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SELF-DETERMINATION AND SECESSION IN CONSTITUTIONAL LAW

Report adopted by the Commission at its 41th meeting (Venice, 10-11 December 1999)

Introduction

Major political changes of very different kinds have been a most obvious feature of the past decade in Europe.

a. The process of European unification has been characterised by its concurrent deepening and widening. National boundaries have gradually faded, and so has national sovereignty, as a result of the Single European Act followed by the Treaties of Maastricht and Amsterdam. Meanwhile, the number of states either immediately or potentially concerned by European integration has increased considerably.

b. Just as gradually, the states reduced their powers not only upwards to supranational authorities but also internally and downwards by devolution of certain powers to lower tiers (regions and decentralised public authorities).

c. At the same time but with much greater speed, democracy and rule of law have made enormous strides in many states following the collapse of the systems of the bipolar world.

d. Coinciding with these relatively conflict-free developments, a process of national assertion has gained ground in a way not seen in Europe for a long time; a form of national sovereignty that precludes power-sharing with higher or lower authorities has been sought or proclaimed, in particular in states born out of secession, and the growth of nation-states has been unprecedented for such a short period. After more than forty years of virtually total stability, new frontiers have been established as they disappear elsewhere. This process, which has led to the dissolution of three states, may have been peaceful in the case of Czechoslovakia but was attended by tragedy and bloodshed in Yugoslavia and to a much lesser extent in the Soviet Union. It should be noted that the constitutions of the latter two States contain dispositions relative to the secession of Republics.

This is the context in which the Council of Europe Parliamentary Assembly has considered the questions of self-determination and secession[1] and asked the Venice Commission to give its opinion in the matter.

Self-determination is above all governed by international law. The definitions and general concepts, chiefly in terms of public international law, are given in the memorandum submitted to the Parliamentary Assembly Political Affairs Committee[2]. The purpose of this report is, on the other hand, to examine the question of self-determination and secession as addressed by constitutional law. This report will not refer again to the rules of international law, even if they are immediately applicable in the States' domestic law. It is founded on national constitutional sources, viz. constitutions and statutes of a constitutional nature, as well as on rulings by constitutional courts and equivalent authorities. The states considered here are the Council of Europe member states, with the applicant states, as well as South Africa and Kyrghyzystan in view of their special status with the Venice Commission.

This study is divided into two parts. The first deals with the status of territorial integrity in constitutional law and how it affects the area under consideration. The second part raises the

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1 See the motion for an order on self-determination and secession presented by Sir Russell Johnston, Doc. 7305 (12 May 1995) and the memorandum entitled "Self-determination and secession" (rapporteur: Mr Severin, drawn up in consultation with the rapporteur by Centrul Pentru Drepturile Omului, Bucharest; AS/Pol (1996) 24), submitted to the Political Affairs Committee.

2 AS/Pol (1996) 24.

question of self-determination, the idea being to ascertain whether according to its definition in national constitutional law it can form an impediment to the principle of territorial integrity.

The study is followed by two synoptic tables setting out the relevant constitutional provisions of the states concerned.

I. The principle of territorial integrity: a concept acknowledged in constitutional law

1. Silence about secession but focus on territorial integrity

a. To say that secession is inimical to national constitutional law would be an understatement. This is hardly surprising, for it would result in the dismemberment if not destruction of the state's very foundation. However, none of the constitutions studied expressly employs the term "secession" to proscribe the phenomenon itself or its preparatory acts. Keeping silence about secession may indeed suffice to outlaw it. In the absence of a constitutional provision that permits secession, it is unlikely to take place within the existing constitutional order, even if each constitution must be interpreted in its context and it is therefore not possible to set down a general rule for the interpretation of such a silence. Constitutional amendment is nevertheless provided for, except when there is special stipulation that the unity of the state (*Portugal*[3]) or territorial integrity (*Romania*[4], *Ukraine*[5]) constitutes material (intrinsic) limits to revision of the constitution. Sometimes the Constitution expressly provides for a constitutional amendment which would impair the unity of the state, but which may be obstructed by the stipulation of a referendum (*Croatia*[6] and *Moldova*[7] where the majority of registered electors must agree to it). Furthermore, the constitutional law of a state may even impose that a negotiation takes place when the desire to secede is clearly expressed on a part of the territory[8].

The prohibition of secession often follows in any case from constitutional provisions referring to values challenged by secession: indivisibility, national unity and, still more commonly, territorial integrity. In the following paragraphs an effort is made to identify the norms that use these terms in a prohibitive sense.

b. Affirmation of *the indivisibility of the state* plainly implies outlawing of secession, and is common to almost half the states covered by the present research[9]. The state's indivisibility is not to be confused with its unitary character, and therefore consorts with regionalism and federalism. That much clearly emerges from the texts of the *Spanish* and *Italian* Constitutions: "the Constitution is based on the indissoluble unity of the Spanish nation, the common and indivisible homeland of all Spaniards, and recognises and guarantees the right to autonomy of the nationalities and regions of which make it is composed"[10]; "the Republic, which is one and indivisible, recognises and promotes local autonomy; it applies the fullest measure of administrative decentralisation in services dependent on the state and adjusts the principles and methods of its legislation to the requirements of autonomy and decentralisation".[11] The Italian Constitutional Court has even declared with regard to the special status of Trentino-Alto Adige that the ability of the ethnic minorities inhabiting the region to elect their own representation on

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3 Article 288.a of the Constitution.
4 Article 148.1 of the Constitution.
5 Art. 157 of the Constitution.
6 Article 87.2 of the Constitution.
7 Article 142.1 of the Constitution; the assent of the majority of "registered voting citizens" is required.
8 See the decision of the Supreme Court of Canada quoted below ch. II.2.b.
9 See appended table.
10 Article 2 of the Spanish Constitution.
11 Article 5 of the Italian Constitution.

a genuinely equal footing can only be beneficial to the national interest and to the actual principle of national unity[12]. Finally, in *Russia* federalism and self-determination of peoples within the Federation are certainly basic principles of the legal order, in the same way as the principle of state integrity[13].

c. The concept of *state unity* or *national unity* also recurs regularly in constitutional texts, but is less univocal than indivisibility. When the two are in juxtaposition, as in *South Africa*[14], or *Moldova*[15] they can be considered more or less synonymous.

On the other hand, the concept of national unity is apprehended quite irrespective of the question of secession when its perceived object is to unite previously or presently separated territories to form a single state, as set forth in the preambles to the *German* and *Irish* Constitutions.

Likewise, the reference to the President of the Republic as representing or guaranteeing national unity is intended more to highlight this figure's role as a symbol of unity and a representative of the state than to emphasise the indivisibility of the state (see for example *Italy*[16], *Kyrghyzystan* [17], *Portugal*[18], *Romania*[19] and *Ukraine*[20]). In *Poland* however, the Constitution expressly provides that the President shall ensure the inviolability and integrity of the territory[21]. The constitutional provisions which maintain unity of the *people* (*Azerbaijan*[22] and *Romania*[23]) rather than of the *territory* do not put the main emphasis on the indivisibility of the territory. This corresponds to the goal of averting conflicts. The *South African* Constitution, in mentioning national unity as one of the aims of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities at the same time as peace, friendship, humanity and tolerance[24], only very indirectly contemplates possible secessionist tendencies. Safeguarding the unity of the state, as an aim of national defence, can also mean preserving *territorial integrity* from external interference (*Austria*[25]; see also the Croatian constitutional provision[26] authorising emergency measures in the event of an immediate danger to the independence and unity of the Republic).

Like indivisibility, the unity of the state may be proclaimed alongside recognition of regional autonomy (*Portugal*[27] where the Azores and Madeira are concerned).

d. *Territorial integrity* is also a concept embodied in numerous constitutions[28]. However, it is not univocal either, as territorial integrity can be threatened both from outside (*external* aspect of territorial integrity) and from within (*internal* aspect of territorial integrity); only in the second instance is the question of secession relevant.

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12 Bulletin on Constitutional Case-Law (published by the Venice Commission), ITA-1993-1-017.
13 Article 5.3 of the Constitution.
14 Article 41.1.a of the Constitution, but see II.3.a below.
15 Article 10.1 of the Constitution.
16 Article 87 of the Constitution.
17 Article 42.2 of the Constitution.
18 Article 120 of the Constitution.
19 Articles 80.1 and 82.2 of the Constitution.
20 Article 102.2 of the Constitution.
21 Article 126.2 of the Constitution.
22 Articles 5.2 and 8.2 of the Constitution.
23 Article 4.1 of the Constitution.
24 Article 185.1.b.
25 Article 9a.1 of the Constitution.
26 Article 101.1.
27 Article 225.1-2.
28 See appended table.

Where territorial integrity is referred to in the constitutional provisions on national defence or armed forces (examples: *Albania*[29], *Belarus*[30], *Hungary*[31] and *Moldova*[32], the main emphasis is on protection against foreign aggression; the same applies to the right to oppose forcible encroachment on the territorial integrity of the state (*Lithuania*[33]).

The head of state's role as guarantor of territorial integrity (*Armenia*[34], *Azerbaijan*[35], *Georgia*[36]), and the oath which he swears to uphold it (*Azerbaijan*[37], *Belgium*[38], *Luxembourg*[39]), relate to both the internal and the external aspect of territorial integrity. So does the oath sworn by the members of parliament (*Cyprus*[40] and *Turkey*[41]), for instance.

In order to make the alteration of the external boundaries difficult, several constitutions subject this to stricter special rules. In the *Czech Republic*, a constitutional law is required[42], in *Azerbaijan* a referendum[43] and in *Greece* an absolute majority of all members of parliament[44].

2. Territorial integrity as a restriction of fundamental rights

The internal aspect of territorial integrity is most pronounced when it comes to regulating fundamental rights. The following paragraph is intended to demonstrate how far national constitutional law permits such limitations. *Freedom of association* is assuredly the right subjected to the greatest number of express restrictions founded on respect for territorial integrity, especially as regards political parties. For instance, the *Moldovan*[45] and *Romanian*[46] Constitutions declare unconstitutional any political parties or other organisations which, by their aims or activities, militate against territorial integrity. Comparable provisions are found in the *Russian*[47], *Georgian*[48] and *Ukrainian*[49] Constitutions as well as in Slovak legislation[50]. The *Portuguese* Constitution establishes that political parties should respect the principle of state unity.[51] It forbids regional parties.[52] In *Bulgaria*, it is unconstitutional merely for an association to act to the detriment of national integrity[53], whereas in *Croatia* territorial integrity must be endangered or subjected to violent threat[54]. In *Greece*, seizure of publications directed against

29 Article 12.1 of the Constitution.
30 Article 1.3 of the Constitution.
31 Article 19E.1 of the Constitution.
32 Article 108.1 of the Constitution.
33 Article 3.2 of the Constitution.
34 Article 49.2 of the Constitution.
35 Article 8.3 of the Constitution.
36 Article 69.2 of the Constitution.
37 Article 103.1 of the Constitution.
38 Article 91.2 of the Constitution.
39 Article 5.2 of the Constitution.
40 Article 69 of the Constitution.
41 Article 81 of the Constitution.
42 Article 11 of the Constitution.
43 Articles 3.2.2 and 11.3 of the Constitution.
44 Article 27.1 of the Constitution.
45 Article 41.4.
46 Articles 8.2 and 37.2.
47 Article 13.5.
48 Article 26.3.
49 Article 37.1.
50 Article 4.e of the Association Act (Act No. 424/1991).
51 Article 10.2.
52 Article 51.4.
53 Article 44.2 of the Constitution.
54 Articles 6.3 and 43.2 of the Constitution.

the territorial integrity of the state is possible, so that *freedom of the press* is curtailed[55]. The *Ukrainian* Constitution provides for limitations to *freedom of thought and expression* on similar grounds[56]. The position is the same as regards freedom of expression under the *Georgian* Constitution[57], which further provides that "the exercise of minority rights should not oppose the … integrity … of Georgia"[58]. There is a similar rule in Slovakia[59]. These provisions are reminiscent of the possibility afforded by the Croatian constitutional law on human rights and freedoms and the rights of national and ethnic communities and minorities (now suspended) to dissolve the organs of "special statute" (ie self-governing) districts if they infringe the sovereignty and territorial integrity of the Republic of Croatia[60].

Moreover, imperilment of territorial integrity may prompt emergency measures that restrict freedoms (*Belarus*[61], *Croatia*[62] and *France*[63]). In *Lithuania*, such measures are only prescribed where the threat is of external origin[64].

Particular attention should be drawn to the constitutional law of *Turkey*. This country's provisions on preservation of territorial integrity (especially its internal aspect) are unusually numerous. Some do not, or at least not directly, involve restrictions to fundamental rights. For instance, the state must take measures to ensure the education and development of youth in opposition to ideas aiming at the destruction of the indivisible integrity of the state with its territory and nation[65]. The members of the Grand National Assembly[66], and likewise the President of the Republic[67], must swear to safeguard the indivisible integrity of the country and the nation. The primary function of the courts of state security is to deal with offences against the indivisible integrity of the state[68], which raises the question of limitations to fundamental rights.

This is the area of Turkish constitutional law containing the most provisions as regards the principle of territorial integrity. Under the general constitutional provision concerning restrictions to fundamental rights, the first ground for restriction to be mentioned is that of safeguarding the indivisible integrity of the state with its territory and nation[69]. Furthermore, there is a provision outlawing wrongful exercise of fundamental rights. Within the meaning of the Turkish Constitution, wrongful exercise is primarily with intent to violate the indivisible integrity of the state, and the text of the Constitution further provides that infringements of this prohibition are punishable by law[70]. Specific restrictions are also prescribed regarding freedom of the press. Dissemination of news or articles that imperil the territorial integrity of the state involves the criminal responsibility of the persons implicated. Suspension of the distribution of printed matter may be ordered in that case, as may the seizure of the offending publications and even the temporary suspension of a periodical[71]. Further specific provisions are made in respect

55 Article 14.1.c of the Constitution.
56 Article 34.3.
57 Article 24.4.
58 Article 38.2.
59 Article 34.3 of the Constitution.
60 Article 47.1, 2nd indent.
61 Article 100.1.18 of the 1994 Constitution; Article 84.1.20 of the 1996 Constitution.
62 Article 100.1 of the Constitution.
63 Article 16.1 of the Constitution.
64 Articles 84.16 and 142.2 of the Constitution.
65 Article 58.1 of the Constitution.
66 Article 81 of the Constitution.
67 Article 103 of the Constitution.
68 Article 143.1 of the Constitution.
69 Article 13.1 of the Constitution.
70 Article 14 of the Constitution.
71 Articles 28.5, 28.7 and 28.9 of the Constitution.

of political parties, whose statutes and programmes must not be in conflict with the indivisible integrity of the state[72]. Nor may political parties participate in decisions and activities which are prejudicial to the territorial integrity of Turkey[73]. Finally, organs of public professional bodies, which are public law corporations comprising all who engage in a given occupation, may be temporarily removed from office inter alia to preserve the indivisible integrity of the country and nation[74].

Thus Turkish constitutional law strongly emphasises the need to safeguard the country's territorial integrity, especially the internal aspect thereof. This follows both from the letter of the Constitution and from the constitutional case-law, also extensive in this respect. The Constitutional Court has ordered the dissolution of several parties deemed to be seeking to destroy the integrity of the state. As a result, the People's Labour Party (HEP)[75], the Freedom and Democracy Party (ÖZDEP)[76] and the Democratic Party (DEP)[77] were dissolved on the ground that they prejudiced the unity of the state. In the findings of the Constitutional Court, it is stressed that the principal characteristic of the Turkish state is its integral nature. It is therefore out of the question to divide Turkey and the Turkish nation into two groups, "Turks" and "Kurds". Any party attempting to divide Turkey is *ipso facto* unconstitutional[78]. In particular, political parties are forbidden to proclaim themselves in favour of the self-determination of the Kurdish people[79] and even of a federal system[80]. Hence the unitary form of the state is not only sacrosanct, as for example in *Romania*[81]*;* being so, it is not open to challenge by political parties.

The principle of territorial integrity may conceivably result in restriction of the right of ownership. Accordingly, the *Romanian* Constitutional Court was asked to determine the constitutionality of a law under which companies of Romanian nationality but with partly or exclusively foreign capital were entitled to acquire a property right and all other rights *in rem* over the land required by them in order to achieve the purpose of their activity. The Court nevertheless held that a distinction should be drawn between the inalienability of Romania's territory as a concept in constitutional law and the ownership of land, a civil law issue[82].

In a related sphere, the *Turkish* Constitutional Court had to determine the constitutionality of privatisation operations. It held that participation by foreigners in the privatisation of public companies, while not excluded in principle, should be subject to certain restrictions. The Court cited the examples of public services in the field of telecommunications and electricity, which it considered very important to the independence and integrity of the Turkish nation[83]. The fact that 51% of the shares remained in the public sector amply sufficed to safeguard the independence and integrity of the Turkish nation and the indivisibility of its territory[84].

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72 Article 68.4 of the Constitution.
73 Article 69.8 of the Constitution.
74 Article 135.7 of the Constitution.
75 Bulletin on Constitutional Case-Law, TUR-1993-3-002.
76 Bulletin on Constitutional Case-Law, TUR-1994-1-001.
77 Bulletin on Constitutional Case-Law, TUR-1994-2-003.
78 See below for the judgments of the European Court of Human Rights concerning dissolution of political parties in Turkey.
79 Bulletin on Constitutional Case-Law, TUR-1994-1-001.
80 Bulletin on Constitutional Case-Law, TUR-1993-3-002.
81 Article 148.1 of the Constitution.
82 Bulletin on Constitutional Case-Law, ROM-1997-1-001.
83 Bulletin on Constitutional Case-Law, TUR-1994-2-005.
84 Bulletin on Constitutional Case-Law, TUR-1996-1-005.

The decision of the *Russian* Constitutional Court of 31 July 1995 on the constitutionality of certain Presidential Decrees and Federal Government Resolutions relating to the situation in the Chechen Republic[85] deals with limitations to fundamental rights in the event of internal armed conflict of a secessionist character. The Constitutional Court held that, even without a state of emergency having been proclaimed, it was possible for the President of the Republic to resort to using the armed forces to ensure the integrity of the state - necessarily entailing restrictions of fundamental rights. However, certain provisions of the resolution "on the expulsion out of the Chechen Republic of persons who pose a threat to public security and to the personal security of citizens, who do not live on the territory of the said Republic" were considered contrary to the free choice of place of residence and abode[86], for want of legal foundation[87]. Likewise, the provision of that resolution stipulating immediate withdrawal of the accreditation of "journalists working in the zone of the armed conflict who transmit untruthful information or engage in the propaganda of national or religious enmity" was deemed contrary to the right to freedom of information[88] and the right to protection of rights and freedoms before the courts[89].

It is interesting to observe that the *Croatian* Constitutional Court has upheld a refusal to register a political party for reasons including the threat which it posed to the territorial integrity of the Republic, when in fact it aimed to alter the national boundaries not through reduction of the territory but by annexing foreign territories[90].

The *European Court of Human Rights* has made determinations on several occasions as to whether restrictions to fundamental rights founded on public interest requiring the upholding of territorial integrity comply with the European Convention on Human Rights. Accordingly, a measure expelling a German national and member of the European Parliament from French Polynesia and prohibiting her from re-entering that territory, and a measure prohibiting her from entering New Caledonia, were found to infringe the right to freedom of expression. The applicant had taken part and spoken in a pro-independence and anti-nuclear demonstration held in French Polynesia. The interference constituted by these measures was not "necessary in a democratic society"[91] because the utterances held against her had been made during a peaceful authorised demonstration, her speech contributed to a democratic debate in Polynesia, there had been no call for violence and the demonstration had not been followed by any disorder[92].

Another case, concerning Greece, was declared inadmissible by the Court on the ground that national remedies had not been exhausted. However, the European Commission for Human Rights considered that the conviction of the applicant for having called in public (during an electoral campaign) "Turks" members of the Islamic minority of Western Thrace constituted a violation of the freedom of expression[93].

The Court has also given judgment in two cases concerning prohibition of political parties in Turkey, finding a violation of the right to freedom of association[94]. The Turkish Constitutional

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85 Bulletin on Constitutional Case-Law, RUS-1995-2-002; CDL-INF (96) 1.

86 Article 27.1 of the Constitution.

87 Cf. Article 55.3 of the Constitution.

88 Articles 27.4 and 27.5 of the Constitution.

89 Article 46 of the Constitution.

90 Bulletin on Constitutional Case-Law, CRO-1998-3-021.

91 Article 10 of the European Convention on Human Rights (ECHR).

92 *Piermont v. France*, 27 April 1995, Series A No. 314, Bulletin on Constitutional Case-Law, ECH-1995-1-007.

93 Art. 10 ECHR : *Ahmet Sadik v. Greece*, judgment of 15 November 1996, Rec. 1996 p. 1638 ; the report of the Commission appears on page 1668.

94 Article 11 ECHR.

Court had held that the programme of the United Communist Party of Turkey (TBKP) was such as to undermine the territorial integrity of the state and national unity, having regard to the prohibition of self-determination and regional autonomy under the Constitution; the party's aims, in favour of separation and division of the Turkish nation, warranted the dissolution of the party. The party programme referred to the Kurdish "people", "nation" or "citizens", though without describing them as a "minority" or claiming on their behalf the conferment of special rights, notably that of separation from the rest of the Turkish population. The programme mentioned the right to self-determination, deploring the fact that, owing to recourse to violence, it was not "exercised jointly, but separately and unilaterally", and suggested a political remedy to the problem. The Strasbourg Court did not consider the interference with freedom of association "necessary in a democratic society"[95]. It declared in particular that "democracy thrives on freedom of expression. From that point of view, there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State's population and to take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned. To judge by its programme, that was indeed the *TBKP*'s objective in this area". On the basis of the TBKP's actions, it was moreover not plausible that it concealed objectives and intentions different from the ones it proclaimed. The difficulties associated with the fight against terrorism could not be put forward for the prohibition measure, in the absence of any element involving the responsibility of the TBKP for the problems which terrorism poses in Turkey[96]. An analogous case concerned the dissolution of the Socialist Party (SP), a party which advocated setting up a federation, whose Chairman had made public declarations such as "the Kurdish people are standing up" and spoken of the "Kurdish nation's" right to self-determination and to "create a separate state" by referendum. The Court of Human Rights considered the restriction imposed to be excessive. In particular, interpreted in their proper context, the impugned statements did not urge separation from Turkey but were intended rather to emphasise that the proposed federation could not be achieved without the free consent of the Kurds, which should be expressed by referendum. Nor did the Court discern any incitement to the use of violence or to infringement of the rules of democracy. In particular, the Court underlined that "the fact that such a political programme is considered incompatible with the current principles and structures of the Turkish State does not make it incompatible with the rules of democracy. It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself"[97].

A similar case, albeit relating to a non-profit making association, concerned Greece. The aims of the association called "Home of Macedonian Civilisation" set out in its memorandum of association were to preserve the folk culture and the traditions of the Florina region. The national courts had refused to permit the association to be registered on the ground that it had separatist intentions; they held that the term "Macedonian" was used to dispute the Greek identity of Macedonia and its inhabitants by indirect means. The Strasbourg judges viewed the assertion that the applicants and their association represented a danger to Greece's territorial integrity as based on a mere suspicion and as incapable of justifying such a restriction on freedom of association, which was violated as a result[98].

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[95] Article 11 para. 2 ECHR.

[96] *United Communist Party of Turkey and others v. Turkey*, 30 January 1998, Reports of Judgments and Decisions 1998 p. 1, Bulletin on Constitutional Case-Law, ECH-1998-1-001. The quotation is from para. 57.

[97] *Socialist Party and others v. Turkey*, 25 May 1998, Reports of Judgments and Decisions 1998 p. 1233. The quotation is from para. 47.

[98] *Sidiropoulos and others v. Greece*, 10 July 1998, Reports of Judgments and Decisions 1998 p. 1594.

II. The right to self-determination: a constitutional law concept?

The importance which national systems of constitutional law attach to protection of the state's territorial integrity nevertheless leaves room within the ambit of the Constitution for the right to self-determination. Indeed, a number of constitutions refer either to self-determination or to like concepts. The remainder of this report will examine the effect of such references, which may differ widely in meaning.

As stated in the memorandum submitted to the Parliamentary Assembly, "the concept of self-determination" refers broadly to two interconnected aspects:

a. The "internal aspect" defines the right of peoples freely to determine their political status and to pursue their cultural, social and economic development.
b. The "external aspect" refers to the right of peoples freely to determine their place in the international community of states"[99].

In international law, "peoples", in contrast to national minorities for example, have the right to self-determination[100]. When it recognises the right to self-determination, constitutional law defines the subjects of this right – as it does its content – on a case by case basis, as the following developments show.

1. The state's external self-determination

Most commonly, the constitutional provisions on self-determination refer to the external self-determination of the state in question, to its right to independence vis-à-vis the outside world.

Thus the reference to "the unity and freedom of Germany in free self-determination" in the German Constitution[101] concerns both internal self-determination and the external self-determination achieved by reunification.

In other states, the emphasis clearly shifts to external self-determination; this is true of states having recently achieved or regained independence. The right of the *Croatian* nation to self-determination and state sovereignty[102] are to be construed as referring to secession from Yugoslavia, as the Constitution was adopted when this Republic was still part of the Yugoslav Federation. The *Slovenian* Constitution contains similar provisions[103]. To the same effect, the Constitutions of *Belarus*[104], *Estonia*[105] and *Ukraine*[106] can also be cited.

The right to *secession* is even mentioned explicitly in the preamble to the *Croatian* Constitution as an element of the right to self-determination and state sovereignty. *Croatia* and likewise *Slovakia*, also originating from the dissolution of a state, further provide for the possibility of association or alliance with other states while reserving the right to withdraw subsequently[107].

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99 AS/Pol (1996) 24, p. 8. The internal aspect of self-determination in international law is what the Supreme Court of *Canada* alludes to in holding that in so far as the Quebecers form a "people", its self-determination is already achieved within the framework of Canada (Bulletin on Constitutional Case-Law, CAN-1998-3-002).

100 On the definition of peoples and national minorities, see AS/Pol (1996) 14, pp. 3-5.

101 Preamble, op. cit.

102 Preamble and Article 140.2 of the Constitution.

103 Preamble and Article 3.1.

104 Article 9.1.

105 Preamble.

106 Preamble.

107 Article 135 of the Croatian Constitution, Articles 7 and 93.1 of the Slovakian Constitution.

2. Self-determination within the state?

The fact that most constitutions lack provisions on self-determination not of but within the state in question is hardly surprising. However, some states prescribe rules on internal self-determination the meaning of which can vary significantly.

a. In *South Africa*, "the right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude … recognition of the notion of the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation"[108]. Here, self-determination excludes the right to secede, as is made clear by the terms "in the Republic", but not the right to institute specific public authorities under national legislative provisions. The question of the scope of the collective right to self-determination has furthermore been put to the South African Constitutional Court in connection with the process of certifying the Constitution. The Court held that self-determination, as prescribed by a constitutional principle to which the final text of the Constitution should adhere, did not comprise any notion of political independence or of separation. It referred clearly to what should be done in the independent exercise of individuals' rights of association within the civil society of a sovereign state[109]. In the same way, "self-determination of the peoples in the *Russian* Federation" is regarded as one of the foundations of the federal structure, on a par with its "state unity"[110]. Each of these cases therefore concerns a form of *internal* self-determination whether of a political or a more strictly socio-cultural kind.

b. The Supreme Court of *Canada* ruled that there is no right either under the Constitution or in international law for Quebec to secede unilaterally from Canada. Indeed, a democratic decision of Quebecers in favour of secession would put at risk the ties of interdependence forged between the people of the provinces and territories of Canada and based on shared values that include federalism and respect for minorities. The secession of a province cannot be achieved unilaterally under the Constitution, that is without negotiation with other participants in the federation, within the existing constitutional framework. On the other hand, each of the participants in the federation may initiate constitutional amendments on issues including secession, and this right implies a reciprocal duty on the other participants to engage in discussions to address any legitimate initiative to change the constitutional order. Although a right to self-determination or to secession is not recognised, the continued existence of the Canadian constitutional order could not be indifferent to a clear expression of a clear majority of Quebecers, in reply to a clear question, that they no longer wish to remain in Canada. Negotiations would need to be opened following such a vote, requiring reconciliation of the various rights and obligations between two legitimate authorities, namely the majority of the population of Quebec and that of Canada as a whole[111].

c. Without overt question of self-determination, alterations to intra-state territorial boundaries - including the creation of new entities - may be subject to the consent of the populations concerned, especially in federal states. This may be regarded as a form of self-determination within the state. For example, in *Germany* change in the boundaries of the Länder is subject to referendum in the Länder concerned and, specifically, in the territory whose assignment to a Land is to be changed, except in the case of changes affecting a territory with not

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108 Article 235 of the Constitution.
109 Bulletin on Constitutional Case-Law, 1996-3-020.
110 Article 5.3 of the Russian Constitution.
111 Bulletin on Constitutional Case-Law, CAN-1998-3-002.

more than 50 000 inhabitants and requiring only the consultation of the communes and districts concerned[112]. Also to be mentioned in this regard are the plebiscites leading to the creation of the Jura canton in *Switzerland* and the referendum held in *Moldova* on the status of Gagauzia. In *Austria*, a Land boundary can only be redefined by corresponding constitutional laws of the Federation and the Land whose territory is redefined[113]. In *Russia*, the populations of the areas concerned are to be consulted when the boundaries of areas under local self-government are changed[114], whereas the boundaries between subjects of the Federation may be altered by their mutual agreement, provided the Council of the Federation assents[115]. Finally, the new Swiss Constitution provides that any modification of the territory of a canton must be submitted for the approval of the relevant electoral body and the cantons concerned ; it is then submitted for the approval of the Federal Assembly. The rectification of cantonal borders is done by agreement with the cantons concerned[116].

Comparable rules apply in certain unitary states. In *Portugal*, the creation of administrative regions, together with alteration of their boundaries, are submitted to national as well as regional referendum[117]. In *Albania*, according to the Constitution, the limits of territorial administrative units may be modified only with the consent of the local population[118]. In *Croatia*, the territory of local administrative units is settled by a law after consultation of the residents, whose opinion must be expressed in a manner ensuring credible and impartial results[119].

d. Lastly, texts of constitutions may relate both to the internal and to the external aspect of self-determination, as for example the German Constitution which refers to "free self-determination[120], or the South African Constitution which refers to "the right of the South African people as a whole to self-determination, as manifested in this Constitution"[121]. In these cases, however, there is no question of self-determination of a part of the state or of the people.

3. Self-determination and decolonisation

The question of self-determination as it relates to decolonisation is outside the scope of this report[122]. None the less, the constitutional law of some former colonial powers contains rules on the subject. According to the Preamble to the *French* Constitution, "the Republic offers to the Overseas Territories that express the desire to adhere to them, new institutions …". "*Portugal* remains bound by her responsibilities under international law to promote and guarantee the right to self-determination and the independence of East Timor"[123]. Furthermore, "in international relations, Portugal shall be governed by the principles of … the right of peoples to self-determination, independence …"[124].

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112 Articles 29, 118 and 118a of the Constitution.
113 Article 3.2 of the Constitution.
114 Article 131.2 of the Constitution.
115 Articles 67.3 and 102.1a of the Constitution.
116 Article 53.3-4 of the Constitution.
117 Bulletin on Constitutional Case-Law, POR-1993-1-007.
118 Art. 108.3.
119 Bulletin on Constitutional Case-Law, CRO-1998-1-008.
120 Preamble, para. 3.
121 Article 235 of the South African Constitution.
122 See the report AS/Pol (1996) 24 pp. 9-10, 13.
123 Article 293.1 of the Constitution.
124 Article 7.1 of the Constitution.

Conclusion

This report confirms one of its prior assumptions, namely that as the fundamental norm of the state the Constitution is in general opposed to secession and instead emphasises concepts such as territorial integrity, indivisibility of the state and national unity. In certain cases, these principles allow of restrictions to fundamental rights. As is evident in the case-law of the European Court of Human Rights, such restrictions must nonetheless comply with the principle of proportionality and accordingly be applied only in serious circumstances.

The term "self-determination", unlike "secession", is by no means alien to constitutional law. However, there is no general recognition in constitutional law of the right to self-determination, nor any common definition of those who are entitled to it and its content. Moreover, the constitutions studied, when they recognise the right to self-determination, do not deal with the procedure which allows for its implementation. Procedural rules only exist for the modification of territorial boundaries within the State, which is not explicitly recognised as being a form of the right to self-determination.

The term self-determination, in constitutional law, has multiple meanings and may in particular denote:

- decolonisation in the few cases where the issue still arises;

- the right to independence of a state which is already constituted;

- the right of peoples freely to determine their political status and to pursue their development within the state's frontiers (internal self-determination).

Internal self-determination may be exercised by the assertion of specific fundamental rights, with a collective character, in particular in the cultural sphere, or even by federalism, regionalism or other forms of local self-government within the state with all due regard to territorial integrity. Apart from the aforementioned cultural autonomy, federalism, regionalism, and possibly local self-government, may be mentioned. In particular, the establishment of public authorities - federated entities especially - and the alteration of their boundaries may constitute a form of self-determination. This broad interpretation of the internal aspect of self-determination is intended to avert conflicts which might carry a risk of secession.

On balance, while in very general terms secession is alien to constitutional law, self-determination, primarily construed as internal, is an element frequently incorporated in constitutional law but needing to be dissociated from secession.

A P P E N D I X

SYNOPTIC TABLE
ON SELF-DETERMINATION AND SECESSION
IN CONSTITUTIONAL LAW

This table refers to the provisions in matters of self-determination and secession made by the constitutions of the Council of Europe member states together with the Venice Commission's associate members and South Africa.

Column A: State concerned.

Columns B-E: Territorial integrity.

Column B: Provisions mentioning indivisibility or unity of the state, subject to the specific clauses in Column D.

Column C: Provisions mentioning territorial integrity, also subject to column D.

Column D: Provisions concerning restrictions to fundamental rights on grounds of the state's territorial integrity, indivisibility or unity, and material limits to revision of the Constitution.

Column E: Provisions on alterations to external boundaries.

Columns F-G: Right to external self-determination/secession = external aspect of self-determination = right of peoples freely to determine their place in the international community of states.

Column F: Right to self-determination in general.

Column G: Right to secede.

Columns H-I: Right to self-determination/autonomy within the state = aspects of self-determination not entailing secession.

Column H: Any reference to self-determination not involving external self-determination.

Column I: Rules on alteration of boundaries between federated states, regions or other intra-state territorial entities.

Column J: Other references to self-determination which, in the texts studied, concern only foreign policy.