nations have a moral right to secede, the author distinguishes between national and ethnic minorities.[42] Though qualifying both groups as "cultural minorities", Bossacoma defines national minorities as those groups that "stems from previously self-governing peoples incorporated into a larger State who typically wish to maintain themselves as distinct societies".[43] Conversely, ethnic minorities are to be considered those individuals and their families who arrived in a State from other countries, as a consequence of migration and who typically wish to integrate into the society.[44] This should lead to another distinction, namely between two types of multicultural States: multinational and polyethnic States. However, it is possible to argue that other authors more often refer to a broader category of ethno-cultural minorities, encompassing national, cultural, ethnic, linguistic, religious differences.[45] Moreover, also the difference between multicultural States could be reframed, as federal scholars as Duchacek[46] and Stepan[47] used respectively the terms polyethnic and multinational to refer to States

[39] See for example the work of RAZ, MARGALIT; NORMAN; Y. TAMIR, *Liberal Nationalism*, Princeton: Princeton University Press, 1993; W. KYMLICKA, *Politics in the Vernacular*, Oxford, Oxford University Pres, 2001; J. COUTURE, K. NIELSEN, M. SEYMOUR (edited by), *Rethinking Nationalism*, Calgary, University of Calgary Press, 1998; K. NIELSEN, *Liberal Nationalism and Secession*, in M. MOORE (edited by), *National Self-Determination and Secession*, Oxford, Oxford University Press, 1998, 103-133; M. MOORE, *The Ethics of Nationalism*, Oxford, Oxford University Press, 2001.

[40] BOSSACOMA, 44-47.

[41] BOSSACOMA, 44.

[42] BOSSACOMA, 76-87.

[43] BOSSACOMA, 77.

[44] In is interesting to observe that such a distinction recalls the UN framework on ethno-cultural groups that Kymlicka discussed in relation to the difference between indigenous people and minorities. In fact, according to the UN, indigenous peoples are the one that should be entitled to accommodationist solutions, due to their stronger self-governing claims, while minorities should seek integration in the State. Kymlicka argues that such conception has proven inadequate to deal with ethno-cultural relations and dynamics around the world, and it is in particular unable to deal with the aspiration to autonomy by national minorities, which the Council of Europe defines as a broader category encompassing both indigenous peoples and minorities (see W. KYMLICKA, *The Internationalization of Minority Rights*, in S. CHOUDHRY (edited by), *Constitutional design for divided societies*, Oxford, Oxford University Press, 2008, 111-140).

[45] See for example the contributions in S. CHOUDHRY (edited by), *Constitutional design for divided societies*, Oxford, Oxford University Press, 2008.

[46] I. DUCHACEK, *Comparative Federalism: The Territorial Dimension of Politics*, Ann Arbor, University of Michigan Press, 1970, 276-309.

in which ethno-cultural differences become politically relevant for political mobilization, thus not identifying a substantial difference. Nevertheless, Bossacoma retains such distinctions and adds that ethnic minorities may eventually become national minorities, through the normative force acquired by the passage of time and the bond forged with the territory.

Another issue that is worth discussing is how Bossacoma proposes to solve the dilemma of the right to secession of better-off nations, namely through a system of secession taxation.[48] Before developing such a system, the author argues that in cases of the secession of rich nations, the requirements to exercise the right to secede are to be stricter, especially in terms of democratic deliberation. In fact, according to the author, "the richer the seceding nation is, the greater the need for compromise is and the less unilateral the exit should be".[49] The elements of negotiation and agreement are crucial to establishing the secession taxation system, which can take the form of a *secession fee* or a *secession tax*. The former refers to a final amount to be owed when secession is completed; the latter to the obligation for the seceding territory to pay a quota of its wealth indefinitely or for a long period of time, as a means of solidarity with the parent State.[50] These two forms differ in their respective objective, as the secession fee would cover for the investments made by the former parent State in the seceding territory, while the secession tax would compensate for the difference in relative wealth between the new State and the parent State. Bossacoma claims that the overall system of secession taxation could be included and reflected in the international agreements, thus regulating the allocation of assets and liabilities, and enshrining such compromise in a legal document. In such a way, classic objections such as excessive fragmentation and infinite secession would be resolved.

To conclude this section, it should be mentioned that Bossacoma's theory is based on a Rawlsian contractualism seeking a "realistic utopia".[51] This means that the articles and principles of the hypothetical multinational contract are imagined to be applied in "ideal contexts", namely liberal-democratic States. However, the author aims to develop a theory capable to adapt also to "non-ideal

[47] A. STEPAN, *Towards a New Comparative Politics of Federalism, Multinationalism, and Democracy: Beyond Rikerian Federalism*, in E. L. GIBSON, *Federalism and Democracy in Latin America*, Baltimore, Maryland, Johns Hopkins University Press, 2004, 29-84.
[48] Such proposal is inspired by BUCHANAN, 133. See BOSSACOMA, 115-120.
[49] BOSSACOMA, 115.
[50] BOSSACOMA, 116.
[51] BOSSACOMA, 15; RAWLS, *The Law of Peoples*.

contexts",[52] where national pluralism is not recognized or respected, and therefore democratic secession is not tolerated. According to *Justice as multinational fairness*, the more the parent State has perpetrated or is perpetrating an injustice against a seceding entity, the less strict secession requirement ought to be. In other words, the more unjust the treatment, the lower the requirements. Nonetheless, Bossacoma is aware that the concepts of legitimacy and justice are matters of degree, and that it could be problematic to justify secession solely on those grounds.[53] Moving to an opposite situation, where the seceding nation is manifestly illiberal compared to the parent State, then the right to secede ought to be translated with the right to internal self-determination. In this case, the liberal parent State would remain the guarantor of the excessive illiberalism of such subnational entities.

The normative goal of Bossacoma's book is clear from the beginning and it is strongly supported throughout the book. In particular, he strongly supports the juridification of the moral grounds at the heart of secessionist claims, as without such recognition normative reasons are trumped by *realpolitik* and effectiveness. Conversely, the author strongly believes that "the politics of facts should gradually be overcome in favor of the politics of norms".[54] According to Bossacoma, this is possible only by recovering the traditional role of the law, which, unlike morality, creates and institutionalizes mechanisms of protection, recognition, adjudication, and enforcement of norms. Namely for this reason, Bossacoma's book proceeds with the analysis of the *legality* of secession, starting from international law.

4. Secession under international law: the right to self-determination of peoples

The second part of the book, on international law, starts with the analysis of the principle of self-determination of peoples,[55] since international law provides neither an explicit right nor a

[52] BOSSACOMA, 120.
[53] BOSSACOMA, 121.
[54] BOSSACOMA, x.
[55] Mancini recalls the definition of self-determination in international law, as "the freedom for all peoples to decide their political, economic, and social regime" (see MANCINI, 487). Bossacoma frames the principle of self-determination as a concept, while the different senses it may assume as different conceptions of the same concept. For example, self-determination can be understood "as a principle ensuring democratic forms of government; as a principle against colonial rule; as a principle prohibiting invasion and occupation of other territories by foreign powers; as a principle

prohibition of secession, but has tolerated it under the principle of self-determination. The international emergence and development of such principle have its origin in the context of the World Wars, with two opposite views: Leninist and Wilsonian.[56] On the one hand, with the advent of the Bolshevik Revolution, Lenin supported the idea of a multinational federation, based on the recognition of the right to self-determination of nations. This included the right to secede, as nations had "an equal right to become nation-States",[57] and not recognizing such right was an oppression of nations and nationalism. However, it should be noted that, in the Leninist view, the socialist cause had priority over the right to self-determination, even though the latter contributed to the success of the former. Nevertheless, Bossacoma re-reads the Leninist view in the light of *Justice as multinational fairness*, as "plurinational federalism requires recognizing nations as free for democratic self-determination and, conversely, internationalism without either national recognition and the right to self-determination may turn into undesirable, hostile or even tyrannical cosmopolitanism".[58] On the other hand, according to Wilson, self-determination was a corollary to popular sovereignty, intended as the right of peoples to choose their government. This had two different translations: internally as self-government, externally as a criterion to govern territorial changes.[59] In the context of the First World War, the external dimension of self-determination was directed mainly at the division of the Ottoman and Austro-Hungarian Empires, as well as the settlement of colonial disputes (even though still to be reconciled with the interests of the colonial powers). At the end of World War I, the Wilsonian view prevailed in the Paris Peace Conference, and it was realized in the form of the protection of minorities under the supervision of the League of Nations. However, the newly established League system did not provide a minimum standard of protection for *all* European minorities, since "obligations were imposed only on newly independent States, and not on Allied and associated States",[60] thus giving rise to expansionist and irredentist nationalisms.

governing acquisition, transfers and loss of sovereignty over a territory; as a principle protecting free determination of the current sovereign States; as a principle recognizing free determination of certain groups within or between sovereign States" (see BOSSACOMA, 148). A classic reference point for the discussion of the principle of self-determination in international law and practice can be found in A. CASSESE, *Self-Determination of Peoples: A Legal Reappraisal*, Cambridge, Cambridge University Press, 1995.

[56] BOSSACOMA, 152-156. See also CASSESE, 11-36.; MANCINI, 488-491.

[57] BOSSACOMA, 152.

[58] BOSSACOMA, 153.

[59] BOSSACOMA, 154.

[60] MANCINI, 488.

At the end of the Second World War, even though the Yalta and Potsdam Agreements had to deal with significant re-adjustments of frontiers, the principle of self-determination did not play a determinant part. Nonetheless, it should be noted that, contrary to the Covenant of the League of Nations, self-determination was included in the 1945 Charter of the United Nations. Although, such inclusion must not be mistaken as an obligation on the Member States, since it was only recognized among the purposes of the UN. Internationally, the positions on self-determination were mainly three: the socialist countries; the developing and decolonizing countries; the Western countries.[61] First, the socialist States emphasized the external dimension of the right, as it allowed colonized peoples to become free sovereign States. Concerning the internal dimension, they considered that "the only basis for true self-determination of the people was a socialist government which could emancipate the proletariat".[62] Then, while supporting the socialist emphasis on the external dimension of self-determination, the second category of countries feared that it could give rise to secessionist claims from their ethnic and national minorities. Finally, the Western States underlined the internal dimension, as "an obligation on States to respect democracy and the fundamental rights of their citizens, irrespectively of their belonging to a national majority or minority",[63] and thus privileging a new universal and individualistic conception of human rights.[64] From their perspective, the external dimension of self-determination was against the interest of colonial countries, as France and the United Kingdom. However, even this last category opened to the right to self-determination of colonies, as a new global dynamic was approaching, namely the Cold War.

If in the period between 1947 and 1991, territorial changes were subjected to the assessment and accepted by "great powers", the end of the Cold War era brought about a dramatic change. In fact, the breakup of the socialist federations, i.e., USSR, Czechoslovakia, Yugoslavia, rapidly gave rise to the spread of ethnonationalism in Europe and around the world. In such a context, democracy emerged as a legal obligation of States to join the international community, putting minority rights,

[61] BOSSACOMA, 157-159.
[62] BOSSACOMA, 157.
[63] BOSSACOMA, 158.
[64] On this note, is should be reminded that the International Covenants on Civil and Political Rights (ICCPR) and on Economic, Social and Cultural Rights (ICESCR) of 1966 address the issue self-determination in their first article, providing that "all peoples have a right of self-determination". According to Cassese, these articles should be read in conjunction with art. 27 of the ICCPR (referring to ethnic, religious or linguistic minorities, but not to national minorities), so that the right of ethnic, religious or linguistic minorities would be ascribed to their member individually, without giving rise to collective rights to self-determination (see MANCINI, 489; BOSSACOMA, 158-159; CASSESE, 57-61).

secession, and self-determination again at a central stage in the international arena. In fact, post-1989 democratization was characterized by a strong ethnic component in the management of political dynamics, not always leading to peaceful settlements. The dissolution of Yugoslavia, in particular, posed the US and the European countries with the problem not only of recognition of new States but also of what model of constitutional design to adopt in countries ethnically heterogeneous, where majoritarian democracy would have led to the permanent exclusion of minorities from power, at the same time managing dramatic conflicts. Once again, as it happened after World War I, the "great powers" privileged internal self-determination and the protection of minorities rather than external self-determination, to preserve regional stability and to contain irredentism.[65]

Before moving to the analysis of Bossacoma's proposal of a "utopian type of secession to foster perpetual and just peace",[66] it is worth mentioning three types of secession allowed under customary international law, and the relevant UN declarations and statements made by the States. More specifically, Bossacoma recalls the *Declarations on the Granting of Independence to Colonial Countries and Peoples*[67] and the *Declaration on Principles of International Law*[68], and it should be noted that both declarations interpret the right to self-determination of peoples as complementing and respecting the principles of territorial integrity of States and non-intervention.[69] Accordingly, secession as a form of external self-determination is an exceptional option under international law, tolerated only in case of: colonization; foreign occupation and domination; oppression of minorities, or significant, systematic, and selective violence of human rights.[70] As observed by Bossacoma, the first two are more consolidated types of secession under international law, while the third is still in the process of consolidation. The alternative type of secession proposed by the author is in perfect line with his theory justifying secession, namely a "type of secession based on national self-determination with no need to prove any previous injustice".[71] First, from Bossacoma's perspective, the current rules regulating external self-determination encourage nations to contemplate violence

[65] MANCINI, 491-492.
[66] BOSSACOMA, 168-175.
[67] UN General Assembly Resolution 1514 [XV], 1960 (also known as the "Magna Carta of Decolonization").
[68] UN General Assembly Resolution 2625 [XXV], 1970.
[69] BOSSACOMA, 160.
[70] BOSSACOMA, 160-167.
[71] BOSSACOMA, 168.

or provoke a repressive reaction from the former parent State.[72] In fact, the lack of recognition of the right to secede by democratic and peaceful means creates the conditions to seek other methods to exercise the right to secede. Moreover, violence may be encouraged also by the doctrine of consummated facts to obtain statehood, sacrificing more legitimate and legal means. Finally, the author argues that sub-national peoples might seek unilateral declarations of independence to exercise the right to self-determination, later claiming it by law when the parent State represses the attempt at secession. Furthermore, the author reminds us that art. 1.2 of the UN Charter provides among the purposes of the organization the one "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace".[73] In this respect, Bossacoma especially underlines the concept of *universal peace*, thus emphasizing how self-determination is not depicted as a source of conflict, but on the contrary armed conflict may be a consequence of the violation of self-determination, implying that such violence would be avoidable by recognizing the right to self-determination.[74] The author also recalls the Kantian *perpetual peace*, to be reached by republican constitutions and leading to States less inclined to wage war,[75] as well as the Wilsonian *just peace*, founded on the respect self-determination and aimed at preventing further conflicts.[76] Nevertheless, although recognizing a primary right to secede to minority nations would seem the most rational option to promote peace, the author is aware that, in the international arena, this would be a non-realistic utopia, as the actors of the international society are the States, and among them, many are still illiberal or undemocratic. Therefore, in this respect, Bossacoma accepts the more realist right to external self-determination as a remedy for prior violation or failure of internal self-determination.[77] In particular, the author recalls some proposals in between remedial and primary theories, such as Bauböck's[78] and Costa's,[79] who defend a moral right to secede in the event of persistent violations

[72] BOSSACOMA, 173. See also M. KEATING, *Rethinking Sovereignty. Independence-Lite, Devolution-Max and National Accommodation*, in *Revista d'Estudis Autonòmics I Federals*, vol. 16, 2012, 9-28.

[73] Charter of the United Nations (1945) – Chapter I "Purposes and Principles", Article 1.2.

[74] BOSSACOMA, 174.

[75] See *Perpetual Peace*, in I. KANT, *Political Writings*, Cambridge, Cambridge University Press, 1991, 99-102.

[76] BOSSACOMA, 174.

[77] In particular, Bossacoma distinguishes between violations and failures of internal self-determination. A violation occurs in the event of the breaking or the absence of agreements recognizing internal self-determination, while a failure happens when the demands for internal self-determination are not satisfied or do not fit in with the project of the majority (see BOSSACOMA, 175-178).

[78] See BAUBÖCK, *Why Stay Together?*

of internal self-determination, taking the form of federal autonomy or power-sharing agreements among nations.[80]

To examine a case of violation of internal self-determination leading to secession, the rest of Part II is dedicated to a classic example of a unilateral declaration of independence that raised a series of issues in international law, namely the 2008 declaration of independence of Kosovo. First, Bossacoma defines the concept of unilateral declaration of independence (UDI) as "a public declaration by the representatives or rulers of the population of a specific territory that proclaims political and legal independence without consent of the parent State and without following the internal legal order in force".[81] Then, the book analyzes in particular the 2010 ICJ Advisory Opinion on Kosovo,[82] which confirmed that such declarations are not against international law. In fact, the Court seems to recognize that unilateral secession is compatible with international law under three requirements, i.e., it should be obtained through: peaceful means, democratic process, and in response to prior failures at negotiations and agreement.[83] In so doing, the ICJ relied on the traditional neutrality[84] of international law towards UDIs and was prudently silent about the right to secede as well as the legal implications of declarations of independence. However, some questions still remain unanswered after the Advisory Opinion on Kosovo. For example, it could be argued whether the particularities of the Kosovar case make it difficult to consider it a general precedent or to posit it as an analogy with other UDIs. In fact, Kosovo has been considered a unique case, due to the exceptional level of violence and human rights violations, leading to international intervention,

[79] See J. COSTA, *On Theories of Secession: Minorities, Majorities and the Multinational State*, in *Critical Review of International Social and Political Philosophy*, vol. 6, n. 2, 2003, 63-90.

[80] According to Bossacoma, these proposals would have at least three benefits: 1. They produce incentives by penalizing multinational States that do not recognize and accommodate multinationalism; 2. They balance the traditional protection of sovereign States under international law with a renewed protection of national minorities; 3. They have an interesting component of realism that could make them more attractive for international law and international practice (see BOSSACOMA, 177-180).

[81] BOSSACOMA, 181.

[82] International Court of Justice, Advisory Opinion 22 July 2010, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, available at https://www.icj-cij.org/public/files/case-related/141/141-20100722-ADV-01-00-EN.pdf.

[83] BOSSACOMA, 182.

[84] Years before the ICJ Advisory Opinion on Kosovo, the literature was more or less in line with what will emerge in the 2010 Opinion. In fact, prominent international law scholars as Lauterpacht, Cassese, Crawford, and Musgrave argued that international law neither authorized nor forbade secession, especially since it did not fall within the jurisdiction of international law, and that more generally the issue lied beyond the realm of law (see H. LAUTERPACHT, *Recognition of States in International Law*, in *Yale Law Journal*, vol. 53, n. 2, 1944, 392; T. D. MUSGRAVE, *Self-Determination and National Minorities*, Oxford, Oxford University Press, 1997, 211-237; CRAWFORD, 389-390; CASSESE, 340).

the fact that Kosovars had been deprived of previous internal self-determination,[85] and that the Serbian constitutional order did not longer apply effectively in Kosovo. Moreover, the Resolutions of the Security Council played an effective and overriding normative role on the territory of Kosovo. Nonetheless, it should be noted that the ICJ Opinion adopts a general approach, without resolving only the specific Kosovar case.[86] Another issue left open concerns the principle of non-use of force, and whether it limits the conduct of the parent State towards the supporters of the UDI.[87] The ICJ Opinion suggests an affirmative answer since it argues that such a principle applies within States. Yet, the issue of the use of force is problematic, as force is used both by the parent State and by the separatists, and the use of force is not illegal unless is disproportionate. Moreover, the claim and exercise of the monopoly of the use of force are one of the distinctive elements of what constitutes the State and a requirement for effectiveness.[88]

The principle of effectiveness and the doctrines of international recognition are discussed in the conclusion of Part II.[89] The former principle provides for the recognition of new States that can secure an effective and functioning government, exercising its functions, and able to join the international community.[90] In fact, according to art. 1 of the 1933 Montevideo Convention on the Rights and Duties of States, "the States as a person of international law should possess the following qualifications: i. A permanent population; ii. A defined territory; iii. Government; iv. Capacity to enter into relations with other States".[91] Such requirements recall the main elements of Kelsen's definition concerning the coming into existence of States as a subject of international law: permanent population ("a group of individuals"), a defined territory ("living on a definite territory"), a government ("under an effective and independent government").[92] To these, Kelsen adds the element of internal and external sovereignty ("a government is independent if it is not legally under the influence of the government of another state; and it is effective if it is able to

[85] Kosovo, along with Vojvodina, was an autonomous region within the Republic of Serbia, thus enjoyed a significant degree of autonomy from the central government.
[86] BOSSACOMA, 184.
[87] BOSSACOMA, 185.
[88] BOSSACOMA, 185-188.
[89] BOSSACOMA, 189-207.
[90] BOSSACOMA, 189.
[91] Art. 1 – Convention on the Rights and Duties of States, Montevideo, 1993, Registration n. 3802, available at https://treaties.un.org/doc/Publication/UNTS/LON/Volume%20165/v165.pdf (pp. 19-29).
[92] H. KELSEN, *Principles of International Law*, New York, Rinehart, 1952, 258-259.

obtain permanent obedience to the coercive order issued by it").[93] Along the same lines, Crawford later proposed other criteria as well: independence, sovereignty, permanence, willingness and ability to observe international law, a certain degree of civilization, legal order, international recognition.[94] Bossacoma observes how these are to be read more as principles than as rules, allowing for a more flexible and contextual interpretation.

After defining international recognition as "a legal and political institution to confirm, determine or clarify the birth and existence of new States within international law",[95] Bossacoma defends a conception of recognition that is not merely declarative,[96] but that has also constitutive effects,[97] to nuance the principle of effectiveness. In this way, the principle of effectiveness would allow recognition of new States even though they do not have reached full effectivity, while it would deny it in case of illegitimate factual realities.[98] Such a constitutive view defended by Bossacoma is in perfect tune with the overall normative aim of the author's research. In fact, it would add an idealist dimension to the creation of new States, whilst moving away from the doctrine of *faits accomplis*. A good example to support a constitutive conception of recognition is offered by the disintegration of the USSR and Yugoslavia in the early 1990s. As mentioned in the previous sections of this paper, the two had distinct outcomes, as the Russian Federation was immediately recognized as the continuator State of the former Soviet Union, while the Federal Republic of Yugoslavia[99] was not generally recognized as the continuator State of former Yugoslavia. In fact, the dissolution of the SFRY[100] happened under the supervision of the European Community, within the framework of the Conference on Yugoslavia established in the August of 1991. To guide the process, the Conference established the so-called Badinter Commission, an *ad hoc* arbitration body that provided a series of advisory opinions on general issues concerning the process of dissolution and on specific issues relevant to each seceding territory, deepening the juridification of State recognition.[101] The work of

[93] KELSEN, 258-259.
[94] To a more detailed analysis, see CRAWFORD, 45-95.
[95] BOSSACOMA, 191.
[96] The declarative conception of international recognition considers it as a mere act of confirmation that emerging States fulfil the requirements of the principle of effectiveness.
[97] On the other hand, the constitutive view allows dialogue between international recognition and the principle of effectiveness.
[98] See BOSSACOMA, 191-197.
[99] The Federal Republic of Yugoslavia emerged after the first secession referenda of Slovenia and Croatia, and it was formed by the currently independent States of Serbia, Montenegro and Kosovo.
[100] Socialist Federal Republic of Yugoslavia.
[101] BOSSACOMA, 198.

the Badinter Commission was especially relevant in the case of Bosnia-Herzegovina, as it ruled that the independence referendum had to be duly supervised for the new State to be internationally recognized.[102] Moreover, the Commission was prudently careful not to broaden the issue to self-determination, thus treating the disintegration of Yugoslavia as a process of dissolution of a Federation,[103] and avoiding the risk to widen the international right and principle of self-determination of peoples by creating a precedent for other secession claims.[104] However, one should bear in mind that the Yugoslav federal government did not initiate the process of dissolution of the Federation. On the contrary, Slovenia and Croatia used secessionist terms, arguments, and strategies to declare their independence and sovereignty. This led to a ripple effect on the other Republics, fearing the political effects of the overwhelming dominance of the Serb majority.[105] To summarize these last aspects and to conclude Part II on international law, Bossacoma recalls once again *Justice as multinational fairness*, stressing that these principles "ought to guide recognition of these emerging States, even if they do not fully comply with the traditional elements of the principle of effectiveness".[106]

5. Constitutionalizing secession: constitutional reforms, referendum, and the principle of democracy

The last piece of the puzzle, namely Part III on constitutional law, starts by underlining the absence of constitutional recognition of any right to secede in contemporary constitutions, as also reported by the Venice Commission in one of its reference documents.[107] However, Bossacoma recalls historical and current examples of constitutions that grant or have granted a right to secede

[102] As a consequence, after the positive results of the referendum on 29 February 1992, the members of the European Community recognized the new independent State of Bosnia and Herzegovina on 6 April 1992.

[103] Opinion n. 1 of the Badinter Commission. See also A. PELLET, *The Opinions of the Badinter Arbitration Committee A Second Breath for the Self-Determination of Peoples*, in *European Journal of International Law*, vol. 3, n. 1, 1992, 178-185.

[104] See also CRAWFORD, 391.

[105] For such reason, Bossacoma defines it a "disintegration as a result of a series of cascading secession processes" (see BOSSACOMA, 200).

[106] BOSSACOMA, 205.

[107] Venice Commission, CDL-INF(2000)2, *Report on Self-Determination and Secession*, January 2000.

or to external self-determination,[108] though defining them as an exception to the general rule. The author then recalls three significant cases: the Quebec Secession Reference of the Supreme Court of Canada,[109] the agreement between the British and the Scottish government on an independence referendum,[110] and the constitutional recognition of the right to secede of Montenegro and its exercise through a referendum.[111] According to Bossacoma, these examples provide an inspiration for a constitutionalization of secession based on clarity, negotiation, and compromise, as it will become more evident in the next few pages.

Coming to the objections against the constitutionalization of secession, it is possible to identify three main arguments. The first objection posits that constitutionalizing secession might lead to a strategic use of such a right. In fact, according to Mancini, "the absence of a secession clause does not necessarily prevent stronger subunits from achieving an excessively strong bargaining position, through the strategic use of the secessionist threat, simply because everyone is aware that secession can (and in most cases actually does) occur regardless of its legal legitimacy".[112] Moreover, if such absence could encourage the use of violence, the presence of procedural conditions might actually foster cooperation and compromise among subunits. In this way, as also pointed out by Weinstock, a constitutional secession clause would force secessionist groups to make "a cold and lucid cost/benefit analysis".[113] Secessionists would have to weigh *leaving* versus *remaining*, to recall an expression we have come to know quite well in recent times. A second objection comes from Horowitz, who claims that the constitutionalization of secession might not provide a stable solution to ethnic conflict. In fact, it could actually worsen the situation of subnational minorities, creating a situation where "trapped minorities" in non-homogeneous territories are excluded from power, thus risking becoming "second-class" citizens.[114] The last and most challenging objection is that

[108] For a more in-depth analysis of such examples, see BOSSACOMA, 212-217, and MANCINI, 494-496.

[109] See BOSSACOMA, 242-244. For an interesting study on the Secession Reference, see G. MARTINICO, G. DELLEDONNE (edited by), *The Canadian Contribution to a Comparative Law of Secession*, Cham, Palgrave Macmillan, 2019. In particular, the chapter by Francesco Palermo examines the influence of the Secession Reference on a comparative constitutional law of secession (see F. PALERMO, *Towards a Comparative Constitutional Law of Secession?*, in MARTINICO, DELLEDONNE (edited by), 265-282).

[110] BOSSACOMA, 240-242.

[111] BOSSACOMA, 299-302.

[112] MANCINI, 495.

[113] D. WEINSTOCK, *Towards a Proceduralist Theory of Secession*, in *Canadian Journal of Law and Jurisprudence*, vol. 13, 2000, 262. For Weinstock's requirements to constitutionalize secession, see also D. WEINSTOCK, *Constitutionalizing the Right to Secede*, in *The Journal of Political Philosophy*, vol. 9, n. 2, 2001, 186-203.

[114] D. HOROWITZ, *The Cracked Foundations of the Right to Secede*, in *Journal of Democracy*, vol. 14, n. 2, 2003, 6.

"secession is incompatible with the very nature of the constitution".[115] In fact, the constitutionalization of secession suggests the idea that subnational units possess a form of sovereignty, something that is not compatible with the monopoly of internal sovereignty at the conceptual foundation of the State. In this regard, two opposite views come to mind. The first is the one expressed in *Texas v. White* (1869)[116] by the US Supreme Court. On that occasion, the Court insisted that the Constitution was ordained to form a more perfect Union, conveying an idea of an indissoluble unity and thus rejecting the legitimacy of any claim of a right to withdraw from the Union. On the contrary, as already mentioned, in 1998 the Supreme Court of Canada adopted a radically different approach in the Secession Reference, by stating that "the Constitution is not a straitjacket".[117] If the Canadian Supreme Court did not legitimize a unilateral and unconditional secession on the part of Quebec, the Court did recognize the legitimacy of a negotiated secession, through "a clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada."[118] A similar consent would result in the obligation of all parties to negotiate secession, to be conducted on the basis of the principles at the core of the Canadian constitution, including "federalism, democracy, constitutionalism and the rule of law, and the respect of minorities."[119]

From a more theoretical perspective, Bossacoma defends the constitutionalization of secession as a particular type of constitutional reform, hence preventing unilateral secession and promoting consensual secession, and offering a more rational and just public choice than submitting secession to negotiation under no abstract constitutional provision. Also, Bossacoma argues that, in this way, the principle of democracy and the principle of constitutionalism are made compatible with one another, as the constitutional values of liberty, democracy, and national pluralism would be the driving force for the creation and interpretation of a constitutional right to secede as a mechanism of constitutional reforms.[120] Furthermore, a constitutional secession clause would enshrine the principles of the hypothetical multinational contract on which Bossacoma's theory *Justice as multinational fairness* is founded, and in particular on the principles of democracy, agreement and negotiation, respect for human rights and protection of minorities, territoriality, viability and

[115] MANCINI, 496.
[116] US Supreme Court, *Texas v. White* 74 US 700 (1869).
[117] Supreme Court of Canada, *Reference re Secession of Quebec* [1998], 2 S.C.R. 217, para. 150.
[118] *Reference re Secession of Quebec* [1998], 2 S.C.R. 217, para. 151.
[119] *Reference re Secession of Quebec* [1998], 2 S.C.R. 217, para. 148.
[120] BOSSACOMA, 120-121.

compensation, and avoiding serious damage to third parties.[121] Bossacoma also discusses the nexus between constitutionalism, federalism, and secession, arguing that they do not necessarily constitute an oxymoron, rather a compromise and balance to be achieved. According to Bossacoma, constitutionalizing a right to secede would make the advantages of multinational federalism even greater in terms of accommodation of national pluralism, cooperation and compromise between majority and minorities, and integration and stability.[122] Therefore, in the context of an ideal multinational federation, the fairer the treatment of minorities is, the stricter the requirements for secession should be.[123] In particular, it is recalled how liberal democracies have often used federalism or decentralization to calm secession claims and to avoid recognizing the right to secede.[124] Nevertheless, the never-ending debate on the viability of federalism in multinational States to avoid secession[125] is far from finding a definitive answer.[126]

If the right to secede ought to be constitutionalized, there are several institutional issues related to the principle of democracy still to be addressed, namely, how should the democratic demands for secession be expressed, either via representatives[127] or referendum.[128] As Bossacoma points out, "without the boost and endorsement from their representatives, the people's will expressed in a referendum would be insufficient".[129] In fact, the principle of democratic representation is one of the pillars of liberal democracies, and, as such, it is crucial to include the plurality and complexity of contemporary societies. Moreover, representatives are the actors on the frontline, negotiating the process and the terms of secession. Therefore, especially when it comes to something as meaningful as the creation of a new State, popular sovereignty should be exercised not only through direct

[121] BOSSACOMA, 221.
[122] BOSSACOMA, 224, 256-258.
[123] BOSSACOMA, 259-261.
[124] BOSSACOMA, 9-12.
[125] See, for example, R. BAUBÖCK, *Multinational federalism: territorial or cultural autonomy?* in *IWE Working Paper Series* n. 15, 2001; S. CHOUDHRY, N. HUME, *Federalism, devolution and secession: from classical to post-conflict federalism*, in T. GINSBURG, R. DIXON (edited by), *Comparative constitutional law*, Cheltenham e Northampton, Edward Elgar, 2011, 356-386; W. KYMLICKA, *Federalism and secession: at home and abroad*, in *Canadian Journal of Law and Jurisprudence*, vol. 13, n. 2, 2000, 207-224. W. KYMLICKA, *Is federalism a viable alternative to secession?*, in P. B. LEHNING (edited by), *Theories of secession*, London and New York, Routledge, 2005, 109-148. On the viability of federalism for divided societies, see also the contributions of Arend Lijphart and Donald Horowitz in A. REYNOLDS, *The Architecture of Democracy*, Oxford, Oxford University Press, 2002, 15-54.
[126] F. PALERMO, K. KÖSSLER, *Comparative Federalism. Constitutional Arrangements and Case Law*, Portland, Hart Publishing, 2017, 100.
[127] BOSSACOMA, 263-276.
[128] BOSSACOMA, 277-316.
[129] BOSSACOMA, 263.

participation of the citizens but also through the institutional means of representative democracy. As regards the referendum on secession, Bossacoma focuses his attention on two issues: the clarity of the question, and the "clear majority" to be achieved, and how to define them. These were all issues that were fiercely discussed in the aftermath of the Brexit referendum,[130] questioning whether the question had a clear wording or not and whether the turnout was adequate to trigger such a dramatic outcome.[131] Once again, the normative lenses of the analysis affect the proposed objectives in the wording of the referendum question: intelligibility, conciseness, simplicity, vernacularity, straightforwardness, neutrality, and legal correctness.[132] In particular, Bossacoma observes how the relationship between these requirements appears to be dialectical, more specifically between clarity, conciseness and straightforwardness, and the technical or legal correctness and the sophistication of the question; between clarity and the radicalism of the question; and between clarity and agreements concerning the question.[133] The author recalls a few examples, starting from the Quebec Secession Reference. The Canadian Constitutional Court stated that the Quebecers should express their will in reply to a "clear question",[134] implicitly objecting to the questions in the past two sovereignty referenda, either being too long and complex or unclear and vague. Following the Secession Reference, in 2000 the Parliament of Canada passed the Clarity Act, giving effect to the requirement of clarity. Under such Act, the clarity of the question is to be defined politically by the federal Parliament. In case the Parliament rejects the question for lack of clarity, the Act provides that no negotiations will follow. However, at times clarity has been confused with radicalism of the question, and some have argued that this could be a matter of political expedience.[135] In fact, statistically, the more radical (and clearer) the question on secession was, the less support it gained from Quebecers. Conversely, the vaguer the question, the more popular support it obtained, though not meeting the clarity requirement. Another related example is

[130] On this issue, see N. SKOUTARIS, *On Brexit and Secession(s)*, in C. CLOSA, C. MARGIOTTA, G. MARTINICO (edited by), *Between Democracy and Law: The Amorality of Secession*, London and New York, Routledge, 2019, 195-212.

[131] See R. DUNIN-WASOWICZ, *The Brexit Referendum Question Was Flawed in its Design*, in *LSE Brexit Blog*, 2017; S.B. HOBOLT, J. TILLEY, T.J. LEEPER, *Policy Preferences and Policy Legitimacy After Referendums: Evidence from the Brexit Negotiations*, in *Political Behavior*, 2020.

[132] BOSSACOMA, 281.

[133] BOSSACOMA, 282.

[134] *Reference re Secession of Quebec* [1998], 2 S.C.R. 217, para. 148.

[135] See S. TIERNEY, *Constitutional Referendums. The Theory and Practice of Republican Deliberation*. Oxford, Oxford University Press, 2012, 143.

the UK debate on the independence of Scotland. Being aware of this issue, the Scottish government devised a strategy for a consultation built around a "light independence and a full devolution",[136] while the British government supported a single and straightforward question on secession. In 2012, both governments agreed that Westminster would transfer the legislative powers to Holyrood, provided that it formulated a single question within two years.[137] According to the same agreement, the question would focus on independence, and it would be simple and direct. Lastly, Bossacoma recalls the referendum question on the independence of Montenegro: "Do you want the Republic of Montenegro to be an independent state with full international and legal personality?", as set by the Law on the Referendum on the Legal Status of the Republic of Montenegro. The question was submitted also to the Venice Commission and to the OSCE Referendum Observation Mission, which concluded that it was a clear question, as it was not vague, obscure, or misleading, and that it allowed the voters to express their will without any ambiguity.

As for the clarity of the majority,[138] the problems involve the turn-out, on the one hand, and the approval quorum, on the other. On both issues, there still is no clear consensus. Some scholars,[139] as Bossacoma, propose a simple majority in a referendum, as the most coherent rule in a referendum of consultative nature. However, there are many arguments in favor of a qualified majority,[140] to support the will of a likely irreversible decision.[141] In his theory, Bossacoma merges these two views by defending a procedure according to which a simple majority in a referendum should be followed by a qualified majority of the representatives in the democratic institutions.[142] Bossacoma discusses other two alternative proposals. The first would require a qualified majority in the first referendum and, if only a simple majority is obtained, then require simple majorities in successive referenda at separate times. However, this solution would ignore the role played by democratic representatives, and it would be more costly and less pragmatic to arrange.[143] The third proposal is

[136] BOSSACOMA, 284.
[137] *Agreement Between the United Kingdom Government and the Scottish Government on a Referendum on Independence for Scotland*, 15 October 2012.
[138] See S. BEAULAC, *Sovereignty Referendums: A Question of Majority?: or How "Majority" Actually Begs Numerous Questions*, in C. CLOSA, C. MARGIOTTA, G. MARTINICO (edited by), *Between Democracy and Law: the Amorality of Secession*, London and New York, Routledge, 2019, 105-132.
[139] See P.J. MONAHAN, M.J. BRYANT, *Coming to Terms with Plan B: Ten Principles Governing Secession*, in *Howe Institute Commentary*, n. 83, 1996, 19, 29-30.
[140] NORMAN, 202.
[141] RAZ, MARGALIT, 458.
[142] BOSSACOMA, 304-305.
[143] BOSSACOMA, 305.

imagined to be alternative or complementary to the other two, which would make the approval quorum conditional on the turnout.[144]

The last two topics discussed in Part III are consensual and unilateral secession. Starting from the former type of secession, Bossacoma recalls few examples of significantly peaceful separations in non-colonial contexts, as the independence of Norway from Sweden in 1905 and the secession from Iceland from Denmark in 1918. However, the most interesting case to briefly mention is the secession of Montenegro from the Union of Serbia and Montenegro in 2006. In fact, art. 60 of the 2003 Constitution provided a right to unilaterally withdraw from the Union for Member States (but not for autonomous regions as Kosovo), upon the expiry of a three-year period.[145] Moreover, art. 60 set out a procedure for secession, to be strictly followed under international supervision. Consequently, when in 2006 Montenegro exercised the right to secede from the Union, the process took place under the European intervention and observation, with the involvement of the EU, the Venice Commission, and OSCE, so that the referendum would be based on internationally recognized democratic standards.[146] Therefore, the secession of Montenegro, after the dramatic experience of the dissolution of former Yugoslavia, happened peacefully and consensually.

Lastly, moving to unilateral secession, Bossacoma develops a constitutional theory on unilateral secession based on the awakening of a new constituent people, especially for cases where there is no recognition of the right to secede in the existing constitutional order or where such perspective is an illusion.[147] Specifically, such a theory maintains that it is possible for unilateral solutions to "legitimately overcome the constitutional barriers and raise the seceding nation as a constituent

[144] BOSSACOMA, 306.

[145] Constitutional Charter of the State Union of Serbia and Montenegro – Art. 60: "*Upon the expiry of a 3-year period, member states shall have the right to initiate the proceedings for the change in its state status or for breaking away from the state union of Serbia and Montenegro.*

The decision on breaking away from the state union of Serbia and Montenegro shall be taken following a referendum.

The law on referendum shall be passed by a member state bearing in mind the internationally recognized democratic standards.

Should Montenegro break away from the state union of Serbia and Montenegro, the international instruments pertaining to the Federal Republic of Yugoslavia, particularly UN SC Resolution 1244, would concern and ap- ply in their entirety to Serbia as the successor.

A member state that implements this right shall not inherit the right to international personality and all disputable issues shall be separately regulated between the successor state and the newly independent state.

Should both member states vote for a change in their respective state status or for independence in a referendum procedure, all disputable issues shall be regulated in a succession procedure just as was the case with the former Socialist Federal Republic of Yugoslavia."

[146] BOSSACOMA, 323; MANCINI, 492.

[147] BOSSACOMA, 347-354.

people" [148] only after having sought negotiated and constitutional paths, supported by extensive popular mobilization. Then, Bossacoma reflects upon the emergence of a new legal order, under the Kelsenian and Hartian views.[149] In fact, according to the author, a unilateral declaration of independence can be understood as a "democratic norm that, though not derived from any previous internal constitutional norm, identifies and seeks to give validity to the birth of a new legal-logical constitution".[150] A similar line of argument may be derived from Hartian theory, as a UDI would not forget that changing the rule of recognition is not only a legal issue but also an actual practice of the courts, officials, and private persons.[151] Nevertheless, unilateral secession is developed beyond theory as well,[152] with the analysis of some practical issues, by identifying two main strategies for a UDI to seek independence. The first strategy[153] would aim at directly gaining effective control over the territory and population, while the second[154] would aim at initiating the process of international recognition. Regardless of what road is taken, Bossacoma concludes underlining that, in liberal democracies, unilateral secession needs a clear and persistent majority of citizens in favor of secession, who have spoken out democratically such will.[155]

6. Conclusive remarks: secession is all around us

The literature has long debated whether it is possible to come to a "theory of secession",[156] in an understandable effort to systematize such a complex and multifaceted issue. From the American Civil War in the 1860s to the dissolution of the multinational federations in the 1990s, secession

[148] BOSSACOMA, 348.
[149] In particular, Bossacoma recalls Kelsen's distinction between a legal-logical sense of the constitution and a legal-positive sense, as well as the concept of rule of recognition coined by Hart (see H. KELSEN, *General Theory of Law and State*, Cambridge, Harvard University Press, 1949, 110-122; H.L.A HART, *The Concept of Law*, Oxford, Oxford University Press, 2012, pp.100-123).
[150] BOSSACOMA, 355.
[151] BOSSACOMA, 355.
[152] BOSSACOMA, 357-365.
[153] BOSSACOMA, 360-362.
[154] BOSSACOMA, 363-364.
[155][155] BOSSACOMA, 364.
[156] See, for example, R. BAUBÖCK, *A multilevel theory of democratic secession*, in *Ethnopolitics*, vol. 18, n. 3, 2019, 227-246; M. KEATING, *Is a theory of self-determination possible?* in *Ethnopolitics*, vol. 18, n. 3, 2019, 315-323; P. B. LEHNING (edited by), *Theories of secession*, London and New York, Routledge, 2005; S. MANCINI, *Rethinking the boundaries of democratic secession: liberalism, nationalism, and the rights of minorities to self-determination*, in *International Journal of Constitutional Law*, vol. 6, n. 3-4, 2008, 553-584.

permeates the world's history and current affairs. In Europe, the "potential" secession of Republika Srpska,[157] the Serb entity in Bosnia and Herzegovina, represents one of the key issues in the European integration process. The same, and even more problematically, applies to the still pending recognition of Kosovo, a recent example of "completed" secession. And again, Scotland and Northern Ireland in the United Kingdom, Catalonia and the Basque Country in Spain, the Flanders in Belgium, are all examples of secessionist claims that influence domestic as well as European politics. Beyond Europe, let us think, for example, about the current situation in the People's Republic of China, dealing with Tibet, Xinjiang, and of course Taiwan. These three areas are more or less equally tangible threats to the territorial integrity[158] of the State, as well as they are of crucial importance for the regime, that includes separatist movements among the so-called Three Evils.[159] Furthermore, another example not to be forgotten is India, where secession led to the creation of Pakistan and Bangladesh.[160] The list could go on, moving to every angle of the globe.

The book of Bossacoma, even though proposing a "realistic utopia", is effective in reminding the readers that secession, and the underlying issues, are all around us and demand the attention of scholars and policymakers. In such a context, as emphasized by Mancini, constitutional law plays a fundamental role, setting democratic rules (the *legality*) to channel a process often loaded with emotions and moral arguments (the *morality*).[161]

[157] J. KER-LINDSAY, *The Hollow Threat of Secession in Bosnia and Herzegovina: Legal and Political Impediments to a Unilateral Declaration of Independence by Republika Srpska*, London, LSEE – Research on South Eastern Europe, 2016.

[158] See J. BUSHI, *Constitutional Asymmetry in the People's Republic of China: Struggles for Autonomy Under a Communist Party-State. A Country Study of Constitutional Asymmetry in China*, in P. POPELIER and M. SAHADZIĆ (edited by), *Constitutional Asymmetry in Multinational Federations*, Cham, Palgrave Macmillan, 2019, 105-136; Y. ZHU, D. BLACHFORD, *China's fate as a multinational state: A preliminary assessment*, in *Journal of Contemporary China*, vol. 15, n. 47, 2006, 329-348.

[159] According to the Chinese leadership, the so-called "Three evils" are terrorism, religious extremism, and separatism. See also E. LI, *Fighting the "Three Evils": A Structural Analysis of Counter-Terrorism Legal Architecture in China*, in *Emory International Law Review*, vol. 33, n. 3, 2019, 311-365.

[160] See R. SISSON, L. ROSE, *War and Secession: Pakistan, India, and the Creation of Bangladesh*, Berkeley, California University Press, 1991; K. JACQUES, S. GANGULY, *Bangladesh, India & Pakistan: International Relations & Regional Tensions in South Asia*, in *The International History Review*, vol. 23, n. 1, 2001, 232-233.

[161] MANCINI, 499-500.