Obstacles and passages to secession in liberal-democratic contexts.
Lessons from Catalonia

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1. Introduction

This paper aims to show that secession, especially if unilateral, is difficult in contexts of liberal democracy. The empirical difficulties may, however, ease the normative recognition of a right to secede. After some general remarks, obstacles to consensual secession will be distinguished from those of unilateral secession, emphasizing the harshness of the latter. Three passages will be analyzed to overcome these obstacles, namely domestication, perseverance and drama. Although a combination of all three strategies is expected in the world of facts, domestication and perseverance should trump drama in the normative realm of liberal democracy. The passage of drama ought to be anomalous in contemporary democracies. The strategy of drama can backfire.

2. Secession is difficult in liberal democracies

One year after the 1995 Quebec sovereignty referendum, Stéphane Dion published a theory on the dynamics of secession which gave empirical reasons to explain why secession is difficult in well-established democracies. Although it could be thought to be part of an anti-secession discourse, such predictive theory actually eases the moral and legal recognition of a right to secede. Let us see why. If secession is difficult in liberal-democratic contexts, some conventional objections to the right to secede lose

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1 I owe a debt of gratitude to Alain-G. Gagnon, Victor Ferreres, Jeremy Buck and the Political Theory Research Group.
2 DION, S. “Why is Secession Difficult in Well-Established Democracies? Lessons from Quebec”.
much of their potential (objections such as those claiming that recognizing a right to secede would lead to the creation of numerous new States, excessive disintegration, anarchy and chaos). This is especially so if advanced democracies (in Sorens’s terms) or well-functioning nations (in Sunstein’s terms) “will not face serious secession threats”.

Let us now remind Dion’s empirical account of secession. His model explains whether secession in well-established democracies is expected to have majority democratic support, depending on the interaction between fear of the parent State and the confidence of the secessionist group in the viability of its project. According to this model, it is hard for secessionism to become a majority, since two phenomena would be necessary at the same time: the pro-secession group should both fear the parent State and trust its own project. The fear-confidence dynamic frequently takes opposite directions: “When one is high, the other tends to be low”. As regards the economic sphere, if the secessionist group dominates or is a strong force in the economy of the parent State, it might believe in its chances as an independent State, but would lack sufficient fear of the parent State to act as an incentive for secession. Conversely, if the pro-secession group has been economically dominated and suffered grievances, this can act as an incentive for fear of the parent State but generally also as a disincentive for its trust in its own capacity as an independent State. As a result, the richest sub-State units would not have sufficient fear of the State and the poorest would not have enough confidence in their projects. Regarding the political sphere, a secessionist group that enjoys significant degree of decentralization would probably not fear the parent State enough to take the path of secession. Vice versa, a pro-secession group that does neither have nor exercise self-rule would hardly have sufficient confidence in its own capacity to manage an independent State properly.

It could be added to Dion’s arguments that the transitional costs of a seceding nation or territory with no self-government are far higher than those of a nation or territory that does enjoy some sort of decentralization. The expectations created by the relationship between the secessionist group and the parent State are important as well. If the pro-secession group fears the parent State rolling back or cutting down the degree of

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3 See BUCHANAN, A. Secession. BOSSACOMA, P. Justícia i legalitat de la secessió.
political decentralization and self-government to such an extent as to endanger its national identity and differential traits, even if the current political decentralization is considerable, the secessionists might fear the parent State. The belief in whether the parent State has satisfied the expectations of self-government is also relevant. Indeed, expectations are relevant on both fear and confidence dimensions and on both political and economic spheres.

Let us try to apply Dion’s model with the complement proposed to the cases of Catalonia and the Basque Country. In those minority nations, the political fear engendered by Spain is significant. This fear is nourished by historical precedents which were not democratic and not tolerant of national pluralism, by Catalans and Basques feeling insufficiently respected, recognized and represented by the central institutions, by the process of homogenization of nationalities and regions within Spain, by the cuts and rejections of the reforms and proposals of reform of their respective statutes of autonomy, etcetera. Catalonia fears Spain economically, as there is a broad and growing consensus that the fiscal deficit is excessive and unfair. Conversely, the Basque Country has no such fear, since it enjoys privileged treatment supported by a constitutional clause. Catalonia’s confidence in its political and economic project seems high but heavily dependent on expectations to maintain or soon recover the rights and liberties of the European integration. This explains Spain’s strategy of putting the emphasis on placing an independent Catalonia outside the EU.6

A proper analysis of the obstacles to secede needs, however, to distinguish consensual from unilateral secessions. This is not to say that only the latter type of secession has significant costs for the many parties. Both consensual and unilateral secessions may have high costs for the secessionists, the regional Government and the central Government. Before turning to distinction between the obstacles of consensual and unilateral secessions, it is wise to warn that secession processes are not always purely consensual or unilateral. In fact, many secession processes that start unilaterally may finish with some sort of agreement with the parent State. Both unilateral referendums and declarations of independence can be part of a bigger strategy to seek consensual secession or constitutional change. Proceeding unilaterally can be a risky strategy for it can alienate rather than foster agreement. In addition, proceeding unilaterally without

6 See BOSSACOMA, P. Secesión e integración, § 8.
clear and persistent majorities can advance a defeat because the confidence in the secession project and the trust in the secession leadership can be damaged. Nations tend to nurture from victories and to have limited resistance to defeat. Although minority nations have proved to be historically resilient, perhaps even more than States, they are far from indestructible. They disappear as soon as their members do not identify themselves with the nation anymore.

3. Obstacles to consensual secession

Two relevant types of obstacles will be analyzed in this section. The first type is related to the rule of law. The second is related to time. Whereas the first is more legally based, the second is more politically focused, since time is particularly relevant in today’s politics. Having said that, in high constitutional matters such as secession, law and politics tend to meet and merge.

The rule of law. There are different types of legal obstacles to secession. These types can be ordered along a sort of continuum based on a gradation of legal barriers:

1) Unity, indissolubility or territorial integrity may be entrenched as eternity clauses in the Constitution. This is the case, for instance, of the Constitutions of Romania and Portugal. Article 152 of the Romanian Constitution establishes an eternity clause to protect, the national, independent, unitary and indivisible character of the Romanian State, among other issues. Article 288 of the Portuguese Constitution includes a long list of principles that any constitutional reform must respect such as the national independence and unity of the State. Interestingly, though, this provision has been amended before.

2) Even if unity, indissolubility or territorial integrity are not expressly entrenched as eternity clauses in the Constitution, legal or political actors may understand secession as an implicit limit to constitutional amendment. The Constitutional Court of Italy (Judgement 118 of 2015) seems to understand that there is an implicit eternity clause to protect the unity of Italy. “The unity of the Republic is
such an essential element of the constitutional order it ought to be even subtracted from the power of constitutional reform”, ruled the Court.

3) Secession may need a constitutional amendment, specific legislation or any other legal requirement difficult to reach. In the seminal case Texas v. White, the US Supreme Court ruled as follows: “The Constitution, in all its provisions, looks to an indestructible Union composed of indestructible States. (...) The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration or revocation, except through revolution or through consent of the States.”

4) Referendum on secession or other mechanism to express the democratic will to secede may require a previous constitutional amendment, specific legislation or any other legal obligation difficult to fulfil. Although the Constitutional Court of Spain considers that there are no material limits to constitutional reform, it rules that both secession and a referendum on secession need a previous reform of the Constitution following the rigid amending procedure (Judgements from 103/2008 to 114/2017). In respect to a referendum of independence, the Spanish Executive insists that it neither wants it nor can allow it.7

5) Even if referendum on secession or other mechanisms to express the democratic will to secede are constitutional, difficult requirements might be established by legislation and political decisions. This could be the case of Quebec if the Federal Parliament abused its powers under the Clarity Act. The Canadian Parliament may, for example, deny the clarity of questions on secession, require overwhelming majorities, or circumvent negotiations on secession after a clear majority of Quebecers answers a clear question on secession.

6) The Constitution may enshrine a qualified constitutional right to secede. Article 113 of the federal Constitution of Saint Kitts and Nevis provides a right to secede of the Island of Nevis, which requires approval by two-thirds of its representatives followed by further approval by two-thirds of the citizens of

Nevis voting in a referendum. In addition, a new draft Constitution of Nevis shall be submitted to its citizens before the referendum is held. Constitutionally, no specific role is reserved for the Federal Parliament. In 1998, 61.7% of the electorate of the Island of Nevis voted in favour of secession, short of the two-thirds majority required.

7) Even when the Constitution enshrines a constitutional right to secede, difficult requirements might be established by legislation and political decisions. For instance, although Soviet constitutions recognized the right to secede of some units of the federation, 1990 Soviet legislation on secession developed the constitutional right with very hard-reaching requirements. Among other conditions, a qualified majority of two-thirds of the population permanently residing in the seceding territory and possessing the right to vote according to USSR legislation was needed in the first referendum of independence (Article 6). What is more, during the fifth year of a transitional period, a second referendum with the same qualified approval quorum was mandatory if required by one-tenth of the permanent residents (Article 19). Interestingly, most Soviet republics did not follow that legislation, although being in force at the time.

The legal costs for the State can be of two main sorts. If the State allows a too easy way out, this can have the costs of setting a precedent in favour of low requisites to secede.

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8 A list of constitutional provisions on secession may be found in BOSSACOMA, P. Justicia i legalitat de la secessió, § 3.1.1. Be aware, however, that some of these constitutional clauses were nominal recognitions with no real force and without effective mechanism of enforcement.


10 CASSESE, A. Self-Determination of Peoples, pp. 264-6: “It should be added that the law hastily adopted in 1990, providing for the holding of a referendum by the Soviet republics, clearly failed to meet international standards on self-determination. (…) one may wonder very much whether it ultimately constituted a true application of self-determination or was rather intended to pose a set of insurmountable hurdles to the implementation of the principle. It is apparent from its text that the law made it extremely difficult for the republics successfully to negotiate the entire secession process. Admittedly, in other respects this law is undoubtedly very significant. For one thing, it was the first piece of national legislation regulating the right of secession in a detailed way. For another, it made extensive and careful provisions for all the legal issues raised by the possible secession of the Republics. In spite of these merits, the law was, however, inadequate, for the reasons mentioned above. It is therefore only natural that it was never applied; instead it was rapidly superseded by the dramatic events in the USSR that brought about the precipitous collapse of the Federation. The process of independence by the twelve republics therefore occurred outside the realm of law, both international and municipal”.
The simple majority quorum of the Scottish referendum on independence can be explained because British democracy is not based on qualified majorities and British constitutionalism is not rigid but particularly flexible. Beyond theory and principles, it can also be explained as a strategic move to try to silence secession for a generation. Cameron could have been remembered as a bad UK Prime Minister for losing the North, whereas Lincoln is remembered as an eminent US President for resisting (by the force of arms) the secession of the South. Theory is not the only judge since the voters or the political party can punish Premiers with a soft-approach against secession. In contrast to Lincoln, US President James Buchanan was not praised for his mild approach to the secession of the South.\textsuperscript{11}

A second type of costs is related to excessive legal barriers to secession. If the requisites to secede are too high, pro-secession forces are inclined to abandon the path of the law and even to accuse unionist politicians to hide a political problem under the impenetrable walls of the law. The constitution and the law are then believed not to be meant for the protection of minorities, including minority nations, but for protecting the majority and the powerful. Too high barriers to secede can nurture a crisis of public law, at least within the seceding unit.

\textit{Time.} Negotiation, agreement and consensus are not always easy. The parent State is rarely inclined to negotiate a secession process and the terms of secession, especially if the Constitution does not allow so. Instead, the parent State is often prompted to negotiate within the margins of the Constitution. Negotiation usually needs, in democratic contexts, to be backed by a clear majority in the seceding region, either of voters or representatives. Agreement and consensus are even more difficult and usually take time. The secessionists should show that the will to secede is a clear and persistent democratic claim of the people. Waiting for negotiation, agreements and consensus to come, the secession movement may lose its constituent momentum. It is difficult to maintain large secession mobilization for a long time. In post-modern times, people are

\textsuperscript{11} President J. Buchanan took the view that, even though the southern secessionists had violated the US Constitution, the Federal Government could not make them remain in the Union by force. RADAN, P. “Lincoln, the Constitution, and Secession”, p. 65.
neither used nor prepared to wait long to reach their goals. When people want something, they want it right now. Persistence is a rare virtue in our liquid modernity.\textsuperscript{12} 

It tends to be easier for central Government to resist dividing, centrifugal forces. On the one hand, the central State negotiating with the secessionists can be seen as a sign of weakness because it has succumbed to their threats. On the other, the secessionists need to show that demanding secession is not a threat to get unjust privileges. More support for secession should be seen as a more real but less unjust threat. Secession negotiations should be triggered in the appropriate time, not before. If the central State is not directly forbidding the seeking of a secession mandate, it may accept a vague duty to negotiate only after vague conditions are met. Furthermore, as in the case of Canada’s Clarity Act, the central branches of government are the ones who will judge if these vague conditions are met. Thus, it is possible for the central government to ask a clear secession mandate for starting a negotiation but with unclear rules to determine what a clear mandate is.

Although the judiciary could be a good branch to deal with secession claims, it does not show many signs of having empathy regarding those claims, with some relevant exceptions such as the Supreme Court of Canada in the Quebec Secession Reference. Whereas the judiciary could work as a safety valve in situations where pro-secession forces have overwhelming democratic support, it would usually refuse to do so in situations where secessionist forces are not backed by a clear democratic mandate.

4. Obstacles to unilateral secession

One of the main reasons why consensual secessions should be distinguished from unilateral secession is that the latter has much more worrying costs and troubles than the former. Some of the main obstacles will be highlighted in this section.

\textsuperscript{12} Liquidity of modern times can be instantiated in dissoluble marriages and partnerships, heterogeneous families, temporary jobs, rapid fluctuations in trends and fashions, periodic elections to change the leaders and the representatives, emigrations and immigrations, changes of identity in general and legal bonds of nationality in particular, changing conceptions of the good and life plans, and so forth. In such context it is more difficult for citizens to understand and accept the stability and solidity required in some spheres of societal life. Indeed, States need, for the wellbeing of people, a certain degree of unity, integrity and stability. Due to this need and provided that they are reasonably just, solid democratic majorities are to be required to secede and create new States. States cannot be built and re-built overnight.
**Dangerous polarization.** Unilateral secession is a typical process of perilous polarization. The worse scenario appears when this polarization is not only a risk before and during secession but can also mark the constitutional order of the new State. In particular, polarization would be very costly and damaging if it resulted in a factional constituent period and in a constitution of, for and by a faction of the people. Beyond constitution making, political participation, deliberation and consensus are in danger before, during and after unilateral secessions. In general, unilateral secession can inflict a serious harm to social unity both within the seceding population and the citizenry of the whole State.13

**New public institutions.** In both unilateral and consensual secessions new public institutions may need to be designed and implemented, such as diplomacy, army, police, judiciary, central bank and other independent administrations. Interestingly, the more of these structures the seceding unit already has, the easier secession is; but also, the lesser secession may be desired, since the unit would already have considerable self-governing powers. In contrast with consensual secessions, in unilateral secessions the redesign or replacement of the old institutions is likely to find strong oppositions from inside and outside the institutions. Let us take the judiciary as a paradigmatic example. In Spain, the judiciary is unitary rather than decentralized. This means that there is no Catalan judiciary but just part of the Spanish judiciary in Catalonia. In consensual secession, the judges sitting in Courts located in Catalonia should remain in office if that is their will. Conversely, in unilateral secession the judiciary would probably be a stronghold of the parent State and its constitutional order. The new State would probably be willing to change, at least, the apex of the judiciary as it happened in many revolutions. Internally, the case law of this renewed judicial top would not easily be followed by bottom Courts. Externally, a complete renewal of the judiciary would be seen as a danger for the checks and balances of the newborn State. Let us not forget that, in the context of

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13 Regarding the dangers of polarization and the functions of constitutional law, see SUNSTEIN, C.R. “Constitutionalism and Secession”. SUNSTEIN, C.R. *Designing Democracy*, ch. 4.
the European Union, Member State judges are also EU judges, since the Union entrusted them the proper application of EU law.\textsuperscript{14}

**Supranational integration.** Although supranational integration such as the European Union may encourage secession in abstract, secession might become more fearful if it would imply supranational disintegration. In fact, many citizens of Catalonia and of other European minority nations favour secession provided that supranational integration could continue in some way. Some members of small nations may believe they do not need the parent State anymore, as long as they are remain integrated in a bigger commonwealth. Aware of that phenomenon, both the Union and the high contracting parties are committed to make the pro-secession public belief that integration is far from being guaranteed after secession. Unilateral secession would hardly be recognized and accommodated in the European Union for several reasons. First, Member States hold the constituent power of the Union and hold important constituted powers within the Union's institutions. Second, consensus among Member States is usually required for dealing with highly controversial issues. Third, the rule of law is a founding principle of the Union.\textsuperscript{15}

**Non-recognition.** Whereas Dion’s empirical model focuses on the population of the seceding territory, there are other important external factors such as international recognition and intervention. International subjects, being mainly States and international organizations made by States, generally have a bias against secession. In terms of international law, this is illustrated by the principles of sovereignty and of non-interference and the presumption in favour of the continuity of the existing State, even if it suffers great losses of effective authority.\textsuperscript{16} Thanks to that, while other States do not recognize the emergence of a new State, the parent State has broad leeway to coerce the nascent statehood.

\textsuperscript{14} Beyond the judiciary, as a measure in response to State threat of dissolving the official Parliament of Catalonia, some Catalan secessionists were planning to create a parallel “Assembly of elected officials”.


\textsuperscript{16} CRAWFORD, J. *The Creation of States in International Law*, p. 89.
**State Coercion.** Coercion is a paramount difference between unilateral and consensual secessions. In one way or another, States, including the liberal and democratic, tend to be equipped with many legal instruments to coerce secession challenges. Spain offers a particularly good example of that. Tools to counter secession can be found in many areas of law, namely criminal, administrative and constitutional law. Regarding criminal law, many crimes can apply to situations of secession, such as contempt of courts and sedition. Punishment after trial is not the only possibility. Criminal Courts can often grant or issue interim measures. Since Criminal law usually serves to coerce individuals rather than public institutions, Administrative law might be more appropriate to compel public bodies. Criminal law, though, can be used against seceding authorities and civil servants as well. Regarding constitutional law, many Constitutions contain clauses for exceptional circumstances, such as states of emergency. Some constitutions have, in addition, specific provisions to coerce disobedient self-governing units, such as Article 155 of the Spanish Constitution, Article 37 of the German Constitution, Article 120 of the Italian Constitution and Article 100 of the Austrian Constitution.

**Right to revolution.** In liberal-democratic contexts, the State has a high degree of legitimacy (compared at least to those situations of dictatorship, colonisation, military occupation, serious and continued violation of human rights, etcetera). The principle of democracy is not in the sole hands of the secessionists. Precisely for that reason, State law is not a random product of an oligarchy or faraway elite but a product of political participation and representation of the whole citizenry of the State, including the minority nations, reviewed by Courts with the function, among others, of protecting individual and group rights. Unilateral secession, being a *demotic* revolution, should be an option of last resource.

**Anarchy and crisis of public law.** If law and order are not taken seriously, anarchy and chaos could spread around. If unilateral secession is not understood as a last resort measure, other revolutionary or even extremist movements could use it as a precedent for breaking the legal order. Unilateral secession might set precedent that any just
political or social target can be sought outside the legal order. Likewise, pursuing unilateral secession with no clear and persistent majority can be considered an abuse of constituent power. Unilateral secession can inflict a serious damage to the principle of the rule of law and to the trust in public institutions. The harm can be as serious as to provoke a crisis of public law. In unilateral process of secession there are strong pressures to distort and disfigure the law from both unionist and secessionist sides. Politicians want the law to say what they desire but the interpretation of the law has its limitations. Public law ought to set barriers to seek and exercise political power (and punish those who broke the law). In the pursuit of unilateral secession, public law may be distorted, disfigured, blamed and chastised. If the secessionists perceive Law as a weapon of domination, they claim Democracy, Justice and Power-Politics to be above it.

**Legal uncertainty.** Whereas even in cases of legal, consensual secession such as Brexit legal uncertainty is quite an issue, in cases of unilateral secession legal uncertainty may reach its peak. While in unilateral secession sovereign powers should change hands in one day for the sake of legal certainty, in consensual secession the transfer of powers can be made in a more step-by-step basis. In unilateral secessions, two opposing legal orders would be claiming the recognition and obedience of the authorities and the population. In Hart’s terms, the current legal systems would be competing with an emerging legal system claiming for a new local rule of recognition. Obedience by ordinary citizens and acceptance by the local officials would determine whether this new legal system ends up replacing the exiting one.\(^{17}\) Conscious of the problems related to the lack of legal certainty in secession, constitutional acts have been drafted in Quebec, Scotland, UK and Catalonia. Some parallelisms can be traced among Quebec’s *Sovereignty Bill*, Scottish *Independence Bill*, UK’s *(Great) Repeal Bill*, Catalonia’s *Transitory and Foundational Act*. They make applicable most legal provisions of the legal order which is planned to be exited giving them legal effects in the new order. The aim is basically to ease the legal transition by means of preventing legal gaps, contradictions and abrupt changes. Their strategy is a sort of reversing *Il Gattopardo*:

\(^{17}\) See HART, H.L.A. *The Concept of Law*, pp. 100-23.
for making such deep changes, everything else must remain the same.\textsuperscript{18} This is to say, most legal provisions should be maintained for the legal order as a whole to change.

\textbf{Business-enmity.} Firms, capital and investment do not like legal and political uncertainty. Business, in general, does not like abrupt changes so it would generally despite unilateral secession, unless the seceding government could offer some convincing promises in exchange of support to the project of secession. The promise has to be attractive and credible enough to match the fears associated with legal and political uncertainties. The case of Catalonia might be symptomatic. After the holding of a unilateral referendum of independence and before the issuing of a unilateral declaration of independence, many firms moved their headquarters outside Catalonia. Nevertheless, moving their headquarters can protect them from boycotting attitudes from the parent State and their population and can provide them with more legal certainty.\textsuperscript{19}

\textbf{Consequences of the obstacles.} Due to these great and problematic obstacles, unilateral secession needs a different \textit{kind} and \textit{degree} of democratic support. Regarding the degree, unilateral secession contexts of liberal democracy needs more qualified and persistent majorities than consensual secession. Concerning the kind, democratic support needed in unilateral secession must be more intense, convinced or solid than in ordinary electoral contests and consensual secessions. It has to be intense, convinced and solid enough to resist the great difficulties, high sacrifices and hard times that unilateral secession needs to consolidate a new constitutional order. Since much democratic popular support will not have such intensity and resilience and may thus decrease when realizing the high transitory costs of seceding unilaterally, the democratic support prior to the unilateral declaration of independence ought to be high enough to keep a good level of democratic legitimacy throughout the process of consolidating the new State. Another consequence of such great obstacles could be the

\textsuperscript{18} The famous sentence from the novel \textit{The Leopard}, by Giuseppe Tomasi di Lampedusa, can be translated as: “for things to remain the same, everything must change”.\textsuperscript{19} An analysis of the economic opportunities and threats from secession can be found in CUADRAS-MORATÓ, X. “The economic debate” in \textit{Catalonia}, pp. 149-88. Be aware, though, that business attitudes towards the independence of Catalonia can be rather different depending on the type of company and the type of secession.
lack of cases, outside colonial contexts, of unilateral peaceful secession in consolidated liberal democracies.20

5. Passages to overcome these obstacles

There are three main passages to overcome these obstacles: domestication, perseverance and drama.

**Domestication.** One way of overcoming such obstacles could be to domesticate secession through legalizing a right to secede. This would be domesticating because instead of the secessionists making their own rules out of pure legitimacy, superior levels of government would enshrine a right to secede imposing substantive, temporal and procedural requirements.

Legalization can be of different types. It can be legalized through international, supranational or constitutional law. It can be legalized by the political branches or by the judicial branch, more or less explicitly. Since States are the legislators, executors and judges *par excellence* of international law, it is unlikely that such law will recognize a right to secede beyond a remedy against situations of illegal occupation, exploitation or violation of human rights.21 Within liberal democratic States, it is not so unlikely the negotiation of a constitutional secession clause, either to constitutionalize a particular secession or to enshrine a constitutional right to secede. However less unlikely than the first, in many States the majority nation is not willing to negotiate a constitutional exit door.

Domesticating secession through constitutionalizing a right to secede is not expected to be a straightforward door leading to secession, especially because a qualified right to secede is both expedient and justified. Since the right to secede can be an emergency door for the national minority to prevent, contend or escape centralizing fire,

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20 See BOSSACOMA, P. *Justícia i legalitat de la secessió*, § 3.5. In this work, I analyzed some doubtful cases such as the secessions of Norway from Sweden, of Iceland from Denmark, of Montenegro from the State Union of Serbia and Montenegro, of Singapore from Malaysia. The split of Czechoslovakia should be considered an example of consensual dissolution rather than secession.

21 Beyond colonies, international law does not yet even clearly recognize a general right to secede for territories subjected to serious, persistent and selective violations of human rights. See BOSSACOMA, P. *Justícia i legalitat de la secessió*, § 2.1.4.
constitutionalizing a right to secede may allow or facilitate reasonable integration and federalization.22 What is more, because constitutionalizing secession could be a way of recognizing a shared sovereignty and a constituent power in hands of the entities holding the right to secede, it can foster accommodation and recognition.23

Contemporary liberal democracies do not and cannot live only through coercion. They do need a great deal of persuasion, recognition of pluralism and citizenry voluntary compliance. One strategy of persuasion is definitely domestication of secession through legalization. The State has a problem when a bulk of territorially concentrated people decides to disobey the legal order and pretend to establish a new constitutional order. Therefore, domestication through constitutionalizing secession can be expected once the secession challenge has clear potential. Such potential, though, does not need to be exercised. If the State feels too threatened, aggressive reaction might be expected.

As observed earlier, if secession is so difficult in liberal-democratic settings, the traditional secession objection of leading to anarchy and to unlimited territorial disintegration becomes weaker. In sum, predictive theories claiming that secession is hard in contexts of liberal democracy should ease the recognition of a right to secede.24

**Perseverance.** In democracies where a right to secede is not constitutionalized, secession should be sought through negotiation, patience and widening the democratic support. In the vast majority of democratic States, secession is not constitutionalized. Conversely, many legal orders have substantial and procedural mechanisms to protect unity, indivisibility and territorial integrity. On top of that, most States are unwilling to agree on the terms of exiting. However, when the democratic support to secession is high and prolonged (provided that no normative or material objections such as slavery, protection of minorities or vital resources for the continuance of the parent State), the State might be more and more inclined to welcome sincere negotiations on secession or major constitutional change to better accommodate the secessionist unit (by means of

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22 See BOSSACOMA, P. **Secesión e integración en la Unión Europea**, §§ 3, 5. BOSSACOMA, P. **Justícia i legalitat de la secessió**, § 3.1. One example of domestication in that sense could be Article 50 of the Treaty on European Union.


granting recognition, confederal or consociational arrangements and by admitting the right to secede under certain conditions).

By persevering with clear democratic majorities, the secessionist movement may turn into a constituent movement with more and more power to transform the constituted legal order. Through persistence the secessionist movement might become a sovereign *We the People* with the constituent power able to overcome the established constitutional barriers.\(^{25}\) Since revolution should be a very exceptional option in liberal-democratic contexts, a legal rupture is only legitimate after a long path seeking negotiated and constitutional ways. Only after that, unilateral democratic routes, backed up by intense, sustained and long-lasting popular mobilization, could legitimately overcome the constitutional barriers and transform the seceding nation to a constituent people. After all, unity and the rule of law must be taken seriously when the parent State is liberal and democratic.\(^{26}\)

If, on one side, the seceding nation shows a long lasting will to negotiate in good faith while the democratic support to independence is clear and persistent and, on the other side, the parent State does not show a sincere will to negotiate and uses coercion excessively, third States and international organizations may feel more inclined to recognize the claim for independence and less bound by the principles of sovereignty and non-intervention. As the Supreme Court of Canada wisely dictates: “a failure of the duty to undertake negotiations and pursue them according to constitutional principles may undermine that government’s claim to legitimacy which is generally a precondition for recognition by the international community. Conversely, violations of those principles by the federal or other provincial governments responding to the request for secession may undermine their legitimacy.”\(^{27}\) On the other hand, one wonders whether too weak State coercion that shows ineffective control of the seceding territory may encourage international recognition as well. In sum, both excessive and absent coercion may foster recognition.

\(^{25}\) This proposal draws inspiration from the broader constitutional theory of Bruce Ackerman (*We the People*). See BOSSACOMA, P.; LOPEZ, H. “The Secession of Catalonia” in CUADRAS-MORATÓ, X. (ed.). *Catalonia*, pp. 135-9.

\(^{26}\) See BOSSACOMA, P. *Justícia i legalitat de la secessió*, § 3.7.1.

\(^{27}\) *Reference re Secession of Quebec* [1998], par. 103.
Without perseverance and patience, three dangers might arise: non-recognition, coercion and anarchy. Unilateral declaration of independence in liberal democracy with no clear and persistent democratic support of the population will not easily be recognized by international society. Rushing in the pursuit of secession without the mentioned backing will probably make State coercion more legal and legitimate. Lack of persistence, temperance and self-restraint may lead to anarchy and crisis of public law within the seceding unit equally if achieving independence or not.\textsuperscript{28}

However, a historian and political philosopher interestingly points out: “As contemporary democrats, we would like to see populations consent to the founding of a political body before the power it holds is exercised: first the voice of the chorus, then the players to give us the drama. In that sequence lies the modern concept of political legitimacy, which can arise only out of elections and referendums. We might talk of a ‘ballot-box sequence’. (...) The ballot-box sequence, however, does not enable us to understand how any given democracy, with its elections and parliament, ever took shape. In practice, it turns out that even a democratic founding moment requires representatives who stand up and speak before they are formally appointed as such. A ballot box cannot establish itself. So, seen historically, the reverse founding sequence is the normal one: first the players, then (if necessary) a chorus.”\textsuperscript{29}

\textbf{Drama.} Another strategy to pursue secession is by showing how dramatic the situation is, or, if not dramatic enough, making it seem more dramatic that it actually is. Drama thus refers to actions, events, situations or accounts of them which intent to be exciting, emotional, visible, impressive, extraordinary, alarming, dreadful, terrible, and so forth.

One road to drama is making the audience believe that the parent State is unsatisfyingly liberal, democratic and multinational. There are slightly different ways to do that: honestly explaining why a system, situation or sequence of events is unacceptable (honesty), denouncing only the vices without due notice of the virtues and the causes of such vices (partiality), manipulating either facts and norms to make them seem much worse (manipulation), making the State perform in a nasty way (provocation). When

\textsuperscript{28} See BOSSACOMA, P. “Secesión, democracia y derecho”.
\textsuperscript{29} VAN MIDDELAAR, L. \textit{The Passage to Europe}, p. 305.
unity is at stake, many liberal-democratic States can be tempted to act in more or less authoritarian or indecent ways.

In the quest for secession, drama can have the purpose of making State unjust treatment to the seceding minority more blatant, flagrant. This particular way of seeking drama could be named *remedializing secession*. Since many defend that secession is morally and legally acceptable only as a remedy to serious injustices, the secessionists have a perverse incentive to make the State seem much worse than it actually is or could be. The aim of this strategy is to make a particular secession case to fall under the scope of remedial-right-only-theories of secession.\(^30\) The latter are not purely theoretical accounts, but international doctrines often held by legal and political actors.\(^31\)

Drama has two connected dimensions: the internal and the international. Concerning the internal, the pro-secession public demands more than lyrics alone. Public reason, deliberation, compromise and patience are not enough for some factions of the secessionist movement. This public requires epics: inflated rhetoric, revolutionary events, heroic acts and even martyrdom. Some may even say that secession without swords is nothing but words.\(^32\) Because secession needs the public assuming high costs when the legal and negotiated ways are absent, pro-secession leaders are tempted to use drama as fuel. Ordinary political talk and action, many believe, is not enough to fan the flames. What is more, visible drama might make some dormant, passive or undecided people to favour secession. Unfortunately, for pushing drama rules often need to be ignored, especially when those are made or interpreted by State institutions. In similar vein, whereas domestication and perseverance are generally

\(^30\) I am thinking of remedial moral theories such as those of Buchanan (*Secession*) or Birch (“Another Liberal Theory of Secession”) and remedial legal theories such as those of Buchheit (*Secession*) Musgrave (*Self-Determination and National Minorities*) and Raič (*Statehood and the Law of Self-Determination*). The last author even developed a sort of legal test to assess whether a secession is remedial (§ 3.2.4):

(a) there must be a people which, though forming a numerical minority in relation to the rest of the population of the parent State, forms a majority within an identifiable part of the territory of that State;
(b) the people in question must have suffered grievous wrongs at the hand of the parent State from which it wishes to secede (…), consisting of either

(i) a serious violation or denial of the right of internal self-determination of the people concerned (through, for instance, a pattern of discrimination), and/or

(ii) serious and widespread violations of the fundamental human rights of the members of that people; and

(c) there must be no (further) realistic and effective remedies for the peaceful settlement of the conflict.

\(^31\) See CASSESE, A. *Self-Determination of Peoples*.

\(^32\) Paraphrasing Hobbes in his realistic conception of covenants. See HOBBES. *Leviathan*, p. 117.
compatible with the good management of the day-to-day politics, drama tends to make ordinary politics highly difficult.33

Regarding the international dimension, before being recognized anybody should be known first. Sadly, sub-State entities or regions within sovereign States get to be known worldwide when there is action and drama. Let me illustrate this idea with some examples from Spain. Whereas Catalonia and Basque Country are Spanish nationalities alike, Basque claims for self-determination were much more known beyond Spanish borders due to the drama caused by terrorism. In contrast, Europe and the World did not speak about Catalonia until the drama caused by excessive State coercion against the Catalan unilateral referendum of independence of 1 October 2017. In this regard, the evening of the 10 October international mass media were live reporting the session of the Parliament of Catalonia expecting a declaration of independence. The unilateral declaration of independence was not issued that day by the Catalan legislature following many internal experts and international actors recommending dialogue and consensus rather than unilateralism and rupture. Although these recommendations disdained drama, without it Catalonia would probably have remained unnoticed.34

Even when the international society knows about the will of a minority nation to secede through negotiation and the will of the State to prevent it through the use of force, it does not directly make international public actors get involved. Although the Canadian Supreme Court warns that a failure of the duty to undertake negotiations could favour international recognition, the sad truth is that recognition tends to come out of realpolitik interests or escalating drama. In the European context, the conflict in the Balkans makes clear that international mediation, intervention and recognition comes after drama. Under the premise of the principles of sovereignty and of non-interference, the main international actors tend to intervene when the drama is actually running to tragedy.35

Liberal democracies do violate human rights from time to time. A violation of human rights becomes a convincing secessionist cause when it is selective, serious, excessive

33 A comparison between the Scottish and the Catalan processes of independence may exemplify that.
34 A weak unilateral declaration of independence was issued by the Parliament of Catalonia on the 27 of October and that was followed by an immediate dissolution of that regional legislature by the Spanish Government under the mentioned Article 155 of the Constitution of Spain.
35 See CAPLAN, R. Europe and the Recognition of New States in Yugoslavia.
and systematic.\textsuperscript{36} Liberal-democratic States have higher degree of legitimacy which can, in some occasions, provide wider margins of coercion, since the protection of a reasonably just situation tends to be less objectionable. When States are run democratically, have separation of powers and respect basic individual and minority rights, the sovereignty to run their internal affairs should be broader and, thus, external intervention ought to be narrower.\textsuperscript{37} On the one hand, the less negotiation and the more repression the parent State offers, the less sympathies and public support it will receive from the outer (democratic) World. On the other hand, the less patient and the more troublemaker the secessionist nation is, the less external sympathies and support it will receive.

Drama has other problems and adversities. With drama, although the population might be willing to suffer more for liberating themselves from (a believed to be) an oppressive State, the mentioned obstacles to secession may likely become much tougher. Yet, this initial predisposition to suffer against flagrant injustices might be less long-lasting than it seems. A secession quest in liberal democratic contexts needs a significant structural majority within the seceding nation; because mere passions awakened by drama do not provide enough cohesion, durability, strength and legitimacy to succeed in a constitutional rupture of such magnitude.

Drama is not one-sided. When the seceding nation seeks drama, the State is likely to respond dramatically. State drama can be based on blaming the seceding territory of being nationalistic, illiberal, undemocratic, egoistic and disloyal. In particular, as drama is kin to polarize the society, the State may erect itself as the resistance against a factional project, the guarantor of the minorities within the seceding territory and the protector of legal security and so economic stability. Drama leads to more drama and conflict. Beyond the seceding territory, drama is perceived less directly so less intense. In particular, drama does not affect that much the leading international actors, which prioritize other items such as self-interest, stability, reciprocity, legality and legitimacy. In addition, some international actors might detest a secessionist strategy of drama based on unfairly blame the parent Stated or unduly provoked it to act wrongly.

\textsuperscript{36} See BOSSACOMA, P. Justícia i legalitat de la secessió, § 1.5.3.
In fact, drama may not only help increasing pro-secession mobilization but pro-union mobilization as well. The lesson of the Catalan process of independence is that drama helped mobilizing unionism in form of a massive demonstration almost of comparable numbers as the secessionists. Whereas before drama only the pro-secession groups were strongly mobilized, after the secessionist strategy of seeking dramatic situations, such as the unilateral referendum of independence of 1 October 2017, unionists started to imitate secession strategy of mass-mobilization through civil society platforms, connected with political parties but not directly organized by them. Drama may help awaking silent unionist masses.

6. **Bridges between passages**

The three passages to overcome the obstacles to secede are not fully independent nor incompatible from one another. In the empirical world, secession movements often combine several approaches and tend to build bridges between passages. If not a general strategy, different sections or factions of a particular secessionist movement can follow different passages and change from one to another over time.

In the normative realm, combining and bridging passages is only compatible until a certain point. It makes sense that pro-secession movements in liberal-democratic contexts start with a strategy focused on negotiating a legal secession procedure (*domestication*). By the time that the constitutional and agreed doors to secession are closing, unilateral doors start opening (*perseverance*). Rushing to take unilateral doors is normatively erroneous and empirically risky. It might be difficult to go back to the previous passages. However, secessionist movements may be inclined to take unilateral steps to exit if this leads to State abuse of sovereignty. In contexts of liberal democracy where secession barriers are excessive, secession movements are tempted to incite remedial-right situations such as violation of human rights, undue use of force, suspension of arrangements of internal self-determination, and so forth (*drama*). In liberal democratic frames, both secessionists and unionists should focus on domestication and perseverance while leaving drama as a very last resource.
In the end, the combination of the current international law of self-determination together with excessive constitutional barriers to secede generates a rational (but regrettable) incentive to secession movements to seek *drama* rather than *domestication* and *perseverance*. Yet, drama is of no interest for any part (too much suffering and polarization in the seceding territory, losing reputation and democratic standards in the State level and, finally, growing international instability and fear against secession). The quest for both secession and unity through dramatic means can damage liberalism and democracy within the seceding unit and within the whole State as well. In Spain, it seemed that both secessionists and unionists are inclined to sacrifice significant degrees of liberalism and democracy for the pursuit of their respective political goals.\(^{38}\)

Perseverance is a demanding virtue and strategy in a modern liquid society. In this respect, the Catalan process of independence suffers from three post-modern vices. First, doing a revolution without realizing of the gravity of the pursuit. Second, seeking full freedom with no losses, without analyzing or assuming the high costs of the target. Third, wanting it right now, without showing the patience that claiming independence through rupture deserves in liberal democratic settings. In other words, three post-modern deficits might debilitate secession as well as other group projects and even individual life plans: the sense of *gravitas*, the assumption of costs and the significance of endurance.

Whereas secession breaks in liberal democracies are and should be difficult, breaking the will and mobilization of minority nations to be independent is and should be difficult as well. Both secessionists and unionists should think carefully every step and not jump the gun. It is a long rather than a short run. A civic, large and long-lasting popular mobilization is needed. The virtues of perseverance, prudence, temperance and self-restraint should thus be praised.

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\(^{38}\) Whereas Catalan secessionists broke the law in many occasions and intended to build new constitutional structures without having clear majorities favouring unilateral independence (for instance, violating parliamentary rules and procedures, passing unconstitutional laws and resolutions, disobeying the Spanish Constitutional Court repeatedly, providing the creation of a Catalan Supreme Court composed by new judges appointed by the political branches without qualified enough majorities to facilitate the legal transition), Spanish unionists showed lack of accommodation of peaceful and persistent democratic claims and severe and disproportionate coercion against self-determination and secession performances and actions (for example, avoiding the negotiation of any secession referendum or qualified procedure to secede, denying more fiscal autonomy for Catalonia and limiting its fiscal autonomy under a constitutional clause that merely establishes the fiscal golden rule, disproportionate use of police force to prevent the voting in the illegal referendum of 1 October 2017, severely judging many secessionist leaders for the high crime of rebellion and harshly imprisoning several of them before trial).
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