



The role of referendum and non-referendum mechanisms for  
state-framing processes

by

Pataramon Satalak

LLB (Hons) Chulalongkorn University 2004

LLM Sheffield University 2006

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## **Declaration**

I confirm that the thesis is my own work. It has not been submitted in the same form for the award of a higher degree elsewhere.

The content of this research is current as of 30 April 2017

Pataramon Satalak

July 2017

## **Abstract**

This thesis presents how the ‘will of the people’ is legitimized in the practical application of external self-determination. Since international law recognizes people as political communities, if they are sufficiently knowledgeable and aware of their rights, their involvement can legitimize the actions of their governmental authority. In order for the people’s deliberations- or self-governance- to be considered legitimate, the expression of their will in territorial alteration decision-making processes must be continuous. Moreover it is necessary to have responsible institutional and legal frameworks to guarantee that the people’s will is both considered and put into action.

Using republican liberal theory, this study will explore the importance of ordinary citizens in determining their territorial status. The theory foregrounds the right to participate in determining their own destiny, and suggests a number of practical ways in which democratic legitimacy can be achieved. In order that the people’s will be considered legitimate, republican liberalism promotes ongoing interactions between ordinary citizens, democratic mechanisms, institutions and legal instruments. In order to ensure that any self-determination process conforms to republican liberal theory’s requirements for legitimacy, the process must empower people both individually and collectively to participate. It must also ensure that all citizens are considered equal and have political equality, regardless of their ethnic, racial, religious or linguistic backgrounds. In addition, republican liberal theory stresses the power of the people to check and scrutinize governmental authorities, and addresses the importance of law (constitution or statutes) in guaranteeing that the will of the people is central to any political decision regarding their future status.

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## List of Abbreviations

<b>ACHPR</b> African Commission on Human Rights and People's Rights	<b>AG</b> Administrative-General
<b>CDU</b> Croat Democratic Union	<b>ALP</b> Awami League Party
<b>CF</b> Citizens Forums	<b>CEC</b> Central Election Commission
<b>CNRT</b> National Council of East Timorese Resistance	<b>CIU</b> Catalan nationalist party
<b>CPC</b> The Communist Party of Czechoslovakia	<b>CPA</b> Comprehensive Peace Agreement
<b>DTA</b> The Democratic Turnhalle Alliance	<b>CSFR</b> Czecho-Slovak Federal Republic
<b>EEC</b> European Economic Community	<b>ECtHR</b> European Court of Human Rights
<b>EPAL</b> The East Pakistan Awami League	<b>ERC</b> The Catalan Republican Left
<b>EPSL</b> East Pakistan Student League	<b>HRC</b> The Human Rights Committee
<b>JCC</b> Spanish constitutional court's judgment	<b>ICCPR</b> International Covenant of Civil and Political Rights
<b>ICESCR</b> International Covenant on Economic, Social, and Cultural Rights	<b>ICJ</b> International Court of Justice
<b>ICR</b> The International Civilian Representative	<b>ILO</b> The International Labour Organization
<b>KJI</b> Kosovo Judicial Institution	<b>KNDP</b> Kamerun National Democratic Party
<b>KOEVOET</b> The South West African Police Counter Insurgency Unit	<b>LRSLS</b> The Law of the Referendum on State Legal Status
<b>LFO</b> Legal Framework Order	<b>MPs</b> The Members of Parliament
<b>MINURSO</b> The United Nations mission for the referendum in Western Sahara	<b>NUDO</b> The National Unity Democrat Party
<b>NSGT</b> Non-Self Governing Territories	<b>OPM</b> The Free Papua Movement
<b>OAU</b> The Organization of African Unity / The African Union Organization	<b>OHCHR</b> The Office of the High Commissioner for Human Rights
<b>ODIHR</b> The Office for Democratic Institutions and Human Rights	<b>OSCE</b> The Organization for Security and Co-operation in Europe
<b>OMIK</b> United Nations Interim Administration Mission in Kosovo	
<b>PDA</b> The Party of Democratic Action	

**PISG** The Provisional Institutions of Self-Government

**SADF** South African Defence Force

**SDP** The Serbian Democratic Party

**SG** United Nations Security-General

**SPLM** The Sudanese People's Liberation Movement

**SNP** Scottish National Party

**SNS** Slovak National Party

**SR** The Special Representative

**SRS** The Secretary-General for Kosovo

**SSRC** The Southern Sudan Referendum Commission

**SWANIO** The South West Africa National Independence Organization

**SWANU** The South West Africa National Union

**SWAPO** The South West Africa People's Organization

**TNI** The Indonesian military troops

**TT** Trust Territories

**UN** The United Nations

**UNAMET** The United Nations Mission in East Timor

**UNIF** The United Front for East Timor Autonomy

**UNIRED** The United Nations integrated referendum and electoral division

**UNMIS** The United Nations Mission in Sudan

**UNMIK** The United Nations Interim Administration Mission in Kosovo

**UNOVER** The United Nations Commission for Eritrea

**UNSF** The United Nations Security Force

**UNTAG** United Nations Transition Assistance Group

**UNTEA** The United Nations Temporary Executive Authority

**VPN** The Public Against Violent

**WCG** The Western Contact Group

## Introduction

### 1. General background

It is generally accepted that holding a referendum allows a form of direct, public participation in a decision-making process.<sup>1</sup> The nature of direct participation presupposes ‘the vision of citizen lawmakers’; the people using their values to inform the creation of laws from the outset.<sup>2</sup> A referendum is a mechanism which allows the people to choose, and is designed to illustrate the collective will of the people. During a referendum, ordinary citizens have the opportunity to express their political attitudes on a ballot paper on a proposed topic. Holding a *sovereignty* referendum<sup>3</sup> means that the people’s approval has a legal effect on the change of a territory.<sup>4</sup> Since consent of the people is accepted to be the supreme power,<sup>5</sup> their expressed will can give legitimacy to a boundary alteration. In addition, where the constitution of a state limits the power of the people in expressing their will over such boundary alteration, the people’s will can also legitimize a constitutional change.<sup>6</sup> Ideally, the constitution should reflect the voice of the people, ensuring that there are legal and institutional structures in place to guarantee that all ethnic people within a pluralistic society have

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<sup>1</sup> Laurence Morel, ‘Referendum’ in Michel Rosenfeld and Andras Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 501; Lawrence Leduc, *The Politics of Direct Democracy: Referendums in Global Perspective* (2<sup>nd</sup> edn, Broadview Press 2003) 37

<sup>2</sup> Sherman Clark, ‘The character of Direct Democracy’ (2004) 13 *Journal of Contemporary legal issues* 341, 347-348

<sup>3</sup> In this thesis, the term sovereignty referendum will use interchangeably with independence referendum. See, e.g., Leduc (n 1) 33; David Butler and Austin Ranney, at ‘Practice’ in David Butler and Austin Ranney, *Referendums around the world: The growing use of direct democracy* (AEI Press 1994) 2-3; Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (OUP 2012) 1

<sup>4</sup> Butler and Ranney (n 3) 2

<sup>5</sup> Fabienne Peter, ‘Political Legitimacy’ *Stanford Encyclopedia of Philosophy* (Winter edn, 2014) [http://plato.stanford.edu/archives/win2014/entries/legitimacy/>revised\\_13\\_May\\_2016](http://plato.stanford.edu/archives/win2014/entries/legitimacy/>revised_13_May_2016), last accessed 1 June 2016; Patrick Riley, *Will and Political Legitimacy: A Critical Exposition of Social Contract Theory in Hobbes, Locke, Rousseau, Kant and Hegel* (Harvard University Press 1982) 8-9

<sup>6</sup> Butler and Ranney (n 3) 2 and Leduc (n 1) 30

the opportunity to express their will.<sup>7</sup> The people's will therefore has significant legal power in the process of territorial alteration.

Post-1990, the use of independence referendums<sup>8</sup> was revived to settle disputes over external self-determination practices, for example, in the former Yugoslavia 1991, Quebec 1997, and Scotland 2014. As Tierney states "holding referendums has become part of state-framing processes designed to express the collective will of the people".<sup>9</sup> In this sense, the people's autonomy is necessary to balance state power, and when the people are given such status, this legitimizes the actions of the governmental authorities of the state.<sup>10</sup> The *practical application* of the external right to self-determination relies on this interaction between the people and the state; between the people's will as a supreme power, and the ability of domestic institutions to reflect and carry out their will.<sup>11</sup> The relationship between them relies on the equal participation of all affected groups of people in the decision-making process,<sup>12</sup> necessitating that political institutions take into consideration the will of all the people in order for the state to gain international legitimacy.

However, there are practical difficulties in holding an independence referendum which can undermine the stability of the 'free and genuine expression of the will of the people'. *Firstly*, even if the referendum gains a majority vote, it may not have any

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<sup>7</sup> Robert A. Dahl, *Democracy and its critics* (Yale University Press 1989) 25; Simone Chambers, 'Democracy, Popular Sovereignty, and Constitutional Legitimacy' (2004) 11(2) *Constellations* 153

<sup>8</sup> The use of sovereignty referendums may be examined in five periods. The first period began with the French Revolution. The second period started with the process of the unification of Italy in nineteenth century. The third was inspired by the Wilsonian principle of self-determination, referendums were provided by the Paris Peace Treaty for ending war between Germany and Austria. The fourth period comprised the decolonization process after the Second World War. The fifth period started with the collapse of the USSR and the former Yugoslavia. See, e.g., Ilker Gokhan Sen, *Sovereignty Referendums in International and Constitutional Law* (Springer 2015) 18-20; J.A. Laponce, 'National Self-determination and Referendums: The Case for Territorial Revisionism' (2001) 7(2) *Nationalism and Ethnic Politics* 33, 38-40

<sup>9</sup> Tierney (n 3) 10

<sup>10</sup> Thomas M. Franck, 'The emerging right to democratic governance' (1992) 86 (1) *AJIL* 46,50; Thomas M. Franck, 'Legitimacy and the democratic entitlement' in Gregory H. Fox and Brad R. Roth (eds), *Democratic governance and international law* (CUP 2001) 26

<sup>11</sup> James Summers, 'The rhetoric and practice of self-determination' (2004) 73 *Nordic Journal of International Law* 325,327

<sup>12</sup> Frederick G. Whelan, 'Prologue: Democratic theory and the boundary problem' in J. Roland Pennock and John W. Chapman (eds), *Liberal Democracy* (New York 1983) 18-19

legal consequences unless the executive authority approves the legal validity of the outcome.<sup>13</sup> On the one hand, the executive may decide not to approve the outcome. If the executive opposes the public's demands, holding a referendum will be meaningless and have no legal consequence. On the other hand, the elites or governmental authorities can use the referendum simply to prove their democratic status without making any changes. Thus the outcome of any referendum is not necessarily a legitimate one.<sup>14</sup> *Secondly*, there is the problem with identifying those eligible to take part. If certain groups of people are included in a voter's list, this directly affects the outcome of the referendum.<sup>15</sup> In addition, holding a referendum is considered to be 'a zero-sum game' or 'winner takes all', for example, in Western Sahara, the inclusion of one particular group of people could have determined the final outcome of a referendum.<sup>16</sup> Thus, it is not fair to some ethnic groups of people who are excluded from the list. *Thirdly*, holding an independence referendum cannot be described as either a dynamic or continuous process. If the process is dynamic then it is changeable and flexible. If it is continuous it allows ongoing public participation in decision-making processes and includes 'communicative actions' between citizens and governmental authorities. In this sense, citizens are able to check, revise, or contest their political agents' actions in state institutions.<sup>17</sup> The nature of a referendum, however, is a singular action. Post-referendum, there is no clear, ongoing framework to ensure that the people's interests will be upheld. In other words there is no designated state institution to carry out the will of the people after they have made their decision. In addition, because a referendum is a one-shot-deal, if there is a

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<sup>13</sup> Tierney (n 3) 23-27

<sup>14</sup> SP Bill Report on the Scottish Independence Referendum Bill Session 4 (2013) 7

<sup>15</sup> Tierney (n 3) 75-84

<sup>16</sup> Anna Theofilopoulou 'The United Nations and Western Sahara: A Never-ending Affair' (2006) 116 United Nations Institute of Peace Special Report 2

<sup>17</sup> Some republican liberal theorists support the significance of the communicative actions between citizens and governmental authorities. See Philip Pettit, *Republicanism: A Theory of Freedom and Government* (OUP1997) 190-194; Richard Bellamy, 'Republicanism, Democracy, and Constitutionalism' in Cecile Laborde and John Maynor (eds), *Republicanism and Political Theory* (Blackwell 2008) 161-163; John W. Maynor, *Republicanism in the modern world* (Polity 2003) 155-158

constitutional restriction of the people's power, there is no recourse for the people to ensure that their will is taken into consideration. These limitations present continual difficulties with degree of legitimacy that the people's will can give to the outcome of a referendum.

The mere establishment of a process-based mechanism -such as a referendum- is not sufficient to assess the free and fair will of the people. In this study, two alternative methods are provided to measure the free and fair will of the people in determining their territorial status: representative processes and public consultations. Republican liberal theorists consider these two mechanisms to be more dynamic and ongoing than referendums on the basis that they fundamentally require institutional and legal frameworks to carry out the will of the people.<sup>18</sup> As a result, continuous channels exist which allow the people to engage with the governmental authorities.

The first method of operation is the representative process. A representative process, including holding an election, is carried out to select the people's representatives who are expected to promote the local populations' interests.<sup>19</sup> The use of representative processes as a mechanism for external self-determination allows opportunities for checking and balancing between legislative, executive, and judiciary powers.<sup>20</sup> Obviously, there is a channel for public involvement in contesting or challenging the central government's policies through their representative bodies. The mutual checks and balances between competing groups is an important way to protect the interests of various groups of people.<sup>21</sup> In other words, the people are able to 'influence and

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<sup>18</sup> Philip Pettit, (n 17) 146-147

<sup>19</sup> Bernard Manin, *The principle of representative government* (CUP 1997) 170-172; Paul Hirst, *Representative democracy and its limits* (Polity1990) 23-24

<sup>20</sup> Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge 2007) 197-198

<sup>21</sup> *Ibid* 197-198

direct' their representative through state institutions.<sup>22</sup> After the people have voted, they inform the content and meaning of their own decision-making process. If the people are dissatisfied with their representatives' actions, they have the right to remain politically engaged and the right to contest any consequential action through the state institutions.

In terms of an institutional framework, republican liberalism proposes two objectives to ensure all people can be involved in the representative process: the composition should include representatives from all ethnic backgrounds and administrative power should be allocated to a federal or local government.<sup>23</sup> The former guarantees equal participation, ensuring that all public interests are heard, for example, the Federal Assembly of Czechoslovakia which included both Czechs and Slovaks in equal number.<sup>24</sup> The latter is an alternative way to raise awareness amongst local populations of their right to self-govern, for example, the Catalan Parliament which played a crucial role in balancing the power of the state government and requesting a greater degree of autonomy.<sup>25</sup> If these two objectives are reached, the representative process is more interactive and dynamic, and ensures broader political participation.

In terms of a legislative framework, it is crucial that the law guarantees the rights of the people, in particular the right to engage in free and fair elections. It provides a legal requirement for institutions involved in the process that there is a proportional number of representatives from all ethnic backgrounds within the territory. Moreover the law can provide guidance regarding the degree of authority that federal

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<sup>22</sup> Pettit (n 17) 187

<sup>23</sup> Richard Bellamy (n 17) 171

<sup>24</sup> Katarina Mathernova, 'Czecho? Slovakia Constitutional Disappointments' (1992) 7(3) *American University Journal of International Law and Policy* 471, 480

<sup>25</sup> Kathryn Cramer, 'Political power and civil counterpower: the complex dynamics of the Catalan independence movement (2015) 21(1) *Nationalism and Ethnic Politics* 104,112



governments should have, in particular administrative power. Republican liberalism mandates that the creation of law is a way to guarantee public participation in any decision-making process through the representative system.<sup>26</sup>

The second method of operation is a public consultation. The main aim is to ensure that all ethnic minorities are involved in the decision-making process. A public consultation aims to create political equality among populations in determining their future status. It is a way of consulting the local population through a ‘dialogue’ system. During a territorial alteration, a public consultation consists of two stages. Firstly, ‘informed and motivated’ citizens are consulted to express their will individually and collectively. The establishment of communicative action is the central part of the consultative process in order to discuss and share information among populations.<sup>27</sup> Ordinary citizens have opportunities to share their attitudes whether they agree or disagree with the territorial change. Then, a combination of elected and nominated representatives convey these public opinions to a state institution. These two stages of action illustrate the ongoing processes which take the people’s will into consideration. If all ethnic people participate and freely express their opinion on their territorial status, this will increase the degree of legitimacy of the governmental authority in implementing a policy or law.

Republican liberal theory addresses the importance of these institutional and legal frameworks as integral to the practical application of any external self-determination process, because their presence legitimizes the expressed the will of the people. As a theoretical framework for assessing the legitimacy of public opinion, republican

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<sup>26</sup> Philip Pettit, *On the people’s terms: A Republican Theory and Model of Democracy* (Cambridge 2012) 225-229

<sup>27</sup> On the explanation of ‘dialogue system’ and ‘communicative action’ see James Bohman, *Public Deliberation: Pluralism, Complexity, and Democracy* (MIT Press 1996) 28-37; John Dryzek, *Deliberative Democracy and Beyond: Liberal, Critics, Contestations* (OUP 2002) 20-27; Seyla Benhabib, ‘Toward a Deliberative Model of Democratic Legitimacy’ in Seyla Benhabib (ed), *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton University Press 1996) 71-74

liberalism crucially emphasizes democratic legitimacy, involving both political equality<sup>28</sup> and human rights protection. Ideally, any democratic process must encourage the people's participation (particularly minorities) in decision-making and must create political equality among populations. Human rights protection has been systemized to ensure that the people's fundamental freedoms are guaranteed in political participation. If these two elements function properly, then the outcome of the decision-making process is legitimized in the eyes of the international community. Republican liberalism advocates that *all* people must be involved in decision-making, and that their fundamental freedoms must be in place,<sup>29</sup> in order that a territorial alteration process is considered legitimate.

Applying republican liberal theory to external self-determination processes provides a greater degree of legitimacy to the outcome of the process because the theory advocates for greater democracy (including broader participation) and for human rights. The application of republican liberal theory is in accordance with the democratic principle; the use of procedural mechanisms in public decision-making provides for political equality among different groups of people within a society.<sup>30</sup> They can play their role as constituent powers with no fear of interference or coercion in the decision-making process. In terms of human rights, the theory proposes that all people, both individually and collectively, should have the right to say whether they agree or disagree with territorial change. According to republican liberal theorists,<sup>31</sup> there should therefore be three, integral parts of the collective decision-making process: the people's freedom to express their will without any domination from the

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<sup>28</sup> Cass R. Sunstein, 'Beyond the Republican Revival' (1988) 97(8) *The Yale Law Journal* 1539, 1552-1553

<sup>29</sup> Philip Pettit, 'Republicanism, Democracy, and Constitutionalism' in Cecile Laborde and John Maynor (eds) (n 17) 107-108

<sup>30</sup> Philip Pettit (n 17) 31-32; Cass R. Sunstein (n 28) 1539, 1552-1553

<sup>31</sup> Philip Pettit (n 17); Philip Pettit (n 26); John Mayor, *Republicanism in the modern world* (n 17); Richard Bellamy (n 17); Cecile Laborde and John Maynor (eds), *Republicanism and Political Theory* (n 17); Cass R. Sunstein, (n 28) 1539-1590

authorities, the presence of functional institutions to put public opinions into action, and the recognition of the people's authority within a legal framework.<sup>32</sup>

*Firstly*, the people's right to decide should be free from any governmental coercive measures, and without pressure or intervention from the state or any institution. Republican liberal theory states that all people should be considered equal, regardless of their ethnic background.<sup>33</sup> Political equality must exist during the practical application of self-determination. In order for the outcome be considered legitimate, the free and genuine will of the people must be expressed both individually and collectively. Individually, republican liberal theory advances that each human being should have the freedom to choose their way of life. Collectively, the theory mandates the importance of communities sharing their opinions during decisions affecting their future.<sup>34</sup>

According to the Human Rights Committee in General Comment No.25,<sup>35</sup> during any decision-making process, certain substantive rights of individuals should be promoted and protected: freedom of expression, freedom of movement and freedom of peaceful assembly.<sup>36</sup> These three are categorized as fundamental civil and political rights which create a relationship between government and people. Organized groups or civil society can gather the collective will of the people about political affairs. If the

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<sup>32</sup> See more details on Philip Pettit, *On the people's terms* (n 26) 5-8

<sup>33</sup> Philip Pettit (n 17) 66-68

<sup>34</sup> Michael Freeman, 'National Self-Determination, Peace and Human Rights' (1998) 10(2) *Peace Review* 157; Philip Pettit (n 17) 210-211

<sup>35</sup> The Human Rights Committee is a permanent human rights body to implement the International Covenant on Civil and Political Rights. See Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Clarendon Press 1991) 44-55

<sup>36</sup> These three substantive rights are expressed in the work of the Human Rights Committee. See Human Rights Committee, General Comment No. 25 (57) (1996) para8,12

collective decision-making process does not reflect individual participation, this will decrease the level of legitimacy of the overall process.<sup>37</sup>

In the context of the external self-determination process, the application of republican liberalism can contribute to the evolving interpretation of the ‘peoples’ within international law. ‘People’ as units of self-determination, within international law, are recognized based on political and territorial units.<sup>38</sup> According to the UNGA res 1514 (1960), 1541 (1960), and 2625 (1970), only people living in dependent territories or certain administrative units (i.e. colonial, trust, non-self-governing territories) were granted the right to be consulted about the alteration of their own territory.<sup>39</sup> In addition, according to the International Covenant on Civil and Political Rights 1966 and the Human Rights Committee in General Comment No.12 (1984), the application of the right to self-determination is linked with a sovereign state. Only people of a state were entitled to exercise their right to self-determination.<sup>40</sup> When applying republican liberalism, the whole population residing within the territory is considered equal.<sup>41</sup> No specific groups of people (i.e. ethnic classification) prevail over any other group of people within the same territory.

*Secondly*, there must be institutional frameworks in place which uphold the will of the people. Internally, the interplay between the legislative, executive, and judicial systems is a domestic method of balancing power in order to take the will of the people into consideration. They can check and balance each other’s power to prevent

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<sup>37</sup> Christoph Mollers, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford 2015) 63

<sup>38</sup> Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res 1514 (XV) (14 Dec 1960) (adopted by 89 votes to none; 9 abstentions); Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter, UNGA 1541 (XV) (15 December 1960) UNGA Res 2625 (XXV) (24 October 1970) <http://www.un-documents.net/a25r2625.htm>

<sup>39</sup> UNGA Res 1514 (n 38) para5; UNGA 1541 (XV) Principle VI; UNGA Res 2625 (XXV) (n 38) Principle 5 para6

<sup>40</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Art.1; Human Rights Committee, ‘General Comment No. 12 Article 1 (The right to self-determination of peoples)’ (13 March 1984) para4 UN Doc HRI/GEN/1/Rev.9 (Vol.I)

<sup>41</sup> Cass R. Sunstein (n 28)1539,1552; Philip Pettit (n 17) 110-111

each other overruling the will of the people.<sup>42</sup> For example, if the executive or the legislative order attempts to overrule the will of the people, the judicial review of legislation can balance their power by forming a legal reasoning beyond the political process in order to protect the will of the people.<sup>43</sup> Apart from this, during the decision-making process, political parties, the media and civil societies can help to create ‘informed and motivated’ citizens who are then capable of taking part.<sup>44</sup>

Meanwhile, international institutions work alongside the state to ensure that public involvement in political affairs becomes an integral component of decisions about governance. Internationally, the United Nations (UN) framework is an alternative to a state framework in recognizing the will of the people in territorial alteration processes. Because international institutions represent the association of member states, their resolutions are accepted as practical guidelines to member states. The expressed will of the people should be an integral part of constructing new institutions or of modifying existing ones in order to foster self-government.<sup>45</sup>

Besides this, regional organizations, for example, the Organization for Security and Co-operation in Europe (OSCE)’s human rights system, the African Commission on Human and People’s Rights (ACHPR) under the African Charter on Human and People’s Rights<sup>46</sup> also provide evidence to support the significance of the will of the people as an integral part of legitimizing territorial alteration processes. For example, *the Katangese Peoples’ Congress v Zaire* in 1994,<sup>47</sup> the African Commission held that the right to self-determination might be exercised in a variety of ways, including

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<sup>42</sup> Richard Bellamy (n 20) 195-199

<sup>43</sup> Christoph Mollers (n 37) 92

<sup>44</sup> Philip Pettit (n 17) 58-61; John W. Maynor (n 17) 176-177

<sup>45</sup> On the ascertainment of the wishes of the inhabitants and UN participation in decision-making processes see A. Rigo Sureda, *The Evolution of the right of self-determination: A study of United Nations Practices* (Leiden 1973) 307-323

<sup>46</sup> OSCE’s human rights system, for example, Office for Democratic Institutions and Human Rights (ODIHR) About ODIHR see <http://www.osce.org/odihr>; African Commission on Human and Peoples’ Rights see <http://www.achpr.org>; [Accessed 30 December 2017]

<sup>47</sup> *Katangese Peoples’ Congress v Zaire* 75/92 (ACHPR, Decision taken at its 16<sup>th</sup> Session, Banjul, The Gambia 1994)

“independence, self-government, federalism, confederalism, unitarism or any other form of relations that *accords the wishes of the people*, but fully cognizant of other recognized principles such as sovereignty and territorial integrity”.<sup>48</sup> These regional organizations can use their reporting systems or render their legal opinions through communication procedures to assess the legitimacy of external self-determination practical action. After the people have expressed their will, existing state institutions must take responsibility for putting it into action. If there are no such institutions, republican liberalism advocates for the creation of laws which ensure that the will of the people is carried out.<sup>49</sup>

The practical application of external self-determination processes always involve more than one unit (i.e. people, state agencies, governments, political institutions etc.)<sup>50</sup> After the people have expressed their views, state institutions should take further steps to consider these views and put them into action. When looking at republican liberal theory, the interaction between the people and state institutions is considered as a fundamental element of external self-determination processes.<sup>51</sup>

Thirdly, legal frameworks must be put in place to guarantee the first two dimensions detailed above. Legal mechanisms can create a robust system which safeguards the free and genuine will of the people. This robust system – i.e. the constitution or equivalent statutes – is considered to be the supreme law of the nation. Republican liberal theory advocates that the people’s authority be protected by such legal mechanisms in order to achieve democratic legitimacy and human rights protection.<sup>52</sup>

There are two major outcomes of having the people’s will safeguarded by law. Firstly,

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<sup>48</sup> Ibid para26; Quoted in David Raic, *Statehood and the Law of Self-Determination* (Kluwer 2002) 330

<sup>49</sup> Philip Pettit (n 17) 190-192; John W. Maynor (n 17) 154

<sup>50</sup> James Summers, ‘The internal and external aspects of self-determination reconsidered’ in Duncan French (ed), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (CUP2013) 232

<sup>51</sup> Philip Pettit (n 17) 172-173

<sup>52</sup> Richard Bellamy (n 20) 188-191

the creation of laws is a way to enact certain standards of democratic legitimacy, for example, the equal participation of all people and proportional equality of representatives.<sup>53</sup> Popular power therefore only exists if the people's right to participate is enumerated in the constitution or equivalent legal regulations. In order to protect the fundamental rights of all people, legislation must exist which ensures that everyone, including minorities (such as ethnic groups), have freedom of expression, of movement and of association.<sup>54</sup> If these conditions are secured properly, the free and genuine will of the people will legitimize governmental action. Secondly, legislation must ensure that all non-governmental institutions can work independently from state control and that existing state institutions must take responsibility for carrying out the will of the people.<sup>55</sup> If a state has a constitution this can ensure that a non-arbitrary (i.e. a non-coercive) outcome of external self-determination can be reached.<sup>56</sup>

According to the *In Re secession of Quebec* 1998, the Canadian Court held that the constitution was the expression of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government.<sup>57</sup> Thus, it is necessary to design laws with the aim of providing communicative channels between the state and the people.<sup>58</sup> The constitution emphasizes that citizens have a clear, legal duty to be involved in decision-making process. In order to ensure the process is legitimate, the fundamental rights protection of all ethnic communities is a crucial point to put in place within a

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<sup>53</sup> Philip Pettit (n 17) 175-177; Christoph Mollers (n 36) 75-76

<sup>54</sup> Robert McCorquodale, 'Self-Determination: A Human Rights Approach' (1994) 43 ICLQ 857,858; Michael Freeman (n 34) 157

<sup>55</sup> John W. Maynor (n 17) 161

<sup>56</sup> Philip Pettit (n 17) 172-173; Richard Bellamy, (n 20) 188-191

<sup>57</sup> *In Re Secession of Quebec*, Canada Supreme Court Judgment 2 SCR 217 (1998) para 85, 87

<sup>58</sup> *Ibid* para67-68, 71

constitution.<sup>59</sup> Using republican liberalism can contribute to the degree of legitimacy of any decision-making process because it supports the value of domestic law as an instrument to control the balance of power between government and people.<sup>60</sup> The sharing and balancing of the people's authority and governmental power is a way to legalize people as a source of legitimacy. Thus, the external recognition of external self-determination process may be facilitated if the rights of people are guaranteed by law.

## 2. The Research Question

The distinction between the internal and external right to self-determination in international law came into existence in the Special Report of the United Nations Commission for Indonesia in 1949.<sup>61</sup> On the one hand, internal self-determination refers to the ability of people to choose which governing system they want by establishing a democratic decision-making processes.<sup>62</sup> If people do not enjoy their internal rights to self-determination, they are entitled to secede.<sup>63</sup> On the other hand, the external right to self-determination was traditionally implied as the right of colonial people to secede from the parent state and form an independent state.<sup>64</sup> The legal consequence of external self-determination can be territorial change. Then, post-1960, the external right to self-determination became a general right belonging to all people in non-colonial situations.<sup>65</sup> This was due to ethnic groups of people

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<sup>59</sup> Ibid para68,74,77

<sup>60</sup> Philip Pettit (n 17) 174-176 ; Richard Bellamy (n 20) 17-20

<sup>61</sup> The first distinction was made in the Special Report of the United Nations Commission for Indonesia 1949. See 'United Nations Commission for Indonesia' Special Report to the Security Council on the Round Table Conference UNSC S/1417 (10 November 1949) para52 [http://repository.un.org/bitstream/handle/11176/87022/S\\_1417-EN.pdf?sequence=2&isAllowed=y](http://repository.un.org/bitstream/handle/11176/87022/S_1417-EN.pdf?sequence=2&isAllowed=y) [Accessed 7 January 2017]

<sup>62</sup> Ibid para52

<sup>63</sup> *In Re Secession of Quebec* (n 57) para138

<sup>64</sup> UNGA Res 1514 (XV) (n 38) para5; Anne F. Bayefsky, *Self-Determination in international law: Quebec and Lessons Learned* (Kluwer 2001) 1

<sup>65</sup> Christian Tomuschat, 'Self-Determination in a post-colonial world' in Christian Tomuschat (ed), *Modern Law of Self-Determination* (Brill 1993) 3,17-18; Robert McCorquodale, (n 54) 857, 875-876; Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (CUP1995) 52-55; David Raic (n 48) 228-231



increasingly demanding the right to self-government (i.e. autonomy, sovereignty, or independence) freeing themselves from oppression or alien dominating powers.<sup>66</sup> The assertion of democratic governance (i.e. the interaction of procedural mechanisms, state institutions, and legal mechanisms) is a way to ensure that public political participation within a state is compliant with international standards. If all three work together, this will help to increase the degree of legitimacy of the practical application of the external self-determination process.

In this thesis, the main research question is “*How can the expressed will of the people during external self-determination be most legitimately ascertained and implemented?*”. In order to respond to this question, three practical applications of external self-determination are examined: referendums, elections and public consultations. These three mechanisms illustrate varying degree of continuity of the expression of the people’s will. This study argues that holding a referendum is not considered to be a dynamic and ongoing process. Instead, non-referendum mechanisms (i.e. representative processes including an election and public consultations) provide more dynamic and continuous action than referendums.

This research focuses on external self-determination practices because of the inherent conflict between the administrative ruling power and the people under the existing regime. In the past, the power for territorial alteration was solely in the hands of the government, and the people had no right to decide their own destiny.<sup>67</sup> In the last half-century, there has been increasing calls from people living in former-colonial states to allow greater popular autonomy over their territorial status. The greater involvement

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<sup>66</sup> Marc Weller ‘Why the Legal Rules on Self-determination Do Not Resolve Self-Determination Disputes’ in Marc Weller and Barbara Metzger (eds), *Settling Self-Determination Disputes: Complex Power-Sharing in Theory and Practice* (Brill 2008) 21; Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (University of Pennsylvania Press 1990) 4-5

<sup>67</sup> Helen Quane, ‘The United Nations and the Evolving Right to Self-Determination’ (1998) 47(3) *The International and Comparative Law Quarterly* 537, 553

of people has been supported by international institutions, and many international *legal* institutions have succeeded in enshrining in law the people's right to express their will over their territory.<sup>68</sup> As a result, from an international legal standpoint, for external self-determination processes to be considered legitimate they must involve public participation.<sup>69</sup> When the people's rights are positioned at the center of the territorial alteration process, this demonstrates how 'the people' as an entity, shift from the object to the subject of international law.<sup>70</sup> In other words, they become the right-holders and constituent power during any process which has the potential to change their status.

Within the scope of international law, the external 'right to self-determination' has arguably shifted from the right to independence, towards the procedural right belonging to all people. In other words, people act as political constituents in the external self-determination processes. The right of peoples to self-determination is recognized within international and regional treaties.<sup>71</sup> One interpretation of this right is simply that people should be able to publicly participate in politics. However, due to the vagueness of the concept of external self-determination in international law, the people's rights need judicial opinions and interpretations to protect them.<sup>72</sup> A significant number of international legal documents support the idea that the right of

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<sup>68</sup> UNGA Res1514 (XV) (n 38) para2; International Covenant on Civil and Political Rights (n 40) (ICCPR) Art1; International Covenant on Economic, Social and Cultural Rights 1966 (adopted 16 December 1966) 999 UNTS 3 (ICESCR) Art1; UNGA Res 2625 (XXV) (n 38) principle 5; Rosalyn Higgins, *Problems and Process: International Law and how we use it* (Oxford 1994) 118; Jan Klabbers, 'The Right to be taken seriously: Self-Determination in international law' (2006) 28(1) Human Rights Quarterly 186,189; Marti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law* (Cambridge University Press 2002) 32

<sup>69</sup> Public participation can be described as a deliberative process by which ordinary citizens are involved in decision-making processes. See Thomas M. Franck, 'Legitimacy and the democratic entitlement' (n 10) 29-32; Thomas Franck, 'The Emerging Right to Democratic Governance' (n 10) 46; Gregory H Fox, 'The right to political participation in international law' in Gregory Fox and Brad Roth (eds), (n 10) 48-50

<sup>70</sup> Rosalyn Higgins, (n 68) 49; Rosalyn Higgins, 'Conceptual thinking about the individual in international law' (1978) 4 British Journal International Studies 1,3-5

<sup>71</sup> Charter of the United Nations (24 October 1945) 892 UNTS 119 Art1 (2) <http://www.un.org/aboutun/charter> accessed 10 June 2015; UNGA Res 1514 (XV) (n 38); International Covenant on Civil and Political Rights (ICCPR) (n 40) Art1; International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) (n 68) Art1; UNGA Res 2625 (XXV) (n 38) principle 5; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter) Art20

<sup>72</sup> Jan Klabbers, (n 68) 186,189

self-determination is a procedural right belonging to all peoples. These include the UN General Assembly Resolution 1514 of 14 December 1960 and the Resolution 2625 of 24 October 1950. The former specified the legal significance of the right to self-determination from the 'principle' to a 'legal right' for non-self-governing territory.<sup>73</sup> The latter was a legal instrument to clarify how international law regulates self-determination. It also mentions that it is the duty of states to promote the right to self-determination of peoples.<sup>74</sup> In addition, the CERD General Recommendation No.21 of 23 August 1996 provided the scope of the external aspect of self-determination that "all peoples have the right to determine freely their political status and their place in the international community based upon the principle of equal rights and exemplified by the liberation of peoples from colonialism and by the prohibition to subject peoples to alien subjugation, domination and exploitation".<sup>75</sup> Based on these documents, only peoples within the colonial territory and peoples within non-self-governing territory are entitled to exercise their rights to self-determination.

Due to the lack of a clear division between internal and external self-determination in international law documents, in the non-colonial situation, one argument with regard to external self-determination is how to implement this right along with public involvement in any decision-making process. In order to answer this question, it is worthwhile to look at the possible meanings of self-determination and certain prerequisites of external self-determination. According to Patrick Thornberry, the external dimension of self-determination defines the status of a people in relation to

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<sup>73</sup> Antonio Cassese (n 65) 70

<sup>74</sup> Ibid 70

<sup>75</sup> CERD 'General Recommendation No.21 (Right to self-determination)' (23 August 1996) para4 <http://www.uio.no/studier/emner/jus/humanrights/HUMR5508/v12/undervisningsmateriale/General%20Recommendation%20No21-self-determination.pdf> accessed 10 June 2015

another people, State or Empire.<sup>76</sup> In this sense, peoples are the central units of external self-determination. They can interact with other entities, for example, other peoples, governments, or states.<sup>77</sup> Thus, external self-determination could refer to a people-centered perspective and their exercising of their rights with other peoples or institutions.<sup>78</sup> In addition, there was evidence in *In Re secession of Quebec* in 1998 to address the possible rights of people in external self-determination. There is a prerequisite condition for people to claim self-government through the process of the external self-determination. If a state fails to perform its duty to provide the internal right to self-determination for peoples, they are entitled to claim for external self-determination.<sup>79</sup> This condition implicitly suggests that people's fundamental freedom and their participative role in any public affairs should be protected.

When the people are accepted as a constituent power involved in the 'state-framing process', it is necessary both to establish processes to assess the will of people, and also to protect their substantive right to express their will.<sup>80</sup> During any self-determination process, the success of these two actions (creating processes and protecting people's substantive right to express their will) can increase the legitimacy of the decision-making process through accountability. Importantly, the international legal community has never specified how to carry out such public participation in a way that satisfies democratic and human rights-based needs.<sup>81</sup> During external self-

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<sup>76</sup> Patrick Thornberry, 'The Democratic or Internal Aspect of Self-Determination with some remarks on Federalism' in Christian Tomuschat (ed), *Modern Law of Self-Determination* (Martinus Nijhoff 1993) 101

<sup>77</sup> James Summers (n 50) 232

<sup>78</sup> Conference on Security and Cooperation in Europe Final Act (CSCE), 'Helsinki Final Act 1975' Principle VIII (2) <https://www.osce.org/helsinki-final-act?download=true> accessed 10 June 2015 "By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, *their internal and external political status*, without external interference, and to pursue as they wish their political, economic, social and cultural development".

<sup>79</sup> *In re secession of Quebec* (n 57) para126, 134-135,154, 161

<sup>80</sup> James Summers, *Peoples and International Law: How Nationalism and Self-determination Shape a Contemporary Law of Nations* (2 edn, Martinus Nijhoff 2014) 3,46

<sup>81</sup> Some authors made some observations on the limitation of the will of the people in external self-determination practices and the importance of the reconciliation between the right to self-determination and human rights practice. See James Summers (n 80) 46; Robert McCorquodale, (n 54) 857,858; Allen Buchanan, *The heart of human rights* (Oxford 2013) 3; Jan Klabbbers, (n

determination processes, these three mechanisms are used as a way to identify the will of the people. The nature of each of these procedural mechanisms is different; this research explores the different conditions and specifications that influence how the free and fair will of the people is ascertained and implemented. It is noteworthy that the outcome of an external self-determination process is considered legitimate because the international community will then accept the internal decision. Thus, it is crucial to generate domestically stabilized systems to guarantee free and genuine will of the people. The three practical applications demonstrate different degrees of legitimacy due to the different ways in which each ascertains and implements the will of the people.

### **3. Research Methodology**

#### **3.1 Doctrinal Research**

This study is categorized as doctrinal research. It aims to develop a legal theory,<sup>82</sup> using the conduct of states and judicial opinions to examine how the external rights of peoples to self-determine evolve in a practical sense.<sup>83</sup> Unlike previous doctrinal studies, which have examined the practical application of external self-determination by applying nationalist,<sup>84</sup> liberal and communitarian principles,<sup>85</sup> this research uses an

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68) 186,189; Anna Michalska, 'Right of Peoples to Self-determination in International Law' in William Twining, *Issues of Self-Determination* (Aberdeen University Press 1991) 71-75

<sup>82</sup> Ian Dobinson and Francis Johns 'Qualitative Legal Research' in Mike Mc Conville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007) 21

<sup>83</sup> Several states support the peoples' right to self-determination through their interpretative documents, for example, Netherlands, France, Australia, New Zealand, Denmark, France, and others. See James Summers, (n 80) 302-303. The statement of judicial opinion can be seen in the ICJ advisory opinion. See ICJ Reports (1975) Western Sahara (Advisory Opinion) para55 accessed 20 April 2015

<sup>84</sup> Elie Kedourie, *Nationalism* (4<sup>th</sup> edn, Blackwell 2000); James Summers, (n 76); James Summers, 'The Rights of Self-Determination and Nationalism in International Law' (2005) 12 *International Journal on Minority and Group Rights* 325-354; John Breuilly, *Nationalism and the state* (Manchester University Press 1982)

<sup>85</sup> Will Kymlicka, *Liberalism, Community, and Culture* (Oxford 1989); Will Kymlicka, *Multicultural citizenship: a liberal theory of minority rights* (Oxford 1995) (OUP 1995); John Rawls, *The laws of peoples with the idea of public reason revisited* (Harvard 1999)

alternative interpretation – republican liberal theory. Since an aspect of ‘the right to self-determination’ is a right to democratic participation, public political participation is of central importance to the process.<sup>86</sup> Using the core principles of modern republican liberal theory to establish a process of measuring the will of the people foregrounds public participation in external self-determination practices.

Doing research based on theoretical development requires the selection, discussion, and evaluation of primary and secondary source material. These collections of data are used as interpretative tools to evaluate the legitimacy of external self-determination practices, creating examples of best practice. Qualitative research methods are used to analyze how the will of the people is an integral part of territorial alteration, and therefore how republican liberalism (which foregrounds public participation) remains more relevant than any other theoretical framework in external self-determination processes.

### 3.2 Data Collection and Analysis

The data collection and analysis will be based on the use of republican liberalism as an underlying theory which supports the people’s rights during external self-determination processes. The data collection in this study consists of literature examining both republican liberal theory and democratic legitimacy. These two collections of data are used as interpretative tools to evaluate the legitimacy of external self-determination practices. The literature is analysed in order to examine the development of liberalism, communitarianism and classical and modern republican liberal theory, and how the latter can be applied to external self-

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<sup>86</sup> This can be explained by the relationship between Article 1 and Article 25 of the ICCPR. See Dominic McGoldrick (n 35) 247-249; James Summers, (n 80) 73; Jan Klabbers, (n 68) 186,189; Thomas Franck, ‘The Emerging Right to Democratic Governance’ (n 10) 46

determination practices. This study uses republican liberal theory to examine how public opinion is an integral part of legitimizing external self-determination practices. In addition, analyzing the literature also involves examining the conditions for achieving democratic legitimacy. This includes the nature of procedural and substantive legitimacy in decision-making processes, and guides how domestic law should protect the will of the people. The argument is therefore developed through this analysis that republican liberalism is a better solution than any other relevant theories in external self-determination processes.

Therefore the documents used to analyze public participation in self-determination practices include international treaties, international customary law, regional treaties, international or regional institutions' official documents, the contentious cases between states' and the courts' decisions and guidelines, state reports and the reports of non-governmental organizations. In addition, secondary sources include academic papers, textbooks, the opinion of experts in the field of international law and the lectures of internationally respected lawyers. These kinds of documents play a supportive role in re-conceptualizing international legal theory, tracing the development of the practical application of external self-determination.

#### **4. Theoretical Framework of the Research- Republican Liberal Theory**

Among international lawyers, there is a question over the proper procedural mechanisms and substantive norms for public, political participation in determining their territorial status. The answer lies in the use of republican liberalism as an underlying theory in external self-determination practices. This theory mandates the

importance of peoples as constituent powers in any decision-making process. Territorial alteration affects the people politically, economically and socially, and therefore is a decision that must involve the people.<sup>87</sup> Since an external self-determination process has direct consequences on the people's lives, their collective decision-making is considered to be a way to legitimize governmental action in a territorial alteration process.

When people become central in any decision making process, it is essential to create a way to put their public opinion into action. Looking at the three different theories, there are some restrictions when implementing these theories in external self-determination practices. The use of nationalist theory lessens the people's authority to determine their future status. Within this theory, a state or a governmental authority has the full power to decide 'who should be the people' who are entitled to decide.<sup>88</sup> Most of them classify people based on ethnic background in order to create a homogenous society.<sup>89</sup> Thus, different ethnic groups are not recognized as the legal entities. It is not fair for certain groups of people who are excluded from any decision-making process. In addition, the people-centered perspective can be seen in two underlying theories: liberalism and communitarianism. The former outlines that each individual has the authority to determine their own future. Each will make decisions freely and choose their interests.<sup>90</sup> The latter emphasizes the communal or group rights as collective decision-makers.<sup>91</sup> However, the application of liberal theory in self-determination processes is contrary to a pluralistic society because it is hard to

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<sup>87</sup> David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Polity 2007) 18

<sup>88</sup> Robert Lansing, *The peace negotiations: a personal narrative* (Constable 1921) 83,91

<sup>89</sup> Eric Hobsbawm, *Nations and Nationalism since 1780: Programme, myth, reality* (2edn CUP 1992) 19; James Summers (n 80) 17-18

<sup>90</sup> John Stuart Mill, *On Liberty* (Penguin 1974) 120; John Westlake, *The Collected Papers of John Westlake on Public International Law* (Cambridge 1914) 26

<sup>91</sup> Will Kymlicka, *Contemporary political philosophy: An introduction* (2<sup>nd</sup> edn, Oxford University Press 2002) 208



find any conciliation between different ethnic communities.<sup>92</sup> In the context of communitarianism, collective decision-makers sometimes do not reflect the consensus between group members as some dissenting opinions (i.e. a member in the group) are not considered by other members.<sup>93</sup>

Applying republican liberalism can provide solutions to ensure that the people's will is respected by governmental authorities. This study is based on the modern form of republican liberal theory which has been formalized in Philip Pettit's 1997 book, 'Republicanism: A Theory of Freedom and Government'.<sup>94</sup> Recognizing that the people are a political entity, Pettit proposed that they should be involved throughout any decision-making process which would affect their lives. The status of the people is therefore emphasized in his version of republican liberalism; greater involvement of the people in political affairs can legitimize the actions of the state. It is also concerned with the importance of popular sovereignty, a principle which holds that the will of the people should prevail over governmental authority.<sup>95</sup> Therefore modern, republican liberalism advocates that the people's right to participation must be guaranteed to enable popular sovereignty to balance state power.<sup>96</sup> Republican liberalism bases the ideals of popular sovereignty on the protection of people's fundamental freedoms – i.e. the people's rights to freedom of expression, assembly and movement.<sup>97</sup> If human rights are properly implemented during the decision-making process, the expressed will of the people will conform to the ideals of republican liberalism.

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<sup>92</sup> Will Kymlicka, *Liberalism, Community and Culture* (n 85) 47

<sup>93</sup> Allen Buchanan, 'Assessing the Communitarian Critique of Liberalism' (1989) 99(4) *Ethics* 852, 863

<sup>94</sup> Philip Pettit (n 17); Philip Pettit (n 26). Later, there are several republican theorists who conduct their research based on Pettit's work. See John W. Maynor, (n 17); Richard Bellamy (n 17)

<sup>95</sup> Cecile Laborde and John Maynor, 'The Republican Contribution to Contemporary Political Theory' in: Cecile Laborde and John Maynor (eds.) (n 17) 9

<sup>96</sup> Richard Bellamy (n 20) 191-193

<sup>97</sup> Philip Pettit (n 17) 143-147; Philip Pettit (n 26) 44-49

Unlike communitarian theory or liberalism, republican liberal theory suggests a set of practical guidelines which, if used during the self-determination procedure, makes the collected will of the people more credible. Firstly republican liberalism suggests that to motivate citizens to express their will, raising public awareness of their right to participate can be done through civic education.<sup>98</sup> Thus the people are ready and educated in advance of any decision-making process. Secondly republican liberalism gives a number of guidelines for creating institutional frameworks which foreground the people's will.<sup>99</sup> However there are two particular practical guidelines which can be applied directly to external self-determination processes.

i) the distribution of the people's representatives should be based on proportional numbers of different ethnic groups in a particular territory;

ii) the allocation of powers to regional or local governments should balance the powers of central government.<sup>100</sup>

Thirdly republican liberalism suggests that having a law or domestic constitution which guarantees public involvement can promote and protect the will of the people.<sup>101</sup> Through doing this, a state can demonstrate its acceptance the people's opinion as an integral part of self-determination. Based on these three sets of guidelines, republican liberal theory provides a more concrete way (than any other theory) of recognizing the people as the subject of international law, and suggests that institutional and legal frameworks can uphold the people's authority in any decision-making process. Within the framework of international law, republican liberalism provides realistic, practical ways to carry out external self-determination based on the

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<sup>98</sup> John W. Maynor (n 17) 148-149

<sup>99</sup> Republican liberal theorists make an attempt to establish institutional ideals, for example, the rule of law, the separation of powers, and democratic accountability. See Philip Pettit (n 17) 172-180; Philip Pettit (n 26) 215-218; Richard Bellamy (n 20)

<sup>100</sup> Richard Bellamy (n 20) 195-199

<sup>101</sup> Philip Pettit (n 26) 282-285; Richard Bellamy (n 20) 184-188

credible will of the people, leading to the acceptance of the legitimate outcome by the international community.<sup>102</sup>

## **5. Contribution to the field**

This study illustrates how the will of the people can legitimize external self-determination practices and its consequence in the legitimacy of territorial alteration. Referendums, elections and public consultations demonstrate varying degrees of continuity of the expression of the people's will. Within the procedural mechanisms, the different ways in which the will of the people is ascertained is analyzed to identify their legitimacy. The thesis suggests that non-referendum mechanisms, such as representative process and public consultations, are more dynamic and ongoing than referendums, and are therefore more legitimate in identifying the will of the people.

Republican liberal theory can be used as a guiding principle to interpret the practical application of self-determination practices. This theory stresses the importance of equal participation of the people in a decision-making process and addresses the importance of involving institutional and legal frameworks to complement the people's will. If these three conditions of republican liberal theory properly function, this will increase the degree of legitimacy of the external self-determination process.

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<sup>102</sup> Philip Pettit (n 17) 146-147; Richard Bellamy (n 20) 191-195

## **6. Overview of chapters**

Chapter 1 examines the right to self-determination as a right to public political participation as confirmed in the International Covenant of Civil and Political Rights (ICCPR). Since the external right to self-determination relates directly to ‘the people’, popular authority is an integral part of legitimizing the external self-determination process. Public participation is an integral component of moral reasoning and can increase the quality of the secession process. During any decision-making process, the interaction between ordinary citizens and political institutions is a factor in the legitimacy of the subsequent governmental authority. In order to ascertain the will of the people, this study introduces an alternative theory to liberalism and communitarianism to evaluate external self-determination practices. Republican liberal theory encourages the active role of the people. All ethnic groups are equally considered. Republican liberalism mandates a continuous process of taking public opinion into account. This requires institutional and legal mechanisms to support ongoing public participation.

Chapter 2 explores the use of referendums as a process-based approach which is generally considered to be a direct and a participatory form of democracy. When the alteration of territorial status is in question, a referendum assesses the will of the people. There are two types of independence referendums: consensual and non-consensual. Consensual-based referendums take place when there is agreement between the parent states. Some instances include Eritrea 1993, East Timor 1999, Montenegro 2006, South Sudan 2011 and Scotland 2014. By contrast, non-consensual based referendums involve disagreements between two parties; the parent state and the secessionist movement with popular support. This typology includes the former

Soviet Union and the former Yugoslavia, Ukraine 1991, Quebec 1996, Crimea 2014, and Catalonia 2014. In most cases, the Constitutional Court rulings identify the constitutional imperative with a view to preserving unity and the territorial integrity of the states rather than securing public support for peaceful secession. From the study, however, the use of referendums in external self-determination practices does not inherently imply a dynamic and ongoing process of assessing the will of the people. The 'one shot deal' nature of a referendum cannot be described as either dynamic or ongoing. In fact critics argue that referendums are used as executive driving mechanisms to claim popular legitimation.

Chapter 3 examines an indirect way of public participation, that is, an election and its representative processes. There are five instances to illustrate how public opinions are put into action: Namibia, Czechoslovakia, Kosovo, Bangladesh and Catalonia. Representative processes are classified into two types: consensual and non-consensual. Both types are analyzed through five components to assess their legitimacy: the nature of the election and the subsequent actions of the elected representatives, majority and minority relations, the pre-identification of voters, human rights protection, and the role of international institutions. Through the lens of republican liberal theory, an election and the actions of the people's elected officials can be considered as a dynamic and ongoing process. When the people are not satisfied with the governmental action, they have opportunities to choose new representatives to promote their interests. Meanwhile, the people are able to contest or review any consequential action of the election through the different levels of state institutions (i.e. local, or federal, or national institutions). Therefore there is a recourse system for the people to ensure that their will is taken into consideration. In addition, if there is proportional equality of the people's representatives then the latter can be

held fully accountable to the people, and the outcome of their decisions will be more legitimate.

Chapter 4 explores the public consultation process as an alternative way of identifying the will of the people. The aim of public participation is to create political equality and to broaden public participation. If all groups of people are consulted in a territorial alteration, this will increase a degree of legitimacy of governmental authority. There are two instances (i.e. West Papua and Bahrain) which illustrate how a public consultation has been conducted in a territorial alteration processes. During external self-determination practices, a public consultation has two stages: the direct participation of the people in expressing their political opinions and the implementation by the people's representatives of the outcome of the collective consultation. According to republican liberalism, the people as a political community should have the right to be continuously, publically involved in the practical application of any territorial alteration processes. There are three relevant factors affecting the legitimacy of public consultations: international institutions' involvement, the effective participation of the people, and human rights protection. These three factors are explored in detail to measure the free will of the people in public consultation processes.

## Chapter 1

### The expressed will of the people during the external self-determination process

#### 1. Introduction

The aim of the chapter is to explore self-determination as a right belonging to all people to decide their future destiny, as interpreted by the international legal community. In theoretical rhetoric, the right to self-determination is the right of the people to public, political participation which allows ordinary citizens to be involved in decision-making processes. Judge Dillard's statement in the *Western Sahara advisory opinion* in 1975 under the International Court of Justice (ICJ) jurisdiction supported this position. He stated that:

“Self-determination is satisfied by a free choice not by a particular consequence of that choice or a particular method of exercising it”.<sup>103</sup>

This statement emphasizes the right to self-determination as a process of decision-making. It concerns people's ability to take part in deciding the legal rules which affect their future destiny.<sup>104</sup> Thus, according to Dillard, the expressed will of the people should be an integral part of external self-determination.

One example of a political decision is a territorial alteration, or external self-determination, where local populations should be able to decide which country they belong to. In practice, when one considers 'the people' as the central element of external self-determination, one needs to consider the mode of operation of allowing people to express their will. During public participation in external self-determination,

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<sup>103</sup> ICJ Reports (1975) *Western Sahara (Advisory Opinion)* (n 83) para55

<sup>104</sup> Robert McCorquodale, 'Self-Determination beyond the colonial context and its potential impact on Africa' (1992) 4 *African Journal of International and Comparative Law* 592, 593

it is necessary for the people to express their will through a political process - (i.e. a referendum, an election, or a public consultation) however each of these requires an international legal framework consisting not just of the law, but of institutions and law-making processes. The interaction between popular participation and political institutions<sup>105</sup> is a factor in the legitimacy of subsequent governmental authority.

Republican liberalism is a theory which can resolve problems of political discrimination against ethnic groups in a pluralistic society and emphasizes the importance of relevant institutions and legal frameworks to make the process of public participation more robust.<sup>106</sup> Since the people are of central importance to external self-determination practices, during a territorial alternation process, they are recognized as a political community who have the right to deliberate their decision.<sup>107</sup>

International lawyers have raised questions about which groups of people are entitled to make these decisions.<sup>108</sup> In most external self-determination practices, the eligibility of voters in a secession process is linked to their ethnicity. The people are divided by the race or community they belong to, but this categorization excludes some ethnic groups in the decision-making process.<sup>109</sup> One solution is to treat all people in the same manner regardless of their backgrounds. All people who may be affected by the outcome of a political decision should be involved in the decision-making process.<sup>110</sup> This equal consideration in participation can increase the level of legitimacy of a secession process. Using republican liberal theory to examine 'the expressed will of the people' usefully foregrounds political equality. Republican

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<sup>105</sup> James Summers (n 84) 325, 327; Jure Vidmar, 'The Right of Self-Determination and Multiparty Democracy: Two sides of the Same Coin?' (2010) 10(2) Human Rights Law Review 239,240

<sup>106</sup> These republican liberal theorists stated the substantive and procedural mechanisms for public involvement in any decision-making process. See Philip Pettit (n17) 174-177; Richard Bellamy, (n 17) 188-195; John Mayor, (n 17) 48-51

<sup>107</sup> Philip Pettit (n 26) 160-162; John W. Maynor (n 17) 20-22

<sup>108</sup> The discussion on the peoples as units of self-determination is mostly based on ethnic identity and territorial units. See James Summers, (n 80); Robert McCorquodale (n 54) 857, 859-861

<sup>109</sup> Karen Knop, *Diversity and Self-Determination in International Law* (Cambridge University Press 2002) 55-57; Frederick G. Whelan, (n12) 21-22

<sup>110</sup> Frederick G. Whelan, (n12) 16; Karen Knop (n 109) 60-62



liberalism also mandates that in order for the consequence of any such self-determination process to be legitimate, the expression of the people's will needs institutional and legal frameworks. Institutional frameworks (either domestic or international) are necessary to check each other, so that the people are not dominated and are able to express their popular sovereignty. Legal frameworks are required to create both opportunities for the people to communicate reciprocally with the political institutions, and also a legal obligation to listen to all the people in a pluralistic society. Republican liberal theory fills the gap where institutional and legal vacuums which have previously prevented external self-determination processes from being acceptable and legitimate. By emphasizing equal, public participation backed by institutional and legal frameworks, it provides a set of guidelines for future territorial alteration processes to be more legitimate in the eyes of the international community.

Undeniably, ordinary citizens are directly affected by governmental action when there is a change in boundaries. Public political participation in a secession process is a way of increasing the people's authority while the government has no free hand to make decisions based on its own interests. If the people have the authority to balance state power, this legitimizes the actions of the governmental authorities of the state.<sup>111</sup> In other words, the government must be based on 'the consent of the governed',<sup>112</sup> i.e. the power of public opinion over government, who must perform their duty according to the people's interests.<sup>113</sup> The consent of the people can be assessed through processes which involve them expressing their will. Public participation therefore increases the degree of political and legal legitimacy that a government holds after a decision has been reached. Both a legal concept (the moral reasoning of law) and a political

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<sup>111</sup> Patrick Riley, (n 5) 1; Thomas M. Franck, 'Legitimacy and the democratic entitlement' (n 10) 29-30

<sup>112</sup> Appendix: 'The Declaration of Independence' in Allen Jayne, *Jefferson's Declaration of Independence: Origins, Philosophy, and Theology* (University Press of Kentucky 1998) 175; Patrick Riley, (n 5) 1

<sup>113</sup> Frederick G. Whelan, (n 12) 15

concept (democratic governance) illustrate how the people's participation acts as a standard for legitimacy. 'The moral reasoning of law' is a process where fairness, justice and equality exist within the law-making process.<sup>114</sup> In terms of external self-determination, the legitimacy of any decision-making process is increased when the moral reasoning of the law (and therefore wider public involvement) is upheld. 'Democratic governance' means how to bring public scrutiny upon decision-making processes, in other words the interrelation between the people, state mechanisms and democracy.<sup>115</sup> Democratic governance includes public participation and human rights protection. In terms of increasing legitimacy, democratic governance states that it is the duty of a state to guarantee human rights protection for all people, who are therefore free to express their will during the decision-making process. Both moral reasoning and democratic governance require public involvement as an integral component of any decision-making process.

### *1.1 Legitimacy and legality in the law of secession*

Through the lens of the international law, there are both political and legal justifications for the will of the people to be included. Legitimacy is originally a political concept whereas legality is a legal concept.<sup>116</sup> **Legitimacy** can be defined as a subjective political standard of rules and rule-making. Among these is the perception a decision is made in accordance with a 'right process' and, the intercommunication between the ruler and ruled.<sup>117</sup> If the people are able to engage with the governmental action this makes the rules and rule-making process are

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<sup>114</sup> Richard Bellamy, (n 20) 19

<sup>115</sup> Thomas M. Franck, 'The emerging right to democratic governance'(n 10) 46,50

<sup>116</sup> Lon L. Fuller, *The Morality of Law* (Yale University Press 1969); Jutta Brunnee and Stephen J. Toope, *Legitimacy and Legality in international law: An Interactional Account* (CUP 2010); Richard Falk, Mark Juergensmeyer, and Vesselin Popovski, *Legality and Legitimacy in Global Affairs* (eds) (OUP 2012)

<sup>117</sup> Thomas M. Franck, *The power of legitimacy among nations* (OUP 1990) 64-66; Daniele Archibugi and Mariano Croce, 'Legality and Legitimacy of Exporting Democracy' in Richard Falk, Mark Juergensmeyer, and Vesselin Popovski, (n 116) 418-419

considered to be more acceptable to international community and therefore the decision-making process is legitimate. **Legality** is the quality of a state or process being in conformity with the law. Legality provides a way of increasing the people's authority in law-making process through communicative channels.<sup>118</sup> In terms of external self-determination, the legality of the external self-determination process requires the inclusive participation of the people.

Legality and legitimacy are two, interconnected issues<sup>119</sup> which justify public involvement in any decision-making process through the existence of relevant rules, institutions or systems.<sup>120</sup> In fact legitimacy fills the gaps that legality leaves, justifying the legal validity of the procedural mechanism chosen to assess the will of the people.<sup>121</sup> If a state adheres to the conditions of legitimacy, this can lead to a lawful act of secession. According to Thomas M. Franck, legitimacy in the international law system lays out four 'objective factors'.<sup>122</sup> These factors can be used to validate the legitimacy of a national government in a secession process.

*Firstly*, 'determinacy' is the existence of legal regulation. It can be assessed from 'substantive' and 'procedural' perspectives. Substantively, it deals with the clarity of a legal text. In certain circumstances, if the legal text is ambiguous, it is necessary to redress this through institutional channels. Procedurally, it relates to responsibility of state authorities to carry out their duties regarding law creation.<sup>123</sup> In terms of secession, the right to unilateral secession is neither recognized nor prohibited under

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<sup>118</sup> Jutta Brunnee and Stephen J. Toope, (n 116) 24

<sup>119</sup> Jutta Brunnee and Stephen J. Toope, (n 116) 5; Richard Falk, 'Introduction: Legality and legitimacy: Necessities and problematics of exceptionism' in Richard Falk, Mark Juergensmeyer, and Vesselin Popovski, (n 116) 15-16; David Dyzenhaus, 'The legitimacy of legality' (1996) 46(1) The University of Toronto Law Journal 129, 131

<sup>120</sup> C.A. Thomas, 'The Concept of Legitimacy and International Law' LSE Working Papers 12/2013 p.11 <http://ssrn.com/abstract=2265503> accessed 15 March 2016

<sup>121</sup> Ibid p.11

<sup>122</sup> Thomas M. Franck, (n 117); Thomas M. Franck, 'Legitimacy in the international system' (1988) 82 (4) AJIL 705-759; Thomas M. Franck, 'The emerging right to democratic governance' (n 10) 46-91

<sup>123</sup> Thomas M. Franck, (n 117) 67,80

international law. There are two possible conditions of a secession process within external self-determination practices. One is the consensual agreement between two involved parties to allow public involvement in territorial alteration.<sup>124</sup> Another is the remedial secession when local populations are politically oppressed or discriminated against. Secession is considered to be a remedial mechanism for such groups living under unjust circumstances.<sup>125</sup>

According to Buchanan<sup>126</sup>, Van Den Driest<sup>127</sup>, Buchheit<sup>128</sup> and Vidmar<sup>129</sup> proposed that remedial secession should exist as a method of redress for the violation of human rights.<sup>130</sup> The remedial right to secession should take place under two set of circumstances. Either the physical survival of the territory's members must be threatened by actions of the state (or there are violations of other basic human rights). Or the territory has been unjustly occupied by a sovereign state or other than the previous parent-state.<sup>131</sup> However, Nielsen proposes some additional criteria that would extend the remedial right to secession to other groups. By his account, the right to secession should necessitate (1) their cultural survival being threatened (2) and the former parent state not respecting the will of the majority of the people.<sup>132</sup> These arguments for the remedial right to secession' all rest on the people's involvement in their own political status being obstructed in some way. It is necessary therefore to create legal and institutional frameworks to allow these affected groups of people to determine their territorial autonomy. However, these criteria have no clear

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<sup>124</sup> Lee C. Buchheit, *Secession: The Legitimacy of Self-Determination* (Yale University Press 1978) 31; Christian Tomuschat, 'Self-Determination in a post-colonial world, in Christian Tomuschat (ed), (n 65) 7

<sup>125</sup> Allen Buchanan, 'Theories of secession' (1997) 26(1), *Philosophy and Public Affairs* 31,34; Lee C. Buchheit, (n 124) 2; Will Kymlicka, 'Federalism and Secession: At home and abroad' (2000) 13(2) *Canadian Journal of Law and Jurisprudence* 207

<sup>126</sup> Allen Buchanan, (n 125) 31, 36-37

<sup>127</sup> Simone Van Den Driest, *Remedial Secession: A Right to External Self-Determination as a Remedy to Serious Injustices?* (Intersentia 2013) 302

<sup>128</sup> Lee C. Buchheit, (n 124) 222

<sup>129</sup> Jure Vidmar, 'International Legal Responses to Kosovo's Declaration of Independence' (2009) 42 *779*, 814-818

<sup>130</sup> *In Re Secession of Quebec*, (n 57) para133

<sup>131</sup> Allen Buchanan, (n 125) 37

<sup>132</sup> Kai Nielsen, 'Liberal Nationalism, Liberal Democracies, and Secession' (1998) 48 *University of Toronto Law Journal* 253, 265

international legal text to clarify whether certain situations have reached the level of secession or not. This limitation needs a practical action and juristic opinion to recognize its legal determinacy.<sup>133</sup>

*Secondly*, ‘symbolic validation’ takes place when a rule-making process or institution uses cues in order to gain compliance with a command.<sup>134</sup> There are two interrelated issues: the authority of the rule-makers<sup>135</sup> and the communicative system with the recipients.<sup>136</sup> The former refers to the existing state or international institutions which take responsibility for passing laws or releasing practical tools in the form of binding laws, for example, legislatures or the UN subsidiary bodies (i.e. Security Council and General Assembly). The latter is the establishment of communicative action between governmental authority and the people provided by the existing state institutions.

In order to assess the legitimacy of a governmental authority by international legal standards, it is necessary to look at two authoritative bodies: states and international institutions.<sup>137</sup> These two are the main actors within the international legal system. Allen Buchanan argues that the legitimacy of laws depends on the legitimacy of the institutions that make them.<sup>138</sup> Therefore assessing the legitimacy of law involves analysing the diverse composition of state and international institutions. If these bodies are considered legitimate, then the frameworks they create and maintain during external self-determination practices are also considered legitimate, as is the result of the territorial alteration process.

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<sup>133</sup> Steven R. Fisher, ‘Towards “never again”: searching for a right to remedial secession under extant international law’ (2015-2016) 22 Buffalo Human Rights Law Review 261, 296

<sup>134</sup> Thomas M. Franck, (n 122) 705, 725

<sup>135</sup> Thomas M. Franck, (n 122) 92

<sup>136</sup> Thomas M. Franck, (n 122) 94

<sup>137</sup> Thomas M. Franck, (n 122) 705,706; Thomas M. Franck, (n 117) 64-66

<sup>138</sup> Allen Buchanan, ‘The legitimacy of international law’ in Samantha Besson and John Tasioulas, ‘The Philosophy of International Law’ (Oxford 2010) 90

In a practical sense, there are two types of ethnic communities' request: secession<sup>139</sup> and power-sharing for self-governing purposes (i.e. federation, autonomous territory, sovereignty, confederation).<sup>140</sup> The former is the withdrawal of a group of people from a larger entity, becoming a new, independent state. The latter is a strategy for resolving unequal access to political power in multiethnic societies. The redistribution of power is a way of accommodating the right to self-determination with the aim of increasing minority involvement. In most circumstances, states and international institutions are involved in a secession process or a self-governing purpose. They can work collaboratively to ensure public participation as integral component of territorial alteration. During secession process, the communication between government, non-governmental organizations, media, civil society and ordinary citizens is essential to empower public authority towards collective decision-making processes.

*Thirdly*, 'coherency' is the conduct of governing bodies (i.e. states or institutions) which apply the same regulations in a similar manner fairly and equally.<sup>141</sup> Through the lens of international law, the practice of the state is considered to be a form of international law. In addition, international and regional institutional frameworks are also essential to monitor and to implement rules equally.<sup>142</sup> Regarding the right to self-determination, it can evolve in this way from incoherence to coherence which reinforces its legitimacy.<sup>143</sup> The right to secede is a part of the people's right to self-determination, the practical application of which involves a diversity of actors including the people who wish the boundaries to change political institution and the

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<sup>139</sup> Harry Beran, 'A democratic theory of political self-determination for a new world order' in Percy B. Lehning (ed) *Theories of secession* (Routledge 1998) 40

<sup>140</sup> *Ibid* 41

<sup>141</sup> Thomas M. Franck, (n 122) 705, 738

<sup>142</sup> Thomas M. Franck, 'The emerging right to democratic governance' (n 10) 46, 86

<sup>143</sup> *Ibid* 46, 86

international community.<sup>144</sup> A way to justify the secession process involves the political actors and legal consequence of the legal process. As the expression of the people's will is the basis for state power, the consent of the people in any decision-making process can increase the level of legitimacy of governmental action. If public involvement is not taken into account consistently in self-governing processes, this lessens the stability of rule.<sup>145</sup>

*Fourthly*, 'adherence' is a state action to commit itself to a legal obligation. In order to assess the quality of law, the nexus between primary rule (law context) and secondary rule (i.e. negotiating, interpreting) can increase the level of legitimacy.<sup>146</sup> In terms of the right to self-determination, adherence is a controversial issue. In the era of decolonization, the right to self-determination was widely recognized as the right to be independent. The outcome of decolonization was the release of new independent states to be free from domination by a more powerful state. The establishment of territorial integrity principle aims at maintaining territorial status quo of a state. In non-colonial situations, secession is claimed by certain groups of people within a particular territory for self-governing purposes. Crucially, secession was, and still is, another way to create a new state under the scope of external self-determination.<sup>147</sup> In practice, there is no specific justification for legalizing the secession process except a consensual action between two involved parties (i.e. parent state and a secessionist movement) to draw new boundaries.<sup>148</sup> In addition, a state's obligation within the international law perspective is to ensure democratic participation from all citizens within its territory. International law imposes certain

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<sup>144</sup> Thomas M. Franck (n 117) 170-171; Paul Groarke, *Dividing the state: Legitimacy, Secession and the Doctrine of Oppression* (Ashgate 2004) 96-97

<sup>145</sup> Thomas M. Franck, (n 122) 705, 741

<sup>146</sup> Thomas M. Franck, (n 117) 184, 191

<sup>147</sup> Marcelo G. Kohen, 'Introduction' in *Secession: International Law Perspectives* (CUP2006) in Marcelo G. Kohen, *Secession: International Law Perspectives* (CUP2006) 1

<sup>148</sup> Simone Van Den Driest, (n 127) 314-316

conditions for public involvement in secession process: democratic governance and human rights.<sup>149</sup> Public participation in a territorial change is a way of balancing territorial integrity of a state.<sup>150</sup> Some theorists argue that territorial integrity is a principle which protects a state from an external intervention. It does not cover an action of taking a piece of territory away within a state.<sup>151</sup> In order to consult local populations, if democratic governance and human rights are met by a state during a secession process, then the latter is considered to be more legitimate in the eyes of the international legal community.

### *1.2 Moral reasoning and secession process*

Within the international legal perspective, a process of secession must conform to certain standards of morality.<sup>152</sup> Legal theorists<sup>153</sup> have attempted to incorporate the people's moral reasoning into the law-making process. When a state creates a law the people have an opportunity to demonstrate their opinion about this law. However during territorial alteration, the process used to elicit the will of the people allows them to explicitly voice their moral reasoning. This public involvement in politics is considered by international lawyers to increase the quality of the secession process because it guarantees the equal treatment of all the people in a territory.<sup>154</sup>

The insertion of moral reasoning into a secession process is a way of creating a more reasonable outcome among the secessionists, former parent states, and international community.<sup>155</sup> The use of human reasoning in law-making process can create legal

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<sup>149</sup> Thomas M. Franck, 'The emerging right to democratic governance' (n 10) 46,52-53

<sup>150</sup> Jure Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice* (Hart Publishing 2013) 9

<sup>151</sup> Marcelo G. Kohen, (n 147) 6; Marc Weller, 'The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia' (1992) 86(3) AJIL 569, 572

<sup>152</sup> Allen Buchanan, 'Towards a Theory of Secession' (1991) 101(2) *Ethics* 322, 338-339; Paul Groarke, (n 144) 5

<sup>153</sup> Lon Fuller, (n 116) 95-106; Paul Groarke, (n 144) 37

<sup>154</sup> Paul Groarke, (n 144) 24-25

<sup>155</sup> Lee C. Buchheit, (n 124) 8



obligations in conformity with moral value.<sup>156</sup> When the people are recognized as subjects of international law, they have the right to rule and exercise their power with moral reasoning.<sup>157</sup> If local populations are involved as integral parts of law creation, this could lead greater to public, consensual compliance to the rule.<sup>158</sup>

The moral principle consists of justice and equality to the public involvement in the secession process. **Justice** is used to test the quality of a procedural mechanism being just and fair when people make decisions in their territorial status. If a state meets the requirement for justice, the actions of the state are legally legitimate. In addition, political and legal institutions must be designed to function in conformity with the principle of justice.<sup>159</sup> **Equality** is a concept which is compatible with the non-discrimination principle. All people are treated equally in a similar manner. The equal participation of the people in a territorial alteration decision is, in turn, not upheld by any legal framework.<sup>160</sup> The idea of equality is also reliant on the human rights moral reasoning which aims to protect the individual rights of people. If individual rights are upheld, this makes the outcome of the *collective* decision-making process more legitimate in the creation of a new state, or in the request for an autonomous territory. A fair implementation of the right to secede can be evaluated using procedural mechanisms. During any decision-making process, it is necessary to allow all ethnic communities to participate and be represented. This requirement needs institutional or legal frameworks to ensure the stability of law. If a secession process implements as a way of redressing an injustice action (i.e. a remedial right), this would ensure the treatment of minority people fairly and justly.

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<sup>156</sup> Lon Fuller, (n 116) 97; Ronald Dworkin, 'Philosophy, Morality, and Law. Observations Prompted by Professor Fuller's Novel Claim' (1965) 113(5) University of Pennsylvania Law Review 668, 675

<sup>157</sup> C.A. Thomas, 'The Concept of Legitimacy and International Law'(n 120) p.11

<sup>158</sup> Thomas M. Franck, (n 122) 705, 709

<sup>159</sup> Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (OUP 2004) 18; Paul Groarke, (n 144) 36

<sup>160</sup> Allen Buchanan (n 159) 120-121

### *1.3 The inclusion of public participation into democratic governance*

Democratic governance is a concept which limits state power and promotes the people's authority in any collective decision-making process.<sup>161</sup> Democracy is a moral issue and an international legal obligation which allows public participation in any decision-making processes. In addition, democracy is a developing theory which consists of the interaction between autonomous actors (the people) and political institutions.<sup>162</sup> Democratic governance- on a global level- foregrounds the significance of a constitution, which is a written legal tool providing a channel for public engagement in these decision-making processes. Evidence in support of the connection between democratic governance and public participation can be found in Gregory H. Fox and Simone Chambers' work. According to Fox, "the term democracy means the essential procedures by which a democratic society functions;" one such essential procedure is public participation, which allows ordinary citizens to be involved in the decision-making process. This in turn is an example of popular sovereignty at work. Additionally, Fox states that the people hold supreme authority "to exercise their power with consent as grounded in alternative sources of legitimation".<sup>163</sup> In other words, if a state respects popular sovereignty, this confers legitimacy upon it as a governmental authority. The idea that public participation processes should take place as part of popular sovereignty has been developed by Simone Chambers. Based on her reasoning, the process-based model embodies popular sovereignty in a variety of dimensions: giving people a voice, including people in the process and concerning itself with people's opinions.<sup>164</sup> From these two accounts, both public participation and democracy are generally accepted by

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<sup>161</sup> Thomas M. Franck, 'The emerging right to democratic governance' (n 10) 46

<sup>162</sup> Christina M. Cerna, 'Universal democracy: An international legal right or the pipe dream of the West?' (1995) 27 *International Law and Politics* 289,293; Anne-Marie Slaughter, 'International Law in a World of Liberal States' in Richard Burchill, *Democracy and International Law* (Ashgate 2006) 269

<sup>163</sup> Gregory H. Fox, 'The right to political participation in international law' in Gregory H. Fox and Brad R. Roth (eds) (n 10) 49

<sup>164</sup> Simone Chambers (n 7) 153,158

international law theorists as components of popular sovereignty.

Post 1990, a group of international lawyers<sup>165</sup> made attempts to bring a right to ‘democratic governance’ into international law. The impact of this was that the democratic legitimacy of any self-determination process could now be assessed by international actors. Citizens of any state therefore held ‘democratic entitlement’ in international law. This entitlement is grounded in the principle of human rights, with reference specifically to the rights to political participation.<sup>166</sup> The establishment of a democratic decision-making process is not enough to ensure that the people can freely express their will. Instead the legitimacy of the outcome should be assessed by measuring how well the state can protect human rights during the decision-making process.<sup>167</sup> The international community tried to clarify the practicalities of the democratic principle. The motivation for incorporating the democratic principle into international law was twofold; the protection of the fundamental rights of people and keeping peace and security in the international community. Additionally, the presence of democracy can allow the assessment of the integrity of governance.<sup>168</sup> Good governance includes respect for human rights and the meaningful participation of all citizens in the political process and in decision-making affecting their lives. The Vienna Declaration and Programme of Action, adopted at the World Conference on Human Rights in 1993, was the first constitutive, international instrument for firmly establishing democracy as a critical aspect of human rights.<sup>169</sup> The declaration represents “a clear indication of the development of international law” in terms of

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<sup>165</sup> James Crawford, ‘Democracy and international law’ (1993) 64 BYIL113; Thomas M. Franck, ‘The emerging right to democratic governance’ (n 10) 46,47; Jan Wouters, Bart De Meester, and Cedric Ryngaert, ‘Democracy and international law’ (2003) 34 Netherlands Yearbook of International Law 139,143

<sup>166</sup> Thomas Franck, ‘The Emerging Right to Democratic Governance’ (n 10) 46,77; Theodor Meron, *The Humanization of International Law* (Martinus Nijhoff Publishers 2006) 490

<sup>167</sup> Antonio Cassese (n 65) 71; James Crawford, *The Creation of States in International Law* (2<sup>nd</sup> edition Oxford 2011) 383-384

<sup>168</sup> Thomas Franck, ‘The Emerging Right to Democratic Governance’ (n 10) 46

<sup>169</sup> Roland Rich, ‘Bringing Democracy into International Law’ (2001) 12(3) Journal of Democracy 20, 24

supporting, strengthening and promoting democracy as well as respecting human rights and fundamental freedoms in the entire world.<sup>170</sup> The content includes: interdependence within democracy, respect for human rights, and fundamental freedoms which recognize that “*democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives*”.<sup>171</sup> In the context of the right to self-determination, the Declaration points out the “inalienable right of self-determination”. The right to self-determination cannot be denied, as otherwise it leads to a violation of human rights.<sup>172</sup> In addition, in 1996, there was an Agenda for Democratization which emphasized the insertion of democracy into international law. It stated that democracy must be accepted as “the ideal of political power based on the will of the people”.<sup>173</sup> In this Agenda, the proposal of Boutros Boutros-Ghali clearly indicated the importance of cooperation between state and civil society for promoting and consolidating new and lapsed democracies. He also suggested that in a pluralistic society, the presence of a culture of democracy could avoid violence and promote the peaceful, collective rights of the people.<sup>174</sup> From these two international frameworks, one relevant observation is that democracy cannot work without the substantive element of human rights protection.

Human rights, therefore, provide a basis on which democratic mechanisms used during external self-determination can be legitimized. Specifically, if certain civil and political rights of people (i.e. freedom of expression, freedom of movement and freedom of association) are fully protected, this will increase the degree of legitimacy

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<sup>170</sup> Ibid 20

<sup>171</sup> Vienna Declaration and Programme of Action (adopted 25 June 1993) art 8  
<<http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>> accessed 1 July 2015

<sup>172</sup> Ibid art 2

<sup>173</sup> Boutros Boutros-Ghali, An Agenda for Democratization, UN Doc A/51/761 (20 Dec 1996) 1

<sup>174</sup> Ibid 2,8

of collective decision-making outcomes. Human rights protection consists of a moral principle to protect individual rights and a legal obligation for governments to guarantee fundamental freedoms to their citizens.<sup>175</sup>

There are two international law instruments for suggesting how to consolidate democracy and human rights protection. The Commission on Human Rights, under the guidance of the Office of the High Commissioner for Human Rights (OHCHR), passed two resolutions: ‘promotion of the right to democracy’ in 1999<sup>176</sup> and ‘promoting and consolidating democracy in 2000.’<sup>177</sup> The content of the first resolution was the clarification of ‘the rights to democratic governance’ which included the right to political participation with equal opportunity for all citizens and the right of citizens to choose their system of government through constitutional or other democratic means.<sup>178</sup> The concept of democratic governance emphasizes the evaluation of the people’s political position in a culturally diverse society.<sup>179</sup> The second resolution takes further steps to improve the active involvement of civil society in the processes of governance along with building democratic societies, incorporating the inclusion of all people. Furthermore, it suggested that legal and administrative frameworks are crucial for civil society, particularly in pluralistic societies, in order to gather the collective will of the people democratically.<sup>180</sup> During public participation in any decision-making process, human rights protection should therefore be foregrounded.<sup>181</sup>

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<sup>175</sup> Jean L. Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy and Constitutionalism* (CUP 2012) 4

<sup>176</sup> UNCHR Res 57 (adopted 27 April 1999)

<sup>177</sup> UNCHR Res 47 (adopted 25 April 2000)

<sup>178</sup> UNCHR Res 57 (n 176) art 2

<sup>179</sup> Stephen Tierney, ‘Constitutional Referendum: A Theoretical Enquiry’ (2009) 72 (3) *The Modern Law Review* 360, 362

<sup>180</sup> UNCHR Res 47 (n 177) art 1(e)

<sup>181</sup> Thomas Franck, ‘The Emerging Right to Democratic Governance’ (n 10) 46,77

The correlation between democracy and human rights during public involvement processes includes the bottom-up transference of power from the people to the state. On the one hand, public involvement in decision-making processes is an illustration of democracy, and on the other hand human rights can guarantee the promotion and protection of individual rights to expression and association during such processes.

## **2. Colonial and post-colonial legal frameworks for the right to self-determination**

### *2.1 Self-determination as a process for legitimizing decolonization*

After the inception of the United Nations in 1945, the right to self-determination was included in an international legal framework for the first time. From the references in the United Nations Charter in 1945, Article 1 (2) and 55 mentioned “respect for the principle of equal rights and self-determination of peoples”.<sup>182</sup> The meaning of ‘peoples’ was unclear as the classification of people was linked to territorial status. The international community legally recognized three dependent territories where local populations were authorized to express their will on territorial alteration: colonial peoples,<sup>183</sup> peoples in Non-Self Governing Territories (NSGT), and peoples in Trust Territories (TT).<sup>184</sup>

In practice, the right to self-determination was only applied to decolonization of non-European territories (i.e. Asian and African territories). The goal of colonial powers to

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<sup>182</sup> United Nations Charter 1945 (n 71) Article Charter 1(2) The Purpose of the United Nations are: (2) to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.

Article 55 With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on *respect for the principle of equal rights and self-determination of peoples*, the United Nations shall promote: .....

<sup>183</sup> UNGA Res 1514 (n 38) para5; UNGA Res 2625 (n 38) principle 5 para2 (b); Brad Roth, *Governmental illegitimacy in international law* (Oxford 2000) 223

<sup>184</sup> United Nations Charter 1945 (n 71) Article 73,76; UNGA 1541 (XV) (n 38) Principle VI; Antonio Cassese, (n 65) 57; Karen Knop, (n 109) 51

free new independent states ignored the subsequent complicated situations of those new states because the right to self-determination was not exercised as an *ongoing* process.<sup>185</sup> Furthermore, the process of decolonization was not concerned with restoring the ethnic links of the people living in former colonial territories. Consequently, the populations of former colonies were disenfranchised through the reshaping of boundaries by colonizers who provided little choice for those concerned regarding their membership of a new state.<sup>186</sup>

Between 1945 and 1960, the right to external self-determination was made equal to the right to independence. Under the scope of the UN General Assembly Resolution 1514 (1960), external self-determination was invoked as a tool “to legitimize the termination of colonial rule”.<sup>187</sup> The decolonization process was the first time in history that colonial people were granted the right to be consulted about the alteration of their own territory without being dominated by an alien governmental authority.<sup>188</sup> According to the resolution, the colonial people should be able to determine their future destiny.<sup>189</sup> However, the resolution did not specify any practical suggestions for how to consult the people and ascertain their will. In other words, there was still no international legal recommendation for public involvement processes to allow colonial people to participate in decisions which would affect their future status.

Later, the UN General Assembly 1541 (1960) attempted to rectify this by outlining practical public involvement processes for consulting the people in NSGT and TT

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<sup>185</sup> Marc Weller, ‘The Self-determination Trap’ (2005) 4(1) *Ethnopolitics* 12

<sup>186</sup> Lee C. Buccheit, (n 124) 103

<sup>187</sup> Antonio Cassese, (n 65) 71

<sup>188</sup> UNGA Res 1514 (n 38) para5

<sup>189</sup> *Ibid* para5

territories.<sup>190</sup> However, the UN General Assembly only stipulated three options: integration with an independent state, free association with an independent state, and independence.<sup>191</sup> Moreover, only the first and second choices required ‘informed and democratic processes’ as prerequisite conditions of becoming either integrated or associated with an independent state. There was no such ‘informed and democratic process’ required for consulting local populations when they expressed the desire to become an independent state. Due to this lack of an international legal framework for guaranteeing the people’s involvement in such decisions, there was an ongoing discussion about how to create a ‘free and fair process’ to measure the will of the people. This raised the problem of how to balance and accommodate the people’s demands whilst maintaining the stability of territorial state borders.

International lawyers, such as Pomerance, Hannum, McCorquodale, and Thornberry argued at this point therefore that external self-determination required an internationally-defined framework to ensure that in practice, the people could exercise their right to political participation.<sup>192</sup> When the people become an integral part of territorial alteration, any self-determination process is made more legitimate.<sup>193</sup> In other words, all people, without distinction of ethnicity, race, religion, or language difference, are not excluded from participating in deliberative decision-making. People are conceived of as a unit of collective decision-making towards the right to self-determination. Both direct and representative forms of public participation are involved in validating the people’s will under the scope of this right.

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<sup>190</sup> UNGA 1541 (XV) (n 38) principle VI and VII

<sup>191</sup> Ibid principle VI; Antonio Cassese, (n 65) 73; Michla Pomerance, *Self-determination in law and practice* (Martinus Nijhoff 1982) 24; Lee C. Buccheit, (n 124) 92

<sup>192</sup> Michla Pomerance, (n 191) 75; Hurst Hannum, ‘The right of self-determination in the twenty-first century’ (1998) 55(3) 773,776; Robert Mc Corquodale, (n 50) 857, 865, 885; Patrick Thornberry, ‘The Democratic or internal aspect of self-determination with some remarks on federalism’ in Christian Tomuschat (ed.), (n 76) 101-103

<sup>193</sup> Helen Quane, (n 67) 537, 553; Christian Tomuschat, ‘Self-determination in a post-colonial world’ in Christian Tomuschat, (n 76) 6



## 2.2 Post-colonial legal frameworks for external self-determination

The process of decolonization (1945-1970) impacted the legal understanding of external self-determination.<sup>194</sup> Contemporary theorists advocate for a reconsideration of external self-determination as an ongoing right, opening channels for people within a state to play a more active, continuous role in the political governance of their state.<sup>195</sup> It is evident that reforming the concept of external self-determination as a continuous process of participation requires a democratic-based mechanism for assessing the will of the people.<sup>196</sup>

### 2.2.1 International Covenant of Civil and Political Rights 1966

From 1966 to 1970, there were two important legal frameworks to illustrate the right to self-determination as a ‘right belonging to all people’. The *first* was within the principle of Article 1 of the International Covenant of Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR). Both covenants stipulated that “all peoples have the right to self-determination”.<sup>197</sup> For the first time, the people’s right to freely determine their future was expressed in international law. Moreover the Article specifies this right as an ongoing one, not one which ends after independence is attained.<sup>198</sup> If self-determination is understood as an ongoing right, then there is an implication that the people’s expressed will on public, political matters must be sought continuously. To illustrate this, public participation in democratic decision-making required the

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<sup>194</sup> Marc Weller, ‘Settling self-determination conflicts: Recent Developments’ (2009) 20(1) EJIL 111, 113-114

<sup>195</sup> Patrick Thornberry, ‘The Democratic or internal aspect of self-determination with some remarks on federalism’ in Christian Tomuschat (ed.), (n 76) 101; Hurst Hannum, (n 192) 5

<sup>196</sup> Helen Quane, (n 67) 537, 553; Simone Van den Driest, (n 127); European Court of Human Rights, *Loizidou v. Turkey*, Application No. 15318/89, Judgment (Merits), 18 December 1996, Concurring opinion of Judge Wildhaber joined by Judge Ryssdal, para2

<sup>197</sup> International Covenant on Civil and Political Rights 1966 (ICCPR) (n 40) art 1; International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) (n 68) art 1

<sup>198</sup> Dominic McGoldrick, (n 35) 249-250; Gregory H Fox, ‘The right to political participation in international law’ in Gregory Fox and Brad Roth (eds), (n 10) 50

establishment of constitutional and political processes in each state.<sup>199</sup> However, Article 1 of the ICCPR does not spell out a democratic process. Article 1 is upheld by Article 25, however the latter goes one step further by mentioning the opportunity for this right to take place: “every citizen shall have the right and the opportunity ... to take part in the conduct of public affairs”.<sup>200</sup> This Article attempted to promote the link between self-determination and democracy as well as to provide some effective machinery for assuring self-determination and equal rights for people.<sup>201</sup> The right to self-determination shifted away from the outcome and instead towards the procedural right belonging to all people.<sup>202</sup>

According to the Human Rights Committee General Comment number 25, the right to public participation should include the right to vote,<sup>203</sup> and individual rights protection.<sup>204</sup> During decision-making processes, the people’s freedoms of expression, assembly and association are essential conditions of the right to vote.<sup>205</sup> Voters should be able to form opinions freely and independently; simultaneously, they should be free from any unlawful or arbitrary interference or coercive measures. Importantly, the General Comment number 25 allowed state parties to set certain standards limiting people’s right to vote with proportionate and reasonable cause. However, it did not clearly specify what this criteria could be. In 2002, according to *Gillot v France*, the Human Rights Committee confirmed the connection between the right to self-determination and the right to public political participation.<sup>206</sup> Crucially, it also pointed out that restrictions on the right to vote may be imposed but only provided that they are not discriminatory based on people’s ethnic origin, place of birth, family

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<sup>199</sup> Human Rights Committee, ‘General Comment No. 12 Article 1 (n 40) para4

<sup>200</sup> International Covenant on Civil and Political Rights 1966 (n 40) art 25

<sup>201</sup> Thomas M. Franck, ‘The Emerging Right to Democratic Governance’ (n 10) 46,58

<sup>202</sup> Rosalyn Higgins, (n 68) 118; Jan Klabbbers, (n 68) 186,189

<sup>203</sup> Human Rights Committee, General Comment No. 25 (57) (n36) para1

<sup>204</sup> Ibid para3

<sup>205</sup> Ibid para12

<sup>206</sup> *Gillot V. France* (2002) HRC (15 July 2002) Communication No.932/2000 para13.16 UN Doc. CCPR/C/75/D/932/2000

ties, descendent.<sup>207</sup> If people are not able to prove a sufficient link to the territory, this is considered to be a proportionate ‘cut-off point’ for taking part in an electoral process. These actions do not violate the right to political participation under Article 25(b) of the International Covenant on Civil and Political Rights (1966). After the ICCPR Covenant, its Articles and the interpretations contained in the General Comment, the right to self-determination for the first time could be defined as the right to public participation.<sup>208</sup> These documents also provided a set of guidelines for procedural mechanisms required to carry out the practical application of external self-determination practices.

### 2.2.2 United Nations General Assembly Resolution 2625

The *second* framework was laid out in the UN General Assembly Resolution 2625 in 1970.<sup>209</sup> It stated that it was the duty of international community to end colonialism and to permit each colonial territory to assume a political status freely determined by its inhabitants.<sup>210</sup> In addition, the Resolution specified the protection of the territorial integrity of states. However, the ‘safeguard clause’ in principle 5 (7) noted that if a state complies with the principles of equal rights and self-determination for the people (in other words, ensuring the people are able to express their will freely and fairly) then no action should be taken which might destroy its territorial integrity.<sup>211</sup> Thus the resolution argues that to help protect their own territorial integrity in the eyes of the

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<sup>207</sup> Ibid para8.6

<sup>208</sup> Dominic McGoldrick (n 35) 247-248; Human Rights Committee (n 36) para2, 6-8

<sup>209</sup> UNGA Res 2625 (n 38)

<sup>210</sup> UNGA Res 2625 (n 38) principle 5 para2

Every State has the duty to promote, through joint and separate action, the realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle in order:

(a) To promote friendly relations and co-operation among States; and

(b) To bring a speedy end to colonialism, having due regard to the freely *expressed will of the peoples concerned*;

and bearing in mind that subjection of people to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter of the United Nations.

<sup>211</sup> James Crawford, (n 167) 118-121; Antonio Cassese, (n 65) 120-121; David Raic, (n 65) 289; Christian Tomuschat, ‘Self-Determination in a post-colonial world’ in Christian Tomuschat (ed.) (n 76) 19-20

international law, states must take responsibility for ensuring self-determination processes are legitimately and legally managed by a representative government.<sup>212</sup>

Clause 5(7) refers back to the normative principle of self-determination outlined by Wilson in 1918. According to him, the people are the source of all legitimate governmental power; state authority must be based on the will of the people.<sup>213</sup> His idealistic perspective<sup>214</sup> was expressed by proposing the ideals of a democratic system and the popular sovereignty of the people. Thus, he argued over fifty years earlier than the UN Resolution that if a territory's existing government represents the people appropriately then the international community should recognize any subsequent act of self-determination as a legitimate action.<sup>215</sup> Between them, these two frameworks opened a channel to interpret self-determination as a procedural right belonging to all people, who are accepted as having constituent power over their territorial status.

Since the development of the legal understanding of self-determination as a *continuing* right, certain institutions try to develop the idea of public participation and the right to self-determination as established by these frameworks. There are two examples: the Badinter Commission Arbitration in 1991,<sup>216</sup> and the guidelines in the European Commission for Democracy through Law (Venice Commission).<sup>217</sup>

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<sup>212</sup> UNGA Res 2625 (n 38) principle 5 para7

<sup>213</sup> President Wilson's Address to the Congress delivered in a joint session on 11 February 1918 analyzing German and Austrian Peace utterances in paragraph 5 "..... Peoples are not to be handed about from one sovereignty to another by an international conference or an understanding between rivals and antagonists. National aspirations must be respected; peoples may now be dominated and governed only by their own consent. "Self-determination" is not a mere phrase. It is an imperative principle of actions which statesmen will henceforth ignore at their peril." <<http://www.gwpda.org/1918/wilpeace.html>> accessed 14 November 2013; David Raic, (n 65) 175

<sup>214</sup> Michla Pomerance, (n 191) 3

<sup>215</sup> Frederic L. Kirgis, 'The Degrees of Self-Determination in the United Nations Era' (1994) 88(2) AJIL 304, 310; Lee C. Buchheit, (n 124) 93

<sup>216</sup> Declaration on the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union (16 December 1991) (1992) 31 I.L.M. 1494-1526

<sup>217</sup> Venice Commission, 'Self-determination and secession in constitutional law' (10-11 December 1999) CDL-INF (2000); Venice Commission, 'Code of good practice in electoral matters' (18-19 October 2002) CDL-AD (2002) 23 rev; Venice Commission, 'Code of good practice on referendum' (16-17 March 2007) CDL-AD (2007) 008

### 2.2.3 Badinter Commission Framework 1991

The Badinter Commission was set up by the Council of Ministers of the European Economic Community (EEC) on 27<sup>th</sup> August 1991. After releasing the ‘Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union’ in 1991, the Commission acted as a fact-finding body to assess whether the various republics in the former Yugoslavia had fulfilled the criteria for recognition. These guidelines recommended further conditions for recognizing a new independent state. The Declaration included the phrases,

“Respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the *rule of law, democracy and human rights*;

Guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE;

Respect for *the inviolability of all frontiers which can only be changed by peaceful means* and by *common agreement*;

Acceptance of all relevant commitments with regard to disarmament and nuclear non- proliferation as well as to security and regional stability;

Commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning State succession and regional disputes”.<sup>218</sup>

The Declaration stated that new states should be recognized in international law by their commitment to democracy.<sup>219</sup> This was clarified in two fundamental points.

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<sup>218</sup> Declaration on the “Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union (n 216) 1485-1487

*Firstly*, new state-creation involves “a democratic procedure” required by international law. In other words, altering the legal status of a territory requires the expressed will of the people. *Secondly*, state-creation requires “democratic government structures” that adhere to a democratic political system which fully represents the people.<sup>220</sup> Based on democratic procedural requirements, public participation is accepted as an ongoing process. Therefore by specifying that a new state must conform to the rules of democratic governance, the Badinter Commission emphasized that, to be accepted by international law, public participation in any territorial alteration process must be ongoing. In addition, the Badinter also attached human rights and minority rights protection as conditions of recognizing new states.<sup>221</sup>

The Badinter Commission clearly underlined the importance of continuous public participation in the decision-making process of territorial alteration. With reference to the recognition of Bosnia-Herzegovina,<sup>222</sup> the Commission noted that:

“Under the constitution of Bosnia-Herzegovina as amended by Amendment LXVII, the citizens exercise their powers through a representative Assembly or by referendum”.

Thus the statehood of Bosnia-Herzegovina was not recognized because there had been an absence of public involvement in the decision-making process, and neither a

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<sup>219</sup> Jure Vidmar, (n 150) 8

<sup>220</sup> Ibid 12

<sup>221</sup> Declaration on the “Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union (n 216) 1485, 1487

Therefore, they adopt a common position on the process of recognition of these new states, which requires:

“respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and *human rights*”; .....

<sup>222</sup> Ibid Opinion No.4 1485, 1501-1503

representative process nor a referendum had taken place.<sup>223</sup> In addition, the Commission warned that the will of the people must be clearly ascertained from the three different ethnic groups (i.e. Serbs, Croats, and Muslims) residing in the territory.<sup>224</sup> This instance illustrates the significance, by international legal standards, of the expressed will of the people as integral component of external self-determination practices.

#### *2.2.4 The European Commission for Democracy Through law Guideline 1999*

The European Commission for Democracy through law (Venice Commission) released their reports to the Parliamentary Assembly Political Affairs Committee concerning the constitutional right to self-determination and secession in 1999. The commission report focused on the status of territorial integrity in constitutional law and the question of the constitutional right to self-determination. If there was no existing constitutional right to self-determination in a domestic law, secession was considered to be an illegal process.<sup>225</sup> In addition, the Venice Commission played an important role in drafting the code of good practice concerning electoral matters in 2003<sup>226</sup> and referendums in 2007.<sup>227</sup> The Code of Good Practice on Referendums provides some guidelines on conducting referendums to a legitimate and accountable standard.<sup>228</sup> Although the Venice Commission frameworks were not legally binding, it represents a significant contribution towards clarifying certain legal issues and advising on referendum mechanisms with respect to the interests of the people. Meanwhile, the main objective of the Code of Good Practice in Electoral matter was

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<sup>223</sup> Ibid para3 (b) 31 I.L.M. 1485, 1503

<sup>224</sup> Ibid para3 (b)1 31 I.L.M. 1485, 1503

<sup>225</sup> European Commission for democracy through law (Venice Commission) 'Self-determination and secession in constitutional law' (n 217) 3

<sup>226</sup> European Commission for democracy through law (Venice Commission) Code of good practice in electoral matters (n 217)

<sup>227</sup> European Commission for democracy through law (Venice Commission) Code of good practice on referendums' (n 217)

<sup>228</sup> European Commission for democracy through law (Venice Commission) 'Code of good practice on referendums' (n 217) 8

to create advice about electoral processes, providing legitimate avenues for the expression of the people's will. It consisted of five, fundamental principles of elections which should be taken into consideration: suffrage must be universal, equal, free, secret and direct.<sup>229</sup> In order to provide free and fair elections, the Code also mentions how crucial the fundamental rights of voters' are, entailing both the voters' freedom to form an opinion and to express their wishes. The former refers to the duty of states to provide adequate information to voters, including availability in the languages of national minorities. The latter relates to the people's freedom to cast their vote; this should be free from intervention from authorities or individuals threatening their voting rights.<sup>230</sup> In addition, respect for fundamental human rights, the stability of electoral law and the efficacy of procedural guarantees are supportive elements to improve the legitimacy of elections. In terms of human rights, freedom of expression and of the press, freedom of movement, and the freedom of assembly and association for political purposes - are all vital components of election campaigns.<sup>231</sup> The stability of electoral law is a condition for guaranteeing the people's authority in voting systems. Thus electoral law (including the electoral system, electoral commissions, and constituencies' power) should have the same status as statute law, ensuring its efficacy.<sup>232</sup> The efficacy of electoral procedures is based on the establishment of an impartial body and the proper administration of the election process from pre-election to the end of the electoral process.<sup>233</sup>

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<sup>229</sup> European Commission for democracy through law (Venice Commission), 'Code of Good Practice in electoral matters: Guidelines and explanatory report' (18-19 October 2002) CDL-AD (2002) 13

<sup>230</sup> Ibid rev 20

<sup>231</sup> Ibid rev 25

<sup>232</sup> Ibid rev 26

<sup>233</sup> Ibid rev 26



### **3. Why use republican liberal theory to assess the practical applications of external self-determination processes?**

The majority of the literature uses nationalist, liberal, communitarian or a combination of liberal-nationalist theories as underlying doctrines to examine self-determination practices. Since contemporary understandings of society have shifted from populations being homogenous to pluralistic, one of the main difficulties in protecting the people during any self-determination process is upholding the political equality of different ethnic communities residing in a particular territory. Therefore, it is necessary to examine the interrelation between the people, the existing political institutions and legal frameworks. These previously used theories do not offer a clear understanding of this interrelation. In other words, they do not account for how the people's authority, as an integral part of the decision-making process, can balance state, institutional power or can be guaranteed by legal frameworks.

#### *3.1 Nationalist theory*

Nationalist theory divides people into nations which are the foundations for a state.<sup>234</sup> Although it is seen by nationalists as an artificial institution, the state is nevertheless the main focus of their demands.<sup>235</sup> Although in theory the process of self-determination relies on nationalism by categorizing people into national units, (legitimizing decolonization), in practice, there is an inherent tension between the people disenfranchised by colonial regimes.<sup>236</sup>

In order to unite people in a society, the principle of nationality is recognized as a foundational concept of national self-determination. According to Bluntschli, the rise

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<sup>234</sup> Elie Kedourie, (n 84) 1; Eric Hobsbawm, (n 89) 19; Hugh Seton-Watson, *Nations and States: An Enquiry into the origin of nations and the Politics of Nationalism* (Methuen 1977) 1

<sup>235</sup> Lee C. Buchheit, (n 124) 58; John Breuilly, (n 84) 7

<sup>236</sup> John Breuilly, (n 84) 7

of nation states merely implies a political process, necessitating a legal mechanism such as a constitution to legalize the political process. He accepts that the principle of nationality is a way to unite people within the state after it has been created.<sup>237</sup> The nationality principle has both support and opposition. On the one hand, a positive aspect is expressed by John Stuart Mill, who proposes that the nationality principle is a collective symbol of the people which would make them co-operate with each other under the same government. Nationality can be seen as a symbol of race, descent and feelings of either pleasure or regret over the same incidents.<sup>238</sup> In addition, the main objective of the nationality principle is to protect minorities from coercive assimilation into a more powerful nation.<sup>239</sup> On the other hand, Lord Acton criticizes the use of nationality as a standard for uniting people.<sup>240</sup> In his opinion, the right to nationality itself being an arbitrary system whereby the governmental authority has the power to identify the specifications.<sup>241</sup> It is a mechanism for the eradication of the involvement of minority groups, as they are categorized as second class citizens in a state.

Later, the principle of nationality was rephrased as the national self-determination. As a result of national self-determination, certain ethnic communities may request greater levels of autonomy. However, nationalist theory is orientated towards a homogenous society as the collective identity of a nation.<sup>242</sup> In practice, different ethnic communities are not recognized as the legal entities until the governing body

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<sup>237</sup> J.K. Bluntschli, *The theory of the state*, Oxford (The Clarendon Press 1885) 83

<sup>238</sup> John Stuart Mill, 'Considerations on Representative Government' in: John Stuart Mill, *Utilitarianism, Liberty, Representative Government* (J.M. Dent and Sons 1954) 359-366; Quoted in Eric Hobsbawm, (n 89) 19,24

<sup>239</sup> Georgios Varouxakis, *Mill on Nationality* (Routledge 2002) 9

<sup>240</sup> Lord Acton, 'Nationality' in John Neville Figgis and Laurence Reginald Vere (eds), *The history of freedom and other essays* (Macmillan 1907) 270-299

<sup>241</sup> *Ibid* 298-299

<sup>242</sup> Eric J. Hobsbawm, (n 89) 37-38

recognizes them, depending upon the arbitrary will of the governing authorities.<sup>243</sup> Nationalist theorists often make little reference to a distinct cultural identity to justify their claims.<sup>244</sup> Therefore, because only certain ethnic groups are eligible as political entities to express their will, nationalist theory does not guarantee political equality in a pluralistic society during external self-determination.

### 3.2 Liberalist theory

Liberalism is a theory regarding the freedom of individual and personal autonomy.<sup>245</sup> Liberalism advocates people's rights and people's involvement in political movements. States or governmental authorities are expected to represent the people, and be accountable to the individuals they represent, through democratic structures and the rule of law.<sup>246</sup> It aims to protect rights of individuals in expressing their views on any political issue. It also provides a moral argument about the justification for political action and institutions.<sup>247</sup> Believing in the people's authority, liberalism justifies the people choosing their own political direction, and justifies the state's subsequent actions.

Liberal theorists hold that individual 'self-respect', i.e. the people's moral reasoning, is facilitated by providing the conditions for them to judge freely and choose their own best interests.<sup>248</sup> As Copp and Van Dyke state, "the right of secession consists of moral powers together with a moral liberty".<sup>249</sup> However, the application of liberal

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<sup>243</sup> Robert Lansing (n 88) 83,91; James Summers, (n 80) 325, 329; Michael Rowe, 'The French Revolution, Napoleon, and Nationalism in Europe' in: John Breuilly (ed.), *The Oxford Handbook of the History of Nationalism*, (Oxford University Press 2013) 143

<sup>244</sup> John Breuilly, (n 84) 5

<sup>245</sup> Allen Buchanan, (n 159) 322,323; William A. Galston, 'Two concepts of Liberalism'(1995) 105(3) *Ethnics* 516,521

<sup>246</sup> Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument Reissue with the new epilogue* (Cambridge 2005) 71; John Rawls, *Political Liberalism* (Columbia 1993) 19; Antonio Cassese, (n 65) 11

<sup>247</sup> Will Kymlicka, *Liberalism, Community and Culture* (n 85) 9; Allen Buchanan, (n 125) 31, 32

<sup>248</sup> John Stuart Mill (n 90) 120; Alan Ryan, *The Making of Modern Liberalism* (Princeton University Press 2012) 25; Will Kymlicka, *Liberalism, Community and Culture* (n 81) 62; John Westlake, (n 86) 26

<sup>249</sup> David Copp, 'International Law and Morality in the Theory of Secession' (1998) 2(3) *The Journal of Ethnics* 219, 226; Vernon Van Dyke, 'The individual, the state, and ethnic communities in political theory' (1977) 29(3) 343,349

theory is not necessarily concerned with the collective will of the people. There is controversy about ethnic inclusion in decision-making processes in a pluralistic society. Due to the emphasis on individual rights, in practice, liberalism may overlook collective rights; barriers may therefore exist which prevent negotiation or conciliation between different ethnic communities.

### 3.3 Communitarian theory

Communitarianism is most prominent in the mid-20<sup>th</sup> century in an international law context.<sup>250</sup> It was developed from liberal theory, and was intended to solve the problem in the latter of the lack of collective rights.<sup>251</sup> The nature of communitarianism is intended to fulfill the gap of the ‘self’ concept in the liberal theory.<sup>252</sup> Within communitarian perception, the concept of ‘self’ implies the freedom of choice of all people to make decision. As Ellis notes “communitarianism provides to undercut the conflict between fairness and utility”.<sup>253</sup> This principle embraces the communal and cultural values among different backgrounds of people.<sup>254</sup> According to Sandel, the communal aims and values are not just affirmed by the members of the community, but define their identity.<sup>255</sup>

Communitarian theory therefore focuses on groups’ rights as collective decision-makers and advocates the importance of people as members of a community. The concept of communitarianism “presumes culture to derive its value from the choice of individuals”.<sup>256</sup> Within the scope of communitarianism, it stresses the connection

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<sup>250</sup> J.H.H. Weiler, ‘The Geology of International Law-Governance, Democracy and Legitimacy’ (2004) 64 552-553  
<[http://www.zaoerv.de/64\\_2004/64\\_2004\\_3\\_a\\_547\\_562.pdf](http://www.zaoerv.de/64_2004/64_2004_3_a_547_562.pdf)> accessed 30 June 2015

<sup>251</sup> Ibid 47

<sup>252</sup> Will Kymlicka, *Liberalism, Community, and Culture* (n 85) 47

<sup>253</sup> Ralph D.Ellis, ‘Toward a reconciliation of liberalism and communitarianism’ (1991) 25 *The Journal of Value Inquiry* 55,56

<sup>254</sup> Will Kymlicka, *Liberalism, Community, and Culture* (n 85) 48; John Tomasi, ‘Individual Rights and Community Virtues’ (1991) 101(3) *Ethics* 521, 522

<sup>255</sup> Michael Sandel, *Liberalism and the Limit of Justice* (CUP 1982) 150

<sup>256</sup> Michael Freeman, (n 34) 157,161

between individual and the community.<sup>257</sup> This theory accepts communal action and cultural values among people from different backgrounds.<sup>258</sup> However, there is a practical difficulty for guaranteeing the individual rights of people *within* a community. When one person holds a different view to the others in a minority group, communitarian theory does not offer a clear basis for how this contrasting opinion is considered before reaching the final decision.<sup>259</sup>

### 3.4 Liberal nationalist theory

The use of liberal nationalist theory is a way of exploring “how nationalism might contribute to liberal thinking”.<sup>260</sup> These theories can be combined for the purpose of identifying the creation of nation-states. Liberalism can acknowledge the importance of belonging, membership, cultural affiliations and the particular moral commitments that follow them.<sup>261</sup> Likewise, nationalists can appreciate the value of personal autonomy and individual rights and freedoms, as well as sustain a commitment to social justice between and within nations.<sup>262</sup> Liberal-nationalism advocates that all nations should enjoy equal rights and derives its universal structure from protecting individual rights as the central power.<sup>263</sup> According to Nielsen, nations are not only free because of a nationalist perspective of independence. Instead, nations should be concerned about individual rights protection and about democratic governments which represent the people under the perspective of liberalism.<sup>264</sup> These components reflect the combined product of two political sentiments, liberalism and nationalism.

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<sup>257</sup> Will Kymlicka (n 91) 208

<sup>258</sup> *Ibid* 48

<sup>259</sup> Allen Buchanan, (n 93) 852, 863

<sup>260</sup> Yael Tamir, *Liberal Nationalism* (Princeton University Press 1995) 4

<sup>261</sup> Yael Tamir, (n 260) 6; David Miller, ‘Holding Nations Responsible’ (2004) 114(2) *Ethnicities* 240,243

<sup>262</sup> Yael Tamir, (n 260) 6

<sup>263</sup> Yael Tamir (n 260) 6-7

<sup>264</sup> Kai Nielsen, (n 132) 253,260

In external self-determination, there is a question about the application of liberal nationalist theory in multinational states.<sup>265</sup> This theory cannot be applied to such states during external self-determination practices, because if a governing body only respects one national culture it ignores other minority group identities.<sup>266</sup>

### *3.5 Republican liberal theory*

This study instead focuses on republican liberalism, a theory which was developed from liberal and communitarian theories, and which emphasizes political equality in any decision-making process.<sup>267</sup> Republican liberal theory is therefore proposed as an alternative to the four previous theories. As the people are increasingly recognized by international law as actors possessing civil and political rights (or ‘moral foundational appeal’), republican liberalism is increasingly prevalent. When it is applied to external self-determination, the emphasis lies on individual liberty through self-rule in order to achieve self-governance with a fair, collective decision-making process.<sup>268</sup> The theory addresses the interdependence between the active role of ordinary citizens, the procedural requirement for gathering the will of the people both individually and collectively, and the function of institutional and legal mechanisms to carry out the will of the people.<sup>269</sup> Republican liberalism also addresses the protection of group rights on the basis that the people have the freedom to express, confer and discuss their political opinions.<sup>270</sup>

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<sup>265</sup> Kai Neilsen (n 132) 253, 264

<sup>266</sup> Yael Tamir, (n 260) 10

<sup>267</sup> Matthew Craven, ‘Statehood, Self-determination, and recognition’ in Malcolm D. Evans (ed), *International Law* (4<sup>th</sup> edn Oxford 2010) 230; Jans Klabbers (n 64) 186

<sup>268</sup> Philip Pettit (n 17) 103

<sup>269</sup> Philip Pettit (n 17) 98-99

<sup>270</sup> John W. Maynor (n 17) 53-55

However, there is a controversy over the definition of the ‘people’; i.e. those who are entitled to determine their own territorial status.<sup>271</sup> Republican liberal theory provides a way to resolve this problem by considering *all* people as equal, and as having social, cultural, and religious links with a territory.<sup>272</sup> Thus republican liberalism uses the presence of such political equality as a way of increasing the legitimacy of boundary-making processes. When there is more than one ethnic group of people in a particular territory, they should all be considered equal in determining their territorial status. Thus, if various groups of people all demand self-government, then, since this is perceived as a collective expression by those directly affected by any territorial change, future action by the government towards self-determination is legitimized.

Within republican liberal theory, people are perceived as a type of political community; their constituent powers directly produce collaborative decisions in certain situations. As a central concern of the theory, people have the right to be involved in the political arena. The concept of ‘the people’ in republican liberalism develops from both liberal and communitarian theories. The former focuses on the role of individual rights and government neutrality in respecting the people’s autonomy and their choice.<sup>273</sup> The latter emphasizes the communal action within a community.<sup>274</sup> The specific focus of each, however, excludes the focus of the other. Due to this limitation, republican liberal theory provides a more balanced perspective, in that ‘the people’ are treated with equality, taking into consideration both their individual and collective rights.

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<sup>271</sup> Michla Pomerance, (n 191) 29

<sup>272</sup> Cass R. Sunstein, (n 28) 1539, 1552-1553

<sup>273</sup> Will Kymlicka (n 85) 2

<sup>274</sup> Allen Buchanan (n 93) 852,857; Michael Sandel, (n 255) 18

The reason for selecting only these arguments from the many theories that have been characterized as republican liberalist, is that each represents integral factors justifying the relationship between legitimacy and legality of the practical application of external self-determination. Republican liberal theorists endorse popular control over the state to improve the quality of *political* and *legal* legitimacy.<sup>275</sup> The people's consent is required as an integral part of political legitimacy<sup>276</sup> because public consent is a fundamental basis of a legitimate government. Legally, the people should have the authority to determine appropriate boundaries for the country they wish to become a part of, including forming an independent state. They are right-holders and therefore participants in international law both individually and collectively. Individually, each human being has the freedom to choose their own way of life<sup>277</sup>, while collectively, organized groups or civil society gathers the collective will of the people in political affairs. The free and genuine will of the people (i.e. individuals or groups) creates a legal obligation for the government to put their demands into practice, which in turn legitimates the latter's authority.<sup>278</sup>

In terms of external self-determination practice, republican liberal theory emphasizes that political equality and state, international and legal frameworks are integral components. From pre- to post-decision, the people have equal opportunity to be involved in participating, checking, and following up on the consequential action of governmental authority's action in external self-determination practices.<sup>279</sup> This mechanism can ensure that all differing views are considered before implementing law or policy. Similarly, non-governmental organizations are expected to work alongside state institutions to provide alternative channels for public involvement in

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<sup>275</sup> Philip Pettit (n 17) 132

<sup>276</sup> Patrick Riley (n 5) 8

<sup>277</sup> Michael Freeman (n 34) 157

<sup>278</sup> Frederick G. Whelan (n 12) 24-25

<sup>279</sup> Philip Pettit (n 17) 206-209



political affairs.<sup>280</sup> This can guarantee the full implementation of checking and balancing between competing parties in state institutions. Lastly, law-creation can guarantee that state institutions and non-governmental organizations function properly in responding to the people's will.

#### **4. Conclusion**

The expressed will of the people is central to any political decision regarding their future status. In order to increase the value of a moral foundation in the international law system, using republican liberalism can diminish the indeterminacy of territorial alteration processes as it provides a viable solution for institutional and legal constraints in self-governing processes. Republican liberalism is compatible with the understanding of legitimacy and legality. If a state uses republican liberalist conditions for legitimacy and legality, then the practicalities of the territorial alteration process will be made more efficient.

Republican liberalism can contribute positive development in territorial alteration process. Firstly, the people are considered equal and are able to make decisions freely and independently. Secondly, republican liberalism holds that in order to be legitimate, the expression of the people's will needs institutional framework provided by the state and international guidelines. Institutional frameworks (either domestic or international) are necessary to check each other, so that the people are not dominated and this can provide a continuous process to take public opinions into consideration. Thirdly, the motivation for incorporating public involvement into law is required to create both opportunities for the people to communicate reciprocally with the political

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<sup>280</sup> John Mayor (n 17) 155-158

institutions, and also a legal obligation to listen to *all* the people in a pluralistic society.

## Chapter 2

### Referendums as a mechanism for expressing external self-determination

#### 1. Introduction

Having examined the legitimacy of public, political participation in any decision-making process, it is crucial to explore external self-determination as a continuous process, and its practical consequences.<sup>281</sup> There are many international frameworks which requires a connection between procedural mechanisms and the legitimacy of governmental authorities. According to the ICCPR in 1966<sup>282</sup>, Judge Dillard in the Western Sahara case in 1975<sup>283</sup>, the Helsinki Final Act 1975<sup>284</sup>, and the Charter of Paris 1993<sup>285</sup>, the expressed will of the people is recognized as a basis for democracy. In terms of self-determination, the free and fair will of the people is a source of legitimacy for the process. Similarly, during the *Re Secession of Quebec* in 1998, the Supreme Court of Canada specified two conditions for a legitimate process of self-determination, requiring “a clear majority on a clear question in favour of secession”.<sup>286</sup> In this way, the expression of the will of the people would be attained democratically, and the negotiation between the government and the secessionists would happen fairly.

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<sup>281</sup> Dominic McGoldrick (n 35) 249-250; Markku Suksi, ‘On mechanisms of decision-making in the creation (and the re-creation) of states-with special reference to the relationship between the right to self-determination, the sovereignty of the people, and the pouvoir constituant’ (1997) *Tidsskrift for Rettsvitenskap* 426,436

<sup>282</sup> International Covenant on Civil and Political Rights (n 40), art 1 and art 25

<sup>283</sup> ICJ Reports (1975) *Western Sahara* (Sep. Op. Dillard) (n 83) para55 “Self-determination is satisfied by a free choice not by a particular consequence of that choice or a particular method of exercising it”.

<sup>284</sup> Conference on Security and Cooperation in Europe Final Act (CSCE), ‘Helsinki Final Act 1975’ (n 78) Principle VIII (2) <http://www.osce.org/helsinki-final-act?download=true> accessed 15 December 2016 “By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development”.

<sup>285</sup> Charter of Paris for a new Europe 1990 Annex 1, article 7 <https://www.oscepa.org/documents/all-documents/documents-1/673-1990-charter-of-paris-for-a-new-europe/file> accessed 15 December 2015

<sup>286</sup> *In Re Secession of Quebec*, (n 57) para100

These precedents suggest that the free will of the people is a legitimizing tool for the practical application of self-determination.<sup>287</sup> One way of measuring the will of the people in external self-determination practices that is often used by the international community and states is a referendum. A referendum symbolizes a bargaining tool, balancing power between the interests of the government and those of its citizens.<sup>288</sup>

There are several different ways in which the republican theory can be applied to an understanding of the legitimacy of certain self-determination practices. Firstly, the application of the republican liberal theory aims to find a transparent and accountable mechanism with which to increase opportunities for people's participation in politics. It engenders a fundamental concern for democratic process-based legitimacy, and advocates that in order to improve the quality of democracy, the people's right to public-participation should be established.<sup>289</sup> One way in which to do this is through the use of referendums. Secondly, discussions about territorial alteration in particular, can be approached from a republican liberal perspective, because the latter promotes the equality and freedom of all citizens to democratically engage in and contest public policy-in this case, determining their own boundaries.<sup>290</sup> Thirdly, republican liberalism holds that the right to self-determination should be laid out in clear, legal terms, i.e. a constitution or a statute. This is a formal legal document for ensuring that the will of the people will be adhered to, and that self-determination be legitimized.<sup>291</sup> In the absence of a constitutional right to self-determination, republican liberalism states the importance of guaranteeing the rights of the people through various institutional frameworks: e.g. state agencies, international involvement ensuring

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<sup>287</sup> James Summers, (n 80) 3; James Summers, (n 84) 325, 332

<sup>288</sup> Markku Suksi (n 281) 426, 434-435

<sup>289</sup> Philip Pettit, (n 17) 186-187; John W. Maynor, (n 17) 42-43

<sup>290</sup> Philip Pettit, (n 17) 190-191; John W. Maynor, (n 17) 156

<sup>291</sup> Richard Bellamy, (n 17) 9

human rights protections and the role of civil society as a constituent power.<sup>292</sup> Finally, republican liberal theory hold that people should have an equal say in the political arena, and that people should not be classified in terms of their ethnicity, race, linguistic background, etc. Therefore, due to the inherent pluralistic nature of modern society, republican liberalism emphasizes that *all* people should have the right to engage in political decision-making.<sup>293</sup>

Republican liberal theory stresses the maximization of the freedom of the people and the minimalisation of the domination of government.<sup>294</sup> The non-domination character is a fundamental concern of republican liberal theory on the basis that all people are recognized as free to enjoy their freedom. All are treated equally whether majority or minority groups of people since they are all affected by the referendum outcome. A contemporary understanding of citizenship, according to Pettit and Skinner, refers to an instrumental relationship to the overall enjoyment of liberty.<sup>295</sup> This can be exemplified by the demand of a citizenship principle to identify eligible voters in referendum process in order to enfranchise certain groups of people, who could grant a right to vote and affected from the referendum outcome. In addition, the non-domination character can also be interpreted in conjunction with non-interference or any actions which control people's freedom of choice.<sup>296</sup> A referendum is conceived as a tool for elites to prove that they are in favour of a democratic regime. Yet the administrative agencies are responsible for identifying those allowed to vote in a referendum. It is easy for them to use their power to arbitrarily exclude certain groups of people who have dissimilar opinions. The non-interference from elites to settle

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<sup>292</sup> Philip Pettit, (n 17) 135

<sup>293</sup> Ibid 111

<sup>294</sup> Philip Pettit, (n 17) 143; John W. Maynor, (n 17) 45

<sup>295</sup> Quentin Skinner, 'On the Slogans of Republican Political Theory' (2010) 9(1) *European Journal of Political Theory* 95, 97; Philip Pettit, (n 17) 147

<sup>296</sup> Philip Pettit, (n 17) 5,71

questions and determine the referendum process value is represented as the goal of securing freedom of people.<sup>297</sup>

In order to guarantee this, republican liberal theory suggests the need for a viable form of public participation, both through procedural processes and through instrumental processes. In terms of procedural mechanisms, referendums- such as sovereignty or independence referendums - are examples of participatory processes in pluralistic societies that illustrate the will of the people. An instrumental process involves polling stations, election-monitoring, voter identification, establishing an electoral commission to settle specific legal regulations for referendums and appeals. These institutional arrangements are understood as the ingredients of a well-functioning deliberative process<sup>298</sup> because these agencies are involved throughout the process, working on voter-identification and the pre-assessment of people's attitudes. Measuring the legitimacy of the sovereign will of the people within the republican perspective, according to Stephen Tierney, comprises three components: simplicity, democratic legitimacy, and completion. Simplicity is defined by the act of popular expression in answering 'Yes' or 'No' in a referendum. Democratic legitimacy refers to the character of a referendum as a democratic mechanism seeking to maximize the engagement of the people. Completion deals with the satisfaction of there being both winning and losing sides when settling a dispute. A referendum, then, offers an opportunity for people to speak their mind, which is often lacking in the process of representative democracy.<sup>299</sup> Another perspective comes from the work of Laurence Morel. By her account, the function of a referendum can be seen as evidence of popular legitimacy to decide over the future of the nation's territory as a crisis-solving

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<sup>297</sup> Stephen Tierney, (n 3) 24

<sup>298</sup> Cass R. Sunstein, (n 28) 1539,1569

<sup>299</sup> Stephen Tierney, (n 3) 261-262

device.<sup>300</sup> A function of a referendum is to facilitate nation-building so that during any potential boundary alteration, the people have the opportunity to express their will-whether that is to agree or disagree.<sup>301</sup>

Moreover, the function of international institutions is recognized as an institutional framework to provide evidence for democratic transition alongside human rights protection. International institutions are involved in the process of people's registration and assists civic education to ensure that all people are ready to make decisions based on their own voice. Republicanism holds that public political participation is a necessary element in modern pluralistic societies as this mechanism ensures 'an acceptance of rule from top down'.<sup>302</sup> In addition, democratic processes must support civic education. Civil societies' and non-state organizations' involvement are important for running campaigns, raising awareness of civic education, and fulfilling people's commitment to rights protection, such as freedom of expression, movement and peaceful assembly.<sup>303</sup>

In terms of instrumental mechanisms, as a legal instrument, a state's constitution must provide a mandate for public engagement within the democratic processes. As part of the relevance of republican liberal theory and the instrumental mechanism of democracy, the discussion draws on the importance of a domestic constitution for securing individuals' rights to freedom. One aspect of republican liberal theory emphasizes increasing civic virtues and the checking of governmental authority. As a formal constitution is a legal instrument to establish the will of people,<sup>304</sup> republican liberal theory emphasizes the democratic need for a domestic constitution or

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<sup>300</sup> Laurence Morel, 'The Rise of 'Politically obligatory' Referendums: The 2005 French Referendum in Comparative Perspective' (2007) 30(5) *West European Politics* 1045-1050; Quoted in Ilker Gokhan Sen, (n 8) 22

<sup>301</sup> Laurence Morel, 'Referendum' in Michel Rosenfeld and Andras Sajo (eds), (n 1) 457

<sup>302</sup> Nicholas Greenwood Onuf, *The Republican Legacy in International Thought* (Cambridge 1998) 269

<sup>303</sup> Human Rights Committee, General Comment No. 25 (57) (n 36) para8

<sup>304</sup> Philip Pettit, (n 17) 173

equivalent legal instrument to recognize the people's authority. In republican thought, a constitution is perceived as a particular form of government, which "incorporates certain ways of sharing and balancing power".<sup>305</sup> The sharing and balancing of the people's authority and governmental power is a way to legalize people as a source of legitimacy. In the absence of a constitutional right to self-determination, there is a need for an alternative institutional framework that details the states' obligation to establish certain regulations to secure the freedom of people during a referendum process.

The substantive elements of the constitution or other legal framework should include how to allocate power to people. This can be achieved in such a way that it distributes more power to the people. A practical method of balancing governmental and popular power in the constitution-making process is mentioned in the *Re Secession of Quebec* in 1998, which highlighted the concept of constitutionalism and the rule of law. The Supreme Court of Canada specified that:

"The constitutional matter is an obligation of the state and citizens". It guarantees fundamental rights to all Canadian citizens and the rule of law forces governments to act in accordance with the law."<sup>306</sup>

The free and genuine will of the people is a vital component of claiming a referendum to be legitimate. The will of the people is credible and legitimate provided that the main democratic elements of a referendum are present. This chapter will examine a process-based approach which is used in assessing 'the will of the people' when the alteration of territorial status is in question. One of the most accepted process-based

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<sup>305</sup> Richard Bellamy, 'Republicanism, Democracy, and Constitutionalism' in Cecile Laborde and John Maynor (eds), (n 17) 160

<sup>306</sup> *In Re Secession of Quebec*, (n 57) para65



approaches is holding a referendum, which is generally considered to be a direct and a participatory form of democracy. However, the use of referendums in external self-determination practices does not inherently imply a dynamic and *ongoing* process of assessing the will of the people; the ‘one-shot deal’ nature of a referendum cannot be described as either dynamic or ongoing. In fact, critics argue that referendums are used as executive driving mechanisms to claim popular legitimation. Moreover, referendums do not necessarily demonstrate the free and fair will of the people if there is no state or international framework to legalize their will.<sup>307</sup>

Legitimate or illegitimate actions will be explored alongside relevant factors that impact the ‘free and genuine will of the people’. Section 2 primarily outlines the distinction between consensual-based referendums and non-consensual based referendums. These dichotomies will explain how people are recognized as a source of legitimacy within the law. When an existing constitution does not include the constitutional right to self-determination, a referendum can still be held (as non-consensual) within an institutional framework which has been recognized by an international community such as the European community arbitration commission on Yugoslavia. Section 3 discusses a number of conditions for legitimacy when assessing the free will of the people. These include the theoretical conditions from the *Re secession of Quebec* 1998: the clarity of referendum questions, and the impact of the balance of power between the majority and the minority on voting practices. Other, practical considerations for referendum legitimacy include the eligibility of voters, human rights protection, and the function of international institutions concerning referendum organization. The last section will conclude the lessons we have learned

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<sup>307</sup> This issue has taken into consideration with a problem concerning the subject of self-determination. See Markku Suksi, *Bringing in the people: A Comparison of Constitutional Forms and Practices of the Referendum* (Martinus Nijhoff 1993) 247; Lee Buchheit (n 124) 9; James Summers (n 11) 325, 338-343, 363

from different referendums about whether or not the will of the people was clearly established.

## 2. The typology of independence referendums

The dichotomy between consensual and non-consensual based referendums indicates the importance of bringing the power to the people as a source of legitimacy. In practice, on the one hand, a referendum may be held with a clear mandate under a written constitution that promotes legal certainty and predictability.<sup>308</sup> However, on the other hand, holding a referendum faces numerous constitutional constraints.<sup>309</sup> Referendums may be held without the validity of domestic law; in most cases, these actions are denied by the parent state's court as being unconstitutional,<sup>310</sup> e.g. in Tatarstan, and Catalonia. The court's prerogative is to maintain the status quo, preserving territorial integrity rather than giving the people a chance to determine their own political status. In the case of Catalonia, the Spanish constitutional court's judgment (JCC) 103/ 2008<sup>311</sup> commented that:

“The key to this case rests on the basis of whether, firstly from a general perspective, an analysis of what should be considered constitutionally as a referendum, and later, and already on a more specific plane, to decide whether what the contested law considers to be a consultation based on the alleged implicit authority of the Autonomous Community of the Basque Country is in

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<sup>308</sup> There is a consensual action between two governments to agree on holding a referendum. See Allen Buchanan (n 159) 338-339; Marcelo G. Kohen (n 147) 3

<sup>309</sup> Stephen Tierney (n 3) 266-268

<sup>310</sup> Anne Peters 'The Crimean Vote of March 2014 as an Abuse of the Institution of the Territorial Referendum' (2014) <<http://ssrn.com/abstract=2463536>> accessed 16 October 2014

<sup>311</sup> Constitutional Court Judgment No. 103/2008 (11 September 2008) (Unofficial translation) <https://www.tribunalconstitucional.es/ResolucionesTraducidas/103-2008.%20of%20September%2011.pdf> accessed 15 October 2016; Government of Catalonia, 'The Process for holding the consultation regarding the political future of Catalonia: an evaluation' (2 April 2015) p.18

reality an authentic referendum although it avoids that term, as if the conclusion were to be reached that it is in effect a referendum, the contested law would be unconstitutional”.<sup>312</sup>

On this basis, external self-determination practice on independence referendums can be divided into two different types: consensual-based referendums and non-consensual referendums.

### *2.1 Consensual-based referendums*

A consensual-based referendum is where two parties (i.e. state governments) reach an agreement to hold a referendum within the specific provisions of the law,<sup>313</sup> for example, in Eritrea, East Timor, Montenegro, Southern Sudan, and Scotland. From the perspective of international law, when the central government of a state commits itself in advance to respect the will of the people, the latter is a way to balance the territorial integrity of a state.<sup>314</sup> In the eyes of the international law, consensual-based referendums conform both politically and legally to the constitution or equivalent instruments, therefore legitimizing the external self-determination process.<sup>315</sup>

Nonetheless, in practice even though consensual referendums are carried out with the consent of governments, the free and genuine will of the people is contested depending on the context of the protection of the people’s fundamental freedoms (i.e. freedom of expression, movement, or association) and the role of the media and the role of civil society during the process.<sup>316</sup>

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<sup>312</sup> Constitutional Court Judgment No. 103/2008 (11 September 2008) (Unofficial translation) (n 311) judgment para4

<sup>313</sup> Allen Buchanan, ‘The Quebec secession issue: democracy, minority rights, and the rule of law’ in Stephen Macedo and Allen Buchanan (eds), *Secession and self-determination* (New York University Press 2003) 240-241

<sup>314</sup> Malcolm MacLaren, ‘“Trust the People”? Democratic Secessionism and Contemporary Practice’ (2015) 16 *German Law Journal* 631, 637-638

<sup>315</sup> Allen Buchanan (n 159) 338-339; Marcelo G. Kohen (n 147) 3

<sup>316</sup> For example, Southern Sudan media censorship and Eritrea human rights protection during decision-making process See The Carter Center, ‘Observing the 2011 referendum on the self-determination of Southern Sudan final report’ p.24-25; The African-American Institute, *Eritrea: A Report on the Referendum on Independence: April 23-25* p.18-20

## 2.2 Non consensual-based Referendums

A non consensual-based referendum is where two governmental parties cannot reach an agreement to hold a referendum,<sup>317</sup> for example, Quebec, Slovenia and Catalonia. The organization of the referendum may be achieved by the efforts of a group or section of a state wishing to withdraw from the political and constitutional authority of a larger state and to achieve statehood for a new territorial unit.<sup>318</sup> However, the people's expression of their will may oppose the existing constitution which often prioritizes the indivisibility of a state over respecting the rights of the people.<sup>319</sup> However, the legitimacy of non-consensual referendums is based on the recognition of satisfactory human rights protection, including granting political equality between people, guaranteeing fundamental freedoms, and the involvement of media, and civil society during a referendum.

Some fundamental observations will be made about consensual-based referendums and non consensual-based referendums. There are two major factors which have the potential to improve the quality of a referendum: the protection of the fundamental freedom of the people and the involvement of political parties, media and civil societies during any decision-making process. In practice, despite the presence of a constitution, the will of the people in consensual-based referendums can still be limited due to the lack of human rights protection, governmental control over the media's broadcasting, and restrictions of civil society's involvement in civic education. On the other hand, the proposal of non-consensual based referendums is

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<sup>317</sup> Allen Buchanan (n 313) 241-243

<sup>318</sup> *In re Secession Quebec* [1998] (n 57) para83; Patrick Dumberry, 'Lesson Learned from the Quebec Secession Reference before the Supreme Court of Canada' in Marcalo G. Kohen, (n 147) 424

<sup>319</sup> European Commission for Democracy through Law, *Constitutional justice and democracy by referendum* (Proceedings of the UniDem Seminar, Strasbourg, 23-24 June 1995) 17-19

necessarily contentious, whereby local governments or opposition parties express to the central government that a referendum to assess the will of the people is needed. An example of this is the initiative of the Quebec (federal) government to advocate for a referendum on Quebec secession.<sup>320</sup> In addition, non consensual-based referendums rely on greater civil society engagement in civic education and the distribution of information to broad groups of people.<sup>321</sup> These elements can reinforce the free and genuine will of the people as they have access to a range of information. During any decision-making process, if the existing governmental and non-governmental institutions work jointly during a referendum process, this will increase the chances of a credible outcome for the referendum.

### **3. The application of republican liberalism to referendum processes**

Republican liberalism mandates the active role of the people as constituent powers in any decision-making process.<sup>322</sup> Therefore governmental authorities have a duty to create opportunities for public involvement in order to protect the interests of the people. As the expressed will of the people is a source of legitimacy, both practical democratic processes and theoretical democratic ideals (such as human rights) are crucial to improve the quality of territorial alteration processes. *All* the people can confer legitimacy on boundary alteration and policy-making, which gives them political equality in any decision-making process.<sup>323</sup> According to the precedent of the *Re Secession of Quebec*, the Supreme Court of Canada stated that all people can

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<sup>320</sup> Allen Buchanan (n 313) 241-243; Patrick Dumberry, 'Lesson Learned from the Quebec Secession Reference before the Supreme Court of Canada' in Marcalo G. Kohen, (n 147) 431-436

<sup>321</sup> For instance, Ukraine civil society organization – Rukh See The Staff of the Commission on Security and Cooperation in Europe, 'The December 1,1991 Referendum/Presidential Election in Ukraine' (1992) p.11

<sup>322</sup> Stephen Tierney, (n 3) 3-4

<sup>323</sup> Steven Wheatley, 'Democracy in International Law: A European Perspective' (2002) 51 International Comparative Law Quarterly 225,231

exercise their right to self-government through democratic process and any functioning democracy requires a continuous process of public involvement resting ultimately on public opinion reached by the interplay of the people's ideas.<sup>324</sup>

The following section will look at five interrelated factors which determine whether the free and fair will of the people has clearly been ascertained.

### *3.1 Clear wording of referendum questions*

Constructing a clearly-worded question in a referendum is an important element of ensuring the credibility and legitimacy of the will of the people.<sup>325</sup> The questions posed on ballot papers must be consistent with the outcomes, in terms of identifying the wishes of the population. In other words, the will of the people must be genuinely expressed in order to have legitimacy. The importance of constructing clear referendum questions is displayed in the Code of Good Practice on Referendums of the European Commission for Democracy through Law. The objective of this Code is to provide guidelines for best practice when holding a referendum, including setting referendum questions. Because the question has a direct impact on the people's freedom and future, referendum questions must be constructed in a way which ordinary people can understand the implications.

Under the scope of this Code, elements of *clarity* and *conciseness* in a comprehensive referendum question are necessary to give people enough understanding to determine their future. The standards that the Code stipulates has a broader scope than simply *independence* referendums. The explanation stipulates that:

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<sup>324</sup> *In re Secession Quebec* [1998] (n 57) para65,68

<sup>325</sup> Stephen Tierney, (n 3) 226; Ilker Gokhan Sen, (n 8) 255

“The clarity of the question is a crucial aspect of voters freedom to form an opinion. The question must not be misleading; it must not suggest an answer, particularly by mentioning the presumed consequences of approving or rejecting the proposal; voters must be able to answer the questions asked solely by yes, no or a blank vote; and it must not ask an open question necessitating a more detailed answer. Lastly, electors must be informed of the impact of their votes, and thus of the effects of the referendum (is it legally binding or consultative? does a positive outcome lead to the adoption or repeal of a measure, or is it just one stage in a longer procedure?)”<sup>326</sup>

Undoubtedly, a referendum mechanism provides a democratic method of ascertaining the views of the electorate on important political questions on a particular occasion.<sup>327</sup>

From these examples, it is self-evident that the clear manifestation of the people’s will would confer legitimacy on demands for secession. After the Canadian Supreme Court decision in the *Re Secession Quebec*, the standard setting of the Clarity Act 2000 regarding the referendum question was that *it must clear and free from ambiguity* as a precondition for considering the clear expression of the will of the population.<sup>328</sup>

In this manner, the Supreme Court of Canada formulation is specified in the preamble and article 1(3), (4) of the Clarity Act;

“The result of a referendum on the secession of a province from Canada must be free of ambiguity both *in terms of the question asked* and *in terms of the support it achieves* if that result is to be taken as an expression of the

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<sup>326</sup> European Commission for democracy through law (Venice Commission) ‘Code of good practices on referendums’ (n 217) para15

<sup>327</sup> *In re Secession Quebec* [1998] (n 57) para87

<sup>328</sup> The Minister of Justice, ‘Consolidation Clarity Act 2000, S.C.2000, c.26’, (current to 15 December 2014) preamble para4 <<http://laws-lois.justice.gc.ca/PDF/C-31.8.pdf>> accessed 15 January 2015

democratic will that would give rise to an obligation to enter into negotiations that might lead to secession.”<sup>329</sup>

“A clear expression of the will of the population of a province that the province cease to be part of Canada could not result from

(a) a referendum question that merely focuses on a mandate to negotiate without soliciting a direct expression of the will of the population of that province on whether the province should cease to be part of Canada; or

(b) a referendum question that envisages other possibilities in addition to the secession of the province from Canada, such as economic or political arrangements with Canada, that obscure a direct expression of the will of the population of that province on whether the province should cease to be part of Canada”<sup>330</sup>.

What matters here is acceptance of the formulation of the Supreme Court of Canada as offering a common standard for referendums. A clearly expressed question supposes a clear will of the population before taking the further step of negotiations leading to an independent state. The clear will of the people is legitimate and credible if their will were determined with non-arbitrary or dominant by elites. Thus, any bias in the question asked may undermine the legitimacy of a referendum as a free expression of the will of the people.

*In Re Secession Quebec*, the clarity is premised on the basis that “clarity can be realized in a referendum on secession by posing a short and direct question and

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<sup>329</sup> Ibid preamble para4

<sup>330</sup> Ibid article 1(3), (4)



obtaining an enhanced majority”.<sup>331</sup> Pursuant to this, although the Canadian Constitution does not address the use of a referendum procedure, and the results of a referendum have no direct role or legal effect in our constitutional scheme, conducting a referendum undoubtedly may provide a democratic method of ascertaining the views of the people on important political questions on a particular occasion.<sup>332</sup>

Accordingly, the practice in Scotland illustrates the logic of a clearly-worded question being compatible with people’s feeling of security. The referendum legislation on Scottish independence set out the wording of the question to attain the highest standards of fairness and transparency after consultation with independent experts. The agreed referendum sentence was legislated by the Scottish Parliament, with just one question on independence. Then the question was set out in the Referendum Bill to be introduced by the Scottish government, subject to the Electoral Commission’s review process. After a review process, the Electoral Commission submitted the question with a report to the UK Parliament on the clarity of the question.<sup>333</sup> Following this, interested parties were consulted, as they were capable of proposing wording to the Electoral Commission as part of the review process.<sup>334</sup> This review process contributed to the intelligibility of the proposed referendum question, however, despite this, some academics pointed out that the Scottish Parliament set up

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<sup>331</sup> Nadia Verrelli and Neil Cruickshank, ‘Exporting the clarity ethos: Canada and the Scottish independence referendum’ (2014) 27(2) *British Journal of Canadian Studies* 195, 209

<sup>332</sup> *In re Secession Quebec* [1998] (n 57) para87

<sup>333</sup> Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland (Edinburgh, 15 October 2015) section 6, 7 <http://www.gov.scot/Resource/0040/00404789.pdf> accessed 6 November 2015

<sup>334</sup> *Ibid* section 8

the question in favour of the nationalist perspective, and other people's demands were not taken into account.<sup>335</sup>

Another consideration for the importance of clear articulation in the wording of questions in a referendum was referred to in Order 30 of the Scotland Act (1998). The question presented to voters in a ballot comprised one ballot paper in the referendum, and the ballot paper must give the voters a choice between only two responses.<sup>336</sup> The Commission did research, in collaboration with members of the public, to assess the proposed question in terms of intelligibility, simplicity and neutrality. During this information-gathering stage, there were many individuals, organizations and members of committees who gave their opinions on how to format an intelligible question with a clear, simple and neutral disposition.<sup>337</sup> Participation and gathering information from all stakeholders are necessary components of constructive question in conformity with people's demand. In order to avoid any confusion, a proponent of the phrase "do you agree" shall be replaced by a more neutral phrase, as they were concerned that this phrase might lead people into supporting independence rather than remaining with the status quo. Instead of asking "do you agree", they proposed the following wording:

"Should Scotland be an independent country?" Yes or No.<sup>338</sup>

It is vital to note that the formulation of ballot questions is often placed in the hands of state organizations and sometimes with contribution from international institutions.

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<sup>335</sup> Daniel Cetra and Malcolm Harvey, 'Explaining the differing government responses to self-determination demands in Spain and the UK' [https://www.psa.ac.uk/sites/default/files/conference/papers/2017/Cetra%20and%20Harvey%20PSA%202017\\_0.pdf](https://www.psa.ac.uk/sites/default/files/conference/papers/2017/Cetra%20and%20Harvey%20PSA%202017_0.pdf) p.7 (Annual Conference of the Political Studies Association, Strathclyde, 2017)

<sup>336</sup> Scotland Act 1998 (Modification of Schedule 5) Order 2013 section 3 5A (4) <http://www.gov.scot/Resource/0040/00404790.pdf> accessed 6 November 2015

<sup>337</sup> The Electoral Commission, 'Scottish Independence Referendum: Report on the referendum held on 18 September 2014' (December 2014) ELC/2014/02 p.32 sections 2.19–2.20.

<sup>338</sup> Ibid section 2.21; Iain McLean, Jim Gallagher and Guy Lodge, *Scotland's Choices: The Referendum and what happens afterwards* (Edinburgh 2013) 16

This could be involved parliamentary decision-making process, executive bodies or international institutions such as the United Nations. On this point, a proposition to shape the wording of questions requires a consultative process to ensure ballot questions are in agreement with people's concern<sup>339</sup> such as holding public-forum debate, doing researches. Referendum questions should be clear and concise without any intent to mislead public opinion and attain a particular outcome because a clearly worded question provides a tool for eliciting information about what people think, what they feel and what they want.

As regards the external aspect of conducting referendums, no leading questions should be used to examine the people's will on independence, equal sovereignty or greater autonomy demands. Further, in light of independence referendum procedures, the strategic wording of ballot questions is mostly divided into two patterns: the traditional style with a yes/no answer to a specific question or two choices with either a first or a second answer-option. Unlike the traditional style, multiple options in a referendum question allows for differentiated voting choices. Two or more decisive choices in a referendum let people express their preference decidedly for one option.

Before discussing below the specific examples of the wording of the question, it is important to note three fundamental concerns for the formation of questions. First, the wording should be clear and free from ambiguity. This includes using unbiased questions to avoid influencing people to respond in a way that does not accurately reflect their positions. Secondly, the referendum question should not ask two deliberative matters simultaneously as this confuses people's decision-making. In this respect, voters should not be forced to vote for more than one matter. Thirdly, the ballot question should include an option to retain the "status quo". Maintaining the

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<sup>339</sup> A. Rigo Sureda (n 45) 306

status quo prevents boundary conflicts and preserves the interests of peace and security, given the importance of the territorial stability of states' authority.

The following section elaborates on three different patterns of referendum questions. These examples will illustrate the inconclusive will of the people due to the content of the question put to the voters.

### *3.1.1 Ballot question with the influence of elite-driven undertakings*

This sort of ballot questions is requested from a certain number of smaller elite groups, such as a political party leader or the leader of the opposition. An example of such an elite-driven referendum is the British Cameroons. British Cameroons was a mandate territory under the League of Nations entrusted to the British Empire until 1946. After this, the status of Cameroons shifted to Trust Territories under the United Nations. In terms of territorial administration, the British Empire administered Cameroons as an integral part of Nigeria and had shared the political advances in Nigeria. There was a division of territory in Cameroons: the northern part was administered as a part of the Northern region of Nigeria whereas the southern part was separated from Nigeria as a separate unit. Thus, British administration was indirectly controlled over these two areas with the commitment to release these territories as a full self-government within the year 1960.<sup>340</sup>

Prior to a referendum in 1961, there was a persistent objection to the colonial power from the western educated elites. They demanded independence and reunification of

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<sup>340</sup> Art.76 Repertory, Suppl.2, Vol. III (1955-1959) para82-83,85 [http://legal.un.org/repertory/art76/english/rep\\_supp2\\_vol3-art76\\_e.pdf](http://legal.un.org/repertory/art76/english/rep_supp2_vol3-art76_e.pdf) accessed 1 June 2016

Cameroons.<sup>341</sup> In 1961, the British Cameroons referendum was organized by the United Nations after consultation with the political leaders of the territory on the content of referendum questions. The different referendum questions were proposed by the Kamerun National Democratic Party (KNDP) and the leader of the opposition respectively. The KNDP requested secession and the maintenance of the Trusteeship Agreement before reunifying with the French zones whereas the opposition requested integration with Nigeria instead.<sup>342</sup> After listening to these proposals, two referendums were carried out separately in the northern and southern parts of the Cameroons<sup>343</sup> because local populations had dissimilar opinions about their future destiny.

In the Northern parts of the Cameroons, the question posed on the ballot paper was multiple-choice but specifically implied a particular outcome to join Nigeria:

1) Do you wish the Northern Cameroons to be part of the Northern Region of Nigeria when the Federation of Nigeria becomes independent?

2) Are you in favour of deciding the future of the Northern Cameroons at a later date?<sup>344</sup>

These two questions were biased because they reflected the agenda of the former British colonial rulers for the Cameroons to join Nigeria.

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<sup>341</sup> Nicodemus Fru Awasom, 'The Reunification Question in Cameroon History: Was the Bride an Enthusiastic or a Reluctant One?' (2000) African Today 90,92 [www.peoplesawa.com/downloads/48.doc](http://www.peoplesawa.com/downloads/48.doc) accessed 1 June 2016

<sup>342</sup> Art. 76 Repertory, Suppl.2, Vol. III (1955-1959) (n 340) para103,105

<sup>343</sup> UNGA Res 1350 XIII (13 March 1959) section 1

<http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/335/84/IMG/NR033584.pdf?OpenElement> accessed 12 November 2015

<sup>344</sup> Ibid section2

In the Southern parts of the Cameroons, the question posed on the ballot paper was also multiple-choice, but asked whether the people wanted to join Nigeria or Cameroon. The two questions asked:

- 1) Do you wish to achieve independence by joining the independent Federation of Nigeria? OR
- 2) Do you wish to achieve independence by joining the independent Republic of Cameroon?<sup>345</sup>

This question option in on the ballot in Southern Cameroons leaves some doubts about its neutrality. The questions did not give the people a chance to choose self-government. The referendum question in the Southern parts of Cameroon did not offer the status quo option as remaining a Trusteeship under another country's administration. The first option also satisfied the British colonial authorities' aim to integrate Cameroons with its former colony, Nigeria. Likewise, the referendum questions in the Southern parts of Cameroon did not respond to the Anglophone minorities. Further, it could be argued that the people were not consulted about the question, and therefore no alternative to the choice between integration with Nigeria or reunification with Cameroon was provided. For example, the traditional rulers of Southern Cameroon had requested a sovereign Southern Cameroon state without association with either the French Cameroons or Nigeria.<sup>346</sup> This was not presented as an option in the question.

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<sup>345</sup> Ibid section 2

<sup>346</sup> Nicodemus Fru Awasom, (n 341) 90, 109

### *3.1.2 Biased and misleading questions*

Having considered the biased and misleading questions, there were three related issues. First, the question on the ballot paper used either positive or negative phrases with a one-sided character.<sup>347</sup> Respondents are limited in their answer. Second, the use of vague words or statements could influence how people understood and answered the questions.<sup>348</sup> Third, the wording of the proposed referendum question contained several questions in one sentence.<sup>349</sup> Some of these questions were also biased, implying that the electorate would be lead to a particular outcome.

It is also relevant to look at some equivocal statements on ballot questions. To illustrate what I mean, consider two different formats for ballot questions: in Croatia and the USSR's union referendums. In the case of Croatia, the wording does not include a straightforward question. A Decree calling for a Referendum on the Independence of the Republic of Croatia was issued with two sets of options. The content of the wording offered on the ballot paper was:

1. Do you agree that the Republic of Croatia, as a sovereign and independence state which guarantees the cultural autonomy and all civil liberties of Serbs and members of other nationalities in Croatia, shall enter into an association of sovereign states together with other republics (according to the suggestion of the Republic of Croatia and the Republic of Slovenia for solving of the state crisis in the SFRY)?

2. Do you agree that the Republic of Croatia shall remain in Yugoslavia as a unitary federal state (according to the suggestion of the Republic of Serbia and

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<sup>347</sup> Ilker Gokhan Sen (n 8) 260; Stephen Tierney, (n 3) 228

<sup>348</sup> Ilker Gokhan Sen (n 8) 260-261; Stephen Tierney (n 3) 227-228

<sup>349</sup> Ilker Gokhan Sen (n 8) 256; Stephen Tierney (n 3) 232

the Socialist Republic of Montenegro for solving of the state crisis in the SFRY)?<sup>350</sup>

The referendum phrasing implied the possibility of a territorial arrangement made by the administrative power of Yugoslavia. When considering the content of the first question, this phrasing did not deliver a fair test and allow for a decisive expression of the wishes of the population. The wording did not reflect the reality of the situation, as it did not directly ask people to express their views on further negotiations leading to secession. Rather, the first question and statement only implicitly referred to the actual independence of Croatia. It also contained the possibility of integration or association with other republics.<sup>351</sup> This type of question, which forces people to deliberate multiple matters simultaneously can potentially confuse people. In terms of wording, the second question seems clearer to ask people to remain territorial status quo with Yugoslavia. However, the two questions did not reflect the demand of the Serbs (i.e. ethnic minorities) residing in Croatia, as they requested for a greater level of political autonomy in Croatia.<sup>352</sup>

Similarly, the referendum conducted in the former Soviet Union illustrates a number of different scenarios in the referendum process. In 1991, the President of the former Soviet Union, Gorbachev, proposed a plan for organizing the USSR's all-union referendum. The proposed date for the all-union referendum was 17<sup>th</sup> March 1996. The purpose of holding referendums in the Soviet Union was to maintain the Soviet Union Federation by using a referendum to ensure that the will of the people was evaluated within a democratic process. At the early stage, the USSR's all union

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<sup>350</sup> Quoted in Jure Vidmar, (n 150) 177

<sup>351</sup> Jure Vidmar, (n 150) 178-179

<sup>352</sup> Misha Glenny, *The fall of Yugoslavia: The Third Balkan War* (Penguin 1992) 18-19; Ana S. Trbovich, *A Legal Geography of Yugoslavia's Disintegration* (OUP 2008) 194-195



referendum question was boycotted by Estonia, Latvia, Lithuania Georgia, Armenia and Moldova. Accordingly, these former republics set up their own referendums on independence.

The construction of the question in the USSR's all-union referendum seemed to be more purposive, with the aim being to "preserve the Union of Soviet Socialist Republics as a renewed federation of equal sovereign republics". It asks:

"Do you consider necessary the preservation of the Union of Soviet Socialist Republic as a renewed Federation of equal sovereign republics, in which the rights and freedom of an individual of any nationality will be fully guaranteed?"<sup>353</sup>

In this regard, Russia claimed "the question posed was tantamount to asking whether republics had the right to secede".<sup>354</sup> Within the content of this question, the referendum proposal misleads people as to whether or how to renew the federation or how the new constitutional arrangement should be constructed. In addition to this, the paper contained several questions to which people could only answer "Yes" or "No".

A different set of referendum questions in the Baltic Republics adopted a simpler approach, with one sentence requiring an answer of "yes" or "no". The package of referendum questions asked:

Do you want the independence of the Republic of Estonia to be restored?"<sup>355</sup>

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<sup>353</sup> "The referendum "on the preservation of the USSR" the government fooled the people twice' published 19 March 2016 <http://the-newspapers.com/2016/03/19/the-referendum-on-the-preservation-of-the-ussr-the-government-fooled-the-people-twice> accessed 26 September 2016

<sup>354</sup> The Staff of the Commission on Security and Cooperation in Europe, 'Referendum in the Soviet Union: A Compendium of Reports on the March 17, 1991 Referendum on the Future of the U.S.S.R.' 3

<sup>355</sup> Michael Parks, 'Estonia, Latvia Vote Overwhelmingly for Independence: Baltics: Secession from the Soviet Union passes by wide margins in both republics. The next test is a countrywide referendum on Gorbachev's plan' *Los Angeles Time* (4 March 1991) [http://articles.latimes.com/1991-03-04/news/mn-92\\_1\\_soviet-union](http://articles.latimes.com/1991-03-04/news/mn-92_1_soviet-union) accessed 16 November 2015

"Do you support the democratic and independent statehood of the Republic of Latvia?"<sup>356</sup>

"Are you for the independent and democratic state of Lithuania?"<sup>357</sup>

In this group, the language of the referendum questions in Estonia stressed the restoration of independence. It did not consult people about the creation of a new state. The purposive approach was clear in the sense of regaining independence after the illegal occupation by the Soviet Union. The phrasing of "democratic statehood" in Latvia and Lithuania also implies an objective of independence so as to pursue a democratic political system and establish democratic institutions.<sup>358</sup> However, this set of questions demonstrates how the wording of the questions was not neutral in meaning. It contained a one-sided character, which supports state independence.

Likewise, on 5<sup>th</sup> March 1991, the road to independence for Georgia began with the declaration of secession by the Georgian parliament. The form of referendum questions in Georgia was a one-sentence question. The content of the wording offered on the ballot paper was:

"Do you support the restoration of the independence of Georgia in accordance with the Act of Declaration of Independence of Georgia of May 26, 1918?"<sup>359</sup>

The Act of Declaration of Independence of Georgia in 1918 was entered into force in the aftermath of the Russia Revolution 1917. Within the content of the Act, the status of Georgia was recognized as a sovereign state with a theoretical right to secede.<sup>360</sup>

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<sup>356</sup> *ibid* [http://articles.latimes.com/1991-03-04/news/mn-92\\_1\\_soviet-union](http://articles.latimes.com/1991-03-04/news/mn-92_1_soviet-union)

<sup>357</sup> Jure Vidmar, (n 150) 185

<sup>358</sup> Jure Vidmar, (n 150) 187

<sup>359</sup> The Staff of the Commission on Security and Cooperation in Europe, (n 354) 37

<sup>360</sup> Quoted in James Summers, "Russia and competing spheres of influence: The case of Georgia, Abkhazia and South Ossetia in Matthew Happold, *International Law in a Multipolar World* (Routledge2013) 92

Georgia's claim to independence was essentially based on its allegedly illegal incorporation into the Soviet Union in 1921.<sup>361</sup> The proclamation of independence of Georgia can be regarded as a restoration of independence rather than seeking new state independence. The referendum question asked people whether they supported the idea of an independent state. However, it could be argued that the effect of the wording on electoral behaviour was to encourage voters to consider only one response -in favour of independence. Another important point was the reaction of the non-Georgian population of Abkhazia and South Ossetia, who largely boycotted the referendum. The outcome in favour of pro-independence was therefore open to criticism because the non-Georgians voted under constraint with the government creating a threatening atmosphere.<sup>362</sup>

On 1<sup>st</sup> and 10<sup>th</sup> December 1991, two fellow south Caucasian countries, Armenia and Azerbaijan decided to conduct independence referendums. Armenia was the only Soviet Republic that was seeking its independence in conformity to Soviet law on secession, which involves a series of referenda over five years and prolonged negotiations with the central authorities.<sup>363</sup>

“Do you agree that the Republic of Armenia should be an independent and democratic republic outside the USSR?”<sup>364</sup>

Although the phrasing of the referendum question sounds clear in terms of independence, some Armenian opposition leaders pointed out that “the wording of the

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<sup>361</sup> David Raic, (n 48) 402

<sup>362</sup> The Staff of the Commission on Security and Cooperation in Europe, ‘Presidential elections and independence referendums in the Baltic States, the Soviet Union and successor states: A Compendium of Reports 1991-1992’ (1992) 57

<sup>363</sup> Commission on Security and cooperation in Europe, ‘Report on the Armenian Referendum on Independence’, (21 September 1991) 1

<sup>364</sup> Ibid 5

referendum was virtually impossible to vote “no” because this type of question is a leading question to say “yes”.

After Gorbachev’s resignation and the dissolution of the former Soviet Union, the referendum in Azerbaijan was held under the special circumstances because of the ongoing dispute over Nagorno Karabakh. Ultimately, the Azerbaijan Parliament adopted the constitutional act on the restoration of the state independence. According to the constitution, the status of Azerbaijan was under the current system of government follows the Azerbaijan Democratic Republic of 1918-1920. Following this, the ballot paper of the referendum included a one-sentence question:

“Do you support the Constitutional Act on the State Independence of Azerbaijan?”<sup>365</sup>

This question took for granted that people knew what the specific act was about. In addition, people could respond to the question according to their own interpretation of the act.

On 1<sup>st</sup> December 1991, a referendum in Ukraine was carried out with two separate ballots. In addition to the all-union question, the specific republic question asked:

“Do you agree that Ukraine should be part of a Union of Soviet Sovereign Republics on the basis of the declaration on the state sovereignty of Ukraine?”<sup>366</sup>

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<sup>365</sup> Nazrin Gadimova, ‘Azerbaijan celebrates Independence Day’ (18 October 2013) Azernews <http://www.azernews.az/azerbaijan/60728.html> accessed 22 November 2015

<sup>366</sup> The Staff of the Commission on Security and Cooperation in Europe, (n 354) 21

As well as these multiple-choice questions, there was also a specific question for assessing the will of the populations in the three Western oblasts of Lviv, Ivano-Frankivsk and Ternopil. Voters were asked to respond to a third question:

“Do you agree that Ukraine should be an independent state, which independently decides its domestic and foreign policies, which guarantees the equal rights of all citizens, regardless of nationality and religion?”<sup>367</sup>

All things considered, it seems reasonable to assume that the all-union and republic wide questions were too complicated to make people feel secure in expressing their will to support independence. In addition to this, the various referendum questions made a series of contradictory statements about the political implications of each choice. Nevertheless, according to the CSCE report on the referendum in Ukraine in 1991, it appears that over three-quarters of all eligible voters in Ukraine chose independence.<sup>368</sup>

Referendums in Kirgizia, Turkmenistan, and Uzbekistan faced a lot of resistance from the government because these central governments wanted to sustain peace rather than become independent states. According to a report on Turkmenistan’s referendum on independence, there were two questions on the ballot paper:

1) “Do you agree with the legislative establishment of Turkmenistan as an independent democratic state?”

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<sup>367</sup> The Staff of the Commission on Security and Cooperation in Europe, (n 354) 22

<sup>368</sup> The Staff of the Commission on Security and Cooperation in Europe, (n 354) 7

2) “Do you support the statement of the president and Supreme Soviet of the Turkmenistan Soviet Socialist Republic on the domestic and foreign policy of Turkmenistan and the practical activity to implement it?”

In this case, the referendum question on independence was presented with a vaguely worded question about support for the domestic and foreign policy of the president of the Supreme Soviet of Turkmenistan.<sup>369</sup>

The wording question offered on the ballot papers in Kirghizia and Uzbekistan was:

“Do you consider it necessary the preservation of the Union of Soviet Socialist Republics as a renewed federation of equal sovereign states, in which the rights and freedoms of an individual of any nationality will be fully guaranteed?”

If one compares this to the question in the USSR’s all-union referendum, the word “republics” has been changed to “states”. Notably, it did not directly ask people about independence as their conservative governments wanted the union to stay intact. Holding a referendum in this case was not necessarily a mechanism to ascertain the wishes of the population.<sup>370</sup>

Furthermore, it is interesting to look at another example of the referendum question in Tatarstan. The wording simply asked voters to choose either ‘yes’ and ‘no’. In response to pressure from nationalists, the Parliament of Tatarstan made the decision to hold a referendum with a long sentence to determine once and for all the status of the republic. The question asked:

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<sup>369</sup> Jure Vidmar, (n 150) 189

<sup>370</sup> Henry E.Brady and Cynthia S. Kaplan, ‘Eastern Europe and the former Soviet Union’ in David Butler and Austin Ranney, (n 3) 194

“Do you consider that the Republic of Tatarstan is a sovereign state, a subject of international law, entitled to develop relations with the Russian Federation and other states on the basis of treaties between equal partners?”<sup>371</sup>

Looking at the content of the question, the phrase “a subject of international law” allowed room for various interpretations.<sup>372</sup> The Russian government, the Tatarstan president and the nationalist groups all held different views. The Russian government believed the referendum was an attempt to secede, and so it challenged the validity of the referendum, which was assessed by the First Russian Constitutional Court in the Tatarstan case (1992).<sup>373</sup> Tatarstan’s president insisted however that by carrying out a referendum the intention was not to secede from the Russian Federation but to conform their desire for a degree of self-governance. The nationalist groups claimed the wording of the referendum could be used to legitimize a secession.

There are two differing views pertaining to the clear wording of the referendum question: the constitutional court’s rulings and the dissenting opinion of Justice E.M. Ametistov. The Constitutional Court of the Russian Federation in the Tatarstan case stressed that “the Supreme Soviet of the Republic of Tatarstan violated the requirement of clarity and unambiguousness in the wording of questions put to a referendum”.<sup>374</sup> The wording of the question seemed to influence people to vote in a particular direction. It was not a clearly worded question in terms of intelligibility and neutrality. It also contained several questions phrased in one sentence forcing citizens

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<sup>371</sup> Marie Bennigsen Broxup, ‘Tatarstan and the Tatars’ in Graham Smith, *The Nationalities Question in Post Soviet States* (Longman 1995) 83

<sup>372</sup> The Staff of the Commission on Security and Cooperation in Europe, (n 354) 158

<sup>373</sup> In the case of the verification of the constitutionality of the declaration of state sovereignty of the Republic of Tatarstan of 30 August 1990, the law of the Republic of Tatarstan of 18 April 1991 “on amendments and additions to the constitution (Fundamental law) of the Republic of Tatarstan”, The Law of the Republic of Tatarstan of 29 November 1991 “on the referendum of the Republic of Tatarstan,” and the decree of the Supreme Soviet of the Republic of Tatarstan of 21 February 1992 “on the conduct of a referendum of the republic of Tatarstan on the question of the state status of the Republic of Tatarstan” 30 (3) Statutes and decisions of the USSR and its successor states (1994)

<sup>374</sup> *Ibid* 42

to answer more than one question simultaneously. Thus, it could be said that the people did not enjoy either freedom of expression, or their right to participate in the discussion and adoption of laws and decisions.<sup>375</sup> There are three reasons for the Constitutional Court of Russia's ruling to reject the legality of the referendum undertaking. First, the wording of the referendum was unconstitutional in the sense of clarity and being free from ambiguity. Second, the Tatarstan Declaration of sovereignty was the equivalent of an initial unilateral declaration of independence. Third, the content of the Tatarstan constitutional amendment implicitly referred to the status of Tatarstan as not being a part of the Russian Federation.<sup>376</sup>

By contrast, Judge Ametistov supported the transition of the former autonomous Tatarstan to the status of a sovereign state:

“the goal of referendum undertaking determined the universally recognized principle of self-determination and equality of peoples, [and] correspondingly constructs its relations with the Russian Federation and with other states and republics in a new way, on the basis of treaties between equal parties and the delegation on this basis of a number of legal powers to the bodies of the Russian Federation, [this] corresponds to the interests and will of the people of the Republic of Tatarstan as constituted in the Fundamental Law of the Republic”.<sup>377</sup>

He stressed the relationship between the right to self-determination and the right to political participation. If the referendum question lacked clarity and was ambiguous, the expression of the will of the people would be violated according to Article 25 of

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<sup>375</sup> Ibid 42

<sup>376</sup> Sabirjan Badretdinov, 'Tatarstan Sovereignty, Twenty Year Later' *The Kazan Herald* (21 March 2012) [https://www.facebook.com/permalink.php?story\\_fbid=163695060460074&id=393010697473557](https://www.facebook.com/permalink.php?story_fbid=163695060460074&id=393010697473557) accessed 16 November 2015

<sup>377</sup> In the case of the verification of the constitutionality of the declaration of state sovereignty of the Republic of Tatarstan of 30 August 1990, (n 373) 47–48



the International Covenant on Civil and Political Rights 1966, which guaranteed the free expression of the voters in how public affairs were conducted directly or through freely chosen representatives.<sup>378</sup> In addition, he claimed that in terms of universality and the indivisibility of human right, the USSR did not fulfil their legal obligations. Moreover, he pointed out that the expression of the will of the people was recognized by the international community as an act of self-determination.

From this case, it is vital to note that everyone involved understood the key phrase ‘state sovereignty’ differently. For Tatar nationalists, the words meant full independence from Russia; for Tatarstan’s president, they probably meant a greater degree of autonomy from Moscow; and for Moscow itself, they presumably represented a legal and constitutional error to be corrected as soon as possible.<sup>379</sup> From the Russian’s perspective, what was in question was the verification of the constitutionality of the Declaration of the State Sovereignty of the Republic of Tatarstan of 30<sup>th</sup> August 1990. On this point, the Constitutional Court of the Russian Federation reiterated the supremacy of the laws of the Russian federation.<sup>380</sup> A change of status of a subject of the Russian Federation might be done by mutual agreement between the Russian Federation and the subject of the Russian Federation if it did not contradict the Constitution of the Russian Federation or federal laws.<sup>381</sup>

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<sup>378</sup> In the case of the verification of the constitutionality of the declaration of state sovereignty of the Republic of Tatarstan of 30 August 1990, (n 373) 47–48

<sup>379</sup> Sabirjan Badretdinov, ‘Tatarstan Sovereignty, Twenty Year Later’ *The Kazan Herald* (n 376)

<sup>380</sup> Article 76 (5) of the Constitution of the Russian Federation states that “The laws and other legislative acts of the subjects of the Russian Federation may not contradict the federal laws adopted according to the first and second parts of this Article. In case of a contradiction between a federal law and an act issued in the Russian Federation the federal law shall be applied”. <<http://www.regione.taa.it/biblioteca/minoranze/russia1.pdf>> accessed 15 November 2015

<sup>381</sup> Article 66 (5) of the Constitution of the Russian Federation states that “The status of a subject of the Russian Federation may be changed upon mutual agreement of the Russian Federation and the subject of the Russian Federation and according to the federal constitutional law.” <<http://www.regione.taa.it/biblioteca/minoranze/russia1.pdf>> accessed 15 November 2015

### 3.1.3 Formulating questions with no “status quo” options

Territorial stability is a fundamental principle of international law that aims at preserving peace and security of states. The “status quo” is considered to include the continuity and unity of a state’s boundary and prevention of territorial conflicts. Here, there are two comparative examples with such an option pattern provided and not provided in referendum questions: Southern Sudan and Crimea.

In the Southern Sudan case, the ballot question was formulated with two choices: to confirm the unity of Sudan or to secede.<sup>382</sup> Under the scope of the Southern Sudan Referendum Act (2009), article 6, the people of Southern Sudan shall cast vote for either:

1. Confirmation of the unity of the Sudan by sustaining the system of governance established by the Comprehensive Peace Agreement and the Constitution
2. Secession.<sup>383</sup>

In accordance with the international applicable standard for framing a referendum question as set out in the Clarity Act (2000), these multiple options are clearly designed to give people the choice of either the first or second option. This illustrates an unbiased question that favours no particular outcome because there are no intentions to obscure the will of the people.

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<sup>382</sup> The Southern Sudan Referendum Act 2009 Art. 6 “While exercising the right to self-determination through voting in the referendum, the people of Southern Sudan shall either vote for: i. Confirmation of the unity of Sudan by sustaining the system of governance established by the Comprehensive Peace Agreement and the Constitution, or ii. Secession.

<<http://unm.is.unmissions.org/Portals/UNMIS/Referendum/SS%20Referendum%20MOJ-Englis.pdf>> accessed 1 November 2015

<sup>383</sup> Ibid Art.6

In contrast, the Crimea referendum in 2014 ballot question was designed with two unclear options. In this case, instead of yes or no answers, voters needed to select a first or second choice. The two questions in the Crimea case were:

- 1) Are you in favour of unifying Crimea with Russia as a part of the Russian Federation?
- 2) Are you in favour of restoring the 1992 Constitution and the status of Crimea as a part of Ukraine?

The multiple choices in the Crimea referendum question were ambiguous since these questions implicitly led to incorporation into Russia.<sup>384</sup> The first question used a biased word to consult people about returning to the Russian Federation. The second question did not give people any information about the content of the 1992 Constitution. In addition, there was no choice for voters to choose the status quo.<sup>385</sup> Therefore, the referendum in Crimea was not democratic and the outcome not legitimate because the wording of the question did not provide enough choice for the Crimean people to accurately express their will. In other words, these questions offered people an illusion of choice as they had only two options, either to integrate with Russia or remain a part of Ukraine. The referendum question was established in favour of Russian's demands rather than the interests of the Crimean people.

In conclusion, any referendum question must be as clear as possible so that voters understand the important choice they are being asked to make. In this regard, a decisive and fair expression of the wishes of the population should derive from the

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<sup>384</sup> Jure Vidmar, 'The Annexation of Crimea and the boundaries of the will of the people' (2015) 16(3) German Law Journal 365, 381

<sup>385</sup> Anne Peters, 'The Crimean Vote of March 2014 as an Abuse of the Institution of the Territorial Referendum' (n 310) 255

clear wording of questions in referendums. This element reflects to an appeal for legitimacy in referendums so that their outcomes might be respected. Another advantage of clarity is that all citizens can easily understand a question rather than a complicated sentence formulated with the reasoning of administrative bodies disguised so as mislead the people in a particular way.

### *3.2 Majority and minority relations*

In the case of the *Re Secession of Quebec* in 1998, the Supreme Court of Canada directly referenced the Canadian constitution, which provided a fundamental basis for accommodating connection between a democratic procedure and the sovereign will of the people had to be ascertained, *regardless* of their cultural or group identity.<sup>386</sup> It continued that all people could exercise their right to self-government through the democratic process.<sup>387</sup> The Canadian Constitution notes that the will of the people should not only rely on the will of the majority, but equally that minority interests should have an equal footing when participating in a political agenda.<sup>388</sup> Under the Constitution, a democratic society should combine the ultimate power of the people and a legal framework to allow participation.<sup>389</sup> Finally, the Court ruled that the reconciliation of a majority and the dissenting voices of a minority are also recognized as the highlights of a functioning democracy.<sup>390</sup>

In a pluralistic society, balancing the interests of the majority and the minority is inevitable. Democratic legitimacy depends on this interplay between a wide variety of

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<sup>386</sup> *In re Secession Quebec* [1998] (n 57) para65

<sup>387</sup> *Ibid* para64

<sup>388</sup> Will Kymlicka, *Multicultural citizenship: A liberal theory of minority rights* (n 85) 124

<sup>389</sup> *In re Secession Quebec* [1998] (n 57) para75

<sup>390</sup> *Ibid* para77

group interests.<sup>391</sup> Importantly, the fundamental freedoms of all people must be equally protected, regardless of their racial, ethnic or linguistic background. This includes freedom of expression, association, assembly and free elections.<sup>392</sup> Any person belonging to a minority is recognized by the international community as having the right to these freedoms. In practice, they therefore should have the right to express themselves individually or collectively, through political parties, religious organizations, or other identity-based associations.<sup>393</sup> In other words, all people within a state have the ability to check and control the governmental authority. The supreme authority of the people is recognized by the highest laws in the state as crucial to balancing the power of the government.<sup>394</sup> If a state guarantees this popular authority, this will promote democratic equality and the inclusion of minorities in any decision-making process.

From the example, the Canadian Constitutional text and structure conforms to the republican liberal concept that stresses on the balancing the needs of public interests with limiting government authority. Democracy is accepted as a fundamental component in the constitution.<sup>395</sup> It seems clear that the very function of democratic systems is to encompass the right of the minority to engage in and express their will whilst simultaneously upholding majority rule.<sup>396</sup> Thus, the people's will does not rely solely on the majority rule of the people, but must be reached through compromise with minority interests. These elements consist of constitutionalism, individual right protection, minority rights, participation, and public deliberation.

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<sup>391</sup> Quoted in Susan Marks, 'The European Convention on human rights and its democratic society' (1995) *British Yearbook of International Law* 66(1) 209,212

<sup>392</sup> Susan Marks, (n 391) 209,230; Alastair Mowbray, 'Contemporary Aspects of the Promotion of Democracy by the European Court of Human Rights' (2014) *European Public Law* 20 (3) 469

<sup>393</sup> Françoise Tulkens and Stefano Piedimonte, 'The protection of national minorities in the case-law of the European Court of Human Rights' Strasbourg 12-13 March 2008 10

<sup>394</sup> Richard Bellamy, 'The Democratic Legitimacy of International Human Rights protections: Political Constitutionalism and the European Convention on Human Rights' (2015) 25(4) *EJIL* 1019,1022

<sup>395</sup> Robert A Dahl, (n 7) 25

<sup>396</sup> George Klosko, *Democratic procedures and liberal consensus* (Oxford 2000) 138

The term ‘constitutionalism’ refers to the modern form of constitution, which is associated with the people’s sovereignty, equality, and the rule of law. In other words, constitutionalism balances the sovereign power of the people and governmental authority. When a state writes a constitution, public law experts suggest that the content should include the rule of law, the need for due process, and equality before the law.<sup>397</sup> As Dicey points out “the rule of law permeates to the constitution”.<sup>398</sup> Popular constitutionalism implements the ‘rule of law’ because the constitution increases the people’s authority and limits governmental power. One of the ultimate aims of the rule of law is to distribute justice amongst different groups of people in society. A fair, democratic decision-making process is accepted as a mechanism to give equal opportunity to the people. A fully legitimate constitution not only functions as a supreme law but also ensures the political participation of all citizens.<sup>399</sup> Within a pluralistic society, people’s inclusion in the democratic decision-making process is a necessary element for equality. In order to justify the legitimacy of any decision-making process, “it must be determined by the critical judgment of free and equal citizens”.<sup>400</sup>

At an international level, the rule of law is a complementary principle to the national law of individual states.<sup>401</sup> It relates to minimum standards of fairness both in the substantive content and the procedural content of a constitution. Substantive and procedural elements of the rule of law consist of: the supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of

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<sup>397</sup> Richard Bellamy, (n 20) 19

<sup>398</sup> Tom Bingham, *The Rule of Law* (Penguin 2010) 110

<sup>399</sup> Jed Rubenfeld, ‘Legitimacy and Interpretation’ in Larry Alexander (ed), *Constitutionalism: Philosophical Foundations* (Cambridge 1998) 196-197

<sup>400</sup> Quoted in James Bohman, *Public Deliberation: Pluralism, Complexity, and Democracy* (MIT Press 2000) 2

<sup>401</sup> Quoted in Tom Bingham, (n 398) 4

arbitrariness and procedural and legal transparency.<sup>402</sup> It is undeniable that the rule of law is a meaningful concept, which guarantees the rights of all people to participate in democratic decision-making processes whilst simultaneously upholding human rights.<sup>403</sup>

By contrast, the protection of minority rights is a principle which aims to balance the diversity of the population. The division and separation of minorities weakens their identity. The categorization of minority people is based on their ethnic, language, cultural or religious differences. With reference to the International Covenant on Civil and Political Rights (ICCPR) 1966, the protection of minority rights is spelled out in Article 27 that:

“persons belonging to such minorities shall not be denied the right, in conformity with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language”.<sup>404</sup>

In addition, Francesco Capotorti (the Special Rapporteur of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities) and Jules Deschenes (a Canadian member in the Sub-Commission) offer a definition of ‘minority’. They state that:

“A group numerically inferior to the rest of the population of a state, in a non-dominant position, whose members-being nationals of the state- possess ethnic, religious or linguistic characteristics differing from those of the rest of

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<sup>402</sup> UNSC ‘Report of Secretary-General The rule of law and transitional justice in conflict and post-conflict societies’ (23 August 2004) UN Doc S/2004/616 para6

<sup>403</sup> Tom Bingham, (n 398) 6

<sup>404</sup> International Covenant on Civil and Political Rights (ICCPR) (n 40), art 27

the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language”.<sup>405</sup>

“A group of citizens of a State, constituting a numerical minority and in a non-dominant position in that state, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and law”.<sup>406</sup>

The above definition refers to the non-dominant status of minority groups of people within a society. It is important therefore for minorities to have ‘the right to an identity’ in order to prevent their potential assimilation by the central government and to preserve their ethno-cultural background.<sup>407</sup> Given that the right to self-determination is recognized as a collective one, the protection of minority rights is also seen by the international community as a group protection.<sup>408</sup> In other words, people belonging to certain ethnic, linguistic or cultural groups should enjoy their right to self-determination and consequently their rights of citizenship - to vote, to organize politically, and to advocate their views publicly with a fair hearing.<sup>409</sup> A major concern about the legitimacy of a self-determination procedure is that there is fairness in the decision-making process. From an international perspective, the protection of minority rights entails two aspects: the rights of the individual members

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<sup>405</sup> Francesco Capotorti, ‘Study on the rights of persons belonging to ethnic, religious and linguistic minorities’ (New York: United Nations, 1979) para38 E/CN4/Sub2/384/Rev1 <https://www.peacepalacelibrary.nl/ebooks/files/393289761.pdf> accessed 1 June 2017

<sup>406</sup> Jules Deschenes, ‘Proposal concerning a definition of the term “minority”’ (14 May 1985) p.30 E/CN4/Sub2/1985/31 accessed 1 June 2017

<sup>407</sup> Patrick Thornberry, ‘Self-Determination, Minorities, Human Rights: A Review of International Instruments’ (1989) 38(4) ICLQ 867,880

<sup>408</sup> Ilan Peleg, ‘Self-Determination and Majority-Minority Relations in Deeply Divided Societies: Towards a Comparative Analytical Framework’ (2015) 14(5) *Ethnopolitics* 523, 526

<sup>409</sup> Will Kymlicka, *Multicultural Citizenship: A liberal theory of minority rights* (n 85) 131-132



in a minority group, and the rights of the group itself. The former refers to the rights held by individuals which protect their fundamental freedoms of expression, association, assembly, and movement.<sup>410</sup> These latter refer to the rights of minority groups within a society to participate in determining their future status.<sup>411</sup>

Civic participation is a way of expressing a sense of belonging to a constitutional association. People participation in the exercise of their sovereignty involves a democratic procedure, allowing them to take part in the conduction of public affairs.<sup>412</sup> Participation demonstrates the degree of people's inclusion in the decision-making process, given that "citizens can deliberate meaningfully and efficiently in a referendum process."<sup>413</sup> As a referendum process is used to affect constitutional change, one matter for consideration is the role of national decision makers, including people who can be involved in designing their future destiny through a democratic process. People's engagement with a referendum process is necessary to ensure their commitment to participating in decision-making and to allow them to articulate their positions in a democratic polity. The total number of people participating in a referendum process is used to evaluate the genuine will of the people. The minimum requirement of voter turnout in the registration process is essential to assess the strength of popular support. When a poll shows an overwhelming majority of voters in support of independence or the status quo, a "yes" side expresses clear evidence of public opinion. A positive vote in an independence referendum can be taken as the desire of a majority of the population to establish a new state. It often appears that the public has not been highly engaged in the constitution-making process. Many make

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<sup>410</sup> James W. Nickel, *Making Sense of Human Rights* (2<sup>nd</sup> edn. Blackwell 2007) 94

<sup>411</sup> James W. Nickel, (n 410) 155; Ilan Peleg, (n 408) 523, 527

<sup>412</sup> Vivien Hart, 'Constitution Making and the Right to Take Part in a Public Affair' in Laurel E. Miller and Louis Aucoin, *Framing the State in Times of Transition* (United States Institute of Peace Press 2010) 26

<sup>413</sup> Stephen Tierney, (n 3) 38

their decision quickly because of certain pressure groups, which are closely related to political parties. Thus, the constitution-making process with a well-conducted procedure is useful to build stable and peaceful states.

Within the liberal theory, the supremacy of the will of the people over the interests of the government is the target of participatory democracy. The will of the people is also considered to be the highest authority in a democratic polity. People participating democratically is recognized as symbolic of the legitimacy of a collective decision-making process. However, existing accounts of the liberal theory refers not only to active participation, but highlight the equality of all people to participate. Liberal democratic theory emphasizes that all citizens of a particular community should enjoy the right to have their preferences taken into account in public decisions.<sup>414</sup> The relevance of liberal theory and democracy can be expressed through the ‘consent theory’. It is generally agreed that a democratic regime relies on the consent of the people rather than the coercive power of governments to ensure the rule of law.<sup>415</sup> As the consent of the governed is essential to legitimacy, the fairness of democratic procedures are also perceived as useful elements with which to assess the efficacy of citizen participation.

Another essential aspect of republican liberal theory, which relates to the democracy is the non-domination characteristic.<sup>416</sup> All citizens are perceived as having power, ‘a master of rights’, and should not be coerced by an external body or government. Evaluating people’s ability to express their will can help to measure the level of legitimacy of the democratic process within a particular state. Traditional or classical

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<sup>414</sup> Frederick G. Whelan, ‘Prologue: Democratic theory and the boundary problem’ in J. Roland Pennock and John W. Chapman, (n 12) 12

<sup>415</sup> David Butler and Austin Ranney, ‘Theory’ in David Butler and Austin Ranney (n 3) 68

<sup>416</sup> James Bohman, ‘Non-domination and Transnational Democracy’ in Cecile Laborde and John Maynor (eds), (n 17) 190

republican theory strongly supports public deliberation through equality, participation and consensus. Modern republican liberal theory develops this support offering a powerful promotion of constitutionalism, and the active will of the people that this requires.<sup>417</sup> One proponent of republicanism, Philip Pettit, advances the idea that people's participation in the democratic process should be written into the law. The republican liberal theory also requires "more than a mere fact of majority support in the population to change the laws".<sup>418</sup> An inclusion of all persons, including those belonging to national minorities, can integrate the differences and similarities of the communities in order to reach some form of agreement through the process of public consultation.<sup>419</sup>

As indicated by its subtitle, the relationship between the majority and the minority is illustrated by considering the numerical rule of majority assessment and minority concerns.

### *3.2.1 Majority rule and counter-majoritarian difficulty*

The strength of support is another condition with which to identify public opinion. "If public opinion is healthy, democracy will put into power citizens, which reflects the general, informed and deliberate spirit of the majority of the citizens".<sup>420</sup> This formula gives a sensible reason for trusting the people's will through majority rule.

The majority vote of a referendum is typically referred to as the level of support which can be evaluated in the form of qualitative data.<sup>421</sup> The majority concept is generally recognized within a democratic regime, and can be defined as the

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<sup>417</sup> Cass R. Sunstein, (n 28) 1539,1540

<sup>418</sup> Philip Pettit, (n 17) 181

<sup>419</sup> Steven Wheatley, 'Deliberative Democracy and Minorities' (2003) 14(3) European Journal of International Law 507,519

<sup>420</sup> Carleton Kemp Allen, *Democracy and the individual* (Oxford 1943) 34

<sup>421</sup> *In re Secession Quebec* [1998] (n 57) para87

participation of the majority of a people in reaching decisions collectively. In other words, democracy is a method of deciding issues by majority voting.<sup>422</sup>

During the course of a referendum, the test of majority support in a referendum process typically evaluates two components: the percentage of registered voters participating and the percentage of approval amongst those participants. To give an illustration of the relevance of the percentage of registered voters and the percentage of approval, the European Commission for Democracy through Law pointed out that

“The number of registered voters is valid if a certain portion of the registered voters takes part in the vote whereas the number of approval from electorates depends on the approval by an enhanced percentage of the electorates”.<sup>423</sup>

Further, the Commission made the following observations on the minimum turnout requirement: “a minimum turnout of 50% of the registered voters seems appropriate for a referendum on the change of state status”.<sup>424</sup> By this account, it could be said that a low turnout would weaken the legitimacy of a referendum result. Thus, a specific percentage of the majority approval is necessary, to make the claim that a referendum is consistent with the wishes of the population.

It was also apparent that the precedence in the *Re secession of the Quebec* case and the code of good practices on referendums attempted to set minimum requirements for the number of people needed to carry out a referendum. In the former case, the Supreme Court of Canada defined a level of support with a quantitative evaluation.

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<sup>422</sup> Carleton Kemp Allen, (n 420) 43-44

<sup>423</sup> European Commission for democracy through law (Venice Commission) ‘Referendum in European analysis of the legal rules in European States’ (21-22 October 2005) CDL-AD (2005) 034 para110

<sup>424</sup> European Commission for democracy through law (Venice Commission) ‘Opinion on the compatibility of the existing legislation in Montenegro concerning the organization of referendums with applicable international standards’ (16-17 December 2005) CDL-AD (2005) 041 para26, 27; Quoted in Ilker Gokhan Sen, (n 8) 232-233

The latter made an observation about the use of threshold or quorum rules, which deal with particular levels of turnout or support for a referendum outcome.

The clear majority will of the people would confer legitimacy on demands for secession. “An expression of the democratic will of the people must be free from ambiguity both in terms of the question asked and *in terms of the support it achieves*”. However, the court did not give any explanation for the high level of support, except a qualitative evaluation.<sup>425</sup> Later, the Canadian Parliament passed the Clarity Act so as to set out the importance of gaining a majority support and the requirement of democratic legitimacy on how to gather numerical data in a referendum.

The preamble of the Clarity Act also gives emphasis to a clear majority support. The provisional rule states that:

“A clear majority in favour of secession would be required to create an obligation to negotiation secession and a qualitative evaluation is also needed to determine whether a clear majority in favour secession exists in the circumstances”.<sup>426</sup>

Furthermore, there are three factors for identifying the clear majority will of the people. These are endorsed in section 2 (2) that:

“In considering whether there has been a clear expression of a will by a clear majority of the population of a province that the province cease to be part of Canada, the House of Commons shall take into account

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<sup>425</sup> *In re Secession Quebec* (n 57) para87

<sup>426</sup> The Minister of Justice, ‘Consolidation Clarity Act 2000, (n 328) preamble para5

- (a) the size of the majority of valid votes cast in favour of the secessionist option;
- (b) the percentage of eligible voters voting in the referendum; and
- (c) any other matters or circumstances it considers to be relevant.<sup>427</sup>

From the above provision, the Supreme Court of Canada did not clarify the exact percentage of a clear majority, which was to be considered legitimate. The question remains: of the amount that constitutes gaining majority support is 51 % of voters sufficient to claim a clear, majority will of the people? On this point, it could be argued that the majoritarian danger of the use of a referendum represents a dominant of a majority over a dissenting individual or minority. Thus, the assessment of majority rule by numerical number is not sufficient to identify the genuine will of the people. The will of the people would be legitimate if all concerned groups of people, whether majority and minority, participated in a process without discrimination.<sup>428</sup> The full participation from different ethnic groups in a referendum process is another condition to claim popular legitimation of decision-making processes.

Apart from the simple majority requirement, the numerical rule of popular support is elevated to the qualified majority requirement. The basis for majority rule has been challenged by a higher demand for popular support. The main reason for requesting the qualified majority requirement is to ensure that holding a referendum is credible in terms of balancing the will of different groups of people in particular territories. This was exemplified in the cases of Montenegro and Southern Sudan. In Montenegro, a proposition of 55% was made, for the qualified majority to be valid. This level of

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<sup>427</sup> Ibid article 2(2)

<sup>428</sup> Arbitration Committee Opinion No.2 para4 (2) 31 ILM 1992 1499; Marc Weller, 'The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia' (1992) 86(3) 569,593

support was presumably in order to achieve legitimacy if there was a low turnout. In the case of Southern Sudan, the requirement of the qualified majority was 60% of registered voter. Qualified majority voting is the most common method of decision-making, particularly in sensitive issues. In this case, this requirement of support was needed to reflect a broader consensus among indigenous ethnic groups of people. The exact number of majority identification or supermajority requirement is utilized as a mechanism to increase minority involvement in the decision-making processes.<sup>429</sup>

A critical example of this clear majority (or a certain proportion of the population voting one way) is the Montenegrin path to independence. The Montenegro referendum followed the rule of a clear majority as set out in the Clarity Act during the Quebec attempt to secede. Obtaining a clear majority was established in this Act as a requirement for legitimizing the outcome of the referendum.<sup>430</sup> The Law on Referendum on State-Legal Status of the Republic of Montenegro ratified the need for a majority, requiring a minimum of 55% in favour of independence according to the European Union proposition.<sup>431</sup> The result was 55.5% in favour of independence with a turnout of 86.4%.<sup>432</sup>

The Southern Sudan Referendum Act 209 set out a specific quorum requirement: 60% of registered voters were needed plus a simple majority of 50 % plus one for one of the choices was also necessary to be certified.<sup>433</sup> The establishment of a minimum turnout requirement is not unusual however it is not a guarantee that a percentage of

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<sup>429</sup> Robert A. Dahl, (n 7) 141-142

<sup>430</sup> European Commission for democracy through law (Venice Commission) 'Opinion on the compatibility of the existing legislation in Montenegro concerning the organization of referendums with applicable international standards' (n 424) para7

<sup>431</sup> Jure Vidmar, 'Montenegro's Path to Independence: A Study of Self-Determination, Statehood and Recognition' (2007) 3(1) *Hanse Law Review* 73, 98 Rolf Friedrich Krause, 'Popular Votes and Independence for Montenegro' in Wilfried Marxer (ed.) *Direct Democracy and Minorities* (Springer 2012) 28; Zoran Oklopčić 'Independence Referendums and Democratic Theory in Quebec and Montenegro' (2012) 18 *Nationalism and Ethnic Politics* 22,27

<sup>432</sup> Stephen Tierney, (n 3) 278; Jure Vidmar, (n 421) 73, 98

<sup>433</sup> The Carter Center, (n 316) 16

<[https://www.cartercenter.org/resources/pdfs/news/peace\\_publications/election\\_reports/finalreport-sudan-2011-self-determination-referendum.pdf](https://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/finalreport-sudan-2011-self-determination-referendum.pdf)> accessed 10 November 2015

the population will definitely vote. Counting those who have registered to vote does not guarantee their vote in a particular direction; they might abstain. The European Commission for Democracy through Law (the Venice Commission) has elaborated on this matter. A turnout quorum has a direct consequence on the interests of whichever choice has a minority to support. Because people know that the percentage may work against them, they are more likely to abstain as a protest vote than to vote in a particular direction. This has a disproportionate effect on the minority side. A turnout quorum may therefore be a problem if a majority vote approves a proposal without the quorum being reached. The majority side will feel that they have been deprived a victory without an adequate reason.<sup>434</sup> However, the requirement of a turnout quorum is essential to estimate the degree of public participation in the voting process. This regulation is often illustrated in Central and Eastern European countries' constitution as a precondition to validate the referendum process, for example there was a minimum turnout requirement for the independence referendum in Slovenia (1991).<sup>435</sup>

These standards had been specified under the section 41 sub-sections 2 and 3 of the Southern Sudan Referendum Act 2009:

- a) The Southern Sudan Referendum shall be considered legal if at least (60%) of the registered voters cast their votes.
  
- b) If this threshold was not reached the referendum shall be repeated under the same conditions within sixty days from the declaration of the final results.

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<sup>434</sup> European Commission for democracy through law (Venice Commission) 'Code of good practices on referendums' (n 217) explanatory memorandum para51 and 52

<sup>435</sup> European Commission for democracy through law (Venice Commission) (n 424) para26; Ilker Gokhan Sen, (n 8) 233; Stephen Tierney, (n 3) 272



Subject to Sub-Section (2) above, the referendum results shall be in favour of the option that secures a simple majority (50+1%) of the total number of votes cast for one of the two options, either to confirm the unity of Sudan by maintaining the system of government established by the Comprehensive Peace Agreement or to secede.<sup>436</sup>

In this case, the overall turnout was 97.58 % of registered voters, with 98.83% of those who cast a ballot choosing separation.<sup>437</sup> In addressing the point of a certain percentage of possible majority requirements, the clear majority will of the people was represented, ensuring that almost all registered voters in Southern Sudan were able to exercise the right to self-determination. However, the quorum of 60% participation was in question on how much percentage of indigenous people and minority people in Southern Sudan took part in a referendum process. In this case, the quorum participation was not consistent with a simple majority vote of 50 % plus one to identify either secession or unity. Not all registered voters were required to express their views in voting procedures. This condition did not illustrate either strength of majority or minority involvement.

### *3.2.2 Minority involvement*

One legitimate criterion of liberal theory not only references the majority rule but also the elevation of minority interests. According to the General Comment Number 23 of the Human Rights Committee, minority protection is undeniable. Positive legal measures of protection are required to ensure the effective participation of minority

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<sup>436</sup> Southern Sudan Referendum Act 2009 (n 382), section 41

<https://unmis.unmissions.org/Portals/UNMIS/Referendum/SS%20Referendum%20MOJ-Englis.pdf> accessed 1 November 2015

<sup>437</sup> The Carter Center, (n 316) 11

communities in decisions which affect them.<sup>438</sup> In addition, they also have the general rights, for example, freedom of association and assembly and freedom of expression.<sup>439</sup>

Liberal theory suggests that all citizens should be treated with genuine equality, requiring not only *identical* treatment but also *differential* treatment in order to accommodate differential needs amongst all citizens.<sup>440</sup> As the meaning of democracy extends to the consideration of minority concerns, the legitimacy of holding a referendum should not only be assessed by the majority percentage outcome but should also consider the implications for ethnic minority participants. The concept of liberal democracy can be applied to take into consideration the equality of people's political rights. A broader feature of liberal democracy entails the public engagement in collective decision-making among all citizens and the balancing between majority and minority.

The protection of group-differentiated and ethnic minority groups should be ensured with a view to promoting their equal political participation. The authentic deliberation of all citizens is considered as "legitimate expressions of the collective will of the people".<sup>441</sup> Equality should be ensured between a proposal's supporters and opponents. The term "minority" is regularly informed by the notion of ethnicity.<sup>442</sup> During the course of referendum, the ethnic minority groups of people should be able to advocate their views, whether in agreement or disagreement. The fairness among different groups can be illustrated through decision-making procedures within

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<sup>438</sup> Human Rights Committee, 'General Comment No. 23: The rights of minorities (Art.27)' CCPR/C/21/Rev.1/Add.5 (26 April 1994) para6.1, 7

<sup>439</sup> Ibid para5.2

<sup>440</sup> Will Kymlicka, *Multicultural citizenship: A liberal theory of minority rights* (n 85) 113

<sup>441</sup> Stephen Tierney, (n 3) 43

<sup>442</sup> Mohammad Shahabuddin, 'Ethnicity in the International Law of Minority Protection: The Post-Cold War Context in Perspective' (2012) 25 *Leiden Journal of International Law* 885, 886

democratic mechanisms. The meaning of fairness is that the interests and perspectives of the minority be listened to and taken into account.<sup>443</sup>

The balance between majority rule and the ethnic sense of minority protection was a central issue in the Baltic States when carrying out independence referendums, particularly in Estonia and Latvia. After the forcible annexation of the Soviet Union in 1940, there was large-scale immigration of Russians wanting to work in the industrial and administrative sectors in Estonia. This dramatically affected their demographic composition across the Baltic States.

In Estonia, the native populations steadily decreased among the ethnic Russians. For instance, 88.1 % of the population was ethnic Estonian in the census of 1934, compared to 61.5 % in the census of 1989.<sup>444</sup> Prior to the national referendum on the independence of Estonia in 1991, there were many Russians and other non-Estonian populations residing in Estonia who had the right to vote. It appeared that a high level of support was derived from the non-Estonians. The total turnout in the referendum was 83%, and 78% of participants voted “yes”. More than half of non-Estonian respondents (approximately 38%) voted for independence.<sup>445</sup>

Similarly, the demography of the population in Latvia was composed mostly of Russians and other Slavs who arrived after the forcible annexation in 1940. A large proportion of non-Baltic populations in Latvia also expressed their will in favour of independence. In Latvia, there was a requirement that 50% of eligible voters turn out for the referendum to be valid.<sup>446</sup> The overall turnout in the referendum was 88%, and

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<sup>443</sup> Will Kymlicka, *Multicultural citizenship: a liberal theory of minority rights* (n 85) 131

<sup>444</sup> Quoted in Gundar J. King and David E. McNabb, *Nation-Building in the Baltic States* (CRC Press 2015) 56

<sup>445</sup> Riina Kionka and Raivo Vetik, ‘Estonia and the Estonians’ in Graham Smith (ed), (n 371) 140; The Staff of the Commission on Security and Cooperation in Europe, (n 362) 9

<sup>446</sup> Stephen Tierney, (n 3) 272; European Commission for democracy through law (Venice Commission) (n 424) para21

73.7 % of participants voted “yes” while 24.7 % were in opposition.<sup>447</sup> A referendum outcome from 9 of Latvia's 15 rural districts showed overwhelming support for independence among ethnic Latvians, ranging from 83% in the Jekabpils region of eastern Latvia to 98% in the Talsu area of western Latvia. In one of the six districts in heavily Russian Riga, 75% of the voters supported independence.<sup>448</sup> Pro-independence was endorsed with a large support by the non-Baltic population in particular Russian citizens.

In the case of Estonia and Latvia, these exemplify the diversity of people’s consent, giving greater legitimacy to the result. According to a survey, there were three factors support for voting independence among the non-Estonian population; these were knowledge of the Estonian language, the length of residency and a higher standard of living.<sup>449</sup> In part of Latvia, according to Graham Smith, there was evidence to suggest that the Russian community were satisfied to vote in favour of independent statehood. Many Russians preferred to live in Latvia in order to guarantee employment and other economic reasons.<sup>450</sup>

It can be observed that large minorities of Russians and other nationalities had a decisive influence on the independence referendums in Estonia and Latvia as these groups of people had strong and long-standing attachments to their territories. In the absence of unanimity, non-discrimination and equality for all citizens could be used in order to contribute to the democratic legitimacy of referendums. The showing of support for independence by almost half of the non-Baltic population in Estonia and

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<sup>447</sup> The Staff of the Commission on Security and Cooperation in Europe, (n 362) 12

<sup>448</sup> Michael Parks, ‘Estonia, Latvia Vote Overwhelmingly for Independence: Baltics: Secession from the Soviet Union passes by wide margins in both republics. The next test is a countrywide referendum on Gorbachev’s plan’ *Times* (4 March 1990) [http://articles.latimes.com/1991-03-04/news/mn-92\\_1\\_soviet-union](http://articles.latimes.com/1991-03-04/news/mn-92_1_soviet-union) accessed 27 December 2015

<sup>449</sup> Riina Kionka and Raivo Vetik, ‘Estonia and the Estonians’ in Graham Smith (ed), (n 371) 140

<sup>450</sup> Graham Smith, ‘Latvia and the Latvians’ in Graham Smith (ed), (n 371) 162

Latvia greatly strengthened the drive towards independence in the Baltic States.<sup>451</sup>

Conversely, the Lithuanian ethnic composition was the most homogenous of the three Baltic States. Lithuanians had an absolute majority of nearly 80% of the population.<sup>452</sup> The rest of the population included 9.4% Russian, 7% Poles, a small proportion of Belarusians, Ukrainians, Tatars, Latvians and Jews.<sup>453</sup> The overall turnout was 84%, and 90.5% of participants voted “yes”.<sup>454</sup> In this case, the strength of public opinion demonstrated a broad consensus on particularly important rules relating to sovereignty.

Within the liberal sense, the proper treatment of minority is developed from the idea of human rights protection. Liberal theory needs a broader political opportunity for minority. Fundamental freedom of all citizens is guaranteed to ensure that all voters have adequate information to make their own choice. One element to minority rights protection, according to the Human Rights Committee, is the preparation of materials and information about voting in minority languages.<sup>455</sup> This strategy is to ensure that the ethnic minority is not excluded from the referendum vote. However, holding a referendum is not an absolutely necessary condition for the right to self-determination to be exercised in a proper way if the referendum process is not guaranteed the principle of equality between the members of the political community.

During the Slovenian and Croatian independence referendums, minority rights were upheld to different extents. In Slovenia, the Assembly adopted the Plebiscite on the

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<sup>451</sup> The Staff of the Commission on Security and Cooperation in Europe, (n 362) 13

<sup>452</sup> Ineta Ziemele, *State Continuity and Nationality: The Baltics States and Russia Past, Present and Future as defined by international law* (Martinus Nijhoff 2005) 368

<sup>453</sup> Alfred Erich Senn, ‘Lithuania and the Lithuanians’ in Graham Smith, (n 371) 178

<sup>454</sup> The Staff of the Commission on Security and Cooperation in Europe, (n 362) 12; Henry E.Brady and Cynthia S. Kaplan, ‘Eastern Europe and the former Soviet Union’ in David Butler and Austin Ranney, (n 3) 194

<sup>455</sup> Human Rights Committee, ‘General Comment adopted by the human rights committee under Article 40, paragraph4, of the international covenant on civil and political rights’ General Comment No.25 (57) CCPR/C/21/Rev.1/Add.7 (27 August 1996) para12

Sovereignty and Independence of the Republic of Slovenia. The decision in favour of independence was adopted by a majority of 88.5% out of 92%.<sup>456</sup> In this case, the Badinter Commission indicated that Slovenia's independence was supported by a referendum with a majority even though Slovenia failed to negotiate internal agreements with Yugoslavia for its future status. In terms of human rights protection, Slovenia had established various systems to protect and respect human rights and fundamental freedoms. Equality among different groups of people and the use of minority languages in education and legal proceedings were guaranteed in domestic constitutional provisions.<sup>457</sup> This factor contributed to an increase in minority participation. In contrast, when Croatia held an independence referendum in 1991, the governmental authority did not incorporate minority people in the voting process.<sup>458</sup> One of the main concerns was that the Serbian population in Croatia should be able to exercise their right to self-determination. However, the Serbian population was not equally treated as constituent powers, and as a result of feeling that they had been mistreated they set up an autonomous territory in Krajina.<sup>459</sup>

Another aspect of the equality of the majority and minority constituencies is exemplified by the case of Bosnia-Herzegovina. On 1<sup>st</sup> March 1992, the call for a referendum on the future of Bosnia-Herzegovina was necessary to meet the requirements of international recognition for a statehood proposed by the Badinter Commission. The Commission delivered their opinion No. 4 with regard to international recognition of the Socialist Republic of Bosnia-Herzegovina. The commission suggested a mechanism to evaluate the will of the people by means of a

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<sup>456</sup> Jure Vidmar, (n 150) 177

<sup>457</sup> Arbitration Committee Opinion No.7 para2 (b) 31 ILM 1992 1514

<sup>458</sup> Arbitration Committee Opinion No.4 'Comments on the Republic of Croatia's Constitutional Law of 4 December 1991, as last amended on 8 May 1992' 31 ILM 1992 1507

<sup>459</sup> Matthew Craven, 'The European Community Arbitration Commission on Yugoslavia' (1996) 66(1) BYIL 333,384

referendum with full participation of all citizens without distinction.<sup>460</sup> The population in Bosnia-Herzegovina is composed of three distinct groups: Muslims, Serbs and Croats. In terms of political structure, there were three political parties that were closely related to the three national groups within Bosnia-Herzegovina. The three parties were the Party of Democratic Action (PDA) with the support of the ethnic Muslims, the Serbian Democratic Party (SDP) with the support of the Bosnian-Serbs, and the Croat Democratic Union (CDU) with the support of the Bosnian-Croats.

Organizing a referendum in Bosnia and Herzegovina illustrated their diverse backgrounds: 43% ethnic Muslims, 31% Serbs and 17% Croats. The total turnout in the referendum was 63.4%, and 99% of participants voted for independence.<sup>461</sup> Even though the referendum outcome demonstrated overwhelming support for independence, it also appeared that the Serbian population, under the supervision of the Serbian Democratic Party (SDP), boycotted the vote and rejected the result. The main reason for this was the referendum's unconstitutional basis, as the resolution for holding a referendum did not attain a two-thirds approval from the National Assembly, as required by the republic's constitution. In addition, the Bosnian-Serbs delegates were absent at the time of passing a referendum resolution.<sup>462</sup>

In the context of the right to self-determination application, the status of Bosnian-Serbs as an ethnic minority people to exercise their external right to self-determination was considered in the opinion 2 of the Badinter Commission. According to the Badinter Commission, the implementation of the external right to self-determination by the minority groups of Bosnia-Serbs in Bosnia Herzegovina was denied. In this circumstance, the Badinter Commission concluded the status of

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<sup>460</sup> Arbitration Committee Opinion No.4 (n 458) para4 1503

<sup>461</sup> Stephen Tierney, (n 3) 72

<sup>462</sup> Peter Radan, *The Break-up of Yugoslavia and International Law* (Routledge 2002) 185-186

the Serbs people as constituents of the Yugoslavia federation rather than constituents of republics. In addition, the right of people to self-determination was also interpreted as referring to a chosen territory rather than referring to the right of people. The will of the people is accepted as legitimate, if the affected parties can express their will freely and fully integrated in political rights.<sup>463</sup>

The independence referendum in Bosnia Herzegovina in 1991 provides some evidence of both legitimate and illegitimate actions in relation to the will of the people. This democratic decision-making process was legitimized by the acceptance of the three major ethnic groups of people in Bosnia Herzegovina territory: Bosnian Muslim, Serbs and Croats. By contrast, it was illegitimate because the will of the people was inconclusive as the ethnic Serbs were not involved.<sup>464</sup> As a result, the Serbs did not accept the outcome of the referendum because only the Muslims and Croats expressed their will to support independence. Meanwhile, the Serbs chose to establish their own referendum in a particular area where the majority of residents were Bosnian-Serbs. After holding their referendum, the Serbs claimed their possessed territory as a self-governing territory. This territory was separated from the area where Croats and Muslims clearly expressed their will to be an independent state from the former Yugoslavia Federation. However, the international community did not recognize the Serbian referendum as being legitimate.

All things considered, the will of the people would be legitimate if all concerned groups of people, whether majority or minority, participated in a referendum process without discrimination.<sup>465</sup> According to republican liberalism, the balance of power

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<sup>463</sup> Arbitration Committee Opinion No.4 (n 458) para3 1503

<sup>464</sup> Brad Roth, (n 183) 23-26

<sup>465</sup> Arbitration Committee Opinion No.4 (n 458) para4 1503; Marc Weller, (n 428) 569, 593



between majority and minority people is a crucial factor to claim that all are treated equally, regardless of their backgrounds. Public involvement should not be confined to the approval of the majority view but should also elevate minority concerns because these groups of people are also affected by the collective decision-making process.

### *3.3 Identification of voters*

As the republican liberal theory stresses the active role of people's engagement in collaborative decision-making, similarly, people are recognized as key players in the context of independence referendums. The existence of different categories of people is controversial in establishing whether voters are eligible in a referendum process. Thus, the categorization of people is done to offer the right to vote to those people affected by the outcome of the referendum process.

Popular mobilization has played a crucial role within liberal democracy because people are recognized as the ultimate source of political authority. When a state decides to extend voting rights to different groups of citizens, a major concern is whether the number of enfranchised voters might affect the turnout percentage and therefore the validity of the referendum. Furthermore, the inclusion of non-resident citizens (who do not habitually reside in a secessionist region) in taking part seems to be problematic. This can jeopardize the legitimacy of the referendum<sup>466</sup>, because these groups have no direct impact on the territorial alteration resulting from an independence referendum.

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<sup>466</sup> Zoran Oklopčic, (n 431) 22,26

People are recognized “as a unit for measuring the dimensions of self-determination”.<sup>467</sup> The task of classifying people involves nationalist and republican liberal views. From the nationalist view, Tierney points out “ a referendum can tell much about the type of nationalist ideology dominant in a specific state or territory; particular rules of inclusion and exclusion reveal whether the vision of the nation that prevails is more or less civic or ethnic in orientation”.<sup>468</sup> Besides nationalist ideas, the concept of peoplehood is also found in republican liberal theory. As Sunstein points out, citizenship is one of the basic republican components as the citizenship manifests itself in broadly guaranteed rights of participation.<sup>469</sup> Citizenship is recognized as a connecting point to grant the right to vote for people in collaborative decision-making process.

Both views outlined in the preceding paragraph prompt questions around the idea of identity. It would appear that the residence-based model is the primary condition to grant the right to vote. Thus, the following critical analysis deals with a residence-based model with the possibility of enfranchising two affected groups of people: nationals residing outside a secessionist region and non-nationals people living in a secessionist region. The extension of a residence-based model, for the latter group, can ensure the legitimacy of a referendum because they are also affected by the outcome. The franchise rule emerges with the intent to connect people and territory. The franchise rule is the combination of citizenship and territorial based dimensions, making an effort to dismiss the state-made distinction between cultural origin and rights. The implementation of the franchise rule depends on a negotiation in which both involved parties would logically try to favour their preferred outcome.

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<sup>467</sup> James Summers, ‘The internal and external aspects of self-determination reconsidered’ in Duncan French (ed) (n 50) 234

<sup>468</sup> Stephen Tierney, (n 3) 60

<sup>469</sup> Cass E. Sunstein, (n 28) 1539, 1542, 1556

Having examined the theory of peoplehood as an extension of people's ability to vote, it is necessary to explore the genuine link between people and states. There are three models to describe people's identity: firstly, as a common ground to offer them a nationality (linking people with a state by birth); secondly, on a territorial-basis (the place of residence connects people and state); and thirdly, as cited in republican liberal concern as a way to preserve people's ethnic and cultural distinction.

However, the practical reason for identifying people in a referendum is in a different position, that is, the nationality principle is not only a sole standard to consider and grant a right to vote for people in a referendum. It comes as no surprise that a residence-based model is widely accepted as offering the right to vote for all permanent residents. This interpretation automatically approves the inclusion of people based on a territorial-basis. Hence, the voter's list in a referendum not only includes native resident citizens but also non-native resident citizens. The latter groups of people are likely to be enfranchised because these people have a genuine link and a sufficient length of time in a territory to vote at referendum.

There are three main reasons why the residence-based model is used to categorize people in a referendum. Firstly, due to the diverse demographic composition, the resident-based criterion includes all affected groups of people living in the territory of the referendum as these groups have a direct impact on its outcome. Secondly, the resident-based principle is connected to the other lists, such as the electoral lists of voters or taxpayer lists.<sup>470</sup> Thus, the resident-based standard seems to be easy for gathering information about the voter's list. Thirdly, the resident-based model is

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<sup>470</sup> Stephen Tierney (n 3) 76-77

useful for enfranchising people in a particular territory.<sup>471</sup> Those people missing from the lists can identify themselves in the registration process.

The following section elaborates on four different situations to consider how to extend the franchise rule in particular situations. Firstly, the claim of national citizens residing outside a secessionist region was a major concern in the Montenegro independence referendum. The rights of Montenegrins residing in Serbia to vote in a referendum were denied because they also enjoy the right to vote in Serbia. Secondly, the Scottish independence referendum provides further argument for a franchise rule settlement. A franchise rule extends to the right of young people, commonwealth European and Irish citizens. Thirdly, the extending scope of a franchise rule was used to include internally displaced persons and refugees as former residents within territory. This is exemplified in the case of Southern Sudan. Fourthly, the recent example of Western Sahara case demonstrates a systematic approach towards updating the censor list in the hands of the United Nations mission. This aimed to extend the right to self-determination to specific indigenous people i.e. Sahrawi indigenous people to be involved in the referendum process.

### *3.3.1 Montenegro and its citizens residing in Serbia*

The main argument of the Montenegro referendum was the extension of voter's rights to those Montenegrin citizens residing in Serbia numbering 260,000.<sup>472</sup> This was a large number of people, who could have dramatically changed the result of the referendum. On this point, it could be said that the extension of the right to vote to Montenegrin citizens residing in Serbia should be denied because a large number of

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<sup>471</sup> Bernard Ryan, 'The Scottish referendum franchise: Residence or citizenship?' in Ruvi Ziegler, Jo Shaw and Rainer Baubock (eds.) *Independence Referendums: Who should vote and who should be offered citizenship?* EUI Working Papers (RSCAS 2014/90) 5

<sup>472</sup> European Commission for democracy through law (Venice Commission), (n 424) 11

Montenegrins residing in Serbia already enjoy the right to vote in Serbia. Apart from this, the residency requirement of 24 months led to the exclusion of people who were denied the right to vote.

The first issue was a controversy over Montenegrin citizens residing in Serbia. This matter was addressed by the European Commission for Democracy through Law (Venice Commission). According to the Venice Commission opinion, people deserve the right to vote in the municipality where they are registered as permanent residents. This means that any Montenegrin who had legally established residence in Serbia would have a right to vote in a Serbian referendum.<sup>473</sup> If they are also included in a Montenegro referendum, they will be granted a double franchise.<sup>474</sup> Thus, the Venice Commission agreed to support the application of the same voter list in the previous electoral process, regardless of Montenegrins inhabitants in Serbia. Furthermore, the Commission also pointed out that the constitutional charter does not require equality between the political rights of Montenegrin citizens resident in Serbia and Serbian citizens resident in Montenegro.<sup>475</sup> Montenegrin citizens resident in Serbia had no right to vote in elections held in Montenegro. Equally, they had also no right to vote in a referendum held in Montenegro unless the law was changed.

The second issue relates to the eligibility of voters and the length of residency requirements. The eligibility of voters was identified in the Law of the Referendum on State Legal Status (LRSL) and other legal documents adopted by the Parliament of Montenegro. Those eligible to vote in the Montenegro referendum had to conform

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<sup>473</sup> International Crisis Group, 'Montenegro's independence drive' Europe Report Number 169 (7 December 2005) 13-14 <https://www.crisisgroup.org/europe-central-asia/balkans/montenegro/montenegros-independence-drive> accessed 15 November 2015

<sup>474</sup> Stephen Tierney, (n 3) 78

<sup>475</sup> European Commission for democracy through law (Venice Commission), (n 424) 48

to two basic criteria: 1) aged over 18 and 2) permanently resident in Montenegro for a period of at least 24 months.<sup>476</sup>

Under the scope of the Montenegro Constitution, Article 32 stipulates that:

“ Every citizen of Montenegro who has reached the age of 18 shall be entitled to vote and be elected to a public office. The voting right is exercised at the elections. The voting right is general and equal. Elections shall be free and direct and voting shall be by a secret ballot”.<sup>477</sup>

As the European Commission suggested that the eligibility of voters in a referendum is in accordance with the previous electoral registration lists, people’s identity in Montenegro, at the time of election, was defined as two tiers: federal (Yugoslavia) and republican (Serbia, Montenegrin). Peoplehood involved all citizens who resided in Montenegro, regardless of whether they had republican citizenship of Montenegro or of Serbia.<sup>478</sup>

Looking at the content of the specific legal documents for the Election of Councilors and Representatives of the Republic of Montenegro (‘the Election Law’ amended in 2000) indicates certain criteria of the eligibility of voters, excluding Montenegrins citizens resident in Serbia. Article 11 states that:

“1. A citizen of Montenegro, who has come of age, has the business capacity and has been the permanent resident of Montenegro for at least twenty four

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<sup>476</sup> Office for Democratic Institutions and Human Rights (OSCE), ‘Assessment of the draft referendum law for conducting referendum elections in the Republic of Montenegro’ (22 January 2001) 10

<sup>477</sup> European Commission for democracy through law (Venice Commission), (n 424) 48

<sup>478</sup> Jalena Dzankic, ‘Understanding Montenegrin Citizenship’ (2012) 16(3) *Citizenship studies* 337, 341

months prior to the polling day shall have the right to elect and be elected a representative.

2. A citizen of Montenegro, who has come of age, has the business capacity and has been the permanent resident of Montenegro for at least twenty four months prior to the polling day, and a citizen residing on the territory of the municipality, as the constituency, for at least 12 months prior to the polling day, shall have the right to elect and be elected a councilor.”<sup>479</sup>

After Montenegro adopted a new citizenship law in 1999, the eligibility of voters, who previously had a right to vote, was denied.<sup>480</sup> Only Montenegrin citizens over 18 years of age, who had resided in Montenegro for two years before the elections, could vote. This enfranchised non-national residents living in Montenegro, that is, Serbian citizens and Montenegrins temporarily residing elsewhere. The maintenance of this 24 months criterion was controversial, calling the legitimacy of the referendum into question because it denied a right to vote guaranteed by the constitution. A person who had voted previously may be denied the right to vote in a referendum due to the change in the Citizenship law. This requirement has a direct effect on voting eligibility rules in local elections.

### *3.3.2 The Scottish referendum and the franchise rule*

In terms of voter eligibility, the focal point of the Scottish independence referendum was the broader scope of people through the lens of the ‘franchise rule’. This defined the relationship between a people and the state based on a territorial basis.

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<sup>479</sup> European Commission for democracy through law (Venice Commission), (n 424) 45

<sup>480</sup> Office for Democratic Institutions and Human Rights (OSCE), (n 476) 7

The 2013 Scottish Independence Referendum (Franchise) Act, 2013 (particularly Section 2) spelled out who could vote. It was agreed that the eligibility of voters should be based on the franchise at the Scottish Parliament and local government elections.<sup>481</sup> In this matter, Scottish institutions took the main responsibility in deciding who should be entitled to vote.<sup>482</sup>

According to Section 2 of the Act, a person was entitled to vote if, on the date on which the poll at the referendum is held, the person was:

“(a) aged 16 or over,

(b) registered in either-

(i) the register of local government electors maintained under section 9

(1) (b) of the 1983 Act for any area in Scotland, or

(ii) the register of young voters maintained under section 4 of this Act for any such area,

(c) not subject to any legal incapacity to vote (age apart), and

(d) a Commonwealth citizen, a citizen of the Republic of Ireland or a relevant citizen of the European Union.”<sup>483</sup>

The franchise rule did not include non-resident Scots, that is, people born in Scotland but now living elsewhere in the UK. This problem would be settled based on the future consideration of Scottish citizenship. This group of people would have a

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<sup>481</sup> SP Bill, ‘Scottish independence referendum (Franchise) Bill explanatory notes (and other accompanying documents)’ (11 March 2013) 24

<sup>482</sup> Bernard Ryan, ‘The Scottish referendum franchise: residence or citizenship?’ In Ruvy Ziegler, Jo Shaw and Rainer Baubock (eds.) (n 471) 6

<sup>483</sup> SP Bill, (n 481) section 2



chance to gain Scottish citizenship after the time of Scottish independence. Certain conditions needed to be met, that is, “any person with a parent or grandparent who qualified for Scottish citizenship could register as a Scottish citizen”.<sup>484</sup> However, this left a controversy over how many generations that would be included.

The franchise rule in the Scottish referendum extended the eligibility of voters to those aged 16 and 17. The franchise rule was a Scottish National Party (SNP) parties’ policy.<sup>485</sup> Of those aged 16 or 17 in the population, it appeared that nearly 110,000 were registered to vote. This was 3.5% of the total number of registered voters (i.e. 3,600,000).<sup>486</sup> The extension of the right to vote to 16 and 17 year-olds differs from UK electoral law which only allows those of 18 years to vote. In practice, the administrative organizations and the campaigners were obstructed with the limited time (i.e. two months prior to a referendum) to plan and undertake targeted activity to register young voters.<sup>487</sup> In addition, there were certain legal restrictions with regard to the security of young people’s data.<sup>488</sup> This legal mechanism was established to protect them from campaigners or political parties from accessing their details.

### *3.3.3 Southern Sudan and the extending scope of the franchise rule*

The voter’s identification process identifies that certain groups of people should be qualified to vote in the referendum. In certain circumstances, some specific groups of people include exiled people, indigenous people and groups affected by a mass expulsion. Granting the right to vote to non-resident natives is also a controversial

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<sup>484</sup> Bernard Ryan, ‘The Scottish referendum franchise: residence or citizenship?’ In Ruvi Ziegler, Jo Shaw and Rainer Baubock (eds.) (n 471) 8

<sup>485</sup> Ibid 6

<sup>486</sup> The Electoral Commission, ‘Scottish Independence Referendum: Report on the referendum held on 18 September 2014’ ELC/2014/02 9-10

<sup>487</sup> Ibid 39

<sup>488</sup> Ibid 38-39

matter. Before the referendum process, Southern Sudan had experienced difficulties in defining voter eligibility, as this country was experiencing brutal internal conflicts.

The Southern Sudan Referendum Act, 2009 set out the eligibility criteria. According to Article 25 of the Act, a person had to meet the following conditions in order to be able to vote:

- “1. Born to parents both or either of whom belongs to any of the indigenous communities residing in Southern Sudan on or before 1<sup>st</sup> January 1956, or whose ancestry is traceable to one of the ethnic communities in Southern Sudan.
2. permanently residing, without interruption, or whose parents or grandparents are residing permanently, without interruption, in Southern Sudan since the 1<sup>st</sup> of January 1956;
3. has reached 18 years of age;
4. be of sound mind;
5. registered in the Referendum register.”<sup>489</sup>

The eligibility criteria for the Southern Sudan referendum reflected the intention of including ethnic Southerners and long-term residents in a secessionist region. This case illustrates the enfranchisement of a large number of internally displaced persons or refugees without proof of citizenship. However, the Act posed many contradictions in terms of the registration process and the proof of people’s identity. There was no

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<sup>489</sup> The Southern Sudan Referendum Act 2009 (n 382) art 25

requirement that a voter must be a Sudanese citizen and there was no specific provision for the length of time they had to have been in residence.<sup>490</sup>

In the case of Southern Sudan, voter registration is likely to have been one of the most sensitive aspects of the referendum process, because it left certain issues with regard to the types of documentation for proving people's identity. According to article 26.1 b of the Referendum Act, for the purpose of Section 25 the identity of the voter shall be proved by one of the following:

b) A direct oral or written testimony by a competent Sultan from the County.

According to Article 28.2 of the Act, anyone who satisfied the following conditions should register his/her name in the referendum register:

a) meet the eligibility requirements as defined in Section 25 of this Act,

b) possess identification document or a certificate approved by the Administrative Unit in the County or by the local or traditional competent authorities as the case may be, and,

c) not have been registered in any other location.

According to the statement above, there was a contradiction between Article 26.1b and 28.2b regarding proof of a voter's identity. The documentation required to register as a voter was ambiguous. However, this issue was made clear in the Southern Sudan Referendum Commission (SSRC) Voter Registration Regulations specified in Article 10 [h]:

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<sup>490</sup> The Carter Center, (n 316) 10-11

“As proof of identification, an oral testimony by a concerned county official or dignitary of the concerned community could also be used”.<sup>491</sup>

In assisting with this stipulation of the Act, the SSRC Voter Registration Regulations 2010 specified that, in case of doubt about the authenticity of any document, the Chairperson of the RC should seek the assistance from the Sultan or the concerned Chief of the village. There was concern for missing groups of people who had fled from the territory during brutal conflicts. As a result of these conflicts large numbers of people had been internally displaced and therefore could no longer be recognized as former residents within a particular territory, losing their ability to vote. Because the SSRC could not set out a list of ethnic and indigenous communities eligible to participate,<sup>492</sup> the eligibility criteria for many potential voters involved the oral testimony and approval of the chief of the village. The contributive role of the chief of the village or the Sultan to confirm the identity of people was crucial to identify the number of people in a specific area who were eligible to vote. Although in this case, a solution was found, in general of there is no systemic, civil registration or proof of identity, it is difficult to claim that the free will of the people has been ascertained if large numbers have been unable to participate in the process.

#### *3.3.4 Western Sahara and long-term settlement of voter's qualifications*

The Western Sahara referendum faced a lot of difficulties when granting the right to vote. A key sticking point was the complexity of the identification of voters for the referendum. Both sides were determined to win by proposing their needs for a greater inclusion of Saharan populations qualified to participate in the referendum. The

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<sup>491</sup> Quoted in European Union Election Observation Mission, ‘Sudan: final Report on the Southern Sudan Referendum’ (9-15 January 2011) 27 [http://www.eods.eu/library/FR%20SUDAN%202011\\_en.pdf](http://www.eods.eu/library/FR%20SUDAN%202011_en.pdf) accessed 15 November 2015

<sup>492</sup> Ibid 17

Frente Polisario relied on the Spanish authorities' census list in 1974 whereas Morocco rejected this census because it included the Sahrawi tribal groups, which escaped from the Spanish invasion to the north of Morocco. The Sahrawi tribal groups are recognized as indigenous people who left for refugee camps in Algeria and Mauritania.<sup>493</sup> Morocco suggested the enfranchisement of a larger proportion of people, including tens of thousands of applicants of Saharan origin now living in Morocco.<sup>494</sup> An in-built proportional scale would have had a direct impact on the referendum outcome.

To facilitate a free and fair referendum, the United Nations mission for the referendum in Western Sahara (MINURSO) was established to deal with the identification process. Owing to interference from both parties, the United Nations proposed establishing a specific committees, the Saharan Identification Commission.<sup>495</sup> Its function was two-fold: updating information from the 1974 census and making a list of eligible voters. The first stage dealt with updating all the information up to the present. While doing so, the collection of census data included the number of deaths since 1974 as well as those who were still alive, whether inside or outside territory, in order to update the entire voter list. The second stage contained more details of the procedure. It started by identifying people and issuing registration cards to those who had been granted the right to vote. Then, those who had not been included on the list had the right to appeal against the commission's decisions.<sup>496</sup>

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<sup>493</sup> Alexis Arief, 'Western Sahara' Congressional Research Service 7-5700 RS20962 (8 October 2014) 2 <https://fas.org/sgp/crs/row/RS20962.pdf> accessed 15 November 2015

<sup>494</sup> Anna Theofilopoulou, (n 16) 2

<sup>495</sup> UNSC 'Report of the Secretary-General' (1990) S/21360 para25-26 [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/21360](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/21360) accessed 15 Oct 2015

<sup>496</sup> UNSC 'Report of the Secretary-General (1990) S/22464 para21-23 [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/22464](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/22464) [accessed 15 Oct 2015]

During the technical mission of gathering and updating people's identity, the Saharan Identification Commission struggled with a large amount of tribal groupings. Their nomadic lifestyle posed a problem for justifying legal ties of certain people to certain territories. To resolve this, research was carried out under the guidance of population experts and in consultation with the tribal chiefs. After having completed their two goals, MINURSO's next task dealt with collecting data, comments and feedbacks submitted to the Secretary-General for consideration, in consultation with the Chairman of the African Union Organization (OAU).<sup>497</sup>

After completing the identification process in 1995, the United Nations mediation efforts began in 1997 with the appointment of James Baker as a special envoy of the Secretary-General of Western Sahara. Compromises were made with the adoption of the Houston Agreements. The Houston Agreement tried to settle disputes over the implementation of a referendum, including the identification process. It claimed to guarantee the freedom of expression and movement, assuring equal access to radio broadcasts and detailing the procedure for a free and fair referendum.<sup>498</sup> Then, the identification process and the establishment of a final voter list were finally completed at the end of 1999 with a high number of 131,038 appeals.<sup>499</sup> The appeal process was a factor that both parties concerned, in particular the procedural review of the concurrent oral testimony by two tribal leaders. It would appear that some tribal leaders were biased against applicants from the opposite side.<sup>500</sup> No agreement could be made between the two parties. Morocco insisted that the implementation of a referendum was not possible if the Saharans were excluded from taking part in a

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<sup>497</sup> UNSC 'Report of the Secretary-General' (1990) (n 495) para29

<sup>498</sup> Erika Conti, 'The Referendum for self-determination: is it still a solution? The never ending dispute over Western Sahara' (2008) 16 African Journal of International and Comparative Law 178,183

<sup>499</sup> UNSC 'Report of the Secretary-General (2001) S/2001/613 para28

[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/2001/613](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2001/613) [accessed 9 March 2016]

<sup>500</sup> Ibid para34-35

referendum. The Frente Polisario requested the repatriation of refugees- the indigenous people of Western Sahara (Sahrawis) - and enfranchised these groups of people into the voter's list.

After long discussion on the eligibility of voters, the Identification Commission has set out the criteria of electorate voters in Western Sahara referendum as follows:

“ Those eligible to voter in the referendum are those persons who are at least 18 years of age and:

(a) who have been identified as qualified to vote by the Identification Commission of the United Nations Mission for the Referendum in Western Sahara (MINURSO), as reflected on the provisional voter list of 30 December 1999 (without giving effect to any appeals or other objections);

(b) whose name appear on the repatriation list drawn up by the United Nations High Commissioner for Refugees (UNHCR) as at 31 October 2000; or

(c) who have resided continuously in Western Sahara since 30 December 1999.

Those eligible to vote shall be determined by the United Nations, whose decision shall be final and without appeal”.<sup>501</sup>

If the list of qualified voters of any person did not appear in the provisional list of 30 December 1999 or on the repatriation list as at 31 October 2000, the UN had the full authority to approve the status of people with two additional criteria. By doing so, the UN shall: (a) determine the credibility and legal sufficiency of all such testimony and other evidence; and (b) based on that testimony and other evidence, determine who is

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<sup>501</sup> UNSC 'Report of the Secretary-General' (2003) S/2003/565 Annex II Peace Plan for self-determination of the people of Western Sahara para5 [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/2003/565](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2003/565) [accessed 10 March 2016]

(and is not) entitled to added to the list of qualified voters.<sup>502</sup>

The UN announced that only colonial people were categorized as those who could exercise the right to self-determination. However, the UN contradicted itself; the right of the indigenous Sahrawi people to self-determination provided a broader categorization, including people in Non-Self-Governing Territory (NSGT).<sup>503</sup> In effect, “the Sahrawi people can exercise their inalienable right to self-determination and decide the status of their territory in a free, democratic, and genuine way”.<sup>504</sup> Even though the rights of the Sahrawi people were recognized by the UN resolution, the people’s rights were not implemented due to the failure of compromise between the Frente Polisario and Morocco.

According to the above criteria, the Western Sahara case indicates that a territorial-based link is not sufficient to identify the eligibility of voters. The eligibility of voters in the Western Sahara referendum as identified to ensure that all concerned people were included in the voter’s list. This case demonstrated that assessing the will of the people is not realistic if the free will of the people does not conform to the elite demands.

From these four examples, non-national residents are shown to be entitled to the right to vote with the application of a franchise rule, according to the Venice Commission, whereas national people living outside the secessionist region should not be granted the right to vote. This contradiction leaves room for discussion about requirements for

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<sup>502</sup> Ibid para6

<sup>503</sup> A.Rigo Sureda, (n 45) 215; Thomas D. Musgrave, *Self-determination and national minorities* (Oxford 1997) 151

<sup>504</sup> Sidi M Omar, ‘The right to self-determination and the indigenous people of Western Sahara’ (2008) *Cambridge Review of International Affairs* 21(1) 41, 56



a specific length of time in which citizens must leave their country or for the length of time necessary to become a permanent resident. One of the solutions was well illustrated in the condition of *Gillot V. France*; a proposition of 20 years' continuous domicile was acceptable to determine a genuine link with the territory.<sup>505</sup> The condition stated that the only realistic way to confirm a voter list was to enfranchise the population existing in a territory at the time of their exercise of self-determination. In addition, a specific length of residency was required to prove the genuine link between the people and their particular territory, for example the requirement of two consecutive years for Montenegrin residents. In Scotland, the eligibility of voters extends to young people (16-17 years of age) which is different from the conditions of the general election voters.

### *3.4 Human rights concerns*

One aspect of liberal theory is the coexistence between minority rights and human rights in the sense that strengthening the human rights protection system helps to resolve conflicts arising between different ethnic or cultural groups. Another essential aspect of the republican liberal theory relates to the freedom of the people from the non-domination of arbitrary power, that is, a republican view of freedom and equality encompasses broader perspectives about human rights and the proper relations between states.<sup>506</sup> People's liberty can be verified on a domestic and international level. The former relates to the freedom to act without any dominating power by administrative bodies, whereas, the latter involves the external domination of other

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<sup>505</sup> *Gillot V. France*, (n 206) para2.6 (f), 7.1, 10.4, 14.4

<sup>506</sup> Quentin Skinner, (n 295) 95

states.<sup>507</sup> As the protection of individuals' rights is included as a component in the constitutional texts, balancing their rights is useful in order to achieve justice and legitimacy. Individual freedom applies to all people without any distinction based on ethnic identity. The protection of individual rights and freedoms relates to democratic theory in the sense that everyone has equal rights or equal values. Individual rights protection and equal right for all individuals are core values of liberalism. Within the republican liberal theory, the representative government is recognized as an institution to protect and promote people's freedom and human rights. The institutional form of a representative government is derived from the large scale of society and the modern world of nation-states. Democratic ideas proliferate to a larger domain for people's rights protection, individual freedom and personal autonomy within the nation-state. Republican legitimacy at a national level deals with the non-arbitrary use of power of a state and function under the ultimate control of the citizens.

The relationship between the right to self-determination and human rights can be described as a progressive interpretation of liberal and republican theory. People are recognized as holders of the right to self-determination and they enjoy freedom and non-domination from arbitrary powers. In international law, the external right to self-determination is interpreted in conjunction with the right to public political participation. According to the Human Rights Committee general comment No. 25, this right includes the protection of people's fundamental freedoms during a referendum process, including at least the freedom of expression, movement, and assembly.<sup>508</sup> These individual rights should be guaranteed by law in any decision-making process. In terms of freedom of expression, when people are recognized as

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<sup>507</sup> Quentin Skinner, (n 295) 95,100

<sup>508</sup> Human Rights Committee, General Comment No. 25 (57) (n 36) para8

constituents, they are able to express their views freely and independently. Freedom of expression also includes the media's right to create a communicative channel between ordinary citizens and the governmental authority.<sup>509</sup> In the context of freedom of movement, people have a right to move from one place to another.<sup>510</sup> The government has no right to expel people because this action may change the outcome of the referendum. In addition, people have a right to assemble to exchange their ideas or share information to influence governmental policy.<sup>511</sup>

The interrelation between states, existing institutions (both governmental and non-governmental organizations), ordinary citizens and civil society is crucial to assess effective public participation. During any referendum process, the role of political parties, the media, and civil society are contributing factors to ensure the free communication of information and ideas between ordinary citizens and governmental authority.<sup>512</sup>

The main concern of human rights protection is to ensure that all people can enjoy their fundamental freedoms and it is the responsibility of the government to ensure this. These essential rights are freedoms needed so that people have the ability and opportunity to vote effectively.<sup>513</sup> The interpretation of these substantive freedoms coexists with the right to political participation. An important question is how to find a balance between the government's use of power and the demands of the people. Giving people the chance to take part in the collaborative decision-making process

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<sup>509</sup> Ibid para25

<sup>510</sup> Human Rights Committee, General Comment No.27 'Freedom of movement (Art.12) UN.DOC CCPR/C/21/Rev.1/Add.9 (1999) para4,7

<sup>511</sup> Human Rights Committee (n 36) para25

<sup>512</sup> Ibid para25

<sup>513</sup> Ibid para12

gives credibility and legitimacy to the use of referendum process. If the process is seen to be open and transparent, people will believe that they have full authority to access and be involved in a particular issue that affects their lives.

During the independence referendums in Eritrea (1993) and East Timor (1999), the protection of human rights was in question. The secession of Eritrea from Ethiopia in 1993 provides an example of a consensual secession with a UN-sponsored referendum. During the course of the referendum, human rights protection in Eritrea was problematic, specifically freedom of movement. After registering for the voting list, it appeared that certain groups of people were expelled from the country based on a perceived risk to the national security of Ethiopia. These people therefore did not have a chance to vote in the independence referendum. Subsequently, the Ethiopian government noted that because these people claimed to be Eritrean, it was impossible to accept their citizenship because Eritrea did not exist at the time of their registration.<sup>514</sup> In addition, no process or institution to ensure democratic governance existed at the time. Thus, the establishment of an institutional framework for civic education was crucial to increase the level of public participation, guaranteeing freedom of expression.<sup>515</sup> Overall the protection of human rights in Eritrea was in development; on the one hand, certain people's freedom of expression was violated, but on the other hand civic education was introduced, contributing towards people's ability to freely express their will in the future.<sup>516</sup>

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<sup>514</sup> Hugh Byrne 'Eritrea & Ethiopia: Large-scale expulsions of population groups and other human rights violations in connection with the Ethiopian-Eritrean Conflict, 1998-2000' QA/ERI/ETH/02.001 (January 2002) 14-15 <http://www.refworld.org/pdfid/3de25c7f4.pdf> accessed 15 November 2015

<sup>515</sup> The African-American Institute (n 316) p.18

<sup>516</sup> The African-American Institute (n 316) p.18-22

In the case of East Timor, Portugal and Indonesia reached an agreement on giving the citizens of East Timor an opportunity to determine their future under the UN administering system.<sup>517</sup> The population appeared to support independence, but there were concerns over the protection of human rights.<sup>518</sup> During the referendum, there was widespread intimidation of people, in particular pro-independence supporters. The Indonesian military troops (TNI) threatened and used violent measures against the people in East Timor to influence their behaviour.<sup>519</sup> In addition, the work of the United Nations Mission in East Timor (UNAMET) struggled against the intimidation of the TNI before and after the vote.<sup>520</sup> As a result, the people's freedom of expression was breached as they were dominated by governmental forces, reducing the legitimacy of the expression of their will.

The following section elaborates on three substantive rights relating to referendum processes: freedom of expression, freedom of movement and freedom of assembly and association. These considerations can also be applied to scrutinize the role of political parties, medias and civil societies involving in referendum.

### *3.4.1 Freedom of Expression*

Freedom of expression means the liberty to communicate ideas and to try and convince others of their plausibility. Such freedom is accepted as a foundational freedom in any free and democratic society as this is a necessary condition for the

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<sup>517</sup> UNGA 'Report of the Secretary-General on question of East Timor' (5 May 1999) UN Doc A/53/951 para1 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/126/29/IMG/N9912629.pdf?OpenElement> accessed 10 November 2015; Malcolm N Shaw, 'Territorial Administration by Non-Territorial Sovereigns' in Tomer Broude and Yuval Shany (eds), *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity* (Hart 2008) 397

<sup>518</sup> Kjell-Ake Nordquist, 'Autonomy, Local Voices and Conflict Resolution: Lessons from East Timor' (2013) 20 *International Journal on Minority and Group Rights* 107, 111

<sup>519</sup> *Ibid* 110

<sup>520</sup> The Carter Center, (n 316) 10 <https://www.cartercenter.org/documents/275.pdf> accessed 1 November 2015

realization of the principles of transparency, accountability, and the protection of human rights.<sup>521</sup> “Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment”.<sup>522</sup> As a democracy flourishes freedom of expression, people or a group of persons could enjoy their right in public debate.<sup>523</sup> Freedom of expression is also an integral part of the enjoyment of a wide range of other human rights, such as freedom of opinion, freedom of assembly and association, and the right to vote.<sup>524</sup> In the context of an independence referendum, people’s freedom of expression consists of the expression of their wishes in accordance with the rules prescribed by law.<sup>525</sup>

In the *Kevin Mgwanga et al v Cameroon* case, the authors sent a request to the UN for a third choice in the referendum in Southern Cameroons in 1961.<sup>526</sup> The UN rejected their proposal to include the choice of independence in the referendum question.<sup>527</sup> The Southern Cameroons people (who also called themselves ‘Ambazonian’) only had the chance to join either Nigeria or Cameroon.<sup>528</sup> As a result, the Southern Cameroons people faced negative consequences, such as discrimination against Anglophones. As English native speakers, they were denied equal representation in the national and federal governments.<sup>529</sup>

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<sup>521</sup> George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford 2007) 14; Human Rights Committee, ‘General Comment No.34 Freedoms of opinion and expression (Art.19)’ CCPR/C/GC/34 para2,3

<sup>522</sup> *Case of Stankov and the United Macedonian organization Ilinden v Bulgaria* Application nos. 29221/95 and 29225/95 (ECtHR, 2 October 2001) para85-86

<sup>523</sup> *Ibid* para88

<sup>524</sup> International Covenant on Civil and Political Rights 1966 (n 64) art19; Human Rights Committee, ‘General Comment No.34’ (n 521) para4

<sup>525</sup> European Commission for democracy through law (Venice Commission) (n 217) 17

<sup>526</sup> *Kevin Mgwanga Gunme et al v Cameroon* 266/03 (ACHPR, 27 May 2009) para3

<sup>527</sup> *Ibid* para3-4

<sup>528</sup> *Ibid* para14

<sup>529</sup> *Ibid* para6,8

The African Commission on Human and People's Rights (ACHPR) pointed out two important matters concerning human rights. Firstly, the ACHPR highlighted that respecting the people's will is necessary during any decision-making process, particularly in self-determination practices. They put forward a number of democratic mechanisms including referendums and free elections as a means of creating national consensus. In this case, the people of Southern Cameroon also qualified as a "people" because they identified themselves as having a separate and distinct identity.<sup>530</sup> Secondly, the Commission also reached a decision with respect to freedom of association. The ACHPR stated that the detention of activists or people taking part in demonstrations, the suppression of demonstrations, and the use of force against demonstrators all violated the people's rights and freedoms of expression, of association and of assembly, guaranteed by the constitution or by international human rights standards.<sup>531</sup>

The Human Rights Committee delivered their views regarding the Ambazonians people's freedom of expression in the *Fongum Gorji-Dinka v Cameroon*.<sup>532</sup> In this case, Mr. Fongum Gorji-Dinka, a Cameroon born citizen, claimed that he was refused Ambazonians nationality and his name removed from a referendum voter's list without any reasonable grounds according to the law.<sup>533</sup> The Committee pointed out that the author's name was arbitrarily removed from the voter's list, without any motivation or court decision. This action violated the right to political participation and failed to guarantee the free expression of the people under Article 25(b) of the International Covenant on Civil and Political Rights (1966).<sup>534</sup> In addition, the

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<sup>530</sup> Ibid para179,199

<sup>531</sup> Ibid para116,119,136-137

<sup>532</sup> *Fongum Gorji-Dinka v Cameroon*, (HRC Communication No. 1134/2002, 14 March 2002) UN.Doc.CCPR/C/83/D/1134/2002

<sup>533</sup> Ibid 3.1,3.3

<sup>534</sup> Ibid para4.9

Committee also referred to their previous general comment (No. 25) in which outlined the grounds on which people might be deprived of their voting rights. The action required specific legislation detailing criteria for reasonable grounds, such as mental incapacity, or a higher age requirement.<sup>535</sup> Another claim was based on the arrest and unlawful detention were punitive measures to punish him for the publication of his political pamphlets. Accordingly, this action deprived his freedom of expression under article 19 of the ICCPR.<sup>536</sup> However, the Committee pointed out that the author did not provide sufficient evidence to support his claim. The Committee did not find that detention was a direct consequence of such publications.<sup>537</sup>

#### 3.4.2 Freedom of Movement

Freedom of movement concerns freedom to choose a residence,<sup>538</sup> the right of a national to enter their own country and protection against alien expulsion without due process of law. During any referendum process, it is a state's obligation to provide domestic legal rules, administrative, and judicial practices for protecting the people's freedom of movement.<sup>539</sup> A state is not able to prohibit people from residing in a particular territory based on the state's desire for control.

In the case of *Gillot V. France*, the Human Rights Committee (HRC) considered the appropriate number of years of residency which should prevent violation of the freedom of movement. A condition for the future referendum of New Caledonia in 2020 has set out the eligibility of voters, pursuant to which:

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<sup>535</sup> International Covenant on civil and political rights, 'General Comment No.25 (57) (n 36) para4

<sup>536</sup> *Fongum Gorji-Dinka v Cameroon*, (n 532) para3.4

<sup>537</sup> *Fongum Gorji-Dinka v Cameroon*, (n 532) para4.8

<sup>538</sup> Universal Declaration of Human Rights Article 13(1) and (2); European Convention on Human Rights (Protocol no.4) Art 2(1) and (2) [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf) accessed 15 November 2015

<sup>539</sup> Human Rights Committee, 'General Comment No.27 Freedom of movement (Art.12)' UN.DOC CCPR/C/21/Rev.1/Add.9 (1999) para3



“Persons registered on the electoral roll on the date of the referendum and fulfilling one of the following conditions shall be eligible to vote:

(f) They must be able to prove 20 years continuous residence in New Caledonia on the date of the referendum or by 31 December 2014 at the latest.”<sup>540</sup>

In this case, the Human Rights Committee noted that eligibility to vote based on having resided in a territory for twenty years was not unreasonable. They pointed out that those people who could sufficiently prove their strong ties to a particular territory should be allowed to vote on decisions which would concern them.<sup>541</sup> One observation was that the Human Rights Committee did not provide a clear answer to the issue of people who had temporarily left during those twenty years.<sup>542</sup> This had a direct consequence on people’s freedom of movement and the exclusion of their voting rights.

### *3.4.3 Freedom of Assembly and Association*

Freedom of assembly and freedom of association deal with joint actions of individuals. The focal point is the constitutional implications of the coordinated action of individuals and the modes of how collective decisions are made in the polity.<sup>543</sup> Campaign groups and political associations are tools, which stimulate public discussion. Freedom of assembly consists of the protection of public health or morals or the protection of the rights and freedoms of others.<sup>544</sup> Freedom of association

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<sup>540</sup> Human Rights Committee, *Gillot V. France* Communication No.932/2000 (n 206) para2.6

<sup>541</sup> *Ibid* para8.28, 8.31

<sup>542</sup> *Ibid* para10.4

<sup>543</sup> Ulrich K. Preub, ‘Associative Rights (the rights to the freedom of petition, assembly, and association)’ in Michel Rosenfeld and Andras Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 949

<sup>544</sup> International Covenant on Civil and Political Rights 1966 (n 40), art 21

comprises the right to form and join trade unions for the protection of one's interests.<sup>545</sup>

Freedom of assembly and association are essential component of democracy. Individual and group of individuals can enjoy their right to participation in public affairs.<sup>546</sup> The use of clear and predictable process is legitimate if the will of the people is clearly expressed with uncertain outcomes. To achieve a legitimate aim, human rights protection is a necessary element to ensure that individuals and groups protection are respected to hold their opinion freely and independently.

From a liberal perception, freedom of association is not only defined as the political power of religious power but also the power of private groups to exercise their power over their own members.<sup>547</sup> The right to freedom of peaceful assembly consists of organizing and participating indoor and outdoor activities, such as referendums. People's expression of opinion is a legitimate part of the exercise of the right.<sup>548</sup>

The case of *Stankov and the United Macedonian Organization Ilinden v Bulgaria* provides a useful example of the freedom of minority groups to peaceful assembly. The organization of Iliden was established to unite all Macedonians in Bulgaria on a regional and cultural basis.<sup>549</sup> The aim of the peaceful meeting of Iliden was to allow the free association of minority Macedonians to demonstrate their activities freely. In the Bulgarian government's view, because the Iliden were requesting secession the

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<sup>545</sup> Ibid art 22

<sup>546</sup> UNGA 'Right to freedom of peaceful assembly and association' (2013) A/68/299 para9 <http://www.icnl.org/research/library/files/Transnational/specrap.pdf> accessed 20 March 2016

<sup>547</sup> UNGA A/68/229 (n 546) para6; Will Kymlicka, *Liberalism, Community, and Culture* (n 85) 59

<sup>548</sup> UNGA A/68/299 (n 546) para16

<sup>549</sup> *Case of Stankov and the United Macedonian organization Ilinden v Bulgaria* (n 522) para10

meeting was a threat to their national security.<sup>550</sup> In this case, the European Court of Human Rights (ECtHR) applied Article 11 of the Convention concerning to the right to peaceful assembly. The court reiterated that freedom of assembly and peaceful, open debate were important values to a democratic society. Thus, the action of preventing the peaceful meeting of the Iliden was denied.<sup>551</sup>

The focal point of this case is about the secessionist groups' right to enjoy freedom of assembly. The court did not deny the secessionist-seekers their right of assembly and association. With respect to the right to self-determination, the collective right of the Macedonian minority in organizing activities did not prohibit with the legal basis of country's territorial integrity.<sup>552</sup> The Court reiterated that "demanding territorial changes in speeches and demonstrations does not automatically amount to threat to the country's territorial integrity and national security".<sup>553</sup>

Another example of the freedom to peaceful assembly is the Crimean referendum in 2014. Both pro-Ukrainian and Crimean Tatar ethnic minority groups were prohibited from raising dissenting voices. Both groups were excluded from giving any political opinions or cultural expression. The two groups were denied their right to assembly both prior to and after assemblies. Prior to assembly, they were restricted on time, location and type of activities. After the assembly, it would appear that the Crimean Tatars activists were detained and punished under the Russian criminal code.<sup>554</sup> By contrast, pro-Russian organizations and other civic associations were able to assembly

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<sup>550</sup> Ibid para68,97

<sup>551</sup> Ibid para112

<sup>552</sup> Ibid para69

<sup>553</sup> Ibid para97

<sup>554</sup> Office for Democratic Institutions and Human Rights OSCE, 'Report of the Human Rights Assessment Mission on Crimea (6-18 July 2015)' (17 September 2015) para146 <http://www.osce.org/odihr/report-of-the-human-rights-assessment-mission-on-crimea?download=true> accessed 20 November 2015

freely.<sup>555</sup> Any restrictions on freedom of assembly were dominated by Russia. Under new Crimean legislation that entered into play in August 2014, the organizers of public assemblies must be Russian citizens and must officially request permission to hold an assembly no more than 15 days and no fewer than 10 days prior to the planned event.<sup>556</sup>

When considering the content of legitimacy and the political authority of people, it could be argued that what was lacking in Crimea was “the democratic constituency to exercise their rights to rule themselves in democratic decision-making process”.<sup>557</sup> In a modern democratic society, freedom of peaceful assembly provides a legitimate way for activists and ethnic minorities to be involved in the process. They have a right to organize peaceful assembly to share information and discuss their different positions on political issues. But, in Crimea there was no chance for dissenting groups who were against Russia to take any actions in expressing their views. In addition, it would appear that there were no negotiations among stakeholders in order to ensure the legitimacy and credibility of referendum.<sup>558</sup>

#### *3.4.4 Role of political parties, civil societies, and the media*

In the modern democratic state, political parties, media coverage and civil societies are significant in influencing people’s political positions in their decision-making. International standards for legitimizing the outcome of a referendum include examining of the role of political parties, the media, and non-governmental organizations. These elements also illustrate the stability or volatility of referendum

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<sup>555</sup> Ibid para133

<sup>556</sup> Ibid para131

<sup>557</sup> Fabienne Peter, *Democratic legitimacy* (Routledge 2011) 56

<sup>558</sup> European Commission for democracy through law (Venice Commission) ‘Opinion whether the decision taken by the Supreme Council of the autonomous republic of Crimea in Ukraine to organize a referendum on becoming a constituent territory of the Russian Federation or restoring Crimea’s 1992 constitution is compatible with constitutional principles’ (21-22 March 2014) CDL-AD (2014) 002 para25-26

outcomes because these particular bodies have a lot of influence on voting behavior. Usually, voters reach their opinions from information acquired over the course of a referendum campaign.

In the context of referendums, the role of political parties, the media and civil society are integral to guaranteeing the fundamental freedoms of people, as they must conform to basic democratic standards. In its Advisory Opinion (2005) on the international legitimacy of the Montenegrin referendum, the Venice Commission noted:

“For a referendum to give full effect to these principles, it must be conducted in accordance with legislation and the administrative rules that ensure the following principles: the authorities must provide objective information; the public media have to be neutral, in particular in news coverage; the authorities must not influence the outcome of the vote by excessive, one-sided campaigning; the use of public funds by the authorities for campaigning purposes must be restricted”.<sup>559</sup>

Political parties are the main bodies which organize public opinion and communicate public demands to the governmental authority.<sup>560</sup> During a referendum process, there are two-sided interactions between ordinary citizens and political parties. Ordinary citizens can express their views, both in support of or against the referendum, which can in turn affect the political parties’ campaign. Meanwhile, political parties are able to communicate with ordinary citizens to gain a broad variety of information. After gathering public opinion, the political parties take the people’s will into account when

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<sup>559</sup> European Commission for democracy through law (Venice Commission), (n 424) 11

<sup>560</sup> Joseph Lapalombara and Myron Weiner, ‘The origin and development of political parties’ in Joseph Lapalombara and Myron Weiner, *Political Parties and Political Development* (Princeton University Press 1966) 3

creating policy. Sometimes, the parties act as mediators, translating public opinion into the governmental action. In the absence of political parties, it can be argued that voting outcomes are uncertain because people do not get enough information before reaching their decision.<sup>561</sup>

Civil societies play a crucial role in legitimacy as they “diminish the government-citizen confidence gap and build mutual trust”.<sup>562</sup> The confidence-building element strengthens democratic governance on behalf of the people.<sup>563</sup> The main function of the civil society sector, for example, is to provide a range of information and raise people’s awareness during the decision-making processes. Civic education plays a crucial role during a referendum process in developing the vitality of a just, political order.<sup>564</sup> Furthermore, strengthening civil society can contribute to legitimizing a referendum process. The assertion of democratic governance in external self-determination practices includes processes, mechanisms and systems to promote people as constituent powers. In order to improve democratic governance, civil society plays role at local, national and international levels. At a local level, they engage in community development. At a national level, civil society organizations “perform a watchdog function to improve the quality of electoral and parliamentary processes and seek the accountability of public officials”.<sup>565</sup> At an international level, the UN and other bodies encourage civil society to implement their policies and treaties dealing with civil and political rights.<sup>566</sup> The institutions of civil society act as

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<sup>561</sup> Bernard Manin, Adam Przeworski, and Susan C. Stokes, ‘Elections and Representation’ in Bernard Manin, Adam Przeworski, and Susan C. Stokes (eds), *Democracy, Accountability, and Representation* (CUP 1999) 47-48

<sup>562</sup> Alben Kuyumdzieva, ‘International Practices on confidence-building measures between the state and civil society organizations’ (December 2010) 2

<sup>563</sup> Ibid 7

<sup>564</sup> John W. Maynor, (n 17) 177

<sup>565</sup> G. Shabbir Cheema, ‘Civil Society engagement and democratic governance: An introduction’ in G. Shabbir Cheema and Vesselin Popovski, *Engaging civil society: Emerging trends in democratic governance* (United Nations University Press 2010) 2

<sup>566</sup> Ibid 2

intermediaries, compromising between the needs of persons and states or international institutions.<sup>567</sup>

Having examined the interrelation between political parties and civil societies, the Human Rights Committee noted that, “citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves”. In addition, the Committee stated that all voters should be treated with equal value and respect. Any information and materials should be available in minority languages.<sup>568</sup> The interdependence between political parties and civil societies in a referendum process can be exemplified in the cases of Ukraine and Catalonia.

In the case of Ukraine, civil society organizations (i.e. Popular Movement of Ukraine for Reconstruction-Rukh) contributed to the democratic consolidation of state independence in 1991. The Ukrainian popular movement worked to improve public awareness and run a campaign for a Ukrainian independence referendum. Rukh activists made an attempts against Soviet Union with non-violent actions.<sup>569</sup> The activists had a close relationship with the opposition parties to pursue their political goal towards independence.<sup>570</sup> Due to their non-violent tactics, the Rukh were able to unify around 280,000 people from East and West Ukraine.<sup>571</sup> These actions illustrated the collaborative work between political parties and civil societies in encouraging public involvement with the goal of independence.

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<sup>567</sup> Thomas Christiano, ‘Democratic legitimacy and international institutions’ in Samantha Besson and John Tasioulas, *The Philosophy of International Law* (Oxford 2010) 135

<sup>568</sup> Human Rights Committee, (n 36) para8,12

<sup>569</sup> Ragan Molly Baker, ‘Diffusion of nonviolent civil resistance and the Ukrainian independence movement of the 1980s’ <http://arizona.openrepository.com/arizona/handle/10150/614154> p.20 accessed 15 June 2016

<sup>570</sup> A Report Prepared by the Staff of the Commission on Security and Cooperation in Europe, ‘The December1, 1991 (n 321) p.11

<sup>571</sup> Ragan Molly Baker, (n 569) p.23

Catalan civil society had a lot of influence on the people's right to decide their political future. The strength of civil society in Catalan at the time can be seen through the wide range of activities that took place, such as interpersonal communication, demand for Catalonia's new Statute of Autonomy and the political movement for self-determination.<sup>572</sup> In 2013, popular mobilization known as the 'Catalan way' put pressure on the Catalan politicians to keep their promise to institute a referendum on independence.<sup>573</sup> The demonstration of civil association in Catalan was characterized as a bottom-up phenomenon which pressurized the local government. On this point, the CIU (Convergence and Union) party was substantially responsible for the civil pressure for the pro-independence position.<sup>574</sup>

The media is equally recognized as an essential component for "any functioning democracy and state governed by the rule of law"<sup>575</sup> During a referendum process, the main function of media is to distribute information about public and political issues between citizens, and their elected representatives through electronic media and published materials. The media is considered an intermediate body carrying out popular sovereignty and contributing to the common good.<sup>576</sup> The media can only legitimize a referendum process on the basis that it is transparent and credible. If the government controls the media the people are then dominated because they are exposed to biased information.

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<sup>572</sup> Mireya Folch-Serra and Joan Nogue-Font, 'Civil Society, Media, and Globalization in Catalonia' in Michael Keating and John McGarry, *Minority nationalism and the changing international order* (Oxford 2001) 164

<sup>573</sup> Marc Guinjoan and Toni Rodon, 'Catalonia at the Crossroads: Analysis of the increasing support for secession' in Xavier Cuadras-Morato (ed), *Catalonia: A New Independent State in Europe?: A debate on secession within the European Union* (Routledge 2016) 35

<sup>574</sup> Kathryn Cramer, (n 25) 104, 105

<sup>575</sup> Jan Oster, *Media Freedom as a Fundamental Right* (Cambridge 2015) 9

<sup>576</sup> *Ibid* 15



The mass media is a powerful tool for promoting democracy.<sup>577</sup> Any state-controlled restrictions on media publications violate the freedom of expression, if such restrictions are justified as ‘protecting the public’s interests’. The media can improve the credibility and legitimacy of independence referendums. Within the referendum process, reporting systems are the common measure for securing the implementation of human rights obligations.<sup>578</sup> This includes the establishment of self-assessments or compliance audits examining particular aspects of human rights protection. This should guarantee that the Media and Independence Commission take further steps to protect freedom of expression within a democratic regime. The media and the press therefore play an important role that they are free from intervention from governmental authority.<sup>579</sup> The role of the media is also relevant to censorship of information, which could sway public opinion.<sup>580</sup>

There are two examples which illustrate the censorship of the media during a referendum process: Southern Sudan and Crimea.

The referendum conducted in Southern Sudan in 2009 was perceived to be a peaceful vote. It was mandated by the Comprehensive Peace Agreement 2005 (CPA) signed between the central government of Sudan and the Sudanese People’s Liberation Movement (SPLM). Its purpose was to provide a democratic avenue for Southerners to express their right to self-determination.<sup>581</sup> In fulfilling the mandate of the CPA, the free will of the people was respected and the right of the people of South Sudan to

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<sup>577</sup> Bernadette Rainey, Elizabeth Wicks, and Clare Ovey, *Jacobs, White & Ovey The European Convention on Human Rights* (6<sup>th</sup> edn Oxford 2014) 436

<sup>578</sup> International Covenant on Civil and Political Rights 1966 (n 40), art40

<sup>579</sup> Jan Oster (n 575) 102-103

<sup>580</sup> *Ibid* 109

<sup>581</sup> The Carter Center, (n 316) p.4

self-determination was upheld.<sup>582</sup> In addition, the Southern Sudan Referendum Act 2009 included specific reference to freedom of expression but it did not specifically indicate the role of the media.<sup>583</sup> So although the population did not appear to be in doubt, the Sudanese government was able to take control of the media “on the basis that their reporting constituted a threat to Sudan’s stability and security”.<sup>584</sup> In the northern area, there was censorship of newspapers that supported pro-separation views. In the southern area, national or local radios also broadcasted in support of secession.<sup>585</sup> This illustrates the circulation of one-sided information to the public, and was observed by the European Union Election Observation Mission in Sudan, which made some suggestions. However, “no major improvements on the qualitative level of referendum coverage could be observed”.<sup>586</sup> There were different challenges for the media in northern and southern Sudan. In northern Sudan, there was regular harassment and attacks on freedom of expression on voting days, whereas, in southern Sudan, a major problem was the lack of financial support for publications.<sup>587</sup> For these reasons, the media campaign was inefficient because it failed to provide accurate information among voters.

In Crimea, according to the European Commission for Democracy through Law (the Venice Commission), the referendum did not conform to international and European standards of protecting freedom of expression and freedom of media. One questionable matter was that public media, particular news coverage, was under the control of the Russian military forces. It appeared that online media and print outlets

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<sup>582</sup> The Machakos Protocol (signed at Machakos, Kenya on 20 July 2002)

<<http://unmis.unmissions.org/Portals/UNMIS/Documents/General/cpa-en.pdf>> accessed 4 August 2015

<sup>583</sup> Democracy Reporting International, ‘Sudan: Report Assessment of the Southern Sudan Referendum Act’ (July 2010) 12

<sup>584</sup> The Carter Center, (n 316) 24

<sup>585</sup> The Carter Center, (n 316) 28

<sup>586</sup> European Union Election Observation Mission, (n 491) 43

<sup>587</sup> European Union Election Observation Mission, (n 491) 42-43

had to register with Russian state authorities. The media in Crimea was prevented from freely expressing views against Russia. A referendum was not therefore conducted in accordance with democratic governance<sup>588</sup> because it turned out that no international observers were admitted to report on the referendum situation.<sup>589</sup>

In conclusion, human rights concerns are a necessary component of referendum processes to ensure that people's freedoms are protected. Human rights protection is also perceived as alternative sources of legitimacy in referendum if fundamental freedoms of people are guaranteed. People power allocation in multiple levels of the society is evident to achieve non-domination of the nation state over the people. Furthermore, all relevant actors, such as political parties, medias and civil societies, could have influential roles on people's decision-making and therefore, ultimately, the outcome.

### *3.5 The role and functions of international organizations*

At its inception, 'the will of the people' is also accepted as a basic component of legitimizing governmental authority.<sup>590</sup> The UN General Assembly resolution 1514 in 1960 and the practical application in resolution 1541 made it clear that dependent territories (i.e. colonial territories, trust territories, and non self-governing territory) required the 'freely expressed will and desire of people' without any distinction of race, creed, or colour, in order to enable them to enjoy complete independence and

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<sup>588</sup> European Commission for democracy through law (Venice Commission), (n 558) para22

<sup>589</sup> Anne Peters, 'Sense and Nonsense of Territorial Referendums in Ukraine, and Why the 16 March Referendum in Crimea does not justify Crimea's alteration of territorial status under international law' (EJIL: Talk, 16 April 2014)

<https://www.ejiltalk.org/sense-and-nonsense-of-territorial-referendums-in-ukraine-and-why-the-16-march-referendum-in-crimea-does-not-justify-crimeas-alteration-of-territorial-status-under-international-law/> accessed 1 October 2015

<sup>590</sup> Universal Declaration of Human Rights 1948 (n 538), article 21(3)

freedom.<sup>591</sup> People in the NSGTs and dependent territories were entitled to exercise their right to self-determination within democratic processes to determine their future status. The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1966 proclaimed in Article 1 “all peoples have the right of self-determination”<sup>592</sup> and “every citizen has the right to take part in the conduct of public affairs”.<sup>593</sup> The UN General Assembly resolution 2625 in 1970 addressed the UN function as the main organization for taking responsibility for administering the Trust Territories and the NSGTs territories.<sup>594</sup> In addition, the resolution 2625 specified *the elaboration of the procedural arrangements* in territorial alteration in collaboration with the administering powers of the UN.<sup>595</sup>

The General Assembly resolution 45/150 in 1992 emphasized fundamental freedoms and human right protection. The ‘determination will of the people’ requires an electoral process that provides an equal opportunity for all citizens to put forward their political views. A domestic constitution is a formal mechanism to give legal recognition to the legitimacy of the will of the people individually or collectively.<sup>596</sup> In the context of international involvement, states can make a request to the UN when they need any assistance during the conduct of a democratic process.<sup>597</sup> Other additional resolutions are confirmed by the Security Council resolution 745 in 1992 and resolution 1244 in 2012, which address the right to self-determination

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<sup>591</sup> UNGA Res 1514 (n 38) para5; UNGA Res 1514 (n 38) principle 6 and 7

<sup>592</sup> International Covenant on Civil and Political Rights 1966 (n 40), art.1 (1)

<sup>593</sup> International Covenant on Civil and Political Rights 1966 (n 40), art.25; Human Rights Committee General Comment No 25(57) (n 36)

<sup>594</sup> UNGA Res 2625 (n 38) principle5 para6; A publication of the United Nations Department of Political Affairs, Trusteeship and Decolonization, ‘Fifteen years of the United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples’ Vol.2 No. 6 (December 1975) 19

<sup>595</sup> UNGA Res 2625 (n 38) principle 5 para7

<sup>596</sup> UNGA Res 45/150 (1990) ‘Enhancing the effectiveness of the principle of the principle of periodic and genuine elections’ A/RES/45/150 18 December 1990 para3 <http://www.un.org/documents/ga/res/45/a45r150.htm> accessed 10 October 2015

<sup>597</sup> Ibid para9-10

implementation and the protection of human rights. The latter mentions multi-level participation between international institutions and regional institutions in order to promote democracy, stability, and regional cooperation.<sup>598</sup>

Since the republican liberal theory can be interpreted in conjunction with democratic procedures, it is inevitable that we examine how international institutions commit themselves to international democracy. International organizations can support democracy operationally through a variety of activities, e.g. administering, supervisory and advisory roles. These functional duties aim to ensure that the wishes of the local populations in the decision-making process are expressed and adhered to in a free and fair democratic process.

When determining external self-determination practices, international institutions are responsible for ensuring that ‘the right to democratic participation’ of people is essential to maximize degree of public participation as a condition to assess transparency of decision-making processes.<sup>599</sup> The rights of people to democratic participation include citizens being consulted with and collaborating in the decision-making process. International organizations function in partnership with local institutions for long-term peace and security purposes. From a legal standpoint, the UN Charter 1945 opened up the door to UN involvement in specific missions dealing with popular consultation in territorial arrangements.<sup>600</sup>

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<sup>598</sup> UNSC Res1244 (1999) S/RES/1244 (1999) 10 June 1999 para17

<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/172/89/PDF/N9917289.pdf?OpenElement> accessed 10 October 2015

<sup>599</sup> Gregory H. Fox and Brad R. Roth ‘Introduction: the spread of liberal democracy and its implications for international law’ in Gregory H. Fox and Brad R. Roth (eds), (n 10) 8

<sup>600</sup> Michla Pomerance, (n 191) 12

The following section elaborates on the functions of the UN and the non-UN organizations in referendum processes. The classification of international organizations' involvement in territorial alteration is divided into three different roles: administrative, supervisory and advisory.<sup>601</sup> The administrative role includes the task of the 'United Nations' own functional duties in a referendum process. The UN takes direct responsibility for a popular consultation when disputing parties send them a request, for example, the attempt to identify voter's qualification by the United Nations mission for a referendum in Western Sahara (MINURSO), and framing referendum questions in British Togoland and British Cameroon. The supervisory role aims to ensure that people determine their future with freedom and impartiality. Certain recommendations on weak points are provided in the form of a reporting system. Some instances of the UN supervisory power include the UN commission for Eritrea (UNOVER), the United Nations mission in East Timor (UNAMET), and the UN involvement (e.g. UNMIS and UNIREC) in Southern Sudan referendum 2009. As part of its advisory role, the UN participates in consultations with the aim of ensuring international human rights standards are met. These organizations are entitled to follow-up and scrutinize any violations of human rights during the referendum process. Their legal advisory opinions are useful when examining the evolving interpretation of international human rights standards.

Apart from the UN, the non-UN machinery is also needed in administering, supervising and advising during a referendum. The Venice Commission of the Council of Europe and the regional based human rights, for example the African Commission, are involved in human rights monitoring system in their regions. One of

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<sup>601</sup> A. Rigo Sureda, (n 45); Rosalyn Higgins, (n 68) 114

the main features of the role and functions of these non-UN organizations are to ensure that the fundamental freedoms of people and human rights are guaranteed.

### 3.5.1 Administrative role

The UN administration system was used comprehensively in the territorial arrangement of the British former colonies. A common feature of international administrations authority is that they have their distinct identity separate from the communities which they govern.<sup>602</sup> The local community does not participate or give consent in the process. The UN administration system normally performs its duty under the mandate of the Security Council or the General Assembly.

There are two instances of the UN playing an administrative role in Trust territories: Togoland under British Administration in 1956 and Northern Cameroon in 1959 and 1961. The General Assembly Resolution 944 (X), dealing with the future of Togoland under British Administration, mentioned the use of a plebiscite as a mechanism to assess the wishes of inhabitants.<sup>603</sup> The use of a referendum in British Cameroon, however, was specified in the General Assembly Resolution 1350 (XIII) to recommend the UN as the official administering power.<sup>604</sup> The use of referendums in the Trust Territories aimed to consult local populations in the transitional process from dependent territories to self-governing or independence.<sup>605</sup> The right to self-determination was identified in the Trusteeship Agreement, particularly that people

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<sup>602</sup> Dominik Zaum, 'The authority of international administrations in international society' (2006) 32 (3) *Review of International Studies* 455, 469

<sup>603</sup> UNGA Res 944(X) 'The Togoland unification problem and the future of the Trust Territory of Togoland under British Administration' 15 December 1955 para6  
<https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/104/24/IMG/NR010424.pdf?OpenElement> accessed 10 October 2015; James S. Coleman, *Togoland: International Conciliation NO.509* (Carnegie 1956) 47

<sup>604</sup> UNGA Res 1350 (n 343) para4

<sup>605</sup> Art.76 Repertory, Suppl.2, Vol. III (1955-1959) (n 340) para99

should have the right to freely express their needs to their political system.<sup>606</sup>

Prior to holding a referendum in British Togoland, UN visiting missions were conducted in 1949, 1952 and 1955 respectively. These missions intended to study the possibility of conducting a popular consultation on the status of the territory. This example clearly demonstrates the importance of the UN visiting missions in influencing the UN General Assembly. The role of the UN visiting missions was to do a preliminary survey, make specific recommendations and later submit reports back to the UN General Assembly. In the context of the UN visiting missions, it could be argued that the sources of information were not reliable because the visiting missions did not employ systematic tools for gathering data-like sampling, polling and focused interviews. Instead, most information related to Togoland's problems was provided by British and French officials.<sup>607</sup>

In British Togoland, there was a considerable discussion about the ethnic composition of the people, in particular the Ewe tribal groups of people.<sup>608</sup> Based on the first and second visiting missions' reports, the mission teams proposed a referendum as a way to consult the ethnic Ewe's populations for unification of Togoland.<sup>609</sup> Later, they found that the unification process was in fact opposed by the majority of people and this process was used as a political maneuver by local political parties.<sup>610</sup> Then, the third visiting mission teams decided to propose a referendum as a democratic mechanism to assess the will of the local populations. Following the recommendation

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<sup>606</sup> A publication of the United Nations Department of Political Affairs, Trusteeship and Decolonization (n 594) para82, 86, 87, 91

<sup>607</sup> James S. Coleman (n 603) 78

<sup>608</sup> Ibid 30; A Rigo Sureda, (n 45) 151

<sup>609</sup> UNGA Res 652 (VII) 'The Ewe and Togoland unification problem' (20 December 1952); UNGA Res 750 (VIII) 'The Togoland unification problem' (8 December 1953)

<sup>610</sup> James S. Coleman, (n 603) 47



of the third visiting mission, the UN representatives of the Administering Authority, in collaboration with a United Nations Plebiscite Commissioner, organized a referendum under the supervision of the UN. The UN administering authority and the Government of the United Kingdom decided to set up specific legal instruments to regulate the referendum process. Under the scope of the Togoland under United Kingdom Trusteeship Order 1955, there were three components relating to the referendum process: setting the referendum questions, the eligibility of voters, and defining the geographical categories of self-determination.<sup>611</sup>

The referendum question clearly provided two choices: whether to integrate with the Gold Coast or to separate with the continuity of Trusteeship under British administration.<sup>612</sup> The question put to the voters was the same as that recommended by the visiting mission. In practice, the political leaders were permitted to interpret the meaning of the question to the voters.<sup>613</sup> This action was easily misunderstood by the voters because political parties might offer only one-sided information. In terms of the eligibility of voters, the establishment of the Order Council in accordance with the recommendations of the United Nations visiting mission, granted the right to vote in the plebiscite to every person who: (a) was of the age of 21 years or older; (b) had resided in Togoland under British Administration for at least twelve months in the two years preceding registration; (c) was residing at the time of registration in the ward in which they had applied to be registered; (d) was not disqualified by such causes as conviction, insanity, etc.<sup>614</sup> From these requirements, it was noted that the

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<sup>611</sup> A publication of the United Nations Department of Political Affairs, Trusteeship and Decolonization, 'United Nations Participation in popular consultations and elections' Vol.19 (December 1983) 12  
[http://www.un.org/en/decolonization/pdf/decolonization/decon\\_num\\_19-1.pdf](http://www.un.org/en/decolonization/pdf/decolonization/decon_num_19-1.pdf) [Accessed 24 May 2016]

<sup>612</sup> James S. Coleman, (n 603) 75; A Rigo Sureda, (n 45) 157

<sup>613</sup> James S. Coleman (n 603) 75

<sup>614</sup> A publication of the United Nations Department of Political Affairs, Trusteeship and Decolonization, 'United Nations participation in popular consultations and elections' (n 611) 13

eligibility of voters was mainly based on residency. One exception was taxpayers, who had paid for the previous two years. For this group, it was not compulsory to be permanent residents.<sup>615</sup>

The Administering Authority under the UN General Assembly set up voting units for the referendum according to similarity of public opinions.<sup>616</sup> In other words, instead of the units being based on geography, they were grouped together based on the people's views within certain areas. The people were divided into four different units: (a) the Northern section as a whole; (b) Buem-Krachi District in the north and the Akan Local Council Area in the south; (c) the balance of Buem-Krachi District; and (d) Kpandu and Ho Districts taken together as a single unit.<sup>617</sup> This division of the territory into Northern and Eastern parts did not reflect the cultural differences between the people because the north-south division was in accordance with the colonial administrative units from 1955. In the Northern part, most people were in favour of integration with the Gold Coast. In the Southern part, public opinion was divided between preferring integration with the Gold Coast or independence for a unified Togoland.<sup>618</sup> The majority of people expressed themselves in favour of separation from the Gold Coast (Ghana) Two months after holding a referendum, there was a general election in Togoland to confirm the will of the people. The UN Plebiscite Commissioner was involved in an electoral process. The Commissioner believed that the fate of the referendum was bound up with the results of the general election. However, the referendum result differed from the subsequent election, when the majority of people selected the parties which ran a campaign to integrate with

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<sup>615</sup> Ibid 13

<sup>616</sup> James S. Coleman, (n 603) 78

<sup>617</sup> Ibid 78

<sup>618</sup> A Rigo Sureda, (n 45) 156

Ghana.<sup>619</sup> These two democratic processes questioned whether the local population wanted to separate from Ghana or if they preferred to integrate.

In the case of Northern Cameroons, the UN agencies took the main responsibility for collecting information from the visiting mission representatives. In 1958, the Trusteeship Council asked the Visiting Mission to set up a consultation mechanism in Northern Cameroon under British Administration. The UN's role was clearly to formulate the referendum question. Significantly, the UN General Assembly agreed with the visiting mission representatives to frame the referendum questions separately in the Northern and Southern Cameroons. Referendums were held twice in the Northern part.<sup>620</sup> Firstly, the Northern Cameroons people were asked to decide between incorporation into Nigeria or maintenance under the trusteeship system. The majority of people chose to maintain their territorial status under the trusteeship system. Secondly, the referendum asked voters to select whether to integrate with Nigeria or unify with Cameroon. The majority of people selected to join Nigeria. In this case, the UN organized formal meetings and invited representatives from the two political parties to give more information about the demands of the local populations. The UN acted as a mediator between two differing views and brought these together to design the referendum question. One observation is that the consultation process represented the demands of the local populations through their political representatives. The UN, in particular the General Assembly, played their role based on the desire of local elite leaders to satisfy the outcome of referendum rather than concern the wish of populations.<sup>621</sup>

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<sup>619</sup> A Rigo Sureda (n 45) 162; James S. Coleman, (n 603) 78

<sup>620</sup> A Rigo Sureda (n 45) 165

<sup>621</sup> A Rigo Sureda, (n 45) 168

Another two examples of the UN administering power are the MINURSO specific mission in Western Sahara and the presence of the UNAMET for the East Timor referendum. These instances are illustrated the institutional framework of the UN that free and fair referendums on self-determination were performed.

The referendum process for the people of Western Sahara was governed by the United Nations in collaboration with the Organization of African Unity (OAU). The United Nations Mission for the Referendum in Western Sahara (MINURSO) was a specific agency under the Security Council mandate to ensure a fair and impartial referendum.<sup>622</sup> The Special Representative of the Secretary-General had an exclusive responsibility over matters relating to the referendum and were assisted by an integrated group of civilian, military and civilian police personnel.<sup>623</sup>

At its inception, the UN Secretary-General and the chairman of the OAU held consultations with two parties of the conflict in Western Sahara, Morocco and the Frente Popular para la Liberación de Saguia el-Hamra y de Río de Oro (Frente Polisario). The main task of the MINURSO administering power was during the voter's identification and registration process, specifically, granting the right to vote for the Saharawi indigenous people. Its other two functions were the establishment of the conditions for a referendum campaign, and the conduct of the voting without interference or intimidation from state agencies.<sup>624</sup>

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<sup>622</sup> UNSC Res 690 (29 April 1991) para5(2) <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/596/26/IMG/NR059626.pdf?OpenElement> accessed 31 May 2015

<sup>623</sup> United Nations Mission for the Referendum in Western Sahara (MINURSO)

<<http://www.un.org/en/peacekeeping/missions/minurso/>> accessed 15 July 2015

<sup>624</sup> Report of the Secretary-General, 'The situation concerning Western Sahara' S/21360 (n 495) para59

Firstly, an identification commission was appointed to handle the list of voters. The identification commission aimed to include a number of Saharans living in the territory of Western Sahara, a number of refugees, and non-residents qualified to participate in the referendum.<sup>625</sup> Apart from the identification commission, the special representative of the Secretary-General was also a relevant component of MINURSO. The special representative was responsible for maintaining law and order in Western Sahara during the transitional period and ensured that no one was intimidated in the referendum process. They acted as a coordinator to communicate with the two conflicting parties and the representative of the OAU.<sup>626</sup> In addition, the Secretary-General designated a referendum commission to undertake its role with the special representative in all aspects of the referendum process, for example, the campaign and the voting system.<sup>627</sup> The referendum commission gave advice to the Special Representatives dealing with referendum campaign. There were some significant areas, including the fundamental freedoms, the rights of the media regarding the referendum, the facilitation of the peaceful return of those eligible to vote, the settlement of complaints and disputes, and the maintenance the law and order.<sup>628</sup> As part of the voting system, the referendum commission assisted the Special Representative in matters of considerable importance, such as the specific date of the referendum, the polling stations, the ballot boxes and ballot forms, the association of the official observers from the parties and the representatives of the OAU, the results of voting and the determination of offences.<sup>629</sup>

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<sup>625</sup> Ibid para25,28

<sup>626</sup> Ibid para35,39

<sup>627</sup> Ibid para63

<sup>628</sup> Ibid para64

<sup>629</sup> Ibid para65

In the context of East Timor, the UN Security Council passed resolution 1246 on 11<sup>th</sup> June, 1999, to organize and conduct a popular consultation in East Timor. The resolution established the so-called UN Mission in East Timor (UNAMET) to proceed with a referendum process as a people-consultative mechanism. Based upon the Security Council proposal, the UNAMET had three primary responsibilities: the registration process, the guaranteed freedom of all political and other non-governmental organizations to carry out their activities, and the provision of all necessary information to the East Timorese people.<sup>630</sup> In terms of the administering power, the UNAMET began its own initiative to control the registration process. In the absence of sufficient documentation, the UNAMET instituted an affidavit procedure to identify eligible voters. People who were born in East Timor had to be sworn before a religious leader or village chiefs and witnessed by a registered voter.<sup>631</sup> However this method is not widely accepted because the religious leaders or village chiefs are arbitrarily decided based on their interests. This action had a direct impact on the referendum outcome.

UNAMET took further action creating legislative regulations in order to ensure that all interested parties or populations enjoyed their rights equally. A code of conduct for the referendum was proposed by the UNAMET to provide a framework and guideline for people to understand the process. The code of conduct for the campaign covered the ballot papers, in particular how to facilitate voting for illiterate voters. On this point, the UNAMET worked in collaboration with two pro-autonomy groups: these were the United Front for East Timor Autonomy (UNIF) and the National Council of

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<sup>630</sup> UNSC Res 1246 (1999) 11 June 1999 para4 <http://www.un.org/en/peacekeeping/missions/past/etimor/docs/99sc1246.htm> accessed 15 June 2015

<sup>631</sup> Ian Martin, *Self-Determination in East Timor: The United Nations, the Ballot, and International Intervention* (Lynne Rienner 2001) 54-55

East Timorese Resistance (CNRT). They proposed using flag symbols for illiterate voters: the Indonesian flag for autonomy, and the CNRT flag for independence.<sup>632</sup> In addition, the UNAMET's public information was available in four official languages of the consultation process: Tetun, Bahasa Indonesia, Portuguese, and English.<sup>633</sup> The UNAMET is seen as successful in their active role to motivate people to be involved in the process through various activities, such as publishing referendum information in different languages, and providing a variety of communication channels.

In addition, UNIRED in Southern Sudan took responsibility for contributing voter registration in collaboration with the Southern Sudan Referendum Commission (SSRC). In terms of voter registration, the SSRC launched the voter registration exercise throughout the country. It took about three months from the beginning until the end of the registration process. If the applicant could not provide authentic documentation, or did not have personal identification documents, the Sultan or the chief of the village came to assist and approved the status of the candidate.

### *3.5.2 Supervisory role*

Another dimension of the UN involvement in territorial arrangement is the function of advising and assisting in the preparations for public consultation. Compared with the administering power, the UN supervisory role is wider in scope and covers all the organizational aspects as well as the observational. Creating a transparent referendum is a vital step towards achieving widespread democracy; international institutions act as contributors for encouraging democracy along with respect for human rights and

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<sup>632</sup> Ibid 62

<sup>633</sup> Ibid 55

the rule of law.<sup>634</sup> Free and fair voting systems are a necessary component of allowing people to participate in the decision-making process.

When the requirement of the will of the local population becomes a determining factor in legitimizing the referendum process, the UN monitoring missions can ensure that the implementation of self-determination practices is fair and genuine. In order to assess the efficiency of the UN engagement in a referendum, the UN supervisory role encompasses various activities, such as making observations, monitoring referendums, submitting reports to highlight weak points and how to improve the referendum process in conformity with international legal standards. The UN supervisory mission aims to ensure that people can make their choice within free and fair voting system.

There are two examples of the UN and the EU supervisory role in referendum processes. These are the mission of the UNOVER for Eritrea in 1993 and the UN involvement in Southern Sudan referendum in 2009.

The Eritrean right to self-determination struggled because of the illegal, forced annexation to the Ethiopian federation in 1952. At that time, the Eritreans contended that this action was organized against the will of Eritrea's people because there was no referendum or other democratic mechanisms to assess their will.<sup>635</sup> After the Ethiopian government agreed on Eritrea's right to self-determination, the appointment of the UN commissioner in Eritrea adopted the United Nations General Assembly Resolution 390 (V) to take the primary step of a visiting mission to discuss the

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<sup>634</sup> Jonathan Misk, 'Standardizing the Principles of International Election Observation' (2010) 43 *Vanderbilt Journal of Transnational Law* 763,771

<sup>635</sup> Antonio Cassese, (n 65) 221; Semere Haile, 'The Origins and Demise of the Ethiopia-Eritrea Federation' (1987) 15 *A Journal of Opinion* 9



possibility of holding a referendum.<sup>636</sup> It was apparent that there were two views in Eritrea: those supporting independence and those reluctant to express their wishes due to lack of political experience.<sup>637</sup> Then, the UN Observer Mission to Verify the Referendum in Eritrea (UNOVER) was established pursuant to the UNGA resolution 47/114.<sup>638</sup> The UNOVER did not only work as a specific agency to protect the rights of the Eritreans to self-determination in their future status, but also created long-term stability through their technical assistance mechanisms. Initiating the campaign via political, educational programs was perceived as an important component of raising people's awareness. In addition, they ensured that the people received sufficient time and information before making their decision.<sup>639</sup>

The UNOVER's supervisory role took three forms: voter registration, referendum campaign, and the voting procedure.<sup>640</sup> According to a 1993 Report of the Secretary General, UNOVER recommendations prompted the Referendum Commission of Eritrea (RCE) to make certain special arrangements for three groups of people: prisoners charged with, but not convicted of, crimes; special arrangements to allow members of the Eritrean Popular Liberation Army (EPLA) to register and vote in their barracks; and the re-registration of women.<sup>641</sup> In addition, an identification board established registration districts and took responsibility for enfranchising non-displaced Eritreans, refugees and internally displaced persons (IDPs).<sup>642</sup> Referendum campaign focused on the voters' education in all parts of Eritrea and abroad,

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<sup>636</sup> UNGA Res 390 'Eritrea: Report of the United Nations Commission for Eritrea; Report of the Interim Committee of the General Assembly on the Report of the United Nations Commission for Eritrea' <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/059/88/IMG/NR005988.pdf?OpenElement> accessed 1 June 2016

<sup>637</sup> Ibid para4

<sup>638</sup> UNGA res 47/114 'Report of the Secretary-General concerning a request to the United Nations to observe the referendum process in Eritrea' (16 December 1992) UN Doc A/RES/47/114 para5 <http://www.un.org/documents/ga/res/47/a47r114.htm> accessed 1 June 2016

<sup>639</sup> Available at [http://www.un.org/press/en/1996/19961223\\_pi986.html](http://www.un.org/press/en/1996/19961223_pi986.html) accessed 1 June 2016

<sup>640</sup> UNGA res 47/114 (n 638) para12

<sup>641</sup> UNGA 'United Nations Observer Mission to Verify the Referendum in Eritrea' (11 August 1993) UN Doc A/48/283 para32-36 [http://repository.un.org/bitstream/handle/11176/201844/A\\_48\\_283-EN.pdf?sequence=3&isAllowed=y](http://repository.un.org/bitstream/handle/11176/201844/A_48_283-EN.pdf?sequence=3&isAllowed=y) accessed 1 June 2016

<sup>642</sup> Eritrea: The 1993 referendum on Independence from Ethiopia [http://pdf.usaid.gov/pdf\\_docs/Pnadf326.pdf](http://pdf.usaid.gov/pdf_docs/Pnadf326.pdf) [Accessed 25 May 2016]

particularly in refugee camps outside Eritrea.<sup>643</sup> Education efforts included raising awareness of the implications of voting for or against independence. Non-governmental organizations also launched campaigns if they registered with the RCE. This strategy kept political campaign signs under control.

In the case of Southern Sudan, the UN involvement was represented by the UN Secretary-General. The UN Secretary General passed resolution 1590 in 2005 to establish the United Nations Mission in Sudan (UNMIS).<sup>644</sup> The main function of the UNMIS was to support implementation of the Comprehensive Peace Agreement (CPA) 2005.<sup>645</sup> Another UN agency involved in a supervisory role in Southern Sudan was the UN integrated referendum and electoral division (UNIRED). The role of UNIRED's technical and logistical assistance, in collaboration with the Southern Sudan Referendum Commission (SSRC), includes drafting complaint regulations and providing voter education materials.<sup>646</sup>

In the context of complaint regulations, establishing regulations was suggested by the UNIRED as a way of providing an appeal process for persons who were rejected for registration. The local courts were set up with trained judges to verify people's identity. Meanwhile, civic education was a part of local, civil society campaigns to maximize voter participation. This functional duty was carried out in collaboration with the UNIRED's Public Outreach division. Nevertheless, there was a disagreement between the UNIRED and the SSRC to broadcast through television and radio owned by the Government of Southern Sudan.

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<sup>643</sup> United Nations, Report of the Secretary General UN.Doc A/48/283 (n 641) para38-42

<sup>644</sup> UNSC Res 1590 (24 March 2005) S/RES/1590 [http://www.responsibilitytoprotect.org/files/SC\\_Res1590\\_24Mar2005.pdf](http://www.responsibilitytoprotect.org/files/SC_Res1590_24Mar2005.pdf) accessed 1 June 2016

<sup>645</sup> Ibid Article 4

<sup>646</sup> UNSC 'Report of the Secretary-General on the Sudan' (31 December 2010) UN Doc S/2010/681 [https://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/2010/681&referer=/english/&Lang=E](https://www.un.org/en/ga/search/view_doc.asp?symbol=S/2010/681&referer=/english/&Lang=E) accessed 10 March 2016; UN News Centre, 'UN continues to providing support to Sudan ahead of referendum' <http://www.un.org/apps/news/story.asp?NewsID=36635#.V0zVJjem7II> accessed 25 May 2016

Another significant supervisory role can be illustrated through the function of the international electoral monitoring mission. The main objective of an international election observation is to ensure the protection of human rights and rule of law with respect to the democratic process in assessing the will of the people. In practice, the international election observation carries out their duties in conformity with laws, processes, and institutions in referendum process.<sup>647</sup> During a referendum in Togoland 1956, the UNGA passed a resolution to appoint a UN Plebiscite Commissioner in order to organize and conduct the plebiscite under the supervision of the UN.<sup>648</sup> The main purpose of the Plebiscite Commissioner was to ensure a free and neutral atmosphere for the referendum<sup>649</sup> and submit a report to the UN General Assembly.<sup>650</sup>

In addition, the Office for Democratic Institutions and Human Rights (ODIHR) is the principal institution of the Organization for Security and Co-operation in Europe (OSCE).<sup>651</sup> Their mission is to ensure that people's fundamental freedoms are guaranteed. In addition, the ODIHR mission also involves the promotion of democracy and the rule of law. The ODIHR is the lead agency in Europe in the field of election observation in assessing whether holding referendums is in conformity with the national legislation and international standards.<sup>652</sup> Then, the findings are produced in the form of public reports. These reports provide a summary of events and make recommendation to improve the quality of people participation in referendum processes in the future.

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<sup>647</sup> Declaration of principles for international election observation (27 October 2005) <http://www.osce.org/odihr/elections/104325?download=true> [Accessed 14 April 2016]

<sup>648</sup> UNGA Res 944 on the Togoland unification problem (n 603)

<sup>649</sup> A publication of the United Nations Department of Political Affairs, Trusteeship and Decolonization, 'United Nations participation in popular consultations and elections' Vol.19 (n 611) 12

<sup>650</sup> Markku Suksi, (n 307) 253

<sup>651</sup> OSCE Office for democratic institutions and human rights (ODIHR) <http://www.osce.org/odihr/elections> accessed 11 April 2016

<sup>652</sup> OSCE Office for democratic institutions and human rights (ODIHR) <http://www.osce.org/odihr/elections> accessed 11 April 2016

### 3.5.3 *Advisory role*

The advisory role of international institutions includes a duty to construct a minimum standard for ensuring the fundamental freedoms of the people during a referendum process. Their work is to clarify and interpret practical issues with the aim of standardizing free and fair referendums. One example is the work of the European Commission for Democracy through Law (Venice Commission). The Venice Commission is an advisory body under the supervision of the Council of Europe. The main functions of the Commission are to uphold democracy, human rights, and the rule of law.<sup>653</sup> The adoption of the Code of Good Practice on Referendums is not only a useful piece of work to present the basis of national legislation on referendums but also provides some guidelines on conducting referendums with a legitimate and accountable standard.<sup>654</sup> Although the advisory role of international institutions has no legal binding, the work of the Venice Commission represents a significant contribution towards clarifying certain legal issues and advising on referendum mechanisms with respect to the interests of people.

There are two cases where the Venice Commission took action in an advisory role: Montenegro in 2006 and Crimea in 2014. The former concerned the Montenegrin citizens' right to vote although residing in Serbia. The Venice Commission issued an opinion in response to this, in which it advised against a double standard where Montenegrins living in Serbia had different rights to Serbians living in Montenegro. The Commission advised that both groups of people could only have voting rights in one country, but not both. The Venice Commission was involved in Crimea because they believed that the referendum was illegitimate, and that several conditions for

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<sup>653</sup> Council of Europe (Venice Commission) <[http://www.venice.coe.int/WebForms/pages/?p=01\\_activities](http://www.venice.coe.int/WebForms/pages/?p=01_activities)> accessed 16 August 2015

<sup>654</sup> European Commission for democracy through law (Venice Commission) 'Code of good practice on referendums' (n 217) 8

ascertaining the free and fair will of the people had not been met. The Commission released opinion no.762/2014 on 21<sup>st</sup> March 2014 about Crimea.<sup>655</sup> In order to create a free and fair process, certain conditions had to be met: a clear legal regulation for holding a referendum, respect for people's freedom of expression, democratic deliberation and sufficient time for calling a referendum, the neutrality of governmental authorities, and negotiations among all ethnic groups of people in Crimea.<sup>656</sup> These conditions are useful so that any future referendums may be considered legitimate and credible.

When human rights situations are at stake during a referendum process, the Human Rights Committee (HRC) is a specific agency which contributes to clarify the legal understanding of human rights protection and guaranteeing fundamental freedoms. Even though the opinion of the HRC is not legally binding, their opinion is worthwhile as it reflects the evolution of human rights practices. The role of the HRC in relation to the right of people to self-determination is to set standards of international human rights practices and deal with controversial matters regarding fundamental freedoms and human rights protection. The HRC has additional responsibilities for interpreting the meaning of international law principles and ensuring these conform to the minimum standard of human rights protection. The HRC also keeps records of states' reports on promoting and protecting fundamental freedoms and human rights. In addition, the regional human rights bodies (i.e. African Human Rights Committee, Inter-American Commission on Human Rights) play their role in contributing to the development of human rights in practice.

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<sup>655</sup> European Commission for democracy through law (Venice Commission) (n 558)

<sup>656</sup> Anne Peters, 'Sense and Nonsense of Territorial Referendums in Ukraine, and Why the 16 March Referendum in Crimea does not justify Crimea's Alteration of Territorial Status under International Law' (n 589)

An example of a standard-setting accomplishment can be seen from *Gillot v. France*. In this case, the length-of-residence condition for determining a genuine link with particular territory is 20 years continuous residence- in New Caledonia. The length of residence was related to the right to vote in the future of New Caledonia referendum in 2020. The HRC commented on the importance of a genuine link between people and their right to self-determination. It pointed out that “a self-determination process involving the participation of persons able to prove sufficiently strong ties to the territory whose future is being decided”.<sup>657</sup> In addition, the 20 years continuous residence can prove from other particular ties to the territory, such as possession of customary civil status, existence of moral and material interests in the territory combined with the birth of the person (after the 1998 referendum). If their parents are eligible to participate in 1998 referendum, they are also permitted to participate in the coming referendum in 2020.<sup>658</sup>

From the above, international institutions’ involvement creates institutional framework to guarantee free and fair process of referendum for identifying “the will of the people”. Referendums have been supported by the administering, supervising, and advisory roles of international institutions, using both UN and Non-UN machinery. Considering the expression ‘will of the people’ in external self-determination practices implicitly includes the international involvement of international institutions for prompting the collective will of the people in political participation.

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<sup>657</sup> *Gillot v. France* Communication No.932/2000 (n 206) para14.7

<sup>658</sup> *Ibid* para8.15

#### **4. Conclusion**

Republican liberal theory considers how the free and equal status of people is recognized when they exercise their right to external self-determination. It provides a functional account of legitimacy within external self-determination practices and how states operate under the effective control of its citizens. In addition, republican liberal theory holds that the assessment of the will of the people involves the presence of institutional and legal frameworks to put public opinions into action.

An examination of the differences between consensual and non-consensual based referendums can highlight the ideal version of the free and genuine will of the people. The consensual based referendum is an instance where there are clear legal instruments or a state framework necessary to implement a decision by the will of the people. But in practical application, the existence of human rights protection, and political participation of all stakeholders to have freedom of expression and freedom of peaceful assembly may make it difficult to identify such a will accurately. By contrast, the non-consensual based referendum is an instance where there are no clear legal instruments or state framework to allow people the authority to determine their territorial status. The non-consensual based referendums rely on the active role of civil society, non-governmental organizations or political parties in providing information to the people, such as civic education, running campaigns, collaborating with local governments, establishing civic, religious and cultural institutions.

Due to its character, the discontinuous process of an independence referendum does not provide a clear picture of how to carry out public opinions into state institutions. Measuring the will of the people via a referendum does not give people the

opportunity to discuss or exchange their views, as they simply respond “yes” and “no” to a specific question. In order for the government to assess the will of the people fairly, post-referendum, it is necessary to set up responsible institutions which uphold the will of the people. The existence of legal frameworks is a way of ensuring that the people’s right to participate is enumerated in the constitution or equivalent legal regulations. If these two frameworks are properly secured to the public opinions, the outcome of an external self-determination process may be considered to be legitimate in the eyes of international community.



## Chapter 3

### Non-referendum mechanisms: external self-determination and representative bodies

#### 1. Introduction

*“There were many ways to achieve self-determination. It could be achieved through war or revolution. It could be achieved through election but this required [a] good view; it could be achieved by agreement by parties to other disputes.”*<sup>659</sup>

The quotation above demonstrates that alternatives to referendums (during territorial alteration) exist which embrace the people’s participation in decision-making processes. It suggests that referendums are not the only way to identify the will of the people with regards to self-determination. The will of the people can also be expressed through elections and their representative processes.<sup>660</sup>

This chapter aims to explore the use of non-referendum mechanisms (i.e. elections and parliamentary models) in order to illustrate how representative bodies take on a responsive role (to people’s opinions) in territorial alteration matters. Representative democracy, i.e. the relationship between representative bodies and the people, reveals ‘a structural identity’ between the rulers and the ruled.<sup>661</sup> Representative bodies (rulers mandated by the people’s demands) carry out their function whilst being

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<sup>659</sup> UNSC ‘Report of the Secretary-General on the situation concerning the Western Sahara’ (2001) UN Doc S/2001/613 para40

<sup>660</sup> Daniel Philpott, ‘Self-Determination in Practice’ in Margaret Moore (ed.), *National Self-Determination and Secession* (OUP 2003) 80-81

<sup>661</sup> Duncan Kelly, ‘Carl Schmitt’s Political Theory of Representation’, (2004) 65(1) *Journal of the History of Ideas* 113, 121

responsive and accountable to public opinion.<sup>662</sup> The people (the ruled) are involved in decision-making processes, such as elections, which enable them to select their proper representatives.

In addition, in his theory of ‘representation’ in 1774, Edmund Burke emphasizes the importance of popular sovereignty acting through a constitutional government.<sup>663</sup> The relationship between the representatives and the represented is at the core of representational theory. The term ‘representation’ directs attention to the attitudes, expectations and behaviours of the represented, and their acceptance of their representatives’ decisions as legitimate and based on their own interests.<sup>664</sup> His argument relies on the preservation of sovereign powers within the hands of a Parliament, which is made up of the people’s representatives and carries out the people’s demands. In order to verify the authoritative and legitimate power of such representative bodies, it is necessary to look at the ‘focus and style of representation’ that Burke lays out.<sup>665</sup> In other words, he categorizes different ways of *doing* representation. The ‘focus’ of representation means the elected officials make their legislative judgments whilst taking into consideration both local and national interests.<sup>666</sup> The legitimacy of an elected body lies in its ability to find compromise between these diverse interests; this provides democratic accountability. The ‘style’ of representation refers to the chosen role of legislatures to act either as free agents or as representatives with a mandate.<sup>667</sup> Free agents are representatives who are elected by people in a specific geographical area, but who have the independent discretion to

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<sup>662</sup> John Stuart Mill, *Representative Government* (Kessinger Legacy reprinted 2012) 54, 61; Bernard Manin, *The principles of representative government* (Cambridge 1997) 165

<sup>663</sup> Richard Bourke ‘Popular sovereignty and political representation: Edmund Burke in the context of eighteenth-century thought’ in Richard Bourke and Quentin Skinner (eds), *Popular Sovereignty in Historical Perspective* (Cambridge 2016) 215

<sup>664</sup> Heinz Eulau, John C. Wahlke, William Buchanan and Leroy C. Ferguson, ‘The Role of the Representative: Some Empirical Observations on the Theory of Edmund Burke’ (1959) 53(3) *The American Political Science Review* 742, 743

<sup>665</sup> *Ibid* 744

<sup>666</sup> *Ibid* 744

<sup>667</sup> *Ibid* 748

promote the local people interests or not. Their public decisions are based on broader values which may encompass many diverse groups of people. Representatives with a mandate are officials who adhere to the promises given to the people before being elected. Their public decisions depend solely the concerns of the people in the specific area they represent.

Regarding international law instruments, article 25 of the International Covenant on Civil and Political Rights, 1966, defines ‘a right to public participation’ as taking part “in the conduct of public affairs, directly or through freely chosen representatives”.<sup>668</sup> Thus, the people’s power in decision-making processes is validated at an international level. There are three integral components to popular legitimation: non-discrimination, the right to take part in public affairs, and free elections. Non-discrimination is the right of individuals to vote regardless of their background. The right to take part in public affairs, as detailed above, can take place either directly or indirectly. The latter is exemplified by ‘free elections’- a democratic mechanism which allows the people to express their will. A free election guarantees that the authentic will of the people can be expressed independently in order to select their representatives.<sup>669</sup>

An election is a democratic process during which the people have the chance to vote and select the qualified candidates they wish to be their representatives. These elected officials hold sovereignty to act as the people’s political agents. With regard to the practical application of external self-determination, the indirect expression of the people’s will through representative bodies is a constant interaction. There is an

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<sup>668</sup> International Covenant on Civil and Political Rights (n 40), art 25

<sup>669</sup> Universal Declaration on Human Rights (n 538), art 21; International Covenant on Civil and Political Rights (n 40), art 25; Gregory H. Fox, ‘The right to political participation in international law’, in Gregory H.Fox and Brad R. Roth, (n 10) 53

interplay between the expression of the will of the people through an election and the elected officials' actions. The relationship between these two reflects the nature of a democratic 'dynamic and ongoing process'.<sup>670</sup> Elected officials form representative bodies which then carry out their function in state institutions, putting public concerns about boundary alteration into action. In the context of self-determination practices, two types of representative state institution can be identified: the Constituent Assembly and the local, federal or national legislatures. Although both act as legislative bodies, the main difference between them is the issue of time and scope. The former is responsible for drafting a constitution or amending an existing constitution for the future of the nation.<sup>671</sup> The latter works as a state's legislative organ to facilitate public involvement in its legislative processes<sup>672</sup>, including setting an agenda for requesting a greater degree of autonomy or dealing with an attempt to secession.

The democratic legitimacy and credibility of expressions of external self-determination from these bodies depends on a number of conditions. Firstly, it is important to look at the constitutional position of representative bodies. A constitution or statute mandates the representative bodies' use of power. In the absence of this, the representative processes are perceived as legitimate if they use their power to promote the people's interests. Secondly, a proportional number of representatives must be distributed between different groups of people in a society. This can help to create political unity and reduce the polarization of diverse, political opinions gathered from the voting processes. Thirdly, if the constitutional court overrules the will of the

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<sup>670</sup> Michael Hereth, *Alexis De Tocqueville: Threats to Freedom in Democracy* (Duke 1986) 15

<sup>671</sup> Jon Elster, 'The optimal design of a constituent assembly' in Jon Elster, *Securities against misuse: Juries, Assemblies, Elections* (Cambridge 2013) 206

<sup>672</sup> Karen Syma Czapanskiy and Rashida Nanjoo, 'The right of public participation in the law-making process and the role of legislature in the promotion of this right' (2008) 19(1) *Duke Journal of Comparative and International Law* 1,2

people, the people then have the right to invoke or appeal the court's ruling, or limit the latter's power using other state institutions.<sup>673</sup> There is then a shared responsibility between the parliament and other state institutions to ensure the people's demands are met.<sup>674</sup> These conditions are difficult to meet for a number of reasons, and republican liberalism proposes a way to resolve these problems and therefore ensure that the representatives' actions are legitimate.

Republican liberalism supports the notion that external self-determination should uphold the power of the people through representative processes which are ongoing and dynamic. It proposes a complex and continuous balance of power between the people and their representatives. Two key aspects of republican liberalism are *people's broader participation* in discussing public policies and the *central role of state institutions* in realizing public opinion.<sup>675</sup> It stresses the interactive work between the people and state institutions both pre-election and post-election. This interplay can help to balance the people's power with governmental power in order to achieve democratic legitimacy.

Republican liberalism specifies three, distinct functions of representative bodies: to implement people's decisions<sup>676</sup>; to communicate with people in the form of a dialogue<sup>677</sup>; and to write popular authority into the constitution.<sup>678</sup>

*Firstly*, republican liberalism believes in the people's influential power to control the representative bodies. Ordinary citizens can exercise their power both pre-election

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<sup>673</sup> Ibid 4; Philip Pettit (n 17) 174-175

<sup>674</sup> Quoted in Jon Elster, (n 671) 192

<sup>675</sup> Philip Pettit, (n 17) 225-229; John Mayor, (n 17) 155-168

<sup>676</sup> Philip Pettit, (n 17) 199

<sup>677</sup> Philip Pettit, (n 17) 183-185

<sup>678</sup> John Mayor, (n 17) 150-151

and post-election. Pre-election, an electoral institution plays an important role in encouraging public debate and political parties' expression of their commitment to people through their policies. Then, post-election, people are also able to check, contest or challenge policy implementation through formal and informal means, such as media, civil society, or petitions to a state independent body. A debate-based form of decision-making is perceived as vital in reaching reasoned decisions among different groups of people in a society.<sup>679</sup> This presupposes that people are capable of contesting and discussing their attitudes. The power to debate and contest can be in the form of individual or collective action. People can choose to exercise their rights individually or collectively through non-governmental organizations or independent state organization (Ombudsman). The advantage of a debate-based form of decision-making lies in bringing together interested groups or stakeholders to engage and negotiate their political concerns through compromise to reach a decision.<sup>680</sup> In addition, republican liberal theory's requirement for broader political participation will have been met and the external self-determination practice is more legitimate, that is, minority groups of people are able to express their views in support of or against policies. This can reduce the potential for a majority to hold influential power over minorities.

Reciprocity can be seen during and after all kinds of elections. The people can use their power in different ways. Firstly, they can appeal during the electoral process if their names are missing from the voter's lists, exercising their electoral rights.<sup>681</sup> Secondly, their satisfaction or dissatisfaction is indicated by their re-election (or not) of their representatives. The people can also influence different levels of

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<sup>679</sup> Philip Pettit, (n 17) 187

<sup>680</sup> Ibid 188

<sup>681</sup> Philip Pettit, (n 17) 138

governments: local, federal, national parliament and the Constituent Assembly. Meanwhile, regional levels of governing bodies are expected to act as communal representation to protect the local people's interests. The establishment of a communicative channel with the public is an example of reciprocity, which consolidates a balance of power between the people and the state, where popular authority prevails over state authority. This in turn increases the degree of legitimacy and accountability of representative bodies.

*Secondly*, republican liberalism stresses that the very design of state institutions must create transparency, contestability and impartiality.<sup>682</sup> Both existing and new institutions should be designed based on these three requirements. Transparency means open to the public. Contestability is the opportunity to challenge or oppose a specific policy or legislation. Impartiality is the availability of forums where challengers can expect an unbiased assessment.<sup>683</sup> From these perspectives, the establishment of certain measures to increase the people's authority is necessary for reducing the arbitrary will of representative institutions.

In terms of institutional development, there are three ways to interpret the concept of a 'balance of power'. *Firstly*, the balance of power refers to the classical understanding of a separation of power between legislative, executive and judiciary bodies in responding to the people's demands.<sup>684</sup> *Secondly*, the balance of power means the distribution of power between different level of governments, like in the federal system. The balance of power allows competing groups within a society to

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<sup>682</sup> Ibid 215

<sup>683</sup> Ibid 215

<sup>684</sup> Richard Bellamy, (n 17) 195

mutually check each other in terms of legislation and execution.<sup>685</sup> This can ensure that the different groups' interests are promoted and protected within the governing process. *Thirdly*, the balance of power is the interaction between representative institutions and people. The representative institutions (i.e. parliament, executive or judicial bodies) can help to guarantee the people's interests through legislation, which allows for greater public participation.<sup>686</sup> These three perspectives can improve the quality of interaction between the people and their representative institutions.

*Thirdly*, republican liberalism addresses instances where there is no clear legal instrument to determine the general will of the people. Representative bodies can ensure that the right to public participation is an unconditional characteristic of the constitution.<sup>687</sup> This mechanism guarantees the mandate of representative bodies to carry out their mission in accordance with public preferences.<sup>688</sup> In republican thought, a constitution is recognized as instrumental in guaranteeing the people's authority.<sup>689</sup> A constitutional government is a way of ensuring that the people's fundamental freedoms are enshrined as constitutional principles.<sup>690</sup> Thus, the constitution represents a fundamental structure for reaching collective decisions in a democratic way.<sup>691</sup> It consists of *a due process of law*- which guarantees and limits governmental dominating power over ordinary citizens, and *a way to reform* if the substance of a constitution does not legislate to treat all as equals.<sup>692</sup> The people's representatives can then implement a constitution within which the right to public participation is

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<sup>685</sup> Ibid 198

<sup>686</sup> John Rawls (n 85) 41

<sup>687</sup> Richard Bellamy (n 17) 188; John Rawls, (n 85) 132

<sup>688</sup> Richard Bellamy (n 17) 185-186

<sup>689</sup> John Rawls (n 85) 132-135

<sup>690</sup> Jamal Benomar, 'Constitution-making and peace building: Lesson learned from the constitution-making processes of post-conflict countries' UNDP 2003 p.3

<sup>691</sup> Richard Bellamy, (n 17) 4

<sup>692</sup> Ibid 5



respected by representative bodies and is accepted as a part of checking and balancing the power of state institutions.

Within the ongoing representative process, elected officials are responsible for constitutional reform through legislative institutions. In addition, the promotion of public communication will help to decrease the dominating power of representatives over the people if the constitutional right guarantees the political authority of the people. If there is a constitutional basis for these checks to take place, then the balance of power between the people and their representatives will be maintained, and this can ensure that the will of the people remains central, which is exactly the requirement of republican liberal theory. Moreover, the process of external self-determination will be made more legalized.

## **2. The typology of consensual and non-consensual representative processes**

This section aims to highlight the distinction between consensual and non-consensual representative processes, both for the Constituent Assembly's elections<sup>693</sup> and the function of national, federal or local legislatures, in responding to the public opinion.<sup>694</sup> The differences between consensual and non-consensual representative processes will reveal the four main aspects of legitimacy; the equal distribution of power for representative bodies,<sup>695</sup> public awareness through the media coverage,<sup>696</sup>

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<sup>693</sup> For example, Namibia Constituent Assembly's election in 1978 and 1989

<sup>694</sup> For example, East Pakistan national election in 1970 and Catalonia election in 2012 and 2015

<sup>695</sup> For example, Czechoslovakia institutional and constitutional reform see Katarina Mathernova, (n 24) 471,480; Claudia Saladin, 'Self-Determination, Minority Rights, and Constitutional Accommodation: The Example of the Czech and Slovak Federal Republic' (1991-1992) 13 Michigan Journal of International Law 172, 211-213

<sup>696</sup> There was an example of equal time allocation broadcasting for each party in Czechoslovakia's 1990 election. See 'Guidelines for election broadcasting in transitional democracies' (August 1994 reprinted April 1997) p.26 <https://www.article19.org/data/files/pdfs/tools/electionbroadcastingtrans.pdf> accessed 1 June 2016

the involvement of civil society in local governments and federal parliament,<sup>697</sup> and the role of political parties as mandated representatives.<sup>698</sup>

The first condition for classifying a consensual-based process is that a mutual agreement must exist between parties or representative bodies to identify the will of the people; non-consensual based representatives do not have this agreement. A consensual-based election occurs when there is an agreement between the former administrative powers and international institutions.<sup>699</sup> The agreement formally accepts the process of a free and fair election with the legitimizing contribution of an international institution framework, for example, the 1978 case in Namibia.<sup>700</sup> By contrast, a non consensual-based election happens when there is no agreement between the two interested parties (i.e. the governments involved). The elective process identifies the will of the people in order to find representatives who set a public agenda within the state institutions, such as in Bangladesh in 1970.<sup>701</sup>

The second condition for classifying a consensual-based process is that a clear legal instrumental framework with a constitutional basis exists to ensure the expression of the will of the people is carried out. Drafting a new constitution or amending an existing constitution in a consensual-based process automatically proceeds as a

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<sup>697</sup> For example, Catalonia election in 2012 and 2015 See Montserrat Guibernau, 'Prospects for an Independent Catalonia' (2014) 27(1) *International Journal of Politics, Culture and Society* doi:10.1007/s10767-013-9165-4; David Marti, 'Election report: The 2012 Catalan election: the first step towards independence' (2013) 23(4) *Regional and Federal Studies*

<sup>698</sup> For example, Pakistan national election in 1970 and the role of Awami League Party of East Pakistan see Md. Abdul Wadud Bhuiyan, *Emergence of Bangladesh and Role of Awami League* (Vikas Publishing House 1982)

<sup>699</sup> Marinus Wiechers, 'Namibia's long walk to freedom: The Role of Constitution Making in the Creation of an Independent Namibia' in Laurel E. Miller and Louis Aucoin (eds), *Framing the state in times of transition: Case studies in constitution-making* (US Institute of Peace Press 2010) 82-83

<sup>700</sup> UNSC Res 385 'The situation in Namibia' (30 January 1976) UN Doc S/RES/385 para6-8; UNSC Res 435 (29 September 1978) para3-6 <http://unscr.com/en/resolutions/435> accessed 1 June 2016; Marinus Wiechers, 'Namibia's long walk to freedom: The Role of Constitution Making in the Creation of an Independent Namibia' in Laurel E. Miller and Louis Aucoin (eds) (n 699) 84

<sup>701</sup> The Secretariat of the International Commission of Jurists, 'The Events in East Pakistan, 1971' (Geneva, 1972) 12-13

continuous action of representative bodies (i.e. Constituent Assembly).<sup>702</sup> By contrast, constitution-making in non-consensual based representative process may be an initiative by the local or federal government with which to insist on identifying the will of the people. They may be the result of civil society or other social organizations pushing an agenda which is in the interests of the people.<sup>703</sup>

Consensual action within the parliamentary model is seen in Czechoslovakia in 1993, when both the Czech and the Slovak people's representatives voted for the dissolution of the Czechoslovakia federation.<sup>704</sup> By contrast, the parliamentary models in Kosovo (1999-2007) and Catalonia (2015) illustrate non-consensual action; both Serbia and Spain denied their right to unilateral secession.<sup>705</sup> However, in Kosovo, a temporary commission was set up in the form of a local parliament by international institutions to administer Kosovo's territorial and administrative arrangements in the state's transitional period.<sup>706</sup> In Catalonia, the regional parliament had a mandate from the local people themselves to contest and challenge the policy of the national parliament (i.e. Spanish Congress). In this case, the people's control over their representative body originated from the bottom-up characteristic of civil society.<sup>707</sup> Non-governmental organizations in Catalonia were unique in having the collective strength to push their own agenda through their local parliament.

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<sup>702</sup> Marinus Wiechers, 'Namibia's long walk to freedom: The Role of Constitution Making in the Creation of an Independent Namibia' in Laurel E. Miller and Louis Aucoin (eds) (n 699) 84-85; Jamal Benomar (n 690) p.4

<sup>703</sup> Marc Guinjoan and Toni Rodon, 'Catalonia at the Crossroads: Analysis of the increasing support for secession' in Xavier Cuadras-Morato (ed) (n 573) 32-33

<sup>704</sup> Mary Heimann, *Czechoslovakia: The state that failed* (Yale 2011) 320-321

<sup>705</sup> James Ker-Lindsay, 'Explaining Serbia's Decision to Go to the ICJ' in Marko Milanovic and Michael Wood, *The Law and Politics of the Kosovo Advisory Opinion* (Oxford 2015) 10-11, 13-14; Xavier Cuadras-Morato, 'Introduction: Catalonia, a new state in Europe?' in Xavier Cuadras-Morato (ed) (n 573) 7-9

<sup>706</sup> Bernhard Knoll-Tudor, 'The Settling of a Self-Determination Conflict?: Kosovo's Status Process and the 2010 Advisory Opinion of the ICJ' in Marko Milanovic and Michael Wood (n 705) 78-80

<sup>707</sup> Marc Guinjoan and Toni Rodon, 'Catalonia at the Crossroads: Analysis of the increasing support for secession' in Xavier Cuadras-Morato (ed) (n 573) 33-35

The following observations about consensual-based and non consensual-based representative processes demonstrate that both have the potential to carry out legitimate and illegitimate consequential actions, under different circumstances. However, some practical applications show that the unfair distribution of elected officials can affect voting and constitution-making, such as Czechoslovakia.<sup>708</sup> Human rights protection can also be problematic in consensual-based processes, in particular the freedom of expression and the promotion of civil society function, such as in Namibia.<sup>709</sup> By contrast, non-consensual based representative processes are systemized with the attempt of local or federal governments to strengthen the free expression of the will of the people. Representative bodies can be held more accountable than in consensual based representative processes, because they are committed to responding to and implementing public opinions.<sup>710</sup> Human rights protection is considered a vital component of legitimizing democratic processes. Political party and civil society involvements clearly carry out their duties in response to the informed consent of the people.<sup>711</sup>

### **3. The application of republican liberalism to representative processes**

The right to external self-determination is defined as the people's right to political participation; an election is recognized as a basic form of this participation.<sup>712</sup> From a liberal perspective, 'democracy' is considered to be the people participating and deliberating in politics.<sup>713</sup> Republican liberalism emphasizes *broader* participation

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<sup>708</sup> Katarina Mathernova (n 24) 471,482-483; Lloyd Cutler and Herman Schwartz, 'Constitutional Reform in Czechoslovakia E Duobus Unum?' (1991) 58 University of Chicago Law Review 511, 544-545

<sup>709</sup> Guidelines for election broadcasting in transitional democracies (n 696) p.

<sup>710</sup> National Democratic Institution for International Affairs, 'Democratic elections in Namibia: An International Experiment in Nation Building' (June 1989) 10-12

<sup>711</sup> Marc Guinjoan and Toni Rodon, 'Catalonia at the Crossroads: Analysis of the increasing support for secession' in Xavier Cuadras-Morato (ed) (n 563) 33-35; Ivan Serrano, 'Just a Matter of Identity? Support for Independence in Catalonia' (2013) 23(5) Regional and Federal Studies 523, 532-533

<sup>712</sup> International Covenant on Civil and Political Rights (n 40) art 1,25; Dominic McGoldrick (n 35) 21, 247-248

<sup>713</sup> Frederick G. Whelan (n 12) 14-15; Will Kymlicka (n 85) 11-12

which advocates for *deliberative* and *inclusive* democracy. A deliberative model of democracy is perceived as the free association of citizens in exercising their right to discuss and reach a consensus. An inclusive model of democracy considers the equality of all people in this decision-making process.<sup>714</sup>

When applying the republican liberal theory to representative processes and elections in particular, the interaction between constituencies and representatives is crucial. In republican thought, people as constituent powers are involved in political participation through representative processes.<sup>715</sup> During elections for the purpose of territorial alteration, a screening process takes place (such as in republican liberal theory), through the people's choice of their own elected representatives. However after the election has taken place, the next step involves the people's checking and balancing of the power of these representative bodies.<sup>716</sup> An important element of any external self-determination practice is the consequence i.e. if territorial alteration occurs or not. Republican liberal theory refers directly to the consequential actions of popular participation, specifically through representative processes.<sup>717</sup>

It is essential to look at five interrelated factors which determine whether the representatives' actions are legitimate, based on the degree to which they express the people's mandate.

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<sup>714</sup> Philip Pettit (n 17) 195; John W. Maynor (n 17) 128-129

<sup>715</sup> Philip Pettit (n 17) 172-173; John W. Maynor (n 17) 130-131

<sup>716</sup> Philip Pettit (n 17) 214, 221-222; John W. Maynor (n 17) 53-54

<sup>717</sup> Philip Pettit (n 17) 207; John W. Maynor (n 17) 143-145

*3.1. The nature of the election and the subsequent actions of the elected representatives*

An election is established to allow the local population's involvement in deciding their future status. It provides an equal opportunity for all citizens to become candidates and put forward their political views, individually and collectively with others.<sup>718</sup> The election is a way to give the people's mandate to representatives in order to carry out the people's demands within state institutions. In allowing the people to select their representatives, an election is also the first step of a continuous process of external self-determination. During the electoral process, the will of the people should be respected by any governmental authority, which then implements the outcome - establishing policies or relevant actions according to the needs of the people. The outcome of the electoral process is ideally a collective action: the will of the people is integrated into the agenda set by their representatives.

Looking specifically at external self-determination practices, the consequences of an election and the representative bodies' functionality can be measured in two different ways: either by there being a constitutional amendment or by the newly elected officials requesting a greater level of self-government in an autonomous territory. Ideally, the right to vote should be guaranteed within the national constitution or other specific laws. Drafting a new constitution or constitutional amendment is an integral part of the process of building a nation identity, like in Namibia in 1989, because as a legal instrument, the constitution guarantees the people's political equality and reflects their aspirations. Demanding a greater level of autonomy is another form of

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<sup>718</sup> UNGA Res 45/150 (n 596) para3

continuous action by representative bodies in responding to the people's will. The local representatives act as political agents to put local interest into action at a national level, like in Bangladesh and Catalonia. This can help to legitimize the mandate of the representatives based on the collective will of the people.

There are two representative bodies to carry out the people's mandate in external self-determination practices: the Constituent Assembly and the Members of Parliament (MPs). The Constituent Assembly's primary role is to write a new constitution (or amend the existing constitution); a legal mechanism dictating how any new governing authorities play their roles, whilst reflecting the local population's aspiration, creating a new national identity. The purpose of the Constituent Assembly's election is to divide the electorate according to community and constituency.<sup>719</sup> Thus, the Constituent Assembly consists of a number of representatives from different communities. This practice helps to reflect local populations' interests in national development when drafting a constitution or requesting an amendment. Meanwhile, elected MPs represent the people and having MPs from different territorial constituencies promotes local interests. MPs put 'the verdict of the people' into action,<sup>720</sup> and do this in two ways. They set the agenda according to the people's demands in the local and federal parliaments, and they uphold the people's interests in the National Assembly through checking and balancing the power of the state. For example, MPs are able to vote or abstain from passing any law, such as a constitutional amendment. Thus, the Constituent Assembly and MPs are involved in guaranteeing and transferring the mandate of the people into action.

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<sup>719</sup> Sir W. Ivor Jennings, *The approach to self-government* (Cambridge 1956) 92

<sup>720</sup> Bernard Manin, (n 19) 162

Within republican liberal theory, the expression of public opinion is perceived as necessary for governments and representative bodies to claim legitimacy. The theory dictates that political participation must take place- i.e. the expression of the will of the people- in order to recognize the governmental authority.<sup>721</sup> The theory also states that the consequential effects of such governmental action contributes towards legitimacy; if the people's demands are met by their representatives then the government can claim itself to be legitimate.<sup>722</sup> If representative bodies make their decisions with discretionary power rather than based on the people's demands, their actions are not legitimate.

The following section will explore the use of representative processes in three different consensual and non-consensual processes: Namibia in 1989, Bangladesh in 1971, and Catalonia in 2012-2015. Namibia is a clear instance where external international involvement helped to create an independent territory with legal legitimacy. Significantly, the process included two elections (the first being considered illegitimate in the eyes of the international community) and therefore demonstrates the intricacies of representative processes, even in consensual cases. Moreover, the Namibian case illustrates how collaborative action between international institutions and the national governing agencies can produce an ideal electoral process – including its outcomes, and consequent constitution-building. The example of Bangladesh's general election illustrates a non-consensual representative process which forever changed the power balance between East and West Pakistan. Significantly, the national election of Pakistan in 1970 demonstrated a popular mandate in order to identify the communal representation between East and West

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<sup>721</sup> Philip Pettit (n 17) 11-12; 188-189

<sup>722</sup> Philip Pettit (n 17) 178, 185-186



Pakistan.<sup>723</sup> The national election did not directly mention the local request for independence but presented itself as a democratic process to draw a federal distinction between East and West Pakistan.<sup>724</sup> The Catalonia elections in 2012 and 2015 demonstrate how representative bodies can provide an institutional mandate for independence through regional parliaments.

### 3.1.1 Consensual action in Namibia

During the thirty-year period from 1960 to 1989, the Namibian transitional for independence encouraged a broad discussion about how to reconcile the involvement of international institutions in organizing fair elections and the local population's demands on territorial matters. International institutions, particularly the UN and its subsidiary bodies, were involved in agenda-setting to provide a long-term of peace settlement.

In 1920, the status of South West Africa (Namibia) territory was as a mandated territory of South Africa.<sup>725</sup> Then, after the dissolution of the League of Nations, South West Africa was under the supervision of the UN General Assembly and its Trusteeship Council. After the UN General Assembly terminated its mandate in 1966, South Africa refused to withdraw its ruling power in legislative and executive authority over South West Africa.<sup>726</sup> Following this, Namibia was placed under the supervision of the UN Council for South West Africa.<sup>727</sup> Under the scope of Resolution 2248 adopted on 19<sup>th</sup> May 1967, the UN Council function was “to administer South West Africa until independence, with *the maximum possible*

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<sup>723</sup> Sir W. Ivor Jennings, (n 719) 32

<sup>724</sup> Ibid 47

<sup>725</sup> Covenant of the League of Nations 1919, art 22; A publication of the United Nations Department of Political Affairs, Trusteeship and Decolonization (Vol.1 No.3 December 1974) 5

<sup>726</sup> Umozurike Oji Omozurike, *Self-Determination in International Law* (Archon 1972) 120; A publication of the United Nations Department of Political Affairs, (n 715) 17

<sup>727</sup> United Nations, ‘Report of UN. Council for South West Africa’ (1968) 7(1) *International Legal Materials* 104,105

*participation of the people of the territory*".<sup>728</sup> In addition, the UN Council took responsibility "for promulgating laws, decrees and administrative regulations *until the establishment of a legislative assembly following elections*".<sup>729</sup>

According to Resolution 2248 [1967], the UN council's task was to establish an election to identify the will of the Namibian local populations to exercise their right to self-determination.<sup>730</sup> From 1967, the UN was involved in every step of the electoral process in Namibia. This electoral supervision entailed working with the national authority to ensure the election in South West Africa was free and fair, ensuring the freedom of the people in voting and the impartial action of the national authorities.<sup>731</sup> These actions were in accordance with Resolution 1514 [1960], which mandated that the transfer of power to people must take place in reference to the freely expressed will of the people, enabling them to enjoy complete independence and freedom.<sup>732</sup> Apart from the UN Council for South West Africa, there were two authorities involved in the electoral process for Namibian independence: the Administrative-General (AG), appointed by South Africa and the Special Representative (SR), appointed by the UN Secretary-General.

There are four significant events during the Namibian transition to independence which show, to varying degrees, how the general will of the people was respected by both international institutions and the national government. The first event was the appointment in 1973 of the South West Africa People's Organization (SWAPO) as

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<sup>728</sup> Ibid 105

<sup>729</sup> Ibid 105

<sup>730</sup> A publication of the United Nations Department of Political Affairs, Trusteeship and Decolonization (n 725) 23

<sup>731</sup> Report of the Secretary-General, 'Enhancing the effectiveness of the principle of periodic and genuine elections' A/46/609 (19 November 1991) 6

<sup>732</sup> UNGA Res 1514 (n 38) para5

the people's representatives within the framework of the United Nations. The second event was the Turnhalle Constitutional Conference in 1975-1977. This conference was sponsored by South Africa to discuss a constitutional amendment for the future of South West Africa. The consequential establishment of the Democratic Turnhalle Alliance was the compromise of different ethnic groups. The third was the first ever Namibian national election in 1978 and the subsequent establishment of two interim governments as well as the attempt to draft a constitution for independence between 1979 and 1988. The final event was the election in 1989 to select the Constituent Assembly, whose purpose was to create a constitution reflecting the future aspirations and identity of the nation.

#### 1973: the appointment of SWAPO

Before the appointment of the SWAPO by the Organization of African Unity (OAU) and the UN as a political party, SWAPO was a *political movement* which conducted political liberation activities on behalf of the people. As a movement, it was approved by the National Convention (created in 1971) which was a product of negotiation between political groups inside Namibia including SWAPO, the South West Africa National Union (SWANU), the South West Africa National Independence Organization (SWANIO), and the National Unity Democratic Party (NUDO).<sup>733</sup>

The appointment of SWAPO as the people's representatives was a unilateral action by the UN. SWAPO was recognized as the Namibian representative by the UN General Assembly Resolution 3111 (12<sup>th</sup> December 1973) and the UN General Assembly Resolution 31/146 (20<sup>th</sup> December 1976). These resolutions stated that:

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<sup>733</sup> A publication of the United Nations Department of Political Affairs, Trusteeship and Decolonization (n 725) 8

“The national liberation movement of Namibia, the South West Africa People’s Organization (SWAPO), is the authentic representative of the Namibian people, and support the efforts of the movement to strengthen national unity”.<sup>734</sup>

The UN’s decision to recognize the status of SWAPO as the sole, legitimate representative of the people did not conform to the expressed will of the people.<sup>735</sup> On the date of approval, the local Namibian people had no chance to express their will. In other words, the SWAPO leaders were not recognized as elected officials by the local indigenous people. One observation of the SWAPO appointment is that the UN employed its discretionary power without providing a channel for the people to participate in a collaborative decision-making process. Another contrasting observation is that the UN’s intention was to create proper representation of the Namibian people by appointing SWAPO and therefore to obstruct South Africa’s military activity which was preventing the people from achieving independence.<sup>736</sup> Given that this action on South Africa’s part was labelled as illegal occupation on South West Africa’s territory by the International Court of Justice Advisory Opinion in 1971,<sup>737</sup> the actions of the UN to counter this could be considered as legitimate.

### 1975-1977: The Turnhalle constitutional conference

On the 1<sup>st</sup> September 1975, the Turnhalle conference opened in Windhoek and concluded its work in March 1977. The meetings were held in the Turnhalle (a former

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<sup>734</sup> UNGA Resolution 3111 (12 December 1973) Section 1 para2 <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/281/83/IMG/NR028183.pdf?OpenElement> accessed 15 October 2016; UNGA Resolution 31/146 (20 December 1976) para16

<https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/303/29/IMG/NR030329.pdf?OpenElement> accessed 15 October 2016

<sup>735</sup> Yves Beigbeder, *International monitoring of plebiscites, referenda and national elections* (Martinus Nijhoff 1994) 153

<sup>736</sup> UNGA Res 31/146 (n 734) para4-6

<sup>737</sup> ICJ Advisory Opinion ‘Legal Consequence for states of the continued presence of South Africa in Namibia’ (21 June 1971) ICJ Reports 1971 16 <http://www.icj-cij.org/docket/files/53/5595.pdf> accessed 20 September 2016; National Democratic Institution for International Affairs (n 725) 11

German gymnasium).<sup>738</sup> The conference was the national discussion about the constitutional development of Namibia. The conference was convened by the ruling white population in the territory with the support of the South African government.<sup>739</sup> The participants included various ethnic groups. As a consequence, they agreed to form a new political alliance of eleven ethnic political parties called the ‘Democratic Turnhalle Alliance’ (DTA).<sup>740</sup>

The first session was generally about the importance of the future constitutional structure. A ‘declaration of intent’ was issued to outline the objectives of the conference, including specifically the constitutional development of the country and the desire to respect the wishes of local populations:

“We, the true and authentic representatives of the inhabitants of South West Africa, hereby solemnly declare:

That in the exercise of our rights to self-determination and independence, we are voluntarily gathered in this Conference in order to discuss the constitutional future of South West Africa;

That mindful of the particular circumstances of each of the population groups it is our firm resolve in the execution of our task to serve and respect their wishes and interests;

We therefore decide

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<sup>738</sup> A publication of the United Nations Department of Political Affairs, (n 725) 27

<sup>739</sup> Marinus Wiechers, ‘Namibia’s long walk to freedom: The Role of Constitution Making in the Creation of an Independent Namibia’ in Laurel E. Miller and Louis Aucoin (eds) (n 699) 83

<sup>740</sup> Ibid 83

(a) To draft a constitution for South West Africa as soon as possible and, if possible, within a period of three years;

(b) To devote continuous attention to measures to implement all the aims specified in this Declaration”.<sup>741</sup>

The second session was held from 10<sup>th</sup> to 14<sup>th</sup> November 1975. The participants of the conference agreed to set up four different committees to hear expert evidence on particular issues. The first studied the question of discriminatory practices. The second focused on economic development for inhabitants. The third studied social development. The fourth dealt with educational facilities. These committees needed to report their findings in the third session of the conference.<sup>742</sup> Apart from this, the Constitutional Conference, at its second session, decided that:

“(a) Representatives of the Conference be appointed overseas, when it is deemed expedient, in order to keep governments and institutions informed of developments at the Conference;

(b) Evidence by minority groups and other institutions which espouse a peaceful resolution of the problems of South West Africa should be accepted, in either written or oral form, but that each such request to present evidence be considered on its merits;

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<sup>741</sup> South African Letter Address to the UN Secretary-General, ‘South West Africa and the United Nations’ (27 January 1976) 12-13

<http://dspace.africaportal.org/jspui/bitstream/123456789/30025/1/South%20West%20Africa%20and%20the%20United%20Nations.pdf?1>

<sup>742</sup> Ibid 13

(c) A Committee will be appointed at an appropriate time in order to investigate the question of the return to South West Africa of exiles from the Territory”<sup>743</sup>.

One noteworthy observation is that SWAPO and the UN representatives did not join the conference. From SWAPO’s standpoint, this conference was an attempt by South Africa to reclassify the Namibian ethnic people by incorporating them into a confederation of Bantustans.<sup>744</sup> From the UN’s standpoint, the conference was established to acknowledge South Africa’s illegal occupation regime. In addition, the conference did not include the people’s representative organizations (i.e. SWAPO).<sup>745</sup> After the conference, South Africa established an interim government for the territory and the South African parliament approved a draft constitution. This action was questionable in terms of its legitimacy due to the lack of popular recognition of SWAPO.

The ‘Western Contact Group’ (i.e. France, UK, US, Canada and Germany) (WCG), acted as mediators, initiating an ongoing discussion with South Africa. There were four crucial processes that the Western Contact Group proposed. Firstly, they selected holding a national election as a way to identify the local population’s will. The elected officials worked in the Constituent Assembly which performed its role in the constitution-making process. Secondly, both South Africa and the UN could each appoint one official to govern the territory until independence: the Administrative General (AG) of South Africa and the UN Special Representative (SR) respectively. Thirdly, it dictated the unconditional return and release of all Namibian people in exile, Namibian detainees and political prisoners. Fourthly, South Africa needed to

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<sup>743</sup> Ibid 14

<sup>744</sup> A publication of the United Nations Department of Political Affairs, Trusteeship and Decolonization (n 725) 28

<sup>745</sup> A publication of the United Nations Department of Political Affairs, Trusteeship and Decolonization (n 725) 28

withdraw its troops from Namibian territory and the UN forces were to replace them during the election to maintain law and order.<sup>746</sup>

#### 1978: the first Namibian national election

After the Turnhalle constitutional conference, in December 1978, public political participation took place through an election to decide whether to approve an interim government under an interim constitution. Before holding the election, the UN Security Council passed a resolution to construct a proper framework with which to achieve free and fair elections. According to the UNSC Resolution 385 of 1976, the Namibian people had the right to determine their own future through an election process under the supervision and control of the UN.<sup>747</sup> The resolution specified that:

“The people of Namibia may be enabled freely to determine their own future, it is imperative that free elections under the supervision and control of the United Nations be held for the whole of Namibia as one political entity”.<sup>748</sup>

A free and fair election was designed to ensure the Namibian local population’s authority to determine their future destiny through self-determination. The UN Secretary-General’s Special Representative was appointed to maintain law and order during an election.<sup>749</sup> This election was organized based on a proportional representation voting system, a type of electoral process that allocates seats on the basis of the number of votes each party receives.<sup>750</sup> The advantages of proportional representation are that there are representatives from different political parties, and a promotion of the demands of diverse groups of people.

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<sup>746</sup> A publication of the United Nations Department of Political Affairs, Trusteeship and Decolonization (n 725) 30-31

<sup>747</sup> UNSC Res 385 ‘The situation in Namibia’ (n 700) para7

<sup>748</sup> Ibid para7

<sup>749</sup> UNSC Res 435 (n 700) para3,5

<sup>750</sup> National Democratic Institution for International Affairs, ‘Democratic elections in Namibia: An International Experiment in Nation Building’ (June 1989) 5



Meanwhile, South Africa's AG was nominated to be a continual presence during the electoral process. South Africa took part in establishing an interim government. The DTA which was established during the Turnhalle Conference, won a majority of 82% (41 out of 50 seats in the Constituent Assembly).<sup>751</sup> The UN. Secretary-General's Special Representative (i.e. Martti Ahtisaari) and SWAPO did not recognize the elected Constituent Assembly because the latter was excluded from full participation in this election.<sup>752</sup>

However, Resolution 385 [1976] was not implemented because there was a disagreement between the SR and AG to approve certain of its conditions. In terms of the AG, South Africa intended to prevent the fulfillment of decolonization process under the UN control.<sup>753</sup> Meanwhile, the SR. was not able to transfer the power to the people of Namibia with a free and fair election.<sup>754</sup>

In 1978, the UN Security Council passed Resolution 435 to replace the previous resolution, which established the use of elections in assessing the will of the people. However, after Resolution 435 was passed, an electoral process did not take place smoothly. There was a severe armed attack by the South African military forces on SWAPO forces in Okahenge.<sup>755</sup> This action was the main cause of the delay of an electoral process as a first step for Namibia independence.

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<sup>751</sup> Ibid 5

<sup>752</sup> Marinus Wiechers, 'Namibia's long walk to freedom: The Role of Constitution Making in the Creation of an Independent Namibia' in Laurel E. Miller and Louis Aucoin (eds) (n 699) 83

<sup>753</sup> Peter Manning, 'Namibia's Independence: What has happened to UN Resolution 435?' (1989) 44 Review of African Political Economy 63,64

<sup>754</sup> UNSC S/12636 'Proposal for a settlement of the Namibian situation' (10 April 1978) para2 <http://www.ucdp.uu.se/gpdatabase/peace/SyA%2019780712.pdf> accessed 29 February 2016; Peter Manning, (n 753) 63,65

<sup>755</sup> Peter Manning, (n 753) 63

In the aftermath of the election, there was a lot of obstruction preventing independence, caused by two competing parties (i.e. the UN and SWAPO, and the DTA and South Africa), in particular a constitutional deadlock. In April 1984, a multiparty conference convened to reach a consensus on a new, permanent constitution.<sup>756</sup> In 1985, the second interim government and Council of South West Africa were established to draft a national constitution that would be submitted to the electorate for approval. The Council finished their work within two years but the draft constitution did not gain unanimous support. The DTA withdrew and South Africa ignored the second interim government and the work it had achieved.<sup>757</sup>

In 1987, the UN General Assembly released a Decision 42/417 concerning military bases and installations in colonial and NSGT.<sup>758</sup> In its opinion military bases in the NSGT were major obstacles to the administering powers for ensuring the people's right to self-determination.<sup>759</sup> The General Assembly demanded the urgent withdrawal of all military bases in the international territory of Namibia. All violent armed conflicts against the people of Namibia and their national liberation movement would cease.<sup>760</sup> This resolution was an important step in bringing peace to Namibia.

#### 1989: the election of the Constituent Assembly

Apart from acting as a mediator between South Africa and SWAPO, the Western Contact Group played a role in designing the revised version of an electoral framework in Namibia. The UN Security Council Resolution 435 (1978) was

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<sup>756</sup> Marinus Wiechers, (n 699) 86

<sup>757</sup> Marinus Wiechers, (n 699) 87

<sup>758</sup> A publication of the United Nations Department of Special Political Questions, Regional Co-operation, Decolonization and Trusteeship (No.34 March 1988) Annex II General Assembly Decision 42/417 'Military activities and arrangements by colonial powers in territories under their administration which might be impeding the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples' (4 December 1987) 22

<sup>759</sup> Ibid para2

<sup>760</sup> Ibid para7

implemented to ensure that a free and fair election could take place. Before the second election in 1989, international involvement was divided into three stages: pre-election, during the election, and post-election.<sup>761</sup>

### Pre-election

Firstly, organizing an electoral system in a fragile state was an attempt to consolidate democracy and a new political regime in the aftermath of civil war.<sup>762</sup> Before the electoral process in Namibia 1989, it was necessary to cease military intervention and resolve armed conflicts. The liberation war was a guerrilla war between the nationalist South-West Africa people's organization movement (SWAPO) and others against the apartheid government of South Africa at Okahenge.<sup>763</sup> The armed conflicts spread out in wide areas along the border of South West Africa and in Zambia, Tanzania and Angola, where a number of exiled SWAPO leaderships were. The long conflict had come to an end with the signing of an agreement, the so-called New York Accord, in December 1988. The tripartite agreement (i.e. between Cuba, Angola and South Africa) was signed to implement the UN Security Council Resolution 435 (1978) as a path for Namibia independence.<sup>764</sup>

### During the election

*Secondly*, an election is a democratic mechanism used as a means of achieving governance. In the aftermath of violent conflicts, elections represent an important step towards democratic consolidation.<sup>765</sup> In the case of Namibia, the proposal of an election was the result of negotiations and collaborations between SWAPO, South

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<sup>761</sup> Christopher Saunders, 'Transition in Namibia 1989-1990: and the South African case' (1992) 17 *Transformation* 12,14 <http://digital.lib.msu.edu/projects/africanjournals> accessed 2 August 2016

<sup>762</sup> Muna Ndulo and Sara Lulo, 'Free and fair elections, violence and conflict' (2010) 51 *Harvard International Law Journal Online* 155,156

<sup>763</sup> Peter Manning, (n 753) 63

<sup>764</sup> G.R. Berridge, 'Diplomacy and the Angola/Namibia Accords (1989) 65(3) *International Affairs* 463

<sup>765</sup> Muna Ndulo and Sara Lulo, (n 762) 157-158

Africa, the Western Contact Group, the Frontline States (Angola, Botswana, Mozambique, Tanzania, Zambia, and Zimbabwe), and UN officials. The Western Contact Group established the principles for a free and fair election (i.e. Resolution 435) which were accepted by the UN.<sup>766</sup> The purpose of the election was to select representatives who would make up a Constituent Assembly and create a Constitution for an independent Namibia.<sup>767</sup> This election was a predetermined pathway to assess the will of the people. Holding an election was a way to create a smooth transitional process to independence, and this lack of violent conflict would make the subsequent nation-creation more legitimate. In 1989, the UN Security Council agreed to implement Res 435 of 1978 (which had replaced Res 385) which involved holding an election. This document was a product of a negotiation process between all involved parties, with the support of the South African Government, all Namibian political parties and SWAPO, to bring peace and transfer power to the people of Namibia. The UN Security Council Res 435 was fully implemented, and importantly, emphasized two elements of the electoral process. One, that the election was a selective democratic process to create a representative body (the Constituent Assembly) which would then create a Constitution for Namibia. Two, that the election would facilitate a smooth transitional process to independence.

The election was held from the 7<sup>th</sup> to 11<sup>th</sup> November 1989. The main aim of the election was to guarantee the distribution of power between the political parties. The proposal for a settlement of the Namibian situation stated that:

“The purpose of the electoral process is to elect representatives to a

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<sup>766</sup> UNSC Principles concerning the Constituent Assembly and the Constitution for an independent Namibia (12 July 1982) S/15287 [http://repository.un.org/bitstream/handle/11176/66171/S\\_15287-EN.pdf?sequence=2&isAllowed=y](http://repository.un.org/bitstream/handle/11176/66171/S_15287-EN.pdf?sequence=2&isAllowed=y) accessed 1 Oct 2016

<sup>767</sup> Dennis U Zaire, ‘Namibia and the United Nations until 1990’ 37,47 [www.kas.de/upload/publikationen/2014/namibias\\_foreign\\_relations\\_zaire.pdf](http://www.kas.de/upload/publikationen/2014/namibias_foreign_relations_zaire.pdf) accessed 1 Oct 2016

Namibian Constituent Assembly, which will draw up and adopt the constitution for an independent and sovereign Namibia”.<sup>768</sup>

Under the proposal for a settlement of the Namibian situation, it was set out that the UN’s Special Representative (SR) held responsibility for controlling and supervising an instrumental framework and practical action.<sup>769</sup> The UN’s SR was responsible for guaranteeing fairness and appropriateness during the electoral process, limiting the power of South Africa to intervene in the election.<sup>770</sup>

In addition, the UN’s instrumental framework referred to annulling all restrictive and discriminatory regulations that were unfair to Namibian populations living in South African territory. The practical action was to release all political prisoners and detainees, allowing them to return home to Namibia.<sup>771</sup> A free and fair election in Namibia was possible, then provided that there was no intervention from South Africa. This is an example of how international intervention and standard-setting can help to alleviate tension and crucially prepare the ground for a free and fair election to take place, making its outcome more legitimate.

One noteworthy observation is that although the election was an attempt to democratically identify the will of the people, in practice, there was no clear way to balance power between the South African’s Administrator General (AG) and the UN’s SR in the electoral process.<sup>772</sup> The former was able to maintain its power of law and order until Namibian independence. The UN had no enforcement power to stop

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<sup>768</sup> UNSC S/12636 (n 754) para2

<sup>769</sup> Ibid para7

<sup>770</sup> Ibid para5

<sup>771</sup> Ibid para7 (B)

<sup>772</sup> Christopher Saunders, (n 761) 16

breaches in the law and partisan actions by SWAPO. The UN's SR ignored everything except anti-SWAPO activities, because SWAPO represented the majority of the people and was recognized by the international community.<sup>773</sup> Any action taken against it would *severely* undermine the outcome of the election. Those people, who disagreed with SWAPO, were excluded from participating.<sup>774</sup> Other political parties' activities were ignored as they had no effective implementation of law and order.

Another observation is that an election was a democratic way to officially empower SWAPO, raising them from a people's liberation movement to a political organization.<sup>775</sup> In terms of international law, the election helped to legalize the status of SWAPO from a pre-independence liberation movement to a political party (a key actor under democratic principle) able to represent South West African's demands.<sup>776</sup>

### Post-election

*Thirdly*, the legitimacy of an election is proved through the action of the Constituent Assembly, specifically its adherence to the will of the people while creating the Constitution. After the election in Namibia, the constitution-making process became part of the international peace-making operation; the elected Constituent Assembly convened on 21<sup>st</sup> November 1989.<sup>777</sup> The constitution-making process is important democratically: the free election of representatives and the protection of fundamental rights are issues which are discussed. The establishment of a national identity and the people's aspirations are incorporated into the substance of the constitution.<sup>778</sup> In general, the Namibian constitution-making process was a product of compromise

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<sup>773</sup> A publication of the United Nations Department of Political Affairs (n 725) 8

<sup>774</sup> Henning Melber, *Understanding Namibia: The Trials of Independence* (Hurst and Company 2014) 12

<sup>775</sup> A publication of the United Nations Department of Political Affairs (n 725) 8

<sup>776</sup> UNSC Res 435 (n 700) para3-4; National Democratic Institute for International Affairs (n 750) 18-19

<sup>777</sup> Marinus Wiechers (n 699) 88

<sup>778</sup> *Ibid* 95-96

between different interest groups (i.e. South Africa, the Western Contact Group, SWAPO and other ethnic parties). These interest groups tried to influence the ultimate outcome of the nature of the Namibian state to suit their own interests.<sup>779</sup> Without the efforts of the UN to ensure that the Constituent Assembly fairly represented the people of Namibia, this constitution-making process would have been dominated by South Africa.

The Constituent Assembly was a political institution derived from the Namibian people's mandate. Under the scope of Resolution 435, after the Namibian local populations took part in the election, the Constituent Assembly then convened and adopted a Constitution for an independent Namibia.<sup>780</sup> This step illustrates an instance where the will of the people is carried out by a representative body. The Constituent Assembly was composed of all the political parties that gained seats in the election. The result of the election confirmed that the majority of the Namibian population supported SWAPO. SWAPO gained a majority of 41 seats out of 72 seats in the Constituent Assembly.<sup>781</sup> Other parties received different levels of support: the Democratic Turnhalle Alliance (DTA) 21 seats, the United Democratic Front (UDF) 4 seats, Action Christian National (ACN) 3 seats, the Federal Convention of Namibia (FCN) 1 seat, the Namibia National Front (NNF) 1 seat, and the Namibia Patriotic Front (NPF) 1 seat.<sup>782</sup> On this point, the Constituent Assembly was consisted of different ethnic people representation. This can ensure that the different groups' interests are promoted within the constitution-making process. In addition, the

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<sup>779</sup> Hage G Geingob, 'Drafting of Namibia's Constitution' in Hage Geingob, *State formation in Namibia: Promoting democracy and good governance* 83 [www.kas.de/upload/auslandshomepages/namibia/constitution\\_2010/geingob.pdf](http://www.kas.de/upload/auslandshomepages/namibia/constitution_2010/geingob.pdf) accessed 1 October 2016

<sup>780</sup> UNSC S/12636 (n 754) para11

<sup>781</sup> National Democratic Institute for international affairs, 'The United Nations in Namibia Preliminary report' (November 1989) 1 [https://www.ndi.org/sites/default/files/156\\_na\\_election\\_111589.pdf](https://www.ndi.org/sites/default/files/156_na_election_111589.pdf) accessed 20 November 2016

<sup>782</sup> Henning Melber (n 764) 16; Ray Bush, 'The Namibian Election Process: Just about 'Free and Fair'' (1989) 45-46 *Review of African Political Economy* 151, 157

electoral process was utilized to formally and democratically legalize the status of SWAPO, consolidating their dominant position as representatives of the majority of the people. The electoral process legalized the status of SWAPO as a political party with formal political powers. Then, the 72 members of the Constituent Assembly unanimously selected their leader, Sam Nujoma, as the first president of an independent Namibia.<sup>783</sup>

In general, the degree to which the demands of the people are respected is dependent on two factors; the amount of time the Constituent Assembly is in power and the people's involvement in the constitution-making process. The Constituent Assembly usually only exists for a short period and this factor directly impacts the extent of participation during the constitution-making process.<sup>784</sup> The local populations were not consulted during the process either before or after the Constituent Assembly approved the constitution of an independent Namibia.<sup>785</sup> In Namibia's case, the UN's framework provided a continuous, step-by-step process which upheld the local population's right to participate in decisions over their future status. The UN also created a template for the Namibian Constitution, guaranteeing the freedom of the Namibian people to participate in political decision-making in the future. UNTAG was appointed as a subsidiary body to 'supervise and organize' the country's electoral process to guarantee the 'fairness and appropriateness of all measures affecting the outcome of that election.'<sup>786</sup> In addition, governmental authority is generally perceived as more legitimate when the representatives are concerned about the participation of people in legislative action e.g. constitution-making processes. However, the

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<sup>783</sup> 'Namibia: Parliamentary Chamber: Constituent and National Assembly election held in 1989' [http://www.ipu.org/parline-e/reports/arc/2225\\_89.htm](http://www.ipu.org/parline-e/reports/arc/2225_89.htm) [Accessed 30 August 2016]; Marinus Wiechers (n 689) 90

<sup>784</sup> Jamal Benomar (n 690) 10

<sup>785</sup> Marinus Wiechers (n 699) 97-99; Jamal Benomar (n 690) 8

<sup>786</sup> UNSC Res 435 (n 700) para3; National Democratic Institute for International Affairs (n 750) 17; Henning Melber (n 774) 13-15



Constituent Assembly committed itself to finishing its work within only 80 days. This was in order to ensure that the Constitution was in place before UNTAG withdrew from the Namibian territory.<sup>787</sup> The 72 members of the Constituent Assembly passed the constitution on 9<sup>th</sup> February 1990. Then, the leader of the SWAPO became the first president of Namibia.<sup>788</sup>

The election for a constituent assembly in Namibia is an example of external involvement setting up an electoral system and the application of external self-determination being a continuous process. The case in Namibia also provides a clear demonstration of how external involvement can facilitate the people's mandate being expressed through elected officials. However, only the elected officials had input into the new constitution; the people had no chance to read or provide feedback on a draft constitution before it came into effect. Significantly, this lessened the degree of legitimacy of the constitution-making process-and of course the constitution itself.

### 3.1.2 Non-consensual action in Bangladesh

The election in East Pakistan (Bangladesh) is an example of non-consensual action where the Awami League acted as a representative government on behalf of the Eastern Pakistan people. The justification for holding this election was to identify the will of the people, despite the federal government in West Pakistan being opposed to such a democratic procedure. The example of Pakistan serves two purposes for this thesis. Firstly the creation of a Constitution is the first step towards guaranteeing the people's will in any decision-making process. In Pakistan although there was a struggle to create the Constitution due to different demands from East and West,

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<sup>787</sup> Dennis U Zaire (n 767) 37, 47-48; Lise Morje Howard, 'UN Peace Implementation in Namibia: The Causes of Success' (2002) 9(1) International Peacekeeping 99, 124-125

<sup>788</sup> Dennis U Zaire (n 767) 37,49

eventually it served to increase the level of autonomy of the people of East Pakistan, allowing them, despite being a minority, to participate in decision-making at a national level. Secondly, the example demonstrates that an election alone is not sufficient to ensure that the people's will is respected. In Pakistan, after the election, the East Pakistan people's representatives failed to perform their duty and put public opinion into action. Therefore external self-determination should include more than one process to ensure that the people's rights are included during territorial alteration.

### East and West Pakistan: constitutional disagreements

After partition from India in 1947, there were clear distinctions in territory, language, religion and culture between East and West Pakistan. According to the legal study of the Secretariat of the International Commission of Jurists, East and West Pakistan were each large enough in population and territory to constitute separate nation states.<sup>789</sup> In East Pakistan, 98% of the population spoke Bengali and only 2% spoke Urdu which was the principle language of West Pakistan.<sup>790</sup> This linguistic factor demonstrates the homogeneity of society in East Pakistan, potentially making political negotiation easier, and a more politically equal atmosphere in society.

The first election for the Constituent Assembly of Pakistan was held in 1949. This election attempted to balance power between East and West Pakistan.<sup>791</sup> In terms of the constitution-making process, the first Constituent Assembly failed to complete the task of framing a constitution. The second Constituent Assembly replaced the first in 1955 and the 'late constitution' of Pakistan was adopted in 1956.<sup>792</sup> The second Constituent Assembly was composed of 80 members, half each of East and West

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<sup>789</sup> The Secretariat of the International Commission of Jurists (n 701) 71

<sup>790</sup> Ibid 71

<sup>791</sup> Sir W. Ivor Jennings, (n 719) 111

<sup>792</sup> G.W. Choudhury, *Constitutional Development in Pakistan* (2<sup>nd</sup> edn. Longman 1969) 2

Pakistan residents. This constitution lasted for only two and a half years. Between 1957 and 1960, the country was placed under the military's authoritarian rule. Political parties and popular political activity were prohibited. Instead, the military leader, Ayub Khan, made an attempt to implement 'basic democracy' policy. In his opinion, the Pakistan people were not 'mature' enough (or had sufficient understanding of democracy) to have a right to rule.<sup>793</sup> Thus, basic democracy was the first step towards creating a decentralized system. According to the Basic Democracies Ordinance 1959, local people (those over 18) were trained to learn the democratic system by giving them opportunities to select representatives. Consequently, 80,000 Union Councillors (40,000 in each province) were elected and this Union Council could vote on law-making process and who should become president.<sup>794</sup> In 1960, the elected councils were asked to vote 'yes' or 'no' to the referendum question; "have you confidence in President Ayub Khan?". 95.6% voted to support him.<sup>795</sup> After this, the President decided to create a national constitution.

As part of the 1962 constitution-making process, the Constitution Commission was established to study and gather information for a new constitution. The Commission submitted its report in May 1961. The Commission's proposition to draft a new constitution was not considered satisfactory by the military leader (i.e. General Ayub Khan).<sup>796</sup> Then, the Cabinet appointed a sub-committee to examine the report to submit its own. In addition, the Administrative Committee, which consisted of the Cabinet Secretary, the Additional Chief Secretaries to the Governments of East and West Pakistan and another Central Secretary also examined the Constitution

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<sup>793</sup> Subrata Roy Chowdhury, *The Genesis of Bangladesh* (Asia Publishing House 1972) 33-34;

<sup>794</sup> Razia Mussarat and Muhammad Salman Azhar, 'Decentralization Reforms in Pakistan During Ayub and Zia Era' (2012) 2(1) *Journal of Public Administration and Governance* 123, 128; G.W. Choudhury, (n 792) 2

<sup>795</sup> Razia Mussarat and Muhammad Salman Azhar, (n 794) 129

<sup>796</sup> Yasmeen Yousif Pardesi, 'An analysis of the constitutional crisis in Pakistan (1958-1969)' (2012) 7(4) *The Dialogue* 375,379

Commission's report. The constitutional proposals were finally discussed at the Governor's Conference from 24<sup>th</sup>-31<sup>st</sup> October 1961. The Governor's Conference appointed a drafting committee to write the national constitution.<sup>797</sup>

On 1<sup>st</sup> March 1962, the second constitution of Pakistan came into effect. The 1962 constitution was a legal instrument giving centralized authority to the president and preserving the territorial integrity of Pakistan. The constitution was not based on the theory of separation of powers because the President had a veto power in the law-making process.<sup>798</sup> The parliament structure was sub-divided into National and Provincial Assemblies. The establishment of two Assemblies was an attempt to balance the power of the representative governments. The aim of the first chamber was to promote the people's interests whereas the aim of the second was to deal with province and federal state issues.<sup>799</sup>

As a result of the policy of centralization put in place by the military, East Pakistan's population suffered severe and systematic discrimination from the government in Islamabad. They were dissatisfied with the economic inequality between the two. In the Provincial Assembly of East Pakistan, there was a demand for a greater level of autonomy. In 1966, the Awami League proposed full provincial autonomy with the declaration of a six-point program. (At the same time, there was a popular uprising from which various student organizations developed a more detailed eleven-point program. This latter proposal in 1968<sup>800</sup> aimed to ensure complete freedom for the East Pakistan people to determine their own destiny. The six points were:

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<sup>797</sup> G.W. Choudhury, (n 792) 178

<sup>798</sup> The Secretariat of the International Commission of Jurists, (n 701) 20; Yasmeen Yousif Pardesi, (n 796) 385

<sup>799</sup> Sir W. Ivor Jennings, (n 719) 113

<sup>800</sup> The eleven-points program were: 1) release all political prisoners and students and dropping all political cases including the 'Agaratala conspiracy case' against Shaikh Mujib ur-Rehman. 2) Autonomy for East Bengal along the lines of the six points. 3)

- “1. Pakistan would have a federal structure of government based on spirit of the Lahore Resolution of 1940, with a parliament elected on the basis of universal adult franchise;
2. The central government would have authority only in defense and foreign affairs and all other subjects would be handled by the federating units of the state of Pakistan;
3. There would be two freely convertible currencies for the two wings of Pakistan or two separate reserve banks for the two regions of the country;
4. The power of taxation and revenue collection would be vested in the federating units;
5. There would be two separate accounts for foreign exchange reserves for the two wings of Pakistan;
6. East Pakistan would have a separate militia or paramilitary force as a measure of its security”<sup>801</sup>.

One relevant observation of the six-point program is that the ALP established a path to self-governing purpose. The proposals from the ALP on behalf of the East Bengal population were persistently denied and ignored by West Pakistan. The people’s liberation movement was obstructed by a central government which needed to retain its power in the constitution-making process.

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Restoration of democracy and universal adult franchisee. 4) Nationalization of banks, insurance and big industrial units. 5) Reduction of taxes upon agriculture. 6) Payment of proper wages to laborers. 7) Introduction of a flood control plan in East Pakistan. 8) Formation of independent foreign policy including withdrawal from CENTO, SEATO etc. 9) Lifting of the state of emergency. 10) Establishment of a antedating in West Pakistan, giving full autonomy to Baluchistan, Sindh, NWFP. 11) Withdrawal of the National Education Commission Report, the Hamid ur Rehman Commission Report and the University ordinances. See Riaz Ahmed Shaikh, ‘Military Dictatorship and People’s Movement in Pakistan’ (2009) 13(1) *Jadavpur Journal of International Relations* 24,30

<sup>801</sup> Md. Abdul Wadud Bhuiyan, (n 698) 126-127; Bangladesh Awami League, ‘Six-point demands: Roadmap for Bangladesh’s emancipation’ <http://www.albd.org/index.php/en/updates/news/1219-six-point-demands-roadmap-for-bangladesh-s-emancipation> [Accessed 30 September 2016]

In 1969, President Yahya Khan succeeded his father as President of Pakistan. He abrogated the 1962 constitution and issued the 1970 Legal Framework Order (LFO) as an outline for the National Assembly election and its task of framing a future constitution.<sup>802</sup> The preamble included the phrases,

“WHEREAS provision has already been made by the Electoral Rolls Order, 1969, for the preparation of electoral rolls for the purpose of election of representatives of the people on the basis of adult franchise”.

and

“WHEREAS it is necessary to provide for the constitution of a National Assembly of Pakistan for the purpose of making provision as to the Constitution of Pakistan in accordance with this Order and a Provincial Assembly for each Province”.<sup>803</sup>

Significantly, these phrases constitute a legal condition that any National Constitution must be created, based on the outcome of a national election.

In addition, the LFO clearly suggested a federal system of government<sup>804</sup> to be preferable and that the structure of the National assembly should be reformed. After the LFO took effect, the National Assembly consisted of 313 members; three hundred seats were elected from constituencies and thirteen seats were reserved for women.<sup>805</sup>

It had 120 days from the date of its first meeting to frame a constitution and on its

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<sup>802</sup> Md. Abdul Wadud Bhuiyan, (n 698) 134

<sup>803</sup> The Legal Framework Order 1970 <http://pakistanspace.tripod.com/archives/70lfo.htm> [Accessed 1 October 2016]

<sup>804</sup> Ibid art 20 (1) <http://pakistanspace.tripod.com/archives/70lfo.htm> [Accessed 1 October 2016]

<sup>805</sup> Ibid art 4

failure to do so would stand dissolved.<sup>806</sup> The power to amend any provision in the LFO was reserved by the President.<sup>807</sup>

Above all, the constitutional crisis in Pakistan stemmed from military intervention. All decision-making powers were held by the military leader. The East Pakistan people requested a federal system, suggesting it to be more appropriate than the 'one unit' structure. The federal system was a way to give equal power to local populations in both East and West. In the context of the National Assembly, local populations had no chance to check or challenge any governmental policies because the second National Assembly was nominated not by the people, but by the military leader during the state of emergency. The weakness of the parliamentary system (i.e. the Provincial and National Assemblies) was a major cause of limiting opportunities for effective public participation.

#### Pakistan's national election in 1970

A general election was held in 1970 throughout West and East Pakistan using the one-man, one-vote principle for the first time, which assured East Pakistan a majority of votes and seats at the National Assembly.<sup>808</sup> The distribution of seats in the National Assembly was based on the proportional numbers of the population. As a consequence, the outcome was a clear distinction between the number of East and West Pakistan representatives. In East Pakistan, where, according to the 1961 census, 54% of the population was Bengali<sup>809</sup>, the Awami League Party (ALP) was the main representative; meanwhile the Pakistan People's Party (PPP) became the people's representatives of West Pakistan. Representatives for seats in both the National and

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<sup>806</sup> Ibid art 24

<sup>807</sup> Md. Abdul Wadud Bhuiyan, (n 698) 135

<sup>808</sup> The Secretariat of the International Commission of Jurists, (n 701) 11

<sup>809</sup> Subrata Roy Chowdhury, (n 793) 2

Federal Assemblies were elected in 1970, and the result showed a clear distinction of political will between East and West. The ALP had no seats in West Pakistan while the PPP had no seats in East Pakistan.<sup>810</sup> For the East Pakistan Federal Assembly, which had less power than its West Pakistan counterpart, there were 870 candidates contesting 162 seats. The ALP won 97% (i.e. 160 out of 162). At the National Assembly therefore, ALP elected officials secured 160 out of 300 seats – a majority.<sup>811</sup>

The newly-elected National Assembly officially created a Constituent Assembly on 17<sup>th</sup> April 1971.<sup>812</sup> Because the East Pakistan people gained a majority through the national election, they were able to pressure the central government in Islamabad to construct an administrative system of power between East and West Pakistan. However, there was a military intervention in East Pakistan to obstruct the constitution-making process. Widespread human rights violations occurred; over a million Bengalis were killed and nearly 10 million exiled to India.<sup>813</sup> Despite the fact that the Constitution was unfinished, the process of external self-determination was facilitated by its presence. The process of creating the Constitution provided the groundwork for increasing the autonomy of East Pakistan. When the UN intervened to stop the human rights violations against the East Pakistan people, the journey towards independence was based on the Constitution which had started in April 1971. In January 1972, the President of West Pakistan officially declared the unconditional release of East Pakistan.<sup>814</sup>

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<sup>810</sup> '1970 polls: When election results created a storm' published 8 Jan 2012 <http://www.dawn.com/news/686541/1970-polls-when-election-results-created-a-storm> [Accessed 20 August 2016]

<sup>811</sup> '1970 polls: When election results created a storm' published 8 Jan 2012 <http://www.dawn.com/news/686541/1970-polls-when-election-results-created-a-storm> [Accessed 20 August 2016]

<sup>812</sup> Subrata Roy Chowdhury (n 793) 74-75

<sup>813</sup> David Raic, (n 48) 338

<sup>814</sup> Subrata Roy Chowdhury (n 793) 181



The 1970 election demonstrated that the collective will of the people in East Pakistan was to increase political and economic equality and future independence. West Pakistan's PPP representatives emphasized the centralization system, because this would ensure that West Pakistan would retain power over policies, budgets and political activity.<sup>815</sup> Although the ALP advocated for the Federal System instead, it never proposed the East Pakistan people's desire to become independent. After gaining a majority, the ALP's purpose was to build political independence for East Pakistan, according to the people's will: developing its autonomy under the federal system.<sup>816</sup> However, the ALP did not mention full independence as a separate nation-state in its six-point program.

The role of the Awami League: from constitution-making to the proclamation of independence order 1971 in East Pakistan

In 1970, a national election was held to give a higher degree of autonomy to East and West Pakistan. As a result, the ALP gained an absolute majority in the East Pakistan. The Awami League leader made great efforts to promote the local population's demands for self-governance. Even though the Awami League gained the majority of support from the local population, this dominant position poses a question. To what extent was the general will of the people respected during the negotiation process between the representative bodies of East and West Pakistan?

Regarding the role of the ALP in post-election 1970, there are two factors to consider: the mandated representatives in the National Assembly and the legitimacy of the Proclamation of Independence Order in 1971.

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<sup>815</sup> Ibid 41-42

<sup>816</sup> Ibid 42-43

The task of the National Assembly in East Pakistan was to act as a mandated representative to adopting a constitution and performing the role of an ordinary legislature.<sup>817</sup> From the beginning of March to April 1971, East and West Pakistan representatives could not agree on a draft constitution. The negotiation process was conducted between the President of Pakistan and the ALP leaders. The President proposed using the 1962 constitution as a legal framework for administrative and executive duties until the National Assembly finished a new draft constitution, as he needed to retain his veto power. In contrast, the ALP's position was that a higher degree of autonomy in East Pakistan was required. This was in conformity with the local population's demands in the national election in 1970.

During the constitution-making process, there was a disagreement between the ALP and the central government in Islamabad. The National Assembly did not successfully write a new constitution and the President of Pakistan made an announcement to postpone the National Assembly session. After the President's official declaration of postponement, there was a public reaction; uprisings took place in Dacca and the main cities in East Pakistan. The East Pakistan people demanded an outright declaration of independence for their region of Pakistan.<sup>818</sup> In their opinion, the Awami League was the undisputed people's representatives in East Pakistan. Thus, they expected that their representatives would act in accordance with their demands. They proposed that to draft a constitution, the 'six-point program' should be included in the Confederation of Pakistan. But in reality, the Constitutional Bill passed by the

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<sup>817</sup> Jon Elster, 'The optimal design of a constituent assembly' in Jon Elster, (n 671) 198

<sup>818</sup> Md. Abdul Wadud Bhuiyan, (n 698) 163

National Assembly clearly conflicted with the LFO and the six-point program, ignoring the people's wishes.<sup>819</sup>

The ALP declared independence in East Pakistan as 'Bangladesh' on 10<sup>th</sup> April 1971.<sup>820</sup> The Proclamation of Independence Order had a mandate from the elected members (i.e. East Pakistani's representatives) in the National Assembly and the East Pakistan Provincial Assembly.<sup>821</sup> It was adopted to safeguard the Bengali people's right to become the makers of their own destiny. According to Chowdhury, the Proclamation of Independence of Bangladesh by the ALP in 1971 was recognized by the international community as the East Bengali people exercising their right to self-determination.<sup>822</sup> In addition, the Proclamation of Independence was evidence of the role of the ALP as a government by the people to frame a new constitution that reaffirmed their rights. The Proclamation of Independence included the phrases,

“Whereas free elections were held in Bangladesh from 7<sup>th</sup> December 1970 to 17<sup>th</sup> January 1971, to elect representatives for the purpose of framing a constitution”<sup>823</sup>.

and

“We the elected representatives of the people of Bangladesh, as honour bound by the mandate given to us by the people of Bangladesh whose will is supremely constituted ourselves into a Constituent Assembly”<sup>824</sup>.

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<sup>819</sup> Md. Abdul Wadud Bhuiyan, (n 698) 182

<sup>820</sup> Julia Brower, Ryan Liss, Tina Thomas and Jacob Victor, 'Historical Examples of Unauthorized Humanitarian Intervention' Posted 26 August 2013 Available at: [https://www.law.yale.edu/system/files/documents/pdf/cglc/GLC\\_historicalExamples.pdf](https://www.law.yale.edu/system/files/documents/pdf/cglc/GLC_historicalExamples.pdf) [accessed 1 March 2016]

<sup>821</sup> Md. Abdul Wadud Bhuiyan, (n 698) 193

<sup>822</sup> CA. Hopkins, 'Book review on the genesis of Bangladesh' (1973) 32 (1) *Cambridge Law Journal* 156-157

<sup>823</sup> The Proclamation of Independence 1971, (10 April 1971) para 1

[http://www.docstrangelove.com/uploads/1971/sbbk/documents/Proclamation%201971\\_M\\_Dalil\\_Vol\\_03\\_MMR.pdf](http://www.docstrangelove.com/uploads/1971/sbbk/documents/Proclamation%201971_M_Dalil_Vol_03_MMR.pdf)

Accessed 10 July 2016

<sup>824</sup> *Ibid* para 10

Significantly, these phrases constitute the representative's mandate as legitimate state officials who could act on behalf of their people to declare independence.

The importance of the Proclamation of Independence 1971 was that it validated of the unilateral action for independence. The substance of the proclamation was reliant on the right of people to self-determination.<sup>825</sup> The Eastern Pakistan people were recognized as supreme powers. Thus the representatives mandated their authority with the approval of the people. According to the Proclamation of Independence Order 1971,

“.....in order to ensure for the people of Bangladesh equality, human dignity and social justice, we declare and constitute Bangladesh to be sovereign people's Republic and thereby confirm the declaration of independence already made by Bangabandu Sheikh Mujibar Rahman”.<sup>826</sup>

From the previous statement in the Proclamation Order 1971, the East Pakistan people's right to self-determination was identified through the continuous action of the ALP as their representatives. The elected representatives officially created a Constituent Assembly on 17<sup>th</sup> April 1971. This shows the effectiveness of the governmental authority evidenced by popular support in pressuring the central government in Islamabad to release the East Bengali population as a self-governing territory. In terms of the people's mandate, it was apparent that the unity of people in East Pakistan was a crucial factor in distinguishing themselves from the West Pakistan populations.

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<sup>825</sup> Subrata Roy Chowdhury (n 793) 149

<sup>826</sup> Ibid para2

The case of Bangladesh provides a clear example of a local population's will to implement external self-determination. The success of Bangladeshi independence was derived from the unity of the local population in requesting self-governance.<sup>827</sup> However the example shows that framing a new Constitution to guarantee the rights of the people is an important factor to ensure that the genuine will of the people is respected during territorial alteration. In addition, the people's representatives are another consideration; their actions can determine whether the will of the people is respected. In this example, the will of the Eastern Pakistan population was clearly established through a national election in 1970. However, the ALP deviated from putting public opinion into action, demonstrating that elections are not the ultimate way of assessing the will of the people.

### 3.1.3 Non-consensual action in Catalonia

In 1978, there was a constitutional compromise between the people's representatives in the Spanish Congress. After the constitution entered into force, the development of territorial organization began with the establishment of the autonomous entities, including Catalonia.<sup>828</sup> For local representatives, the purpose of establishing an autonomous territory was to decentralize power from the Spanish government and, later, put themselves in a position to reorganize the territorial structure. In addition, the re-distribution of power to an autonomous region was a way for the latter to establish institutions which shared authority between themselves and the central government. The Spanish constitution acknowledged 'the right to initiate the process

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<sup>827</sup> UNGA Res2625 (n 38) principle 5 para7

<sup>828</sup> Sabrina Ragone, 'Catalonia's recent strive for independence: A legal approach [www.bgazrt.hu/dbfiles/htmltext\\_files/1/0000000181/Sabrina%20Ragone.pdf](http://www.bgazrt.hu/dbfiles/htmltext_files/1/0000000181/Sabrina%20Ragone.pdf) [Accessed 1 September 2016] 71

towards self-government' of an autonomous territory.<sup>829</sup> The Assembly of the autonomous communities could request that the central government pass a bill or submit a non-governmental bill to the Congressional Steering Committee or to a delegation of three Assembly members.<sup>830</sup> Catalonia's powers and responsibilities as an autonomous territory were written under two specific statutes, the Statute of Autonomy 1979 and the Statute of Autonomy 2006.<sup>831</sup> The amendment in 2006 approved an electoral process to identify the will of the Catalan people. 'The right to decide' of the Catalan population was perceived as an initial way to involve the local people in any decision-making process as part of the Spanish nation.<sup>832</sup> Then, if the will of the people was clearly in support of secession from Spain, the local authorities could bring the people's demands to the Spanish Congress for a constitutional amendment. By contrast, from Spain's standpoint, a greater level of autonomy was a way of empowering minority groups of people. The development of an autonomous system of government would, according to the Spanish State Report to the UN, help to resolve problems in their pluralistic society. Self-government is compatible with national unity and is an appropriate way of accommodating the diversity of people in its territory.<sup>833</sup> All Spaniards would be living together within the framework of the Spanish constitution while respecting individual characteristics.<sup>834</sup>

The case of Catalonia demonstrates two things: how a regional parliament can increase the power of a local population's voice in the national parliament by reaching

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<sup>829</sup> The Spanish Constitution 1978 (31 October 1978) article 143(2)  
[http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist\\_Normas/Norm/const\\_espa\\_texto\\_ingles\\_0.pdf](http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf)  
accessed 1 October 2016

<sup>830</sup> Ibid, article 166

<sup>831</sup> Ibid, article 147

<sup>832</sup> Statute of Autonomy of Catalonia 2006, art1 and art25 <http://www.parlament.cat/document/cataleg/150259.pdf>  
accessed 15 October 2016

<sup>833</sup> Carlos Flores Juberias, 'The autonomy of Catalonia: The unending search for a place within pluralist Spain' in Yash Ghai and Sophia Woodman (eds), *Practising Self-Government: A comparative study of autonomous regions* (Cambridge 2013) 229

<sup>834</sup> Human Rights Committee, 'Fourth periodic reports of State parties due in 1994-Spain' CCPR/C/95/Add.1 (5 August 1994) para3-7

a consensus amongst themselves first; and how, by gaining support from the majority of representatives in this regional parliament, the people can be allowed to determine their own territorial status.

Generally, the regional parliament works in collaboration with civil society to represent the local population's interests. Importantly, however, the people need to be able to participate directly in the process of amending a national constitution. It is the responsibility of the people's representatives to promote these interests at a national level- in this case at the Spanish Congress. There are three significant events which illustrate how the Catalan representatives continuously strove to keep their promise of instigating a secessionist movement.

#### 2005: a proposal of the Statute of Autonomy for a greater level of self-government

Firstly, in 2005, the Catalan parliament submitted a proposal to the Spanish Congress to reform the Statute of Autonomy. This action was an initial step towards requesting a greater level of autonomy and expanding the authority of the regional government of Catalonia. Before passing the new Statute in 2006, there was a high level of support from Catalan representatives and the local population. 89% of the members of the Catalan Parliament (i.e. 120 out of 135 seats) approved the proposal.<sup>835</sup> The Catalan citizens were also asked whether they approved the proposal, through a referendum. 73.9% said yes to the proposal, and therefore greater self-autonomy, although there was a low turnout of 49%.<sup>836</sup> Finally, the Spanish Congress adopted the Statute of Autonomy of Catalonia on 19<sup>th</sup> July 2006.

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<sup>835</sup> Government of Catalonia, 'The Process for holding the consultation regarding the political future of Catalonia: an evaluation' (2 April 2015) 10

<sup>836</sup> Enric Martínez-Herrera and Thomas Jeffrey Miley, 'The constitution and the politics of national identity in Spain' (2010) 16(1) Nations and Nationalism 6, 25

The new Statute stated that the main function of the parliament was to represent the people of Catalonia, and it specifically increased the local authority's responsibilities.<sup>837</sup> It protected the people's right to submit legal proposals to the regional parliament, to express their demands directly and to organize public involvement in decision-making processes.<sup>838</sup> This greater level of popular participation empowered civil society to work in collaboration with representative bodies (i.e. parliament). The self-governance that the Statute mandated (and the implicit right to self-determination) legitimized the people's demands to secede from Spain. In terms of autonomy, Catalonia exercises its self-government as an autonomous community in accordance with the Spanish Constitution. In 2006, there was a request for higher quotas of self-government within Spain.<sup>839</sup> One of the main purposes was to convert Spain into a federal or a pluralistic state.<sup>840</sup>

Between 2007 and 2010, there was a massive popular movement in support of 'the right of people to decide and independence'.<sup>841</sup> After the victory of the Catalan nationalist party (Convergència i Unió) in an election in 2010, the party leader attempted to negotiate with the Spanish Congress in order to instigate some form of referendum or public conversation. The new Statute of 2006 stressed the right to initiate public discussion: Article 122 stipulated that:

“The Generalitat (government) of Catalonia has exclusive power over the establishment of the legal system, the modalities, the procedure, the implementation and the calling, whether by the government or by local bodies,

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<sup>837</sup> Statute of Autonomy of Catalonia 2006 (n 832), article 55

<sup>838</sup> Statute of Autonomy of Catalonia 2006 (n 832), article 29 (3), (4), (6)

<sup>839</sup> Marc Guinjoan and Toni Rodon, 'Catalonia at the Crossroads: Analysis of the increasing support for secession' in Xavier Cuadras-Morato (ed), (n 573) 29

<sup>840</sup> *Ibid* 30

<sup>841</sup> Government of Catalonia, (n 835) 8



acting with their jurisdiction, of public opinion, polls, public hearings, participation forums and any other instruments of popular consultation”.<sup>842</sup>

After the campaign and the election in 2010, the Catalan parliament enacted Act 4/2010, which specified the region’s position on popular consultations, via a referendum. The referendum was merely a consultative mechanism and had no legal binding effect. The Catalan government had a duty to report the outcome of any such referendum to Spanish parliament.<sup>843</sup>

#### 2012-2014: an electoral process and a representative body with a mandate

Secondly, an election of the Catalan Parliament was held on 25<sup>th</sup> November 2012 in order to identify the degree to which the people wanted independence, through selection of pro- or anti-independence representatives. The outcome of the election revealed that the local people supported the Catalan Nationalist Party’s (CIU) policy on creating an agenda for self-determination. The CIU won the election with 71 seats out of 135 seats.<sup>844</sup> The *clear* majority, however, went to all the parties which had promised to hold a consultation on the political future of Catalonia, including the Catalan Republican Left (ERC).<sup>845</sup> The leader of the CIU (Artur Mas) signed an agreement with the leader of the ERC, therefore, to strengthen the secessionist movement. After this, Artur Mas the President of Catalonia, made a commitment to the Catalan people about the possibility of Catalonia becoming a sovereign state, because the electorate had demonstrated that a clear majority was in favour of the proposal. The Catalan parliament therefore voted to start the secession process.<sup>846</sup> The

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<sup>842</sup> Statute of Autonomy of Catalonia 2006 (n 832), art122

<sup>843</sup> Joan Vintro, ‘Legality and the referendum on independence in Catalonia’ p.2-3 [www.idpbarcelona.net](http://www.idpbarcelona.net) accessed 30 April 2016

<sup>844</sup> Montserrat Guibernau, (n 697) 5, 20

<sup>845</sup> Government of Catalonia, (n 835) 7; David Marti, (n 697) 507

<sup>846</sup> ‘Catalonia’s push for independence from Spain’ 11 November 2015 <http://www.bbc.co.uk/news/world-europe-29478415> [Accessed 7 March 2016]

vote passed by 72 out of 135 to “begin the process toward the creation of an independent Catalan state in the form of a republic”.<sup>847</sup> As a consequence, the Catalan parliament took responsibility for drafting a new constitution for Catalonia independently from the institutions of the Spanish State.

As a preliminary consultation method, the election had provided a channel for people to participate in the decision-making process. When the Catalan people expressed their collective will, this provided legitimacy to negotiate with the central government of Spain to amend the national constitution, recognizing the right of an autonomous people to decide on their future territorial status. One observation was that people participation in the election was remarkably high. The registration was up to 67.6% on the electoral day.<sup>848</sup> However, the election did not ascertain the will of the people in favour of independence. Then, the President of Catalonia made an attempt to save his own face by proposing a referendum on independence. The Catalan Parliament had to find an appropriate mechanism to consult the local population on the matter of Catalonia as a sovereign state. Therefore they decided to hold a referendum to ask the population directly and measure their will more clearly.<sup>849</sup>

Before this referendum could take place, the Catalan parliament had to provide legislative confirmation of the importance of the will of the people in deciding their own destiny.<sup>850</sup> In 2013, the Catalan parliament released a document recognizing ‘the right of the people to decide’ their future destiny. ‘The Declaration of Sovereignty and Right to Decide of the people of Catalonia’ was set out thus:

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<sup>847</sup> ‘Catalonia MPs vote for secession as Spain looks to block plans in court’

<https://www.theguardian.com/world/2015/nov/09/catalonia-mps-to-vote-on-secession-plan-in-showdown-with-spains-government> Accessed 15 July 2016

<sup>848</sup> Marc Guinjoan and Toni Rodon, ‘Catalonia at the Crossroads: Analysis of the increasing support for secession’ in Xavier Cuadras-Morato (ed), (n 573) 35

<sup>849</sup> Kathryn Cramer (n 25) 1,5

<sup>850</sup> *Ibid* 1,6-7

“In accordance with the will of the majority expressed democratically by the people of Catalonia, the Parliament of Catalonia agrees to initiate the process to make effective the exercise of the right to decide so that the citizens of Catalonia can determine their collective political future, in conformity with the following principles: sovereignty, democratic legitimacy, transparency, social cohesion, legality, and participation”.<sup>851</sup>

The Catalan parliament had a primary role in encouraging the local population to take part in this decision-making process without any interference from Spanish authorities.<sup>852</sup> However, ‘the Declaration of Sovereignty and the Right to Decide of the people of Catalonia’ was unconstitutional according to the ruling of the Spanish Constitutional Court, using the same reasoning as it had in the case of Basque in 2008.<sup>853</sup> The Court prioritized the territorial integrity of Spain over respecting the will of the people. The Court also emphasized that direct or indirect forms of public political participation were not sufficient to put forward a constitutional amendment that an autonomous territory might become an independent state. It argued that in order to validate any legal amendment, the process must be approved by the majority of the entire Spanish Congress, including representatives from the whole country, *not* simply those representatives from the regional territory desiring independence. The Spanish Constitutional Court judgment 103/ 2008 stated that:

“A consultation is convened based on the initial recognition of the existence of the “Basque people’s right to decide” in respect of opening up negotiations, the content and significance of which are indicated in the sole article and

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<sup>851</sup> Generalitat de Catalunya, ‘Declaration of sovereignty and right to decide of the people of Catalonia’ <http://www.catdem.org/cat/downloads2/declaration-of-sovereignty.pdf> para10 and 11 Accessed 15 July 2016

<sup>852</sup> Ibid para9

<sup>853</sup> Ibid para8; Spanish Constitutional Court Judgment 42/2014 (25 March 2014) para3; Government of Catalonia, (n 835) 21

which are specified in the explanation of grounds, based on achieving an agreement which will establish "the bases of a new relationship between the Autonomous Community of the Basque Country and the Spanish state". The law includes as subjects of this new relation the Autonomous Community of the Basque Country and the Spanish state considering this in its meaning of "overall state" and not, as is required in the question of relation to an Autonomous Community as "central state". Therefore, if an attempt to attain this "new relation" were solely to be made through the reform of the Autonomous Statute of the Basque Country there would be no point in the referendum, nor would it be appropriate at this initial moment as popular consultation is only possible for ratification of the reform once this has been approved by the Parliament".<sup>854</sup>

The Catalanian government called for a referendum in September 2012 and a subsequent election in November 2012 as these were two democratic mechanisms which would identify the genuine will of the Catalan population. However, the Constitutional Court denied the legal effect of the Catalan Act 4/2010 which extended authority to the Catalonia government and called for greater public participation. Moreover, the Court stated that 'a right to decide' did not equate with the right to self-determination. The Spanish Constitutional Court ruling 42/2014 stressed that:

"An autonomous community cannot unilaterally call a referendum on self-determination. Catalonia does not have the sovereign right to unilaterally

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<sup>854</sup> Constitutional Court Judgment No.103/2008 (n 311) para17, 18

decide its collective political future; it can, however, be consulted on the issue within the framework of Spanish constitutional law”.<sup>855</sup>

and

“The right to decide held by citizens of Catalonia” is not proclaimed as a manifestation of a right of self-determination not recognized in the Constitution, or as an unrecognized attribution of sovereignty, but as a political aspiration that may only be achieved through a process that conforms to constitutional legality and follows the principles of “democratic legitimacy”, “pluralism” and “legality”, expressly proclaimed in the act in close connection to the “right to decide”.<sup>856</sup>

Significantly, these court rulings illustrate the supremacy of the constitution. Since the constitution did not guarantee the right to self-determination, any demand by the people which lay at odds with territorial integrity was considered unconstitutional.

The actions of the Catalan parliament are an example of a mandated representative which made decisions based on the concerns of the people in the specific area they represent. Despite their demands being denied by the Spanish Congress and the Spanish Constitutional Court, the Catalan representatives continued to strive to initiate alternative mechanisms to involve the local population in their own future.

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<sup>855</sup> Spanish Constitutional Court ruling 42/2014 (unofficial translation)  
<http://www.tribunalconstitucional.es/es/jurisprudencia/restrad/Paginas/STC42-2014.aspx> accessed 2 September 2016;  
Government of Catalonia, (n 853) 19

<sup>856</sup> Ibid (n 853) 19

2015: a continuous action of representative bodies to legitimize secession based on the will of the people

Thirdly, in 2015, a regional election was called two years early in order to identify the will of the people over the issue of Catalan independence. Artur Mas tried to frame the regional election as a de facto referendum on independence.<sup>857</sup> The Catalan parliament made ongoing attempts to carry out the local population's demand for self-governance with the aim of declaring independence within 18 months.<sup>858</sup> The CIU gained the majority of support in the Catalan parliament (i.e. 72 out of 135 deputies).

After the Spanish Constitutional Court's denial of the unilateral action of the Catalan government, the regional government appealed the ruling (42/2014) that an attempt to hold a referendum would be unconstitutional. According to the Spanish Constitutional Court ruling 31/2015, the expression of the will of people regarding their right to self-determination should be limited. The court stated that:

“The freedom of a parliament or of the government of an Autonomous Community to choose policies is legally limited by the Constitution and the Statute of Autonomy. No legislative assembly of an Autonomous Community may adopt a resolution to promote policies that are in absolute contradiction with the Constitution”.<sup>859</sup>

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<sup>857</sup> Lluís Orriols and Toni Rodon, 'The 2015 Catalan Election: The Independence Bid at the Polls' (2016) 21(3) *South European Society and Politics* 359

<sup>858</sup> David Martí and Daniel Cetra, 'The 2015 Catalan election a de facto referendum on independence?' (2016) 26 (1) *Regional and Federal Studies* 107

<sup>859</sup> Spanish Constitutional Court ruling 31/2015 (unofficial translation)

[http://www.tribunalconstitucional.es/es/jurisprudencia/restrad/Paginas/STC\\_2015\\_259\\_EN.aspx](http://www.tribunalconstitucional.es/es/jurisprudencia/restrad/Paginas/STC_2015_259_EN.aspx) [Accessed 2 September 2016]

From the process of submitting an amendment to the Statute of Autonomy in 2005 to the post-referendum actions in 2015, while the expressed will of the people has been considered as unconstitutional, the Catalan elected officials supported the people's right to decide their own future. When the existing Spanish Constitution did not include the constitutional rights to self-determination for people residing in an autonomous territory, public opinions can still be ascertained through a state institutional framework such as local or federal parliament. The actions of the Catalan representatives were in accordance with republican liberal theory, because all the people were included in the decision-making process and were ensured a vote without interference from Spanish authorities. Non-governmental organizations (i.e. civil societies) worked alongside governmental authorities to identify the collective will of the people. They were able to check or contest regional government's policy implementation on behalf of the people.

To sum up, a governmental authority can claim that by responding to and promoting the interests of the people, their position as representatives of the people is legitimized. The inherent 'ongoing' nature of elections and parliamentary models rely, then, on the idea of 'government by discussion', particularly in territorial alteration processes. Manin emphasizes the role of state institutions (i.e. parliament) in providing a central arena in which to debate and share public opinions.<sup>860</sup> Elections in consensual and non-consensual representative processes can claim legitimacy in different ways. Consensual representative processes are legitimized within the framework of international institutions. By contrast, non-consensual representative processes, despite not being officially mandated by a state or international institution, can claim legitimacy by putting their promises to the people into action. If the elected officials

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<sup>860</sup> Bernard Manin, (n 19) 185

keep their promises or go beyond their promises to perform their duty based on the people's demands, this is perceived as transferring the genuine will of the people into action, and thus legitimizing their position. In addition, the role of the Constituent Assembly is a critical factor in justifying the accountable and transparent action of representative bodies. After selecting their representatives, the people are able to assess and ensure that politically legitimate governments carry out their duty, in conformity with the consent of the governed.

### *3.2 Majority and minority relations*

Contemporary understandings of the democratic system refer to the interplay between all involved parties, including stakeholders (e.g. civil society, public sector organizations, minority groups or interested parties) in decision-making processes.<sup>861</sup>

When considering the relationship between the people as constituent powers and representative bodies, there are two noteworthy forms of equality in elective participation: equal opportunity for individual concerns and proportional equality.<sup>862</sup>

The former refers to the rights of people to vote as constituents. People's right to vote is generally considered to be both an individual right and a collective right.<sup>863</sup> All individuals have the right to be involved in the elective process and there should be no discrimination against minorities.<sup>864</sup> In addition, elections are perceived as a collective decision-making process which gathers the interests of all different groups in a pluralistic society.<sup>865</sup> Proportional equality refers to the number of representatives

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<sup>861</sup> Republican liberal theory mandates the importance of non-state organizations in any decision-making process. See Philip Pettit (n 26) 226-227; John W. Maynor (n 17) 174-175

<sup>862</sup> Bernard Manin (n 19) 34-36

<sup>863</sup> Philip Pettit (n 26) 209-211

<sup>864</sup> Ibid 187-188

<sup>865</sup> Bernard Manin (n 19) 186



who have the right to vote in the parliament or the national assembly.<sup>866</sup> These representatives cannot be held fully accountable to the people if there is a proportional number, fairly distributed throughout the population.

The relationship between the elected representative body and the concerns of the majority and minority populations demonstrates how those elected officials respond to the will of the people and perform their duty. An analysis of the legitimacy of the incumbent officials' actions (in terms of balancing the interests of the majority and the minority) can be done from two points of view: the electorate's and the elected officials'. From the electorate's perspective, *all* people should have adequate and equal opportunity to express their preferences and, crucially these are equally weighted during any decision-making process.<sup>867</sup> From the elected officials' perspective, representative bodies should not only promote majority interests but also minority interests. Balancing power between majority and minority interests is important, because when representative bodies make decisions based on the interests of both, the balance of power is fair and the results are more legitimate.

Having examined the relationship between the representative bodies and the balance of majority and minority power, it is crucial to perform dual tracking of representative processes. Firstly, the effective participation of different groups of people in a national election is a necessary to ensure that a representative body is truly representative. Secondly, the composition of representative bodies illustrates how minority involvement has a direct consequence on the degree of legitimacy in a decisive outcome. Thus, in order to ensure effective participation of all diverse groups

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<sup>866</sup> Ibid 187

<sup>867</sup> Robert A. Dahl, (n 7) 109

of representatives, two conditions must be met: the composition of representatives in the national assembly or parliaments must be proportional and voting procedures must demonstrate participation of each group of people. Therefore, with respect to external self-determination practices, a legitimate balance of power exists which allows the people to request a greater degree of autonomy or a constitutional amendment. Ideally, equal popular participation should be reflected in proportional numbers of representatives for majority and minority groups, thus ensuring the legitimacy of their actions.<sup>868</sup> In addition to proportional numbers of representatives, it is necessary to establish certain measures to increase the effective participation of minority groups in decision-making processes.<sup>869</sup>

The following section elaborates on two different cases, showcasing how representative bodies perform their ongoing duty to varying degrees, while conforming to the people's wishes. Republican liberal theory requires a democratic balance of power between the people and the state, which is gained through broader public participation.<sup>870</sup> The theory emphasizes the importance of political equality, treating everyone's ability to vote as equal. Therefore no one majority should prevail over another.<sup>871</sup> The following two cases demonstrate the varying degrees to which this happens, and the impact of this on the legitimacy and transparency of the representative process; how far do they adhere to the democratic ideal of political equality?

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<sup>868</sup> Philip Pettit (n 26) 132

<sup>869</sup> Sarah Joseph and Melissa Castan, *The International Covenant on Civil and political rights: Cases, Materials, and Commentary* (Oxford 2014) 736; Philip Pettit (n 26) 197-198

<sup>870</sup> Philip Pettit (n 17) 65-66

<sup>871</sup> *Ibid* 69

The two comparable cases below are the consensual agreement of the Federal Assembly for dissolution in Czechoslovakia in 1993, and the establishment of a special parliamentary form during transition in Kosovo in 1999. The Czechoslovakia example illustrates the power of minority representatives (i.e. Slovaks) to veto a majority decision (i.e. Czech) they dislike. In this case, the Slovak representatives set an agenda in the state institution for a constitutional amendment, which would in turn create institutional and instrumental reforms, ensuring Slovak political equality.<sup>872</sup> However, the two electoral processes in 1990 and 1992 failed to measure the public demand for secession. The dissolution of Czechoslovakia was solely an act by the elected representatives who performed their duty based on their interests rather than the interests of the people.<sup>873</sup> The example of Kosovo reveals a different perspective on minority concerns. Although broader participation of minority groups was established by an international institution (the UN) to ensure that representatives from all minorities were present in the Assembly, these representatives did not act to promote the interests of the minority groups they were supposed to be representing. Instead they conformed to the interests and desires of the majority representatives (the Albanians) when drafting the unilateral declaration of independence in 2008. Only a small minority of representatives (10 Serbs and 1 Gorani) raised their voices against the declaration.<sup>874</sup>

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<sup>872</sup> Th.J. Vondracek (Translated), 'Constitutional law on the Czechoslovak Federation' in Williams B. Simons (ed.), *The Constitutions of the communist world* (Sijthoff & Noordoff 1980) Art.1, Art.6

<sup>873</sup> Bernard Wheaton and Zdenek Kavan, *The Velvet Revolution Czechoslovakia 1988-1991* (Westview Press 1992) 176-177

<sup>874</sup> Marc Weller, *Contested Statehood: Kosovo's struggle for independence* (Oxford 2009) 231; James Summers, 'Kosovo: From Yugoslav Province to Disputed Independence' in James Summers (ed) *Kosovo: A Precedent? The Declaration of Independence, the Advisory Opinion and Implications for Statehood, Self-Determination and Minority Rights* (Martinus Nijhoff 2011) 40

*3.2.1 Czechoslovakia: an instance of secession as a result of negotiations between representative bodies rather than due to any public demand for independence*

In the 1960s, the population in Czechoslovakia was composed of two primary ethnic groups: the Czechs and the Slovaks. The former comprised two-thirds of the population whereas the latter made up one-third.<sup>875</sup> The unequal numbers of representatives in the Federal Assembly directly affected the outcome of voting or proposing an agenda, which included the consideration of a constitutional right to self-determination and a greater level of self-administration.

There are two points of discussion about the democratic legitimacy of the representative processes in Czechoslovakia during the elections in 1990 and in 1992. *The first* is the composition of the people's representatives within the state institution. From 1968, the Czech and Slovak representatives agreed to create two federal states (i.e. the Czech Socialist Federal Republic and the Slovak Socialist Federal Republic)<sup>876</sup> and this legally came into effect in 1969. Each federal state had its own legislative and executive bodies within the federal structure. There was a constitutional amendment to increase the number of Slovak representatives in the Federal Assembly.<sup>877</sup> Having a proportional number of elected officials had a direct consequence on the number of representatives who could block and action their veto powers. This proportional representation would increase the ability of the Slovak representatives to take part in decision-making processes in the Federal Assembly. The impact of the amendment on the majority dominating was that the three state

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<sup>875</sup> Claudia Saladin (n 695) 172, 193; Milica Bookman, 'War and Peace: The Divergent Breakups of Yugoslavia and Czechoslovakia' (1994) 31 (2) *Journal of Peace Research* 175,179

<sup>876</sup> Sharon Wolchik, 'The Politics of Ethnicity in Post-Communist Czechoslovakia' (1993) 8 *East European Politics and Societies* 153,163; Mary Heimann, *Czechoslovakia: The state that failed* (Yale 2011) 309

<sup>877</sup> Katarina Mathernova (n 24) 471, 482-484

institutions (legislative, executive, and judiciary systems) were all restructured in 1970.<sup>878</sup> The total number of representatives for voting and blocking mechanisms in the National Councils became proportional which reflected the demands of both groups. Despite the increased equality between the Czech and Slovak representative bodies, and between 1970 and 1989, their representatives were still not able to find a compromise between their dissimilar opinions.<sup>879</sup> Thus, as a result two elections were held in 1990 and 1992.<sup>880</sup> *The second* point of discussion is that to hold such elections to assess the will of the people was unprecedented in Czechoslovakia.<sup>881</sup> Previously the people had no opportunity to directly participate politically having been under Soviet rule.

#### The attempt for requesting an equal number of the people's representatives

The Czech and Slovak representatives made great efforts to amend the constitution to rectify this inequality and empower people, in particular the Slovak people (the minority). Under the scope of this amendment the Federal Assembly in Czechoslovakia would consist of two Houses: the Chamber of the People and the Chamber of Nations.<sup>882</sup> The former included two hundred deputies who were elected by a direct vote throughout the Czechoslovak Socialist Republic.<sup>883</sup> The latter contained one hundred and fifty deputies; seventy-five were elected by a direct vote in the Czech Socialist Republic and seventy-five by a direct vote in the Slovak Socialist Republic.<sup>884</sup> The two houses worked together in decision-making processes when they debated governmental policy.<sup>885</sup> In addition, the amendment addressed the super-

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<sup>878</sup> Ibid 494

<sup>879</sup> Ibid 484

<sup>880</sup> Ibid 498-499

<sup>881</sup> Ibid 500-501

<sup>882</sup> Th.J. Vondracek (Translated) (n 872) article 29 (2)

<sup>883</sup> Ibid, article 30

<sup>884</sup> Ibid, article 31(2)

<sup>885</sup> Ibid, article 34(2)

majority voting requirements, which immediately made things more equal between the Czech and Slovak representatives. The supermajority requirement is a mechanism to increase minority involvement in decision-making processes. The amendment established a super-majority requirement of a three-fifths absolute majority in the Chamber of the Peoples (lower chamber) plus a three-fifths absolute majority of each national group in the Chamber of Nations.<sup>886</sup> This proportional super-majority of representatives in the Chamber of Peoples and the Chamber of Nations was necessary to ensure that the constitution legitimately reflected the will of the people. An increased number of voting or blocking procedures was a crucial factor in guaranteeing the stability of the constitution.

#### From the velvet revolution in 1989 to the election in 1990 and in 1992

In 1989, due to the dissatisfaction of students and the Citizens Forums (CF) with the monopolized policy of the Communist Party of Czechoslovakia (CPC), a number of uprisings took place, called 'the velvet revolution'. The demonstrations were a way for the people to express their support for a constitutional amendment. It was a movement campaigning for federal reformation in the administrative department of the Czechoslovakian Federal Assembly. The contention between the Czechs and Slovak leaders was based on ethnic tensions that led to the constitutional amendment. The constitutional amendment would entail a draft of a new electoral law which would increase the level of popular participation in the coming elections. The new electoral law aimed to prevent small parties gaining less than 5% from failing to have a seat in the parliament.<sup>887</sup>

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<sup>886</sup> Lloyd Cutler and Herman Schwartz, (n 708) 511,519

<sup>887</sup> Bernard Wheaton and Zdenek Kavan, (n 873) 130

After the collapse of the communist regime in 1989, the process of agreeing on the dissolution of Czechoslovakia began. Consensual democratic processes were used to form the Czecho-Slovak Federal Republic (CSFR). The first election was held in June 1990. This election was a poor indicator of public demand. The election question asked people ‘are you for change?’.<sup>888</sup> This was not clear because the question did not clarify what ‘change’ means. Amongst the Czech political parties, Havel and the Citizen forums (CF) gained a majority support in the National Assembly and in the Federal Assembly. In the Slovak federal republic, the Public Against Violence (VPN) gained a majority seat in the National Assembly but less than the rival the Christian Democratic Movement (CDM) in the Federal Assembly.<sup>889</sup> In the aftermath of the election in 1991, the Slovak representatives did offer a variety of choices for exercising the right to self-determination, such as a greater form of autonomy, quasi-independence within a federal structure and full independence as a state.<sup>890</sup> In March 1991, Slovakia’s leading party (the Christian Democratic Union) attempted to put sovereignty on the agenda in the constitutional amendment with a great deal of support from the Slovak population. According to the AISA poll, 86% of Slovak citizens were dissatisfied with the federal administration which suppressed the interests of Slovakia. In addition, 22% of Slovak citizens supported separation.<sup>891</sup> Regarding the Czech representatives, Havel disagreed with a right to unilateral secession. A democratic secession was not perceived as necessary to allow each republic to claim the right of self-determination. Both Czech and Slovak representatives could not reconcile their interests over their administrative powers.

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<sup>888</sup> Abby Innes, ‘The Breakup of Czechoslovakia: The Impact of Party Development on the Separation of the State’ (1997) 11 (3) *East European Politics and Societies* 393, 393-394

<sup>889</sup> Bernard Wheaton and Zdenek Kavan, (n 873) 150

<sup>890</sup> Lloyd Cutler and Herman Schwartz (n 708) 511,523

<sup>891</sup> Abby Innes (n 888) 393,410

The second election was held in June 1992. Due to the failure of constitutional talks between the Czech and Slovak representatives, the question of secession was proposed to the public to determine their future.<sup>892</sup> In terms of the composition of people in Czechoslovakia, there was a clear ethnic heterogeneity (e.g. Czechs 81% and Slovakia 86%) residing in each federal unit.<sup>893</sup> Even though there was high participation (83%) in this election, it appeared that 16% of the Slovak population and 31% of the Czech population were undecided on their party preferences.<sup>894</sup> It was also apparent that the will of the Czechs and the Slovaks was not to break up Czechoslovakia into two independent states.<sup>895</sup> After the second election in 1992, Meciar, the political leader of the Movement for Democratic Slovakia parties (HZDS), passed a document called the “Initiative for a Sovereign Slovakia” requesting full sovereignty for the Slovak Republic, and the adoption of a full Slovak constitution.<sup>896</sup> Meciar intended to discuss the matter of sovereignty in the post-election.<sup>897</sup>

The main argument between the Czech and Slovak people was a different understanding of the concept of ‘sovereignty concept’. From the Slovak perspective, sovereignty did not mean independent state sovereignty but rather that two federal states could function independently along legislative and administrative lines while retaining a Federal Assembly. Only one political party (i.e. the Slovak National Party-SNS) supported the independent statehood of Slovakia, and even 44% of the SNS stood against this policy.<sup>898</sup> The Slovak National Council refused to approve the declaration of sovereignty as it was unconstitutional and they believed that the future

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<sup>892</sup> Ibid 394

<sup>893</sup> Milica Z. Bookman, (n 875) 175,184

<sup>894</sup> Sharon L. Wolchik, (n 876) 153

<sup>895</sup> Sharon L. Wolchik, (n 876) 153, 174

<sup>896</sup> Abby Innes, (n 873) 393,420

<sup>897</sup> Ibid 393,419

<sup>898</sup> Ibid 393,430



of Czechoslovakia should be decided by the people through a referendum.<sup>899</sup> Within the substance of this document, Slovak sovereignty meant ‘a confederation state sovereignty’ and that the Czechs should treat Slovakia as an equally sovereign partner.<sup>900</sup> The Czechs however thought that sovereignty meant a federation of two independent states.<sup>901</sup> From their perspective, it meant an internationally recognized bodies (i.e. an independent state).<sup>902</sup> This dissimilarity of opinion meant that no resolution could be found.

In terms of external self-determination the division of Czechoslovakia into two independent states came to an end on 31<sup>st</sup> December 1992, negotiated between elected, political elites (i.e. Klaus of Czechs and Meciar of Slovaks) because neither had gained majority support from the second election in June 1992. The Federal Assembly agreed that the constitution would be amended to separate the Czech and Slovak republics into two independent states.<sup>903</sup> The demise of Czechoslovakia was caused by the failure to negotiate a political arrangement within the federal system as opposed to any popular demand. There was no public opinion pro-independence and no clear public demand for secession.<sup>904</sup> The case of Czechoslovakia’s consensual dissolution therefore is the attempt by elected officials (i.e. the Czech and Slovak representatives) to resolve conflict through democratic, constitutional-based reform. This action is not considered to be an example of a self-determination process through representative bodies. The absence of the expressed will of the people in the decision-making process lessened the degree of legitimacy of the representatives’ actions.

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<sup>899</sup> Jiri Pehe, ‘Bid for Slovak Sovereignty Causes Political Upheaval’ [www.pehe.cz/clanky/1991/199111October1991RFERL.pdf](http://www.pehe.cz/clanky/1991/199111October1991RFERL.pdf) [Accessed 15 August 2016]

<sup>900</sup> Milica Z. Bookman, (n 875) 175,176

<sup>901</sup> Sharon L. Wolchik, (n 876) 153, 177

<sup>902</sup> Mary Heimann, (n 704) 319

<sup>903</sup> *Ibid* 320

<sup>904</sup> Jure Vidmar, (n 150) 71

### *3.2.2 Kosovo and the attempt of minority powers to participate in decision-making processes*

The example of Kosovo demonstrates the importance of using republican liberal theory to standardize the processes used in practice during external self-determination. In theory, Kosovo should have been successful – to an extent – in providing the democratic, domestic institutions which balanced power between majority and minority groups. International institutional involvement was crucial in setting up these democratic institutions.<sup>905</sup> Therefore Kosovo should have served as an example of how the people's representatives can legitimize external self-determination processes, acting on behalf of the local population (whether or not they belong to a majority or a minority group).<sup>906</sup> However, in reality there were practical issues which prevented Kosovo from upholding the will of all the people from minority backgrounds, preventing the outcome of the territorial alteration being wholly legitimate.<sup>907</sup> Since republican liberal theory emphasizes the political equality of *all* people regardless of their ethnic background, the guidance contained within the theory should be applied to the practical application of all external self-determination processes to ensure their legitimacy.<sup>908</sup>

During the 1990s, the population in Kosovo (a province of Serbia) was just short of two million comprising 90% ethnic Albanian, and 7% Serbian with a minority of Turks, Bosniaks, Gorani, Roma, Ashkali and others.<sup>909</sup> In 1999, ethnic cleansing took place under Serbian legislation with the aim of decreasing the population of Kosovo-

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<sup>905</sup> For example, United Nations Mission in Kosovo <https://unmik.unmissions.org> accessed 20 May 2016

<sup>906</sup> UNMIK/REG/2001/9 'On a constitutional framework for provisional self-government in Kosovo' chapter 1.5 <http://www.unmikonline.org/regulations/2001/reg19-01.pdf> accessed 25 May 2016

<sup>907</sup> James Ker-Lindsay, 'Explaining Serbia's Decision to Go to the ICJ' in Marko Milanovic and Michael Wood (n 705) 10

<sup>908</sup> The guidance of republican liberal theory can be seen in Philip Pettit (n 26) 5-6

<sup>909</sup> Marc Weller, (n 874) 10-11

Albanians. 350,000 Albanians were forced to leave Kosovo.<sup>910</sup> Any attempt to ‘change the ethnic balance’ in a particular territory is not recognized within international law,<sup>911</sup> and therefore this action on the part of the Serbians prompted international involvement both in the Kosovo election and then also in the following creation of the Kosovo Assembly.

In order to verify a legitimate action by the Kosovo Assembly, there had to be a proportional distribution of Albanian and non-Albanian delegates. These representative bodies took part in the constitution-making processes that reflected the needs of the local populations.<sup>912</sup> There are two different situations to demonstrate how the minority groups’ representatives involve in decision-making processes: international institutional framework design of representatives’ composition in the Kosovo Assembly and the voting action for the unilateral declaration of in 2008. The delegate-places in the Kosovo Assembly were more proportionally distributed between the Albanian and other representatives from different minority groups incumbent officials. The Kosovo Assembly had the authority ‘directly and exclusively’ to decide on amendments to the Kosovo Constitution and to approve amendments to the Constitution of the Socialist Republic of Serbia.<sup>913</sup> Regarding to the unilateral declaration in 2008, the declaration was adopted by unanimously vote of 109 out of 120 deputies.<sup>914</sup>

The United Nation’s Mission in Kosovo (UNMIK) Regulation No.2001/9 stated that the Provisional Institutions of Self-Government (PISG) were the Kosovo Assembly,

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<sup>910</sup> Ibid 13  
<sup>911</sup> Ibid 62  
<sup>912</sup> Ibid 239  
<sup>913</sup> Ibid 35  
<sup>914</sup> Ibid 231

the President of Kosovo, the Government, the Courts and other bodies and institutions that may be set forth in any Constitutional Framework.<sup>915</sup> According to the Regulation, the PISG should work constructively towards ensuring conditions for a peaceful and normal life for *all* the inhabitants of Kosovo. An important step of such institution-building was to develop multi-ethnic democratic structures that freely expressed the will of citizens.<sup>916</sup> This procedural system was established to ensure that government decision-making was genuinely based on the will of the people. The equal distribution of representatives was believed to create legitimate representative processes in constitution-making which would reflect the national identity of Kosovo in a pluralistic society. Specifically regarding the Kosovo Assembly, Section 9 of the UNMIK Regulation addresses its composition:

“Kosovo shall, for the purposes of election of the Assembly, be considered a single, multi-member electoral district.

(a) One hundred (100) of 120 seats of the Assembly shall be distributed amongst all parties, coalitions, citizens’ initiatives, and independent candidates in proportion to the number of valid votes received by them in the election to the Assembly.

(b) Twenty (20) of the 120 seats shall be reserved for the additional representation of non-Albanian Kosovo Communities as follows:

Ten (10) seats shall be allocated to parties, coalitions, citizens’ initiatives and independent candidates having declared themselves representing the Kosovo Serb Community. These seats shall be distributed to such parties, coalitions, citizens’ initiatives and independent candidates in proportion to the number of valid votes received by them in the election to the Assembly; and

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<sup>915</sup> UNMIK/REG/2001/9 (n 896) chapter 1.5 <http://www.unmikonline.org/regulations/2001/reg19-01.pdf> accessed 25 May 2016

<sup>916</sup> Kosovo Unilateral Declaration of Independence (17 February 2008) Preamble para9

Ten (10) seats shall be allocated to other Communities as follows: the Roma, Ashkali and Egyptian Communities four (4), the Bosniak Community three (3), the Turkish Community two (2) and the Gorani Community one (1). The seats for each such Community or group of Communities shall be distributed to parties, coalitions, citizens' initiatives and independent candidates having declared themselves representing each such Community in proportion to the number of valid votes received by them in the election to the Assembly".<sup>917</sup>

The Kosovo Assembly had the authority "directly and exclusively" to decide on amendments to the Kosovo Constitution and to approve amendments to the Constitution of the Socialist Republic of Serbia.<sup>918</sup> In theory, the representatives were proportionally allocated because the constitutional framework of Kosovo formally recognized six minority communities: Kosovo Bosnians, Gorani, Roma Ashkali, Egyptians, and Turks.<sup>919</sup> These groups were guaranteed reserved seats in the Kosovo Assembly. Thus, both the decision-making of the Kosovo Assembly and its voting for the Unilateral Declaration for Independence (UDI) later in 2008 should have been legitimized.

Between the adoption of the UN Security Council Resolution 1244 in 1999 and the UDI in 2008, there were three general elections held to select the Kosovo Assembly: 2001, 2004 and 2007.<sup>920</sup> The final election before the UDI was held on 17<sup>th</sup> November 2007 in order to select the Assembly. However the level of popular participation was

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<sup>917</sup> Ibid section 1 9.1.1-9.1.3

<sup>918</sup> Ibid 35

<sup>919</sup> European Union Election Expert Mission to Kosovo Final Report (25 January 2011) 25-26

[http://eeas.europa.eu/delegations/kosovo/documents/page\\_content/110125\\_report\\_eu\\_eem\\_kosovo\\_2010\\_en.pdf](http://eeas.europa.eu/delegations/kosovo/documents/page_content/110125_report_eu_eem_kosovo_2010_en.pdf)

[Accessed 1 September 2016]

<sup>920</sup> Ibid 10

low; the voter turnout was 43% and most voters were Kosovo-Albanians.<sup>921</sup> The Kosovo-Serbs still had a strong political connection to the Serbian government who encouraged them to boycott the election. Kosovo-Serbs living in northern Kosovo boycotted the election in 2007 and proclaimed the right to secession in their own area.<sup>922</sup> This action had a direct consequence on the seat-allocation in the Kosovo Assembly. After the election in 2007, the Kosovo Assembly passed a unilateral declaration of independence (UDI) in 2008. The UDI was adopted unanimously by a vote of 109 out of 120 representatives in the Kosovo Assembly. 10 Kosovo-Serb representatives and 1 Gorani representative refused to attend the discussion meeting before the vote was taken.<sup>923</sup> However, the Kosovo-Albanians representatives and democratically elected representatives identified themselves as legitimate state officials who could act on behalf of Kosovar people to declare independence.<sup>924</sup> Since the Kosovo-Albanians were the majority population in Kosovo their wishes prevailed over those of the Kosovo-Serb minority.<sup>925</sup> Importantly given that ‘so-called representatives of the people of Kosovo’ did not represent the whole population, the action did not respect the involvement of a minority group during the external self-determination process of Kosovo.

Another consideration was the authority of the authors of the UDI and its contradiction with the UN Security Council Resolution 1244.<sup>926</sup> According to Resolution 1244, only UNMIK could act on behalf of the Kosovar people which

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<sup>921</sup> Joe Conway, ‘Kosovo Municipal and Assembly elections observed on 17 November and 8 December 2007’ (Council of Europe 31 January 2008) summary para4

<sup>922</sup> *Ibid* section 4.4

<sup>923</sup> James Summers, ‘Kosovo: From Yugoslav Province to Disputed Independence’ in James Summers (ed) (n 874) 40

<sup>924</sup> Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, Written Contribution of the Republic of Kosovo, 17 April 2009 para4.22, 6.13-6.20 <http://www.icj-cij.org/files/case-related/141/15678.pdf> accessed 20 September 2016

<sup>925</sup> Jure Vidmar, ‘The Kosovo Advisory Opinion Scrutinized’ (2011) 24 *Leiden Journal of International Law* 355,367; Marko Milanovic, ‘Arguing the Kosovo Case’ in Marko Milanovic and Michael Wood (n 705) 34

<sup>926</sup> *Accordance with International Law of the Unilateral Declaration of Independence by the provisional institutions of self-government of Kosovo* (Written statement of the government of the Republic of Serbia) 2009 accessed 20 September 2016 para17-18

entitled the UNMIK representatives to create external relations and attend an international conference.<sup>927</sup> However, in a special session, the Kosovo Assembly passed the UDI and proclaimed themselves to be the ‘Kosovo people’s democratically-elected representatives’,<sup>928</sup> making the document, in their eyes, completely legitimate.<sup>929</sup> By contrast the Serbian government argued that the Kosovo Assembly did not represent the will of the Kosovo-Serbs,<sup>930</sup> and that only the UN Security Council had the power to terminate the international legal regime for Kosovo.<sup>931</sup> However, the Special Representative of the Secretary General in Kosovo did not object to the UDI. Thus, the Kosovo Assembly believed that Resolution 1244 did not apply because the Declaration was not made by that institution, but by the representatives of the Kosovo people.<sup>932</sup> After being referred to the International Court of Justice, the ICJ found that the UDI was not prohibited by general obligations under international law or by Resolution 1244, as the declaration was not made by the Kosovo Assembly itself.<sup>933</sup> In other words the ICJ did not find that the UDI was prohibited by international law as it was proclaimed by the elected people’s representatives. However, in the eyes of Serbia, the legality of the UDI should be null and void<sup>934</sup> because the Kosovo Assembly violated the UNSC Resolution 1244 and the Constitutional Framework.<sup>935</sup> The Constitutional Framework stated that “Kosovo is an entity under interim international administration. Therefore, the Kosovo

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<sup>927</sup> Ibid para17-18

<sup>928</sup> The word ‘democratically-elected leaders of our people’ was used in the Kosovo Unilateral Declaration of Independence (17 February 2008) Article 1 “We, the democratically-elected leaders of our people, hereby declare Kosovo to be an independent and sovereign state. This declaration reflects the will of the people .....

<sup>929</sup> Kosovo Unilateral Declaration of Independence 2008 (n 916) para1; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) 2010 403 accessed 20 September 2016 para75

<sup>930</sup> UN Doc. S/PV.5839 (18 February 2008) 4; *Accordance with International Law of the Unilateral Declaration of Independence by the provisional institutions of self-government of Kosovo*, Written comments of the government of the Republic of Serbia, 14 July 2009 para329 <http://www.icj-cij.org/files/case-related/141/15686.pdf> accessed 20 September 2016

<sup>931</sup> UNSC Res1244 (1999) (n 598) para10, 11; Written comments of the government of the Republic of Serbia (n 930) para14,23,41

<sup>932</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (n 929) para109

<sup>933</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (n 929) para81, 84, 122; Jure Vidmar (n 925) 355, 359;

<sup>934</sup> *Accordance with International Law of the Unilateral Declaration of Independence by the provisional institutions of self-government of Kosovo* (n 929) para6; UN Doc. S/PV.5839 (n 930) 5

<sup>935</sup> *Accordance with International Law of the Unilateral Declaration of Independence by the provisional institutions of self-government of Kosovo* (n 929) para886

Assembly had no authority to establish Kosovo as an independent and sovereign state.<sup>936</sup>

In conclusion, Kosovo provides a clear example of how standards set by the international community can increase minority involvement in political participation. The proportional number of representatives and the participation of national minorities in an electoral process are two conditions which can dictate the legitimacy of representative bodies. The inclusive model of democracy was designed to include all the minority groups' representatives in the Assembly. Although seats were allocated to the minority groups' representatives, the absence of Kosovo-Serbs and Gorani representatives in decision-making processes lessened the degree of legitimacy of the democratic process.

### *3.3 Pre-voters identification*

Pre-election, it is crucial to establish an institution to manage the voters' eligibility in an election. The eligibility of voters is set by the UN and Central Election Commission (CEC) to ensure that all competent voters are granted the right to vote. If there are some groups of people missing from the voting list, the registration process needs to be flexible enough (particularly time-wise) to allow missing people to prove their connection with the territory. It is generally accepted that residency is a primary principle for identifying eligible voters in an electoral process. A length of residence requirement is imposed to prove a close connection between a person and their habitual residence. A list of voters is generally updated at least once a year to prevent missing people from the list. In addition, generally the democratic process includes people living outside a territory to register to vote in an election.

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<sup>936</sup> Ibid para894



In addition, there needs to be proper mechanisms with independent judges to decide upon the final voter list, whilst legal provision must be put in place to ensure that there are as few limitations as possible. The consequence of this is that as many people as wish to vote, can, and therefore the general will of the people has been expressed - making the actions of the people's representatives far more legitimate in the eyes of the international community.

There is a specific state institution (i.e. an electoral commission) which acts as an impartial body for the application of the electoral law.<sup>937</sup> In the case of Namibia, the proclamation of the Administrative General (AG) included the eligibility of voters. The Proclamation of the AG, issued on 21<sup>st</sup> July 1989, granted the right to vote to anyone either born in Namibia or with parents born in Namibia. This principle aimed to extend the right to vote to 10,000 Namibian exiles in South Africa.<sup>938</sup> As part of the UNTAG, a Code of Conduct for the electoral process was set up with the approval of ten registered parties. The registration process for the electorate ran from 3<sup>rd</sup> July to 15<sup>th</sup> September 1989 before the election in November 1989. Eligible voters included every Namibian over 18 years of age at the time of registration. Whoever was born in Namibia, or had been a resident in Namibia for at least four years, or the natural child of a person born in Namibia could register to vote.<sup>939</sup>

A problem with the registration process was the requirement for uniform legal regulations to apply throughout the Namibian territory. Another problem was that the discretionary power of the Administrative General (AG) prolonging the timeframe for

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<sup>937</sup> European Commission for democracy through law (Venice Commission), 'Code of Good Practice in Electoral Matters: Guidelines and explanatory report' (n 217) 23 rev 16

<sup>938</sup> Christopher Saunders, (n 761) 17

<sup>939</sup> National democratic institute for international affairs, (n 781) 27

registration in some geographical units.<sup>940</sup> This authoritative power provided some advantages for certain political parties to gain a high number of supporters.

Regarding Kosovo, in 1999, the United Nations Interim Administration Mission in Kosovo (UNMIK) took responsibility for establishing voter eligibility. During the years 2000-2007, the Organization for Security and Cooperation in Europe (OSCE) was given the role of supervising free and fair elections in Kosovo along with setting up the Central Election Commission and its Secretariat; one round of elections in 2001 with an open list, proportional representation system,<sup>941</sup> the second and third rounds of parliamentary elections in 2004 and 2007. In addition, the OSCE assisted the Assembly of Kosovo in declaring the results of the election.

The eligibility of voters in Kosovo was designed to include habitual residence in the territory and outside the territory to vote (if registered before the date provided). One could vote without being a citizen of Kosovo. The UNMIK set up the eligibility of voters conditions so that:

“Each person having attained 18 years of age on the day of the election and satisfying the other criteria of eligibility to vote as applied to the municipal elections held in Kosovo on 28 October 2000 shall be entitled to vote”.<sup>942</sup>

One relevant observation of voter eligibility in Kosovo is that the criteria were open to all ethnic citizens because they did not limit the right to vote to specific geographical areas. Apart from this, UNMIK regulation No. 2001/13 designed

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<sup>940</sup> Ibid 28

<sup>941</sup> Shagufta Ahmed, George Arogo, Erin Epstein et al, ‘Managing elections in Fragile States: A Comparative Analysis of Post-Conflict Electoral System Design in Nepal and Kosovo’ (January 2007) 8

<sup>942</sup> UNMIK/REG/2001/9 (n 915) chapter 9.1.3

registration categories for people to vote in the first Kosovo election in 2001.<sup>943</sup> The eligibility of voters was extended to include the special needs registration eligibility. Under section 3 of the Administrative direction, it specified that:

“The following categories of habitual residents of Kosovo shall be eligible for registration as special needs registrants and shall be eligible to vote:

(a) Persons who were unable to attend a registration centre and duly register on or before 22 September 2001 due to:

(i) Severe mobility limitations;

(ii) Residency in a prison, institution, elderly person’s home or hospital for mentally disabled; or

(iii) A well-founded apprehension of serious physical or mental harm through intimidation, harassment, actual or threatened violence, or other offensive act to the person or his/her property, by reason of the person’s language, religion, political, national or social origin or association or lack of association with a Community.

(b) Persons who were continuously incarcerated or detained in the Federal Republic of Yugoslavia on or before 22 September 2001 and who were unable to attend a Civil Registration Centre or a Voter Service Centre due to such incarceration or detention and who were released and returned to Kosovo prior to the election; and

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<sup>943</sup> UNMIK/DIR/2001/18 ‘Administrative direction No.2001/18 Implementation UNMIK Regulation No. 2000/13 on the central civil registry’ [http://www.unmikonline.org/regulations/unmikgazette/02english/E2001ads/ADE2001\\_18.pdf](http://www.unmikonline.org/regulations/unmikgazette/02english/E2001ads/ADE2001_18.pdf) accessed 7 October 2016

(c) Persons who were incarcerated or detained in the Federal Republic of Yugoslavia on or before 22 September 2001 and remain incarcerated or detained at the date of the election”.<sup>944</sup>

There were two reasons for creating additional criteria of voter’s eligibility for the Kosovo election in 2001. Firstly, there were a huge number of displaced people due to the war in 1999. Secondly, they lacked an accurate census of data for the electoral authority to use as a basis for identifying the total number of people in small districts. In addition, people, who were residing outside Kosovo were granted the right to vote provided that they were in conformity with the section (c) of the direction.

The criteria of eligibility of voters in the UNMIK regulation 2001/9 and UNMIK regulation 2001/13 were implemented in the second and the third round of the parliamentary election in 2004 and 2007. The eligibility of voters included:

“A person is eligible to vote in an election to the Assembly if he/she is 18 years of age on the day of election and is registered in the Municipal Civil Registry Centre in his/her municipality of residence. Persons living outside Kosovo and who have left Kosovo on or after 1 January 1998 and meet the criteria in UNMIK Regulation no. 2000/13 on the Central Civil Registry are also eligible to vote.

An eligible voter who is temporarily residing outside of or displaced from Kosovo, is entitled to cast a ballot in the election to the Assembly through a by- mail voting programme if she/he has successfully applied for a by-mail ballot in accordance with procedures and the deadline of 8 September. The

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<sup>944</sup> Ibid section 3

applicants will receive the voting kit containing everything needed to cast the ballot”.<sup>945</sup>

Voter’s eligibility in Kosovo included people residing inside and outside the territory to exercise their right to vote. The main purposes of extending the time of registration and the eligibility of voter were to create new census-data and gain a high level of participation in the election, in particular the effective participation of the non-Kosovo-Albanian population.

### *3.4 Human Rights protection and people’s fundamental freedoms during elections*

It is necessary to ensure that the determination of the will of the people is free from intervention or influence from state authorities. During every stage of the electoral process, then, the people’s human rights must be protected, namely, freedom of expression, freedom of movement, and freedom of peaceful assembly.<sup>946</sup> Promotion and protection of this freedom is a way of ensuring the broader participation of all stakeholders before taking action in an election. In order for a governmental authority to claim that the genuine will of the people has been expressed, fundamental freedoms must be respected.<sup>947</sup> These freedoms can be facilitated by the media, political parties and civil society. Political parties work alongside the people, facilitating peaceful assembly, sharing information and creating an environment where deliberative, inclusive decision-making can take place.<sup>948</sup> Ideally, the media acts as a channel of communication between governmental agents and the people, raising awareness

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<sup>945</sup> Bjorg Hope Galtung, ‘Kosovo: Assembly elections October 2004’ 10-11

<http://www.jus.uio.no/smr/english/about/programmes/nordem/publications/2005/0205.pdf> [Accessed 7 October 2016]

<sup>946</sup> Human Rights Committee (n 36) para8

<sup>947</sup> Ibid para12

<sup>948</sup> Guidelines for election broadcasting in transitional democracies (n 696) p.16

amongst people that they have the right to be involved.<sup>949</sup> Civil society (such as non-governmental organizations) takes responsibility for ensuring that people have access to a large amount of information, including their own rights. It is an important additional channel for gathering the collective will of the people and transferring to state institutions.<sup>950</sup> If the fundamental freedoms of people are guaranteed, this improves the legitimacy of the actions of the officials to act on behalf of the people.

The concern for human rights is one way to evaluate a representative democracy, looking particularly at the relationship between the voters and the elected officials before, during and after the election itself.<sup>951</sup> *Prior* to an election, a concern for human rights is reflected both in the right to be exposed to a variety of accessible opinions, and in voter eligibility; whether the people are allowed to vote regardless of ethnicity, gender or any other factor.<sup>952</sup> *During* the process of an election, human rights concerns are based on freedom of movement, freedom to engage in the political campaign, the right to vote without interference, and of course an overall discretionary power to place their vote.<sup>953</sup> *After* representatives are elected, people must have the right to check and balance the power of the elected officials.<sup>954</sup> Moreover, political parties must act on the people's behalf in order to promote their interests, as promised during the campaign.<sup>955</sup> People have the right to expect that public opinion will be adhered to in policy and constitution-making. The main aim of this section is to outline how guaranteeing these fundamental freedoms of people allow a representative government to claim legitimacy.

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<sup>949</sup> Ibid p.19-20

<sup>950</sup> Ibid 41-42

<sup>951</sup> A continuous action can be seen within republican liberal theory. See Philip Pettit (n 17) 220-222

<sup>952</sup> Ibid 221

<sup>953</sup> Ibid 221-222

<sup>954</sup> Ibid 224-225

<sup>955</sup> Ann-Kristin Kolln, 'The value of political parties to representative democracy' (2015) 7 (4) European Political Science Review 593, 596

Human rights protection is generally accepted as an important component of legitimate constitution-building. The content of the constitution should include the empowerment of the people to have collective decision-making rights. People's participation in the constitution-making process includes a variety of activities which allow people to discuss a draft version. Thus, raising awareness through campaigns and providing civic education are crucial in encouraging public interest in political participation. If popular participation is taken into consideration by all key stakeholders within a society, the constitution is perceived as a legitimate tool which reflects the national identity and the people's aspirations for the future of the state.

According to the Guidance Note of the UN Secretary-General in the assistance to constitution-making processes in 2009, the constitution-making process includes strengthening the rule of law, improving democratic institutions and practices, and promoting the protection of human rights.<sup>956</sup> Apart from the substance of the constitution, other components of popular participation improvement include the establishment of a representative body to run campaigns, provide public information, and gather the views of people during drafting and post-drafting the constitution.<sup>957</sup>

In addition, according to Article 25 of the International Covenant on Civil and Political Rights (ICCPR), the right to political participation is guaranteed to all citizens. People's right to vote is perceived as an individual right (the right of expression, the right of movement, and the right to assembly) and a collective right

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<sup>956</sup> United Nations, 'Guidance note of the Secretary-General: United Nations Assistance to Constitution-making Processes' (April 2009) 3 <http://www.unu.edu/nu/wp-content/uploads/2016/06/SGGuidanceNote-Constitutionmaking.pdf> [Accessed 1 August 2016]

<sup>957</sup> Ibid 5

(the right to assembly and association).<sup>958</sup> Thus, people's right to participate in decision-making (and thus elections) must be specified in the legal regulations of a state to ensure their protection and promotion.

In order to provide legitimate grounds for an electoral process, the presence of political parties, media, and civil society are considered integral components of promoting effective public participation. To be considered as legitimate by the international community, all three components must be free to work independently and collectively with each other to maximize the people's involvement in the political process. Therefore each must maintain the freedom to operate without state intervention, and the right of each must be protected. The following section will describe these fundamental freedoms during the electoral process: freedom of expression, freedom of movement, and freedom of peaceful assembly. The connection between each of the democratic components (political parties, media and civil society) and each of the freedoms (expression, movement and assembly/association) is detailed below.

#### *3.4.1 Political party, the media and civil society's freedom of expression*

Freedom of expression is the liberty of people to freely express their views when selecting their representatives, regardless of their background. Freedom of expression is reliant on the right of individuals to vote, and to seek or receive information without any limitations before expressing their will.<sup>959</sup> In addition, freedom of

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<sup>958</sup> International Covenant on Civil and Political Rights (n 40), art 25(2)

<sup>959</sup> Human Rights Committee, 'General Comment No. 34' (n 521) para9,11



expression includes the right of political parties, media and civil society to be involved in an electoral process.<sup>960</sup>

Sometimes, political parties represent public opinion. They run their own campaigns to persuade people to select them as representative bodies. Within the democratic process, policy outcomes can demonstrate the transparency and accountability of a political party.<sup>961</sup> A political party's freedom of expression can be expressed as their right to communicate with people about their party policies.

During the Namibian election in 1989, there were more than 40 political parties representing diverse ideologies of racial and tribal affiliations.<sup>962</sup> However, there were only two leading parties (the South West African People's Organization (SWAPO) and the Democratic Turnhalle Alliance (DTA) which had sufficient funding to run campaigns.<sup>963</sup> The TV broadcasters also reserved time for these two political parties to present their campaign statements each night for the final six weeks of the electoral campaign. Other political parties were discriminated against and their freedom of expression to convey information to the people was restricted by the state's censorship. By contrast, the first free election in Czechoslovakia in 1990 exemplified a fair allocation of 4 hours of free television to every political party to impart their message to the public.<sup>964</sup> Similarly, before Bangladesh national election 1970, the President of Bangladesh decided to allow leaders of every party contesting the elections through radio and television.<sup>965</sup>

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<sup>960</sup> Human Rights Committee, 'General Comment No. 25(57)' (n 36) para25

<sup>961</sup> Ann-Kristin Kolln, (n 955) 593, 597

<sup>962</sup> National democratic institute for international affairs, (n 750) 18

<sup>963</sup> Ibid 18

<sup>964</sup> 'Guidelines for election broadcasting in transitional democracies' (August 1994 reprinted April 1997) (n 696) 25-26

<sup>965</sup> Md. Abdul Wadud Bhuiyan, (n 698) 148

The media takes responsibility for presenting a variety of information and acts as a mediator between the state authorities and the people. Ideally, the media should be free from state censorship to ensure that the people receive accurate information to assist them in their decision-making process. The free communication of information between citizens, candidates and elected representatives is an essential condition of a strong, democratic society.<sup>966</sup> Media broadcasting plays a crucial role in providing information to people and receiving their feedback on any public policy. The media can be a mediator between the government and the people, broadcasting the representatives' decisions and the people's reactions to their work. Even though sometimes the media has clearly partisan interests, it is more credible than either government or opposition parties.<sup>967</sup> Its neutrality and credibility is based on the media presenting a variety of facts and information about representative processes to the people. If the media is constrained by the government, this factor directly affects its accountability. In addition, the media's function is to give fundamental information on voting procedures to all eligible voters. Civic education and campaign broadcasts are provided.<sup>968</sup> During electoral campaigns in Namibia and Czechoslovakia, freedom of expression and media was protected to varying degrees.

During the election in Namibia in 1989, there were two issues with the media broadcasting: a plurality of media forms and the neutrality of media broadcasting. Firstly, it appeared that 60% of eligible voters in Namibia were illiterate, thus, radios were an important alternative source of information.<sup>969</sup> The media's freedom of expression includes the right to impart and receive information or idea through

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<sup>966</sup> Sarah Joseph, Jenny Schultz and Melissa Castan, (n 869) 596

<sup>967</sup> Bernard Manin, Adam Przeworski and Susan Stokes, 'Elections and Representation' in Adam Przeworski, Susan Stokes and Bernard Manin (eds), (n 561) 49

<sup>968</sup> 'Guidelines for election broadcasting in transitional democracies' (n 696) 25

<sup>969</sup> 'Guidelines for election broadcasting in transitional democracies' (n 696) 18; National Democratic Institute for international affairs, (n 750) 14

multiple channels of communication. Secondly, the neutrality of the media was questionable. It revealed armed attacks conducted by SWAPO but concealed the hostile actions of South African-funded paramilitary organizations – such as the South West African Police Counter Insurgency Unit (Koevoet).<sup>970</sup> These actions minimized the media's legitimacy in imparting information to people because they provided biased coverage. By contrast, during an election in Czechoslovakia 1992, the media was credible in conveying information to the public because the free media broadcasted information about both sides equally (i.e. Czechs and Slovaks).

Civil society represents different groups organizing themselves to express the people's concerns, to political parties and also to the media. When appropriately supported by the state, it acts as an additional channel of communication from the bottom to the top of the political hierarchy. Civil society is also a vital component of guaranteeing people's fundamental right to broader political participation. According to Cohen and Arato, modern civil society is created through forms of self-constitution and self-mobilization.<sup>971</sup> The former is recognized and protected by law whereas the latter is voluntarily established in order to promote political stability and social differentiation. When the people are gathered together, it is an opportunity for them to express their opinions and share their views, either in agreement or in opposition to policies. Civil society can help to consolidate the proliferation of interest groups in a pluralistic society; these differing views are a key facet of a democratic society.

Civil society's freedom of expression is a collective right of individuals or groups to express their political opinions to political parties or the media. During the electoral campaign in Czechoslovakia in 1992, the Slovak civil society's freedom of expression

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<sup>970</sup> 'Guidelines for election broadcasting in transitional democracies' (n 696) 37

<sup>971</sup> Jean L.Cohen and Andrew Arato, *Civil Society and Political Theory* (MIT 1992) preface IX

was strongly supported by the political parties, who used their influence to then propose an amendment to the constitution.<sup>972</sup> By contrast, the Czech civil society's freedom of expression was limited by the political parties, because the latter did not support public participation in political affairs. The political parties wanted to preserve a state-centralized power. Czech civil society ran a campaign supporting the use of a referendum as a way to legitimize the division of Czechoslovakia.<sup>973</sup>

#### *3.4.2 Political party, the media and civil society's freedom of movement*

Freedom of movement is the liberty of people to freely reside in their territory. The freedom of movement includes a procedural guarantee for the return of refugees, people in exile and displaced persons entitled to their right to vote.<sup>974</sup> In addition, the freedom of movement includes the right of journalists and others who seek to exercise their freedom of expression. They are able to visit specific locations within a state where there are allegations of human rights abuses or violent conflict.<sup>975</sup> A state cannot limit their right to disclose any information on human rights violations.

Each political party has the right to freely movement in all part of territories to communicate their idea and policies to people. The analysis of political party's freedom of movement is conducted to examine how each political party is fully accessible to people.

The media's freedom of movement is a monitoring of states' and officials' actions in order to ensure people's freedom of expression and assembly. State authorities cannot limit the media's freedom of movement by preventing it from disclosing information

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<sup>972</sup> Abby Innes, (n 888) 393,422

<sup>973</sup> Ibid 393,425

<sup>974</sup> Human Rights Committee, 'General Comment No.27 Freedom of movement, Article 12' (n 510) para7,8

<sup>975</sup> 'Guidelines for election broadcasting in transitional democracies' (n 696) 22-23

about human rights violations, because it is responsible for informing the public about the truth around electoral campaigns. Monitoring is a transparent practice which has a positive impact on general respect for human rights and the reduction of acts of aggression and violence.<sup>976</sup>

In order to achieve the protection of media's freedom of movement, media workers clearly identify themselves as independent human rights monitors.<sup>977</sup> It is important that media coverage on human right allegations is fair and reports based on the fact. If the media coverage was failed to perform its duty, this factor can influence people's emotion.<sup>978</sup> In March 2004, there was the most violent of the transitional period in Kosovo, when Kosovo Albanians forced thousands of Kosovo Serbs to leave their homes. Many Serbs villages and towns were destroyed. This ethnic tension was an incident when six major problem in Kosovo for many years. For example, during this time, Kosovar Albanian children from the Caber village were playing alongside the river Iber.<sup>979</sup> The majority of people in this village were Kosovar Serb. Instead of reporting this event neutrality, the Kosovo-Albanians media workers reported this in a biased way, presenting it as an ethnically motivated crime.<sup>980</sup> They reported that an unidentified group of local Serbs released a dog on the Kosovo Albanian children and that four of the children jumped into the river but only one survived. The media did not make it clear what had happened to the other two children. Because the media circulated one-sided information to the public, it had a direct consequence of 'inciting

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<sup>976</sup> European Commission for democracy through law (Venice Commission), 'Guidelines on freedom of peaceful assembly (2<sup>nd</sup> edition)' CDL-AD (2010) 020 84

<sup>977</sup> Ibid 85

<sup>978</sup> 'Guidelines for election broadcasting in transitional democracies' (n 696) p.34

<sup>979</sup> OSCE, 'The Role of the Media in the March 2004 Events in Kosovo' (2004) 4

<http://www.osce.org/fom/30265?download=true> accessed 10 October 2016

<sup>980</sup> Ibid 7

hatred'.<sup>981</sup> This carelessness increased the level of hatred between the Kosovo-Albanians and Kosovo Serbs.

Civil society's freedom of movement is a crucial factor in sharing political opinions between the people, political parties and the media. Civil society's freedom of movement should not be limited by time or place for organizing political activities. Before Pakistan's national election in 1970, there were two student organizations which jointly formed a political alliance to present an eleven-point program based on their dissatisfaction with the economic disparity between East and West Pakistan. The movement of student organizations was free and independent in East Pakistan. These actions gained a high level of support from local populations because the demands of middle-class peasants and workers were included in the eleven-point program.<sup>982</sup> It also appeared that there was no intervention from state authorities.

### *3.4.3 Political Party, the media, and civil society's freedom of assembly and association*

Freedom of assembly and association is the right of individuals, groups of people, or specific registered organizations to establish political activity.<sup>983</sup> Only peaceful assembly is recognized and protected by law. This fundamental freedom is guaranteed to everyone (i.e. individuals, groups, unregistered association, legal entities and corporate bodies).<sup>984</sup> Freedom of assembly includes the right to public political participation in a society that ensures the equality of people to express their opinions, in particular minority groups of people. 'The ability to freely assemble' is a way to

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<sup>981</sup> Ibid 7-9

<sup>982</sup> National Encyclopedia of Bangladesh 'Eleven Points Program'  
[http://en.banglapedia.org/index.php?title=Eleven\\_Points\\_Programme](http://en.banglapedia.org/index.php?title=Eleven_Points_Programme) [Accessed 2 October 2016]

<sup>983</sup> European Commission for democracy through law (Venice Commission), 'Guidelines on freedom of peaceful assembly' (n 976) 4

<sup>984</sup> Ibid 7

provide people the opportunity to express their differing views peacefully whilst under legal protection. People's participation in peaceful assembly can help to ensure that all citizens have the opportunity to express their opinions to civil society, political parties and the government.<sup>985</sup>

The right to organize peaceful assembly is an important way of mobilizing supporters of political parties.<sup>986</sup> It is a way to encourage people to agree overtly with its policies. Candidates represent people in state institutions both at a local and a national level. Communication between political parties and ordinary citizens is a democratic mechanism which influences public opinion. During a national election in Bangladesh 1970, every political party in East Pakistan had its parallel student's organization. The Awami League was supported by the East Pakistan Student League (EPSL).<sup>987</sup> The Student League was a mediator to communicate with other sectors in order to build multi-level support of political party's activities.

The equal access of media broadcasting allows the conveyance of information to the public freely and independently. The media is a key actor in monitoring the implementation of political party's and civil society's freedom of assembly and association. When a large proportion of the population are restricted in their right to peaceful assembly or association, the free media plays an important role in producing reports based on their findings. These reports, ideally, lead to a dialogue between civil society and government with the aim of advancing the promotion and protection of human rights.<sup>988</sup>

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<sup>985</sup> Ibid 13

<sup>986</sup> UNGA Res A/68/299, (n 546) para16

<sup>987</sup> Md. Abdul Wadud Bhuiyan, (n 698) 111

<sup>988</sup> Office for Democratic Institutions and Human Rights (OSCE), 'Handbook on Monitoring Freedom of Peaceful Assembly' 2011 8

Civil society functions to strengthen the implementation of human rights. Civil society's freedom of assembly is not under the control of state's intimidation. Civil society organizations promote the effective participation of all individuals and groups in a society. The freedom of peaceful assembly and association can be exemplified by the people's protest in Kosovo, and the strength of civil society in Catalonia, two cases which demonstrate the varying degrees to which the fundamental protection of people's right to assembly was upheld by state authorities.

In the case of Kosovo, the freedom to public assembly can be seen from the Ombudsman Report 008/2007 concerning the Vetevendosje protest on 10<sup>th</sup> February 2007. The non-violent protest opposed the Comprehensive Proposal for the Kosovo Status Settlement. In this situation, it appeared that there was a violent intervention of state authorities (i.e. polices and UNMIK officers); two protestors were killed and eighty people were injured.<sup>989</sup> The Ombudsman noted that the use of fire-arms with rubber bullets to the upper bodies of protesters was unnecessary, unjustifiable and disproportionate actions. The freedom to peaceful assembly was violated and the state authorities interfered.<sup>990</sup>

By contrast, the freedom of assembly in Catalonia is an example of freely and independently-organized peaceful action. Civil associations established a wide range of activities to support independence of Catalonia, such as a demonstration in Barcelona for amending the Statute of Autonomy 2006, and running campaigns through a variety of media channels.<sup>991</sup> It is undeniable that a massive involvement of

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<sup>989</sup> Flamur Hyseni, 'The right of freedom of public assembly-constitutional aspects' (2015) 1(1) Academic Journal of Business, Administration, Law and Social Sciences 201, 206

<sup>990</sup> Ibid 201, 206

<sup>991</sup> Kathryn Cramer, (n 25) 104, 105



civil society directly influenced the position of the representative bodies in accommodating the people's demand into their decisive action on independence.

Before the National Assembly convened the meeting, an individual-based organization run its campaign on independence in Barcelona on Catalonia's national day.<sup>992</sup> More than one million people, the three pro-independence political parties (i.e. Catalan Nationalist Party, Catalan Republican Left, and initiative for Catalonia Greens) gathered to demand independence.<sup>993</sup> In addition, the relationship between media and civil society is a crucial factor for sharing the sense of nationhood among local populations.<sup>994</sup> Thus, publication or media broadcastings of civil society activity is an additional mechanism to raise public awareness.

In sum, the importance of fundamental rights protection is a crucial factor in guaranteeing the effective participation of people in decision-making processes. If the minimum standard of freedom protection is achievable, this will increase the degree of legitimacy for a peaceful transfer of power. In addition, the function of political parties, media and civil society are crucial factors to transfer a wide variety of information to the people. These three channels of communication have direct consequences on people's decision-making processes.

### *3.5 The role and functions of international institutions*

International institutions occasionally play a supportive role in setting up specific commissions enforcing the right to political participation. This occurs when a territory is not ready to self-govern, and, international institutions can encourage local

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<sup>992</sup> Kathryn Cramer, 'Do Catalans have 'the right to decide'? Secession, legitimacy and democracy in twenty-first century Europe' 2015 Global Discourse DOI:10.1080/23269995.2015.1083326 accessed 23 July 2016 1, 7

<sup>993</sup> Ibid 10

<sup>994</sup> Ibid 12-13

populations' involvement in decision-making processes.<sup>995</sup> International institutions play a role in supervising or observing particular territories to create a viable, democratic society and legitimize the actions of the representative body as a result.<sup>996</sup> As the collective will of local populations is gathered through an electoral process, international institutions' involvement aims to guarantee the transitional process to independence or at least a greater level of autonomy, as in accordance with the local population.<sup>997</sup> This can guarantee that the local populations are included in decision-making processes and the actions of representatives are in accordance with the people's demands.

Within the UN machinery, the function of international institution involvement in elections is divided into two dimensions: electoral verification, and electoral assistance. Electoral verification involves the presence of the United Nations' observers in the territory. Electoral assistance entails a variety of technical or advisory services<sup>998</sup> and is established to ensure the transparency and credibility of elections involving popular participation.

The role of the UN in elections is to create accountability, ensuring that the governmental authority is responsive to the people's will.<sup>999</sup> The use of international observation is applied to "legitimize the election results".<sup>1000</sup> This mechanism can identify the will of the people before proceeding with the independence process. Apart from the UN, the Council of Europe is another international institution which creates certain forms and conditions to legitimize the electoral processes. The

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<sup>995</sup> UNGA Res 45/150 (1990) (n 596) section 2

<sup>996</sup> Ibid section 8

<sup>997</sup> Ibid section 3

<sup>998</sup> Ibid section 5

<sup>999</sup> Jan Wouters, Bart De Meester and Cedric Ryngaert, (n 165) 139,154

<sup>1000</sup> John Ferejohn, 'Accountability and authority: Toward a Theory of Political Accountability' in Adam Przeworski, Susan Stokes and Bernard Manin (eds), (n 561) 131

adoption of Resolution 1264 of the Parliamentary Assembly of the Council of Europe in 2001 aimed to “devise a code of practice in electoral matters and to compile a list of underlying of European electoral systems”.<sup>1001</sup> The Code of Good Practice in Electoral Matters would strengthen the credibility of the electoral observation and monitoring activities conducted by the Council of Europe.<sup>1002</sup>

In the case of Namibia, the territorial status of South West Africa in the League of Nations was a mandated territory under the administrative power of South Africa. After the League of Nations dissolved, South Africa refused to place the territory under the supervision of the General Assembly and its Trusteeship Council.<sup>1003</sup>

The UN-specific agencies in Namibia in 1967 were composed of the United Nations Council for Namibia and the United Nations Transition Assistance Group (UNTAG). The Council mandated its status as representative of the territory at an international level. The UNTAG had taken a supervisory role for the election.

The administrative role of the United Nations Council of Namibia included the task of maximizing the active role of the people to determine their future status.<sup>1004</sup> The General Assembly Resolution 2145 (27<sup>th</sup> October 1966) stated that:

“The General Assembly establishes an *ad hoc committee* for South West Africa-composed of fourteen Members States to be designated by the President of the General Assembly –to recommend practical means by which South West Africa should be administered, so as to enable people of the

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<sup>1001</sup> European Commission for democracy through law (Venice Commission) (n 217) p.4

<sup>1002</sup> European Commission for democracy through law (Venice Commission) (n 217) p.13

<sup>1003</sup> Marinus Wiechers, ‘Namibia’s Long Walk to Freedom: The Role of Constitution Making in the Creation of an Independence Namibia’ in Laurel E. Miller and Louis Aucoin (eds), (n 699) 82

<sup>1004</sup> United Nations, ‘Report of UN Council for South West Africa’ (n 727) 104,105

Territory to exercise the right of self-determination and to achieve independence, and to report to the General Assembly at a special session as soon as possible and in any event not later than April 1967”.<sup>1005</sup>

After the termination of the mandate by the United Nations General Assembly in 1966, the United Nations Council of Namibia was established the following year to control Namibia. Under the scope of the UN General Assembly Resolution 2248, the Council had administrative authority over Namibia. The function of the Council was specified in the United Nations General Assembly Resolution 2248:

“The General Assembly decided to establish a United Nations Council for South West Africa comprising eleven Member States and to entrust to it the following powers and functions:

(a) to administer South West Africa until independence, with the maximum possible participation of the people of the Territory;

(b) to promulgate such laws, decrees and administrative resolutions as are necessary for the administration of the Territory until a legislative assembly is established following elections conducted on the basis of universal adult suffrage;

(c) to take as an immediate task all the necessary measures, in consultation with the people of the Territory, for the establishment of a constituent assembly to draw up a constitution on the basis of which elections will be held for the establishment of a legislative assembly and a responsible government;

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<sup>1005</sup> UNGA Res 2145 (XXI) ‘Question of South West Africa’ (27 October 1966) para6 <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/004/48/IMG/NR000448.pdf?OpenElement> accessed 15 October 2016

(d) to take all the necessary measures for the maintenance of law and order in the Territory;

(e) to transfer all powers to the people of the Territory upon the declaration of independence”.<sup>1006</sup>

The task of the UN Council for Namibia was to work under the supervision of a UN Commissioner for South West Africa appointed by the General Assembly on the nomination of the Secretary-General.<sup>1007</sup>

The UNTAG’s supervisory role included monitoring the free and fair election and working in collaboration with the UN special representatives. The role of UNTAG was to supervise and control an election which aimed to assess the free and genuine will of the people, such as receiving complaints from citizens, party activists, and investigate events where intimidation might take place. Nevertheless, they were not able to arrest or institute legal proceedings.<sup>1008</sup> The main aim of the UNTAG supervision was to ensure that all practices conformed to the fundamental freedom protection of local populations.

The legal authority of the UNTAG was implemented through the UNSC Resolution 435 in 1978. This resolution specified that:

“The Security Council decides to establish under its authority a United Nations Transitional Assistance Group (UNTAG) in accordance with the above-mentioned report of the Secretary-General for a period of up to 12 months in order to assist his Special Representative to carry out the mandate

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<sup>1006</sup> ‘United Nations, Report of UN Council for South West Africa (n 727) 104,105

<sup>1007</sup> Ibid104,105

<sup>1008</sup> National democratic institute for international affairs, (n 710) 33

conferred upon him by the Secretary Council in paragraph 1 of its resolution 431 (1978), namely, to ensure early independence of Namibia through free elections under the supervision and control of the United Nations".<sup>1009</sup>

After releasing resolution 435 in 1978, the UN and UNTAG involved in a negotiating process for alleviate tensions in violent conflicts between warring parties. (i.e. South Africa and SWAPO's people liberation movement). During the 1980s, the UN took action on peace negotiation and they agreed to grant permission to the South Africa's Administrative General (AG) to control the electoral process alongside the Special Representative of the Secretary-General (SRSG). There was no formal institutional framework to generate the collaborative action between the AG and the SRSG for supervising the electoral process. Thus, the impartiality of these two organizations was a vital component of claiming legitimacy of their supervisory mission.

UNTAG maintained its role as a neutral facilitator between South Africa's administrative general and the liberation movement of SWAPO. There was three components of UNTAG's mission: the establishment of UNTAG offices, military disarmament and civilian policing, and preparations for the holding of elections.<sup>1010</sup>

The main purpose of establishing UNTAG office was to coordinate with the UN Special Representation and monitor the workings of South Africa's Administrative General.<sup>1011</sup> In terms of the military disarmament, UNTAG's military component included a total of 50 countries to provide military personnel and civilian police.<sup>1012</sup>

UNTAG military component had three main tasks: restricting to base and disarming

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<sup>1009</sup> UNSC Res 435 (29 September 1978) (n 700) para3

<sup>1010</sup> Lise Morje Howard, (n 787) 99, 108

<sup>1011</sup> Ibid 111-112

<sup>1012</sup> Christof Hartmann, 'External Democracy Promotion in Post-Conflict Zones: Evidence from Case Studies-Namibia' 21,25 [http://aix1.uottawa.ca/~czurcher/czurcher/Transitions\\_files/Final%20Report%20Namibia.pdf](http://aix1.uottawa.ca/~czurcher/czurcher/Transitions_files/Final%20Report%20Namibia.pdf) [Accessed 15 October 2016]

South African Defence Force (SADF) and SWAPO, monitoring SADF withdrawal out of Namibia and demobilizing the Namibians who fought against SWAPO.<sup>1013</sup> In addition, UNTAG's mission included the preparation of local populations' readiness for an election. UNTAG took part in five steps in the electoral process: clarification of the legislative framework, registration of voters, registration of parties, the electoral campaign and the vote itself.<sup>1014</sup> UNTAG brought action for civic education campaign in 13 different local languages, provided a wide range of information throughout a network with 32 broadcasting television and 201 radio programmes. Other informal mechanisms included the distribution of posters, T-shirts, brochures and stickers.<sup>1015</sup>

Another example of international institutional involvement is Kosovo in 1999. The purpose of international institutional intervention in Kosovo was to develop a democratic process for an autonomous self-government. Under the scope of Resolution 1244 (1999), it created a process to establish Kosovo's final status through a 'political settlement'. International institutional involvement in Kosovo was mainly composed of the United Nations Interim Administration Mission in Kosovo (UNMIK) and the OSCE Mission for Kosovo (OMIK). During the long process of negotiation and the transitional period of independence (1999-2008), the main aim of the international institutions included democratic proliferation along with the implementation of human rights protection and rule of law.<sup>1016</sup>

This particular instance of UN involvement is remarkable because rather than working alone, it worked in collaboration with a domestic institution to create long-

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<sup>1013</sup> Lise Morje Howard, (n 787) 99, 115

<sup>1014</sup> *Ibid* 99, 122

<sup>1015</sup> Henning Melber, (n 784) 15; Marinus Wiechers, 'Namibia's Long Walk to Freedom: The Role of Constitution Making in the Creation of an Independent Namibia' in Laurel E. Miller and Louis Aucoin (eds) (n 699) 99; Lise Morje Howard, (n 787) 99, 114

<sup>1016</sup> Bernhard Knoll-Tudor, 'The Settling of a Self-Determination Conflict?: Kosovo's Status Process and the 2010 Advisory Opinion of the ICJ' in Marko Milanovic and Michael Wood (eds), (n 705) 74

lasting democracy during the transitional period. The UN interim administration aims to prepare for substantial autonomy rather than Kosovar independence.<sup>1017</sup> Under the scope of the Security Council Resolution 1244 in 1999, the Special Representative of the Secretary-General for Kosovo (‘SRSG’) was authorized as a mediator to resolve Kosovo solutions. The UNSC Res 1244 stipulated that:

“The Security Council authorizes the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo”.<sup>1018</sup>

Apart from this mediation, the SRSG also contributed to ensure the effective implementation of the Kosovar Provisional Institutions of Self-Government (‘PISG’) in order to empower people to participate in the self-governing process. The development of democratic self-governing institutions gradually evolved under the framework of the UNMIK. Regulation number 2001/9 on 15<sup>th</sup> May 2001 states the SRSG had the authority to:

“protect and promote human rights and to support peace-building activities, the SRSG will retain the authority to intervene as necessary in the exercise of

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<sup>1017</sup> Marc Weller, (n 874) 227

<sup>1018</sup> UNSC Res 1244 (1999) (n 598) para10



self-government for the purpose of protecting the rights of Communities and their members”.<sup>1019</sup>

The function of the European Union was to work in collaboration with other institutions to promote democracy and stabilize those regions affected by the Kosovo crisis. The UN Security Council Res 1244 emphasized that:

“The Security Council welcomes the work in hand in the European Union and other international organizations to develop a comprehensive approach to the economic development and stabilization of the region affected by the Kosovo crisis, including the implementation of a stability Pact for South Eastern Europe with broad international participation in order to further the promotion of democracy, economic prosperity, stability and regional cooperation”.<sup>1020</sup>

The Organization for Security and Co-operation (OSCE) took part in a crucial stage of the peace mission in Kosovo. The OSCE Mission for Kosovo (OMIK) is a component part of the UNMIK. The primary role of the OMIK was to assist the process of institutional building and the promotion of democracy and human rights.<sup>1021</sup> The promotion of democracy and human rights aimed to create a viable society for all citizens in Kosovo. The initial step was to create various political institutions (legislative, executive, and judiciary bodies) along with preparing people to engage with these modern institutional forms of democracy. Kosovar institutional-building entailed the legislative, executive and judicial organizations, such as the central electoral commission (CEC), the Kosovo Judicial Institution (KJI), the Assembly of Kosovo.

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<sup>1019</sup> UNMIK/REG/2001/9 (n 915) para4.6

<sup>1020</sup> UNSC Res 1244 (1999) (n 598) para17

<sup>1021</sup> Claudio Formisano and Georgia Tasiopoulou, ‘The OSCE Mission in Kosovo: A Performance Appraisal’ <https://ifsh.de/file-CORE/documents/.../FormisanoTasiopoulou-en.pdf> [Accessed 11 August 2016]

The task of the UNMIK and the OMIK involved domestic institutional reformation and empowering people to participate in the decision-making processes. The ‘earned sovereignty’ approach proposed to undertake institutional-building with a multistage process to transfer sovereign authority to sub-state entity.<sup>1022</sup> This process was divided into three stages: shared sovereignty, institutional building and final settlement. The role of the UNMIK and OMIK was to facilitate these three major phases. Shared sovereignty was the first step in planning and designing viable local institutions within Kosovo. Then, the role of UNMIK dealt with institutional-building processes for the purpose of transferring authority to new emerging Kosovar institutions. During the institutional-building process, the UNMIK made great efforts to promote democratic institutions and to create democratic culture in Kosovo. This mechanism was the preparedness of domestically political institutions to allow the sub-state entity to effectively operate as an independent state.<sup>1023</sup> Other conditions were also considered as vital components for creating democratically political institutions, such as creating the capacity for people to work with these institutions and human rights monitoring etc. Finally, in 2007, the Comprehensive Proposal for the Kosovo Status Settlement (the Ahtisaari Plan) was endorsed by the UN Security Council to terminate the transitional arrangements from external institutional intervention. Moreover, the final settlement was focused on the function of the EU Special Representative (EULEX) as the International Civilian Representative (ICR) and the Assembly to adopt the constitution. The substance of the Ahtisaari plan entailed the future constitution of Kosovo. A mandate of the ICR is to check and adopt the constitutional provisions before proceeding to the Kosovar Assembly. The ICR action is to ensure that the free will of the people is crucially considered as a

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<sup>1022</sup> Paul R. Williams and Francesca Jannotti Pacci, ‘Earned Sovereignty: Bridging the Gap Between Sovereignty and Self-Determination’ (2004) 40 *Stanford Journal of International Law* 347,350

<sup>1023</sup> Marc Weller, ‘Interim-governance for Kosovo: The Rambouillet Agreement and the Constitutional Framework Developed under UN Administration’ in Marc Weller and Barbara Metzger (eds), (n 66) 243

component for territorial settlement in Kosovo, that is, citizens in Kosovo shall have the right to democratic self-government through legislative, executive, judicial and other institutions.<sup>1024</sup>

The intervention of external institutions in Kosovo during these years provided a continuous process of identifying the will of the people. In particular these external institutions attempted to help Kosovo create a constitutional framework which would emphasize the political equality of all citizens within their multi-ethnic society.<sup>1025</sup>

From this we can see that international institutional involvement was influenced by republican liberal theory which stresses the importance of democratic legislation guaranteeing equality between all people. To do this ensures that state authorities are able to self-govern. The case of Kosovo from 1999-2008 is a good example of how international institutions should not only reform local institutions but should also attempt to establish a legal basis for political participation of diverse groups of people living in a territory.

To sum up, the function of international institutions in representative processes is to reform political institutions within a state and to empower people to use their right to engage in decision-making processes. These two tasks aim to promote democracy and human rights, encouraging the people's participation in decision-making process. Comparing Namibia and Kosovo, the role of the international community in supervising elections has shifted towards facilitating local involvement in decision-making processes. In the context of Namibia, there was no clear mandate for

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<sup>1024</sup> UNSC 'Rambouillet Accords: Interim Agreement for Peace and Self-Government in Kosovo' (7 June 1999) UN Doc S/1999/648

<http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Kos%20S%201999%20648.pdf> accessed 15 October 2016

<sup>1025</sup> UNSC 'Comprehensive Proposal for the Kosovo Status Settlement' Annex I Constitutional Provisions' S/2007/168 Add.1 art1.3

international institutions to contribute strengthening local state institutions. Its main responsibility is to ensure free and fair elections as a legitimate democratic mechanism to identify the will of the people before independence. The change of SWAPO's status from popular liberation movement to a political organization is unilaterally recognized by the UN. Regarding Kosovo, the UN legal framework in the final status of Kosovo was more ambiguous than in Namibia but the local fieldwork is clearer than in Namibia to contribute strengthening local state institutions. The function of international institutions shifted to a multi-stage action. Kosovo's transition to independence was a continuous action which enfranchised local populations in decision-making processes and strengthened local institutions, guaranteeing their ability to self-govern in the long-term.

#### **4. Conclusion**

The will of the people can be identified from representative processes which include elections and the subsequent representative bodies. The establishment of an electoral system allows local populations to express their will regarding their territorial alteration. One advantage of an election is that it encourages the checking and balancing of power between competing groups within a particular territory. A representative process is dynamic and ongoing because it determines the will of the people through electing representatives who work on their behalf. These elected officials work in state institutions to put the people's mandate into action.

When considering consensual and non-consensual representative processes, one important observation is that the people's mandate is put into action to varying

degrees. A consensual action has a clear framework for how the will of the people is to be considered and respected in state institutions. For example in the aftermath of the Constituent Assembly election in 1989, the Namibian constitution-making process was recognized as carrying out the people's desire for independence. However, during consensual representative processes with clear state frameworks, there can be issues. In Namibia, even though there was a clear UN legal framework for establishing an electoral process regarding independence, civil society was not fully developed and therefore could not support the people in their decision-making. Instead, political parties became involved in influencing people's decisions. In addition, a consensual representative process may not reflect the clear mandate of people, like in Czechoslovakia. Prior to the election in 1992, there was no clear mandate from the people about the dissolution of Czechoslovakia. The separation of the two countries was conducted through negotiations between elected political elites.

By contrast, during non-consensual action, such as in Catalonia, the elected political elites used an election in order to measure the degree to which the people agreed with their representative's mandate in favour of independence. Nevertheless, the will of the people was not clearly ascertained since the pro-independence parties did not win a majority of seats in the regional parliament. In addition, in the absence of international institutional involvement, a request for a higher degree of autonomy or a constitutional amendment in non-consensual action is not recognized as a smooth transition. There was a delay in processing the transference of power to the elected bodies. Violent conflict may take place between the two competing parties and may become a turning point, like in the aftermath of the national election in Pakistan 1970. One observation in non-consensual action is that there is a strong civil society to

promote the local population interests, like in Catalonia 2012-2015. This is a way to balance state power in responding to the public demand.

## Chapter 4

### Non-referendum mechanisms: external self-determination and the model of public consultation

#### 1. Introduction

This chapter aims to explore the advantages and disadvantages of public consultations as a process to identify the will of the people. The establishment of public consultation aims to encourage popular, political participation. There are two objectives of consulting local populations during territorial alteration processes: to broaden participation amongst local populations in decision-making and to create ‘informed and motivated citizens’. Broader participation of the people in decision-making processes improves democratic legitimacy because it enables all people have political equality in decision-making processes. Minority involvement is an important way to create political equality; public consultation provides a channel for minority people, who are often excluded, to express their political will.<sup>1026</sup> Such broadening of participation increases the degree of the consultation process and therefore the legitimacy of the governmental authority. The second objective of a public consultation is to raise people’s awareness, specifically in a diverse or pluralistic society, of their right to be involved as ‘informed and motivated citizens’.<sup>1027</sup> Public consultation is therefore set up to encourage participation in political issues, particularly minority or indigenous groups. If they are able to participate in decision-making processes which affect them, this will increase the degree of legitimacy of governmental authorities after a decision has been reached.

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<sup>1026</sup> General Assembly Official Record, ‘Report of the United Nations Commission for Eritrea’ (8 June 1950) Supplement No. 8 A/1285 p.3 [https://digitallibrary.un.org/record/673432/files/A\\_1285-EN.pdf](https://digitallibrary.un.org/record/673432/files/A_1285-EN.pdf) accessed 10 October 2016

<sup>1027</sup> James Bohman, *Public Deliberation: Pluralism, Complexity, and Democracy* (MIT Press 1996) 17

During external self-determination processes in particular, a public consultation has two stages: the direct participation of the people in expressing their political opinions and the role of the people's representatives in carrying out the outcome of the collective consultation.<sup>1028</sup> Public consultation is a mechanism which therefore facilitates communication between constituents and their representatives. The concept of 'dialogue'- i.e. the exchange of political opinions, both amongst citizens and between them and their representatives is the central element of public consultation. Dialogue not only promotes the reconciliation of conflicting interests, but also develops political equality between populations, providing 'ongoing' channels through which citizens' voice are heard.<sup>1029</sup> Neither referendums nor elections facilitate the ongoing use of dialogue, whereas public consultations allow the people to engage in public participation in far more depth, providing a communicative mechanism with which the people can express the reasoning behind their opinions. It is a way of including people, both those in agreement and disagreement with an agenda item in the decision-making process. The purpose of a public consultation is not to reach a unanimous decision but to facilitate the productive expression of diverse opinions, particularly from indigenous and minority groups of people. It is considered a legitimate action if citizens agree sufficiently to cooperate in the consultation.<sup>1030</sup> If a public consultation is used during an external self-determination process, the government will be fully informed about the people's position. Such a consultation allows diverse opinions to be heard during the process of policy creation and implementation after a decision has been reached on the alteration of a territory.

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<sup>1028</sup> General Assembly Official Record (n 1026) p.17

<sup>1029</sup> James Bohman (n 1027) 27-28

<sup>1030</sup> Ibid 26



Due to a previous lack of international standards, the fairest, most equal conditions of carrying out a public consultation have been a controversial issue. A contemporary understanding of a ‘public consultation’ is a mechanism which aims to create free, fair, and legitimate popular involvement in political affairs. A leading example of international law instrument is the International Labour Organization (ILO) Convention Number 169 Indigenous and Tribal Peoples Convention in 1989.<sup>1031</sup> By means of the ILO Convention, one **participatory right** of people in decision-making processes is **‘the right to be consulted’**.<sup>1032</sup> These guidelines suggest a ‘coordinated and systematic approach’ for guaranteeing the equal consideration of all ethnic people in a collective consultation.<sup>1033</sup> The guidelines also suggest how domestic institutions can guarantee the rights of ethnic minority people to be involved in a consultation, as well as the legal mechanisms which should be put in place to ensure that state law gives appropriate status to all people, including minority groups.<sup>1034</sup>

In 2009, the ILO provided some guidelines for standardized conditions of a public consultation which reflect republican liberal theory. According to republican liberalism, ‘the people’ as a political community should have the right to be continuously, publically involved in the practical application of territorial alteration processes. Republican liberal theory states that if a practical application upholds three particular democratic values, then it can be considered legitimate. The three conditions are: minority involvement and peoples’ political equality without governmental authority domination; the presence of institutional frameworks to

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<sup>1031</sup> Indigenous and Tribal Peoples Convention 1989  
[http://www.eods.eu/library/ILO\\_Indigenous%20and%20Tribal%20Peoples%20Convention\\_1989\\_EN.pdf](http://www.eods.eu/library/ILO_Indigenous%20and%20Tribal%20Peoples%20Convention_1989_EN.pdf) [Accessed 15 February 2017]

<sup>1032</sup> International Labour Standards Department, ‘ILO Convention No. 169 (Pro169) Indigenous & tribal peoples’ rights in practice’ 2009 [http://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@normes/documents/publication/wcms\\_106474.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms_106474.pdf) accessed 20 October 2016

<sup>1033</sup> Ibid p. 29

<sup>1034</sup> Ibid p.14

guarantee effective participation; and legal mechanisms to recognize all ethnic identities in a pluralistic society.<sup>1035</sup> Under the ILO convention, these three following conditions are stated as components of legitimate, public consultation.

Firstly, the people must grant ‘informed consent’ that a public consultation may take place, which means that they must know about the proposed issue.<sup>1036</sup> During external self-determination it is particularly important that minority groups are informed and motivated to participate, increasing the fairness of the process. Public consultation promotes the inclusion of minorities, both individually and collectively, encouraging them to express their political opinions, and therefore achieve popular acceptance of the outcome.<sup>1037</sup> Minority involvement in political affairs is also a factor in alleviating tensions or violent conflicts between majority and minority groups of people. Crucially, ensuring minorities are informed about the consultation topics as they are equally affected by the decisions made by the central government.

In order to attain the ‘informed consent’ of the people, the ILO provides two conditions for the consent of the people to be fully ‘informed’; first that there is sufficient circulation of information, and secondly that an appropriate amount of time is allocated. The circulation of information is important to ensure that all the people fully understand the consequences of a public consultation.<sup>1038</sup> Whether they agree or disagree with the proposed topic, the information should include all possible outcomes of the consultation. In addition, the government should not take sole

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<sup>1035</sup> Philip Pettit, (n 17) 190-200; Philip Pettit, (n 26) 160-179; John Mayor, (n 17) 129-133; Richard Bellamy, (n 17) 176-184

<sup>1036</sup> ILO Convention No. 169 (n 1032) p.61; Human Rights Committee, Communication No. 1457/2006 CCPR/C/95/D/1457/2006 para7.6 [http://www.worldcourts.com/hrc/eng/decisions/2009.03.27\\_Poma\\_Poma\\_v\\_Peru.htm](http://www.worldcourts.com/hrc/eng/decisions/2009.03.27_Poma_Poma_v_Peru.htm) accessed 15 February 2017; African Commission on Human and People’s Rights Communication 276/03 Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council)/Kenya para291

<sup>1037</sup> ILO Convention No. 169 (n 1032) p. 62

<sup>1038</sup> ILO Convention No. 169 (n 1032) p. 62; African Commission on Human and People’s Rights Communication 276/03 (n 1036) para289

responsibility for distributing one-sided information. The media and civil society should work together to raise public awareness.<sup>1039</sup> In terms of time allocation, it is necessary to set appropriate time duration for the public, specifically *enough* time to ensure that the communicative system is sufficient to distribute all relevant information to the public. Without informed consent of people, any governmental action after the consultation is not considered legitimate.<sup>1040</sup>

Secondly, the presence of institutional framework has been considered to guarantee equal participation of all people in a public consultation. There are two ideas about how institutional frameworks can operate. The first of these is that there should be public involvement in formulating policy (i.e. the right to propose) from the outset, instead of simply waiting for the people's reaction after the fact.<sup>1041</sup> Consultation with the people, including ethnic minority groups, is a way to include their voices in the formulation process of policy-creation.<sup>1042</sup> The ILO states that the wishes of all the people should be heard in formal institutions through representative bodies. The consequential interaction between the rulers and the ruled in such representative institutions can improve the quality of governmental policy, especially if it involves diverse groups of people. This will improve the fairness and equality of the decision-making process as a whole. The second idea is that institutions should exist which allow all ethnic groups of people to express their public opinion.<sup>1043</sup> The establishment of institutions aimed to include all ethnically and culturally differentiated people, allowing them to share their opinions on a particular issue.<sup>1044</sup>

Institutions should carry out two functions: increase public awareness of the people's

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<sup>1039</sup> ILO Convention No. 169 (n 1032) p. 64

<sup>1040</sup> African Commission on Human and People's Rights Communication 276/03 (n 1036) para268

<sup>1041</sup> ILO Convention No.169 (n 1032), art 7(1), p. 61

<sup>1042</sup> African Commission on Human and People's Rights Communication 276/03 (n 1036) para282

<sup>1043</sup> UN Declaration on the Rights of Indigenous people 2007, art 18

<sup>1044</sup> ILO Convention No. 169 (n 1032) p.75, 77; African Commission on Human and People's Rights Communication 276/03 (n 1036) para132

rights and develop the capacity of indigenous people and minority people to govern themselves.<sup>1045</sup> After the latter have sufficient knowledge to govern themselves, institutions should empower them to be able to represent themselves at a state level, decreasing discrimination and inequality among populations.<sup>1046</sup> The creation of new institutions which confirm the rights of indigenous people or minority people to participate in territorial alteration decision-making processes increases the level of fairness and governmental legitimacy.

Thirdly, it is crucial to recognize all people's identities in any domestic law.<sup>1047</sup> The main aim of creating legal mechanism is to protect the fundamental rights of people. It is a state obligation to respect, protect, and fulfil all people's enjoyment of their fundamental rights to expression, movement, or association. If the right to free and equal political participation is endorsed within a legal instrument, public participation in decision-making processes is more robust.<sup>1048</sup> If all opinions are taken into consideration, the outcome of a decision is legitimate. Thus, the constitution or specific statute is drafted on the basis that the fundamental rights of the people, particularly minority people, are guaranteed by law. During public consultations in territorial alteration processes it is important to have legal protection of the people's right to freely express their genuine will about where they wish to live and to which country they wish to belong.

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<sup>1045</sup> ILO Convention No. 169 (n 1032) p. 49-50

<sup>1046</sup> Ibid p. 29

<sup>1047</sup> Ibid p. 31

<sup>1048</sup> African Commission on Human and People's Rights Communication 155/96 *The Social and Economic Rights Action centre and the centre for Economic and Social Rights v Nigeria* para46-48 [https://docs.escr-net.org/usr\\_doc/serac.pdf](https://docs.escr-net.org/usr_doc/serac.pdf) [Accessed 15 Feb 2017]; Fons Coomans, 'The Ogoni Case before the African Commission on Human and Peoples' Rights' (2003) 52 ICLQ 749, 753; Human Rights Committee, Communication No. 1457/2006 (n 1035) para7.2

If a public consultation complies with these three conditions set up by the ILO, and also aligned with republican liberalism, this can ensure that the public consultation is legitimate and the will of the people is reliable. If the governmental authorities carry out the will of the people according to the public consultation, the government itself will be considered more legitimate. The will of the people has been fairly and clearly ascertained.

## **2. The application of republican liberalism to the public consultation processes**

One important aspect of republican liberal theory is political equality, i.e. the right of every citizen who resides in a particular territory to be allowed to take part decision-making processes which affect their lives. A public consultation is a mechanism which aims to include all citizens in a decision-making process. It encourages people to be informed and motivates them to be involved in their country's politics. Then, the continuous interaction between public opinion and state institutions is a leading factor in constructing legitimacy in a decision-making process. According to Habermas, democratic institutional reformation includes a 'two-track' stage of decision-making (i.e. informal public communication and formal institutions).<sup>1049</sup> The first is that a state should create a communicative mechanism between itself and the political community.<sup>1050</sup> This process can guarantee the collection of public opinions from all stakeholders or interested groups in a pluralistic society. All groups of people are included in the territorial alteration process and have opportunities to express their opinions. In the second track, these diverse opinions are discussed and shared in

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<sup>1049</sup> Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT 1996) 300-301, 307; Patrick O'Mahony, *The Contemporary Theory of the Public Sphere* (Peter Lang 2013) 365-366

<sup>1050</sup> *Ibid* 301-302

formal state institutions through representative bodies.<sup>1051</sup> This can ensure the outcome of decision-making is derived from all the people's concerns.

In the 1960s, West Papua and Bahrain used public consultations to ascertain the will of the local people as part of a territorial alteration process. These two examples illustrate how the public consultation process functions as a part of state creation, however, they also reveal practical difficulties about ensuring political equality amongst a population, in particular minority involvement in the consultation process.<sup>1052</sup> Firstly, not all of the people directly expressed their needs to their representative; the number of people who were consulted was limited. This demonstrates how a government control the practical application of an external self-determination process in order to achieve the outcome it wants.<sup>1053</sup> Secondly, the composition of representative bodies was largely in the hands of the state.<sup>1054</sup> The local populations did not directly elect their own representatives. Therefore, it is difficult to say whether all the representatives promoted the people's interests. Thirdly, in boundary alteration, even though the public consultations took place under the supervision of international institutions (i.e. the UN.), the latter had no legal enforcement over any state jurisdiction. When there was a human rights violation, the UN representatives merely informed the state parties that they should guarantee the fundamental rights of people.<sup>1055</sup> These three difficulties directly affected the degree of legitimacy of the public consultations.

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<sup>1051</sup> Ibid 304

<sup>1052</sup> John Saltford, *United Nations involvement with the act of self-determination in West Irian (Indonesian West New Guinea) 1968 to 1969: The anatomy of betrayal* (Routledge 2003) 160-165; Brad Simpson, 'Power, Politics, and Primitivism: West Papua's Struggle for Self-Determination' (2003) 35(3) *Critical Asian Studies* 469, 471-472; Chapter 8 Maintenance of international peace and security, 'Question of Bahrain initial proceedings' para2; UNSC Res 278 (1970), 'The Question of Bahrain' (11 May 1970) section 2

<sup>1053</sup> For example, in West Papua 1969 public consultation, see John Saltford (n 1052) 161-163

<sup>1054</sup> Ibid 166

<sup>1055</sup> Ibid 176-177

The following section will examine three relevant factors affecting the legitimacy of public consultations: international institutions' involvement in setting up public consultation processes; effective public engagement in decision-making processes; and human rights protection.

### *2.1 International involvement in the establishment of a public consultation*

A public consultation is used to ensure all citizens' political opinions are heard, and to allow local populations to determine the future of their own territory. It is assumed that the differing views of all citizens are conveyed to the state before any final decision is made. International institutions are involved in organizing public consultations in order to guarantee that the local populations can make decisions without any intervention from state authorities. The work of international institutions should be free from state intervention in order that the government can claim the gathering of public opinions to be legitimate. From pre-to post-consultation, there are many ways in which international institutions are involved. In the pre-consultative process, a field trip or a survey is necessary to categorize different groups of people in a particular territory. This stage can help in creating a plan for educational training or raising public awareness on a boundary-making issue.<sup>1056</sup> Then, during the public consultation process, the people will be informed and motivated to express their political opinions freely- in particular indigenous people or minority people who might otherwise be excluded.<sup>1057</sup> In the post-consultative process, the findings of the international institutions' representative are submitted to their governing body in order to assess the degree of legitimacy of the public consultation process.<sup>1058</sup> The

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<sup>1056</sup> This continuous action of public consultation is in accordance with the republican liberal theory, in particular raising public awareness. See John W. Maynor (n 17) 155-171, 175-191; Michla Pomerance, 'Methods of Self-Determination and the Argument of "Primitiveness"' (1974) 12 *The Canadian Yearbook of International Law* 38, 40-41

<sup>1057</sup> John W. Maynor (n 17) 175-178; Michla Pomerance (n 1056) 48-49

<sup>1058</sup> John W. Maynor (n 17) 155-158; Michla Pomerance (n 1056) 49

objective of the international institutions is to ensure a smooth and peaceful transition to an independent state. If the three stages of collective consultation are carried out, this can help to legitimize the actions of the governmental authorities, because political equality has been achieved.

The following two practical applications illustrate different levels of direct public participation in a collective consultation. In the context of Western New Guinea, Indonesia not only dominated the consultative process but also restricted UN monitoring, reducing the legitimacy of the overall process. In contrast, Bahrain provided an opportunity for the people to express their will in determining their future status. The UN acted as mediators conveying the local populations' demands to Iranian state institutions.

### *2.1.1 West Papua*

The issue of West Papua was taken into consideration when the UN Commission on Indonesia was established in 1949. West Papua was a part of 'the Dutch East Indies' or so called 'Dutch New Guinea'. The territory was composed of two provinces: Papua and West Papua. A point of discussion between Indonesia and the Netherlands was whether West Papua was a part of 'the Dutch East Indies' or not.<sup>1059</sup> The Netherlands and Indonesia had different views on the connection between people and territory. In the view of Indonesia, West Papua was an integral part of Indonesia; the people's right over their territory should be considered based solely on their 'political identity' (i.e. the fact that both Indonesians and West Papuans were former colonial territories of the Netherlands) despite a clear 'cultural or racial distinction'. By contrast, the Netherlands believed that the decolonization of Indonesia was not

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<sup>1059</sup> John Saltford (n 1052) 5-6



relevant to West Papua. They argued that the identification of the people was different based on West Papua's cultural or racial ties to Indonesia -rather than simply a change of political administration.<sup>1060</sup>

#### 1949-1961: the beginning of the West Papua controversy

In 1949, the Netherlands and Indonesia signed an agreement called the 'Charter of the Transfer of Sovereignty over Indonesia' at the Hague. The status of West Papua<sup>1061</sup> was an agenda item at the round-table conference discussion but no agreement was found. According to Article 2, the 'status quo' (i.e. New Guinea as a colony of the Netherlands should be maintained. It was stipulated that:

“The status quo of the residency of New Guinea shall be maintained with the stipulation that within a year from the date of transfer of sovereignty to the Republic of the United States of Indonesia the question of the political status of New Guinea be determined through negotiations between the Republic of the United States of Indonesia and the Kingdom of the Netherlands”<sup>1062</sup>

There was a disagreement between the Netherlands and Indonesia over the interpretation of 'one year of status quo'.<sup>1063</sup> From the standpoint of the Netherlands, the one-year timeframe was set up to postpone the re-discussion of their sovereign power over West Papua. They believed that territorial sovereignty belonged to the Netherlands until both parties reached a new agreement.<sup>1064</sup> However, Indonesia

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<sup>1060</sup> A. Rigo Sureda, (n 45) 149

<sup>1061</sup> The territory has various names: New Guinea (Netherlands), West Irian and later Irian Jaya (Indonesia). Then, the territory is called West Papua in the late 1990s in order to satisfy nationalist sentiment. See Brad Simpson (n 1052) 469,475

<sup>1062</sup> Charter of the transfer of sovereignty over Indonesia 1949, art 2 <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/S002081830002899X> [Accessed 10 January 2017]

<sup>1063</sup> Paul W. Van Der Veur, 'The United Nations in West Irian: A Critique' (1964) 18(1) International Organization 53; Daniel Gruss, 'UNTEA and West New Guinea' (2005) 9 Max Planck Yearbook of United Nations Law 97, 99

<sup>1064</sup> Paul W. Van Der Veur (n 1063) 53

contended that according to the Article, West Papua would be incorporated into its sovereignty after that year.<sup>1065</sup>

After the round-table conference in 1949 at the Hague, the Dutch made several attempts to resolve the West Papua problem. Firstly, in 1955, Dutch officials planned to submit a proposal to place West Papua into a trusteeship system under the UN. This attempt did not receive much attention at the Hague.<sup>1066</sup> Secondly, in 1956, a negotiation between Indonesia and the Netherlands in Geneva was launched to determine the status of West Papua. The Netherlands did not accept the unilateral action of Indonesian government to dissolve the Netherlands and Indonesian Union which was signed in Linggadjati Agreement 1949. Indonesia insisted that the negotiations could start when the Netherlands accepted West Papua as a part of Indonesia territory.<sup>1067</sup> Thirdly, in 1961, the Netherlands Foreign Minister Luns made a draft resolution to the General Assembly for calling a transfer of Dutch Sovereignty to the West Papuans and holding a referendum under the supervision of the UN.<sup>1068</sup> This draft resolution did not attain the simple majority requirement.

Meanwhile, the Indonesian authorities' reaction was to pressurize the Dutch to relinquish the West Papua territory altogether. In 1950, for example, the President of Indonesia Sukarno, announced the formation of a unitary system, which included West Papua- consolidating its position as an integral part of Indonesia. The 1955 and 1956 negotiations between Indonesia and the Netherlands failed due to the threat of military forces against the Dutch in Indonesia. In 1958, the tension between Indonesia and the Netherlands rose to the extent that armed conflicts took place. Indonesia

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<sup>1065</sup> Paul W. Van Der Veur (n 1063) 53

<sup>1066</sup> John Saltford (n 1052) 6

<sup>1067</sup> Paul W. Van Der Veur (n 1063) 53; John Saltford, (n 1052) 6

<sup>1068</sup> Daniel Gruss (n 1063) 97, 102

claimed that it had a dominant power over West Papua territory because the Netherlands controlled West Papua without any geographical connection.

In 1961, the Netherlands submitted its “Memorandum on the future and the development of Netherlands New Guinea” to the UN General Assembly. They included their belief that raising awareness among local populations and indigenous people about exercising their rights was an important step for attaining self-governance. Even beforehand, from 1959 the Netherlands had launched a plan of action to train local populations to exercise their right to self-governance. They believed that if West Papuans were to govern themselves in the future, it was important to teach citizens about how legislative, executive and judicial powers should function according to international standards. The Dutch Memorandum of 1961 also stated that the Netherlands intended to cede their power when the West Papuans’ right to self-determination was safeguarded.<sup>1069</sup> They expected that West Papua would declare as an independent state by 1970.

The Netherlands hoped to achieve their aim of educating the local population about self-governance through the establishment of a ‘Papuan National Congress’ and eight Regional Councils.<sup>1070</sup> Prior to the Congress having been established, no West Papuan citizen had been involved in any way in the negotiation process, which was dominated by the colonial power (the Netherlands) and Indonesia. The ‘Papuan National Congress’ or ‘New Guinea Council’ was established to advise the Governor of the West Papua.<sup>1071</sup> The Congress was composed of 16 officials elected by local populations and 12 selected by the Dutch for those areas deemed not yet sufficiently

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<sup>1069</sup> ‘Memorandum on the future and the development of Netherlands New Guinea (9 October 1961) UN Doc A/ 4915 para4 (b)

<sup>1070</sup> Ibid para3

<sup>1071</sup> Daniel Gruss, (n 1063) 97, 101

literate to vote. These 28 members of Congress were responsible for adopting or rejecting the bill (i.e. the New York Agreement 1962) to transfer administrative power from the Netherlands to the UN. Only 14 of them voted to adopt the bill.<sup>1072</sup> Thus, even though half the West Papuan representatives did not agree with the proposal, the bill came into effect in 1962.

### 1962: The New York Agreement

Owing to the long-lasting conflict between the Netherlands and Indonesia, the issue of West Papua was added to the UN agenda by the United Nations Secretary General (UNSG) in 1962. There were two subsequent actions: the New York Agreement - a peaceful settlement mechanism - and the establishment of a United Nations Temporary Executive Authority (UNTEA) along with a United Nations Security Force (UNSF) to administer over West Papua territory.

The New York Agreement stressed the administrative power of the Netherlands over West Papua. The process laid out in the Agreement consisted of two stages. Firstly, the Netherlands would transfer administrative power over West Papua to the UNTEA, which was established under the jurisdiction of the UN Secretary-General. Secondly, after 7 months of power,<sup>1073</sup> UNTEA would then transfer the administration to Indonesia.<sup>1074</sup> Crucially, the New York Agreement was a legal mandate to allow public participation in exercising the right to self-determination. According to Article 18 of the Agreement, the will of the people should be freely expressed through a consultative process. The agreement was set out thus:

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<sup>1072</sup> John Saltford, (n 1052) 20

<sup>1073</sup> John Saltford, 'United Nations involvement with the act of self-determination in West Irian (Indonesian West New Guinea) 1968 to 1969' p.72-73 Available at: [http://resources.huygens.knaw.nl/indonesischebetrekkingen1945-1969/DekolonisatieVanIndonesieEnHetZelfbeschikingsrechtVanDePapoea/papers\\_pdf/saltford](http://resources.huygens.knaw.nl/indonesischebetrekkingen1945-1969/DekolonisatieVanIndonesieEnHetZelfbeschikingsrechtVanDePapoea/papers_pdf/saltford) accessed 30 November 2016

<sup>1074</sup> New York Agreement 1962, art2 <https://www.freewestpapua.org/documents/the-new-york-agreement/> accessed 1 December 2016

“Indonesia will make arrangements, with the assistance and participation of the United Nation Representative and his staff, to give the people of the territory the opportunity to exercise freedom of choice. Such arrangements will include:

(a) Consultations (Musyawarah) with the representative councils and appropriate methods to be followed for ascertaining the freely expressed will of the population”.<sup>1075</sup>

After receiving the transference of West Papua from the Netherlands in 1962, the establishment of the UN administrative mission over West Papua territory was authorized by the General Assembly Resolution 1752. The UNSG was able to carry out his duty in bringing about peaceful settlement over West Papua.<sup>1076</sup> The UN acted as ‘a neutral buffer’ between the Netherlands and Indonesia.<sup>1077</sup> The mandate of the UN concerning West Papua was divided into three phases:

- “1. Providing military observers to supervise the cease-fire that went into effect on 18 August 1962;
2. Administering the territory of West Papua through the United Nations Temporary Executive Authority (UNTEA) with the help of a United Nations Security Force (UNSF), which was to maintain law and order;
3. Dispatching a representative of the Secretary-General to participate in the arrangements for the act of free choice and to observe this act”.<sup>1078</sup>

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<sup>1075</sup> Ibid, art. 18

<sup>1076</sup> UNGA Res 1752 (XVII) ‘Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian)’ (21 September 1962)

<https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/192/60/IMG/NR019260.pdf?OpenElement>

[Accessed 2 Jan 2017]

<sup>1077</sup> Ralph Wilde, *International territorial administration: how trusteeship and the civilizing mission never went away* (Oxford 2008) 13

<sup>1078</sup> Daniel Gruss, (n 1063) 97, 104-105

From the above mandate, the establishment of UNTEA in collaboration with UNSF covered the first and the second phases of action. UNTEA's activities involved many activities, for example, carrying out a field survey of the West Papuans' political opinions.

After implementing the New York Agreement in 1962, there were conflicts between UNTEA and the Indonesian government. On the one hand, UNTEA's job was set out with a 5-year timeframe in assisting Indonesia to guarantee the right of West Papuans to self-determination. But in reality UNTEA carried out its duty for only 7 months and then decided to transfer sovereignty to Indonesia in May 1963.<sup>1079</sup> The work of UNTEA over West Papua had two main weaknesses. Firstly, UNTEA was not ready to play its administrative role. Between the signing of the Agreement and the UN taking responsibility, there was only six weeks for recruiting new staff, planning how to train local populations, understanding the complexity of the problem and ensuring there were sufficient skilled staff.<sup>1080</sup> Secondly, the West Papuans' representatives did not have the opportunity to express their opinions about determining their territorial status in the negotiation process when the New York Agreement was signed in 1962.<sup>1081</sup> Thus, the equal consideration of indigenous people's voices and demands was in doubt, in particular the 'one man one vote' rule, which the UN had proposed to Indonesia as being the best way to allow each citizen to fairly express their opinion.

In addition, UNTEA encountered difficulties in setting up measures for sharing information with the local populations, in particular populations living in remote areas. UNTEA had a limited amount of time for planning after the Dutch unilaterally

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<sup>1079</sup> New York Agreement, art 12 (n 1074)

<sup>1080</sup> John Saltford, (n 1052) 15; Paul W. Van Der Veur, (n 1063) 53,58

<sup>1081</sup> New York Agreement 1962 (n1074)

decided to cede its administrative power. Another problem was that UNTEA could not get involved in maintaining law and order because Indonesia interfered by running its own campaign. Its strategy was to criticize the work of UNTEA, which replaced the Dutch administrative duty, on the basis that Indonesia could do better than UNTEA in meeting the West Papuans' demands.<sup>1082</sup>

#### 1969: the 'Act of Choice' implementation and the public consultation process

Between 1963 and 1969, the West Papua territory was under the control of Indonesia. During these six years popular uprisings were banned and people intimidated with severe punishment if they disagreed with the pro-Indonesian campaign. The Indonesian government ignored the right of West Papuans to participate in political affairs. In 1964, the UN urged Indonesia to provide a mechanism for local populations to express their political opinions based on the 'one man one vote' principle. However, Indonesia gathered the people's will by dividing the West Papuans into 'advanced people' and 'less advanced people'.<sup>1083</sup> The former group had opportunities to express their views independently and vote for their representatives based on the 'one man one vote' basis. The latter groups consisted of those who resided in remote areas.

In 1967, the third phrase of action under the New York Agreement 1962 was conducted when the Indonesian government signed a Memorandum of Understanding to hold a public consultation in West Papua. According to Indonesia standpoint, only a collective consultation was held, without the opportunity for individual citizens to express their views. The Memorandum included the phrase:

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<sup>1082</sup> John Saltford, (n 1052) 31

<sup>1083</sup> Michla Pomerance, (n 1056) 38,50-51

“The government will hold consultations with the Regional Councils in West Irian as to the most appropriate form of free choice and agrees to have United Nations’ participation in the consultation”.<sup>1084</sup>

The ‘Act of Free Choice’ was subsequently released in 1969 as a document for creating viable conditions for a public consultation. This was a legal framework providing a procedural requirement to illustrate how the West Papuans right to self-determination would be applied. A UN representative, Mr. Ortiz-Sanz, held a supervisory role to ‘assist, advise, and participate’ in ensuring that the political rights of the West Papuans were adhered to.<sup>1085</sup>

Before proceeding to a public consultation, the Secretary-General’s representative’s suggested that the ‘consultative assemblies’ would truly represent all populations in the territory if there were three prerequisites for the collective consultation processes: first, they should have a sufficiently large membership; second, they should represent all sectors of the population; third, the new members should be clearly elected by the people.<sup>1086</sup> Evidence for this can be seen in the letter dated 1 May 1969. The letter stated that:

“The consultative assembly consists of representatives of the people who have been democratically elected by the people according to the aspirations and customs of the people of West Irian, and that a consultative assembly should

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<sup>1084</sup> UNGA A/7723 (6 November 1969) Annex 2 ‘Report of the Indonesian government to the Secretary-General of the United Nations, concerning the conduct and the results of the “act of free choice” in West Irian, pursuant to Article 21 of the New York Agreement 1962, p.13

<sup>1085</sup> Annex 1 of the Agreement Between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (n 1076) p.8

<sup>1086</sup> UNGA A/7723 (6 November 1969) (n 1084) Annex 1 ‘para87



be composed of people's representatives involving all layers and groups of the local community".<sup>1087</sup>

Between 22<sup>nd</sup> March 1969 and 12<sup>th</sup> April 1969, a public consultation was held to measure the wishes of local populations in determining their territorial status. The public consultation contained two important stages; 1) a consultation with the elected representative councils in the eight regencies.<sup>1088</sup> 2) The formulation of the questions to permit the inhabitants to decide whether (a) they wish to remain with Indonesia or (b) they wish to sever their ties with Indonesia.<sup>1089</sup> All adult residents (both male and female) at the time of signing the New York Agreement in 1962- or residents who returned to the territory after the termination of the Dutch administration- were eligible to be involved in the public consultation.

The implementation of the Act of Free Choice was fully in the hands of Indonesia. On the one hand, Indonesia argued that certain populations had insufficient knowledge of self-governance, and on the other hand, the Act itself was deliberately ambiguous in explaining why the West Papuans were not entitled to vote using the 'one man one vote' principle. According to Article 18 of the New York Agreement, a procedural requirement for self-determination was collective consultations with the Regional Councils.<sup>1090</sup> All 1026 representatives from eight Regional Councils were elected and each member represented approximately 750 inhabitants.<sup>1091</sup> However, Indonesia did not use the process of public consultation in the way that the international community expected, but instead created their own way of 'consulting' the people. This model

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<sup>1087</sup> UNGA A/7723 (6 November 1969) (n 1084) Annex 1 para121

<sup>1088</sup> UNGA A/7723 (6 November 1969) (n 1084) Annex 1 para81

<sup>1089</sup> New York Agreement 1962, art 18 (c) (n 1074)

<sup>1090</sup> New York Agreement 1962, art 18 (a) (n 1074)

<sup>1091</sup> John Saltford, (n 1073) p. 85; UNGA Res 1752 (XVII) (n 1076) Annex 1 p.8

did not allow individual people to be involved in expressing their political opinion, but instead depended upon how the official representatives (mostly chosen by Indonesia) engaged with the Regional Councils.<sup>1092</sup> It should be noted Indonesia hand-picked the people who would represent West Papua in the consultation, decreasing the legitimacy of the public consultation process. The Regional Councils did not truly represent the West Papuan people, but rather were influenced by Indonesia's interests. The Council did not present opposing views of the people when gathering public opinions. The collective consultation was solely under a state control.<sup>1093</sup> This action did not provide any fairness of public consultation

The collective consultation process that Indonesia established requires interrogation, as there is doubt about whether the wishes of local populations were freely expressed. Firstly, the UN involvement in the election of the eight Regional Councils was not conducted effectively. Only 195 out of 1026 were witnessed by UN observers. The other 831 simply informed the UN special representative (UNSR) of the result.<sup>1094</sup> The UN could not guarantee that the local population had been able to independently discuss their opinion without being influenced by Indonesia. Secondly, the UNSR had no legal power to enforce or prevent Indonesia's actions, in particular their human rights violations.<sup>1095</sup> The mandate of the UNSR was merely a supervisory one in arranging the implementation of the Act of Free Choice 1969. The UNSR could suggest or recommend any practices to meet international standards but it could not interfere during the collective consultation.<sup>1096</sup>

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<sup>1092</sup> John Saltford (n 1052) 122

<sup>1093</sup> Ibid 131-132

<sup>1094</sup> Melinda Janki, 'West Papua and the right to self-determination under international law' (2010) 34(1) *West Indian Law Journal* 1,13

<sup>1095</sup> Paul W. Van Der Veur (n 1063) 53, 67-68, 71

<sup>1096</sup> Daniel Gruss (n 1063) 97,112

From this example, there are two observations to be made about how the wishes of the local population were distorted. Firstly, the government of Indonesia controlled every stage of the public consultation. 'One man one vote' was not fully implemented because populations in 'less advanced areas' were not sufficiently informed. Some dissenting opinions were ignored and citizens intimidated by Indonesia's governmental officers. The elected representatives did not promote the real desires of these local populations. The credible will of the local populations was in question. Secondly, the UN representative failed to perform its duty to ensure the political rights of the people were upheld. Anti-Indonesian politicians or independence campaigns were prevented from expressing their demands in public areas. Through the lens of republican liberalism, the political equality of West Papuans was not upheld. Consequently, diverse groups of people had little opportunity to express their opinions. This can reduce the degree of legitimacy to the UN involvement in the public consultation.

### *2.1.2 Bahrain*

Geographically, Bahrain is an archipelagic state that consists of 33 islands. Only 5 of these islands have resident populations. Bahrain was a former protectorate territory of the British Empire and an integral part of the Persian Gulf.<sup>1097</sup> There was a controversy over Bahrain as a territory between Britain and Iran. Until 1783, Bahrain had been claimed as a part of Iran- albeit separated.<sup>1098</sup> In 1969 the British government contended that Bahrain has been an independent sheikhdom since that year, when the Al-Khalifah rulers had occupied the territory and claimed political

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<sup>1097</sup> John Duke Anthony and John A. Hearty, 'Eastern Arabian States: Kuwait, Bahrain, Qatar, the United Arab Emirates, and Oman in David Long and Bernard Reich (eds), *The Government and Politics of the Middle East and North Africa* (Westview 2001) 140

<sup>1098</sup> *Ibid* 141

separation from Iran.<sup>1099</sup> Thus, Britain claimed Iran had no legitimate right over the territory. In 1928, Britain signed a special agreement with Bahrain as a member of the Gulf State, which maintained Bahrain's status as a self-governing territory, although under British protection.<sup>1100</sup> In practice, the British sent political agents to administer indirect control under a 'protectorate system' which gave the Bahrainis status as British subjects.<sup>1101</sup> In contrast, Iran's contention was based on both historical and legal connections. Historically, in 1820, Iran (Persia) claimed sovereignty over Bahrain, not recognizing the claim to independence put forward since 1783.<sup>1102</sup> Thus, according to the Persians, Bahrain was an integral part of Persia. When the British Empire took control over Bahrain in 1928, this directly affected Iran's dominating power over Bahrain. In response, in 1957, the Iranian Parliament passed a legal declaration to incorporate Bahrain as its fourteenth province. Consequently, two Bahraini representatives were entitled to two positions in the Iranian parliament.<sup>1103</sup>

With regard to the sovereignty of Bahrain, there were differing opinions about the method of operation for consulting local populations in Bahrain. Iran proposed holding a referendum.<sup>1104</sup> The Bahrain government contended that this was not appropriate to solve its territorial dispute because Iran and Britain did not have direct administrative control over Bahrain.<sup>1105</sup> Bahrain was not under the colonial regime of the British Empire. They argued that the use of a plebiscite under the UN supervision was not the best way to ascertain the wishes of populations. Similarly, in the view of a

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<sup>1099</sup> UNSC 'Note by the Secretary-General' (30 April 1970) S/9772 para12

[http://repository.un.org/bitstream/handle/11176/74870/S\\_9772-EN.pdf?sequence=1&isAllowed=y](http://repository.un.org/bitstream/handle/11176/74870/S_9772-EN.pdf?sequence=1&isAllowed=y) accessed 10 February 2017

<sup>1100</sup> Hussain M. Al-Bahrana, 'The fact-finding mission of the United Nations Secretary-General and the settlement of the Bahrain-Iran dispute May 1970' (1973) 22 ICLQ 541, 542

<sup>1101</sup> James Summers, (n 80) 443

<sup>1102</sup> Hussain M. Al-Bahrana, (n 1100) 541

<sup>1103</sup> Al-Pumaihi Mohammed Ghanim, 'Social and Political Change in Bahrain Since the First World War' (Doctoral thesis, Durham University 1973) [http://e-theses.dur.ac.uk/7942/1/7942\\_4940.pdf](http://e-theses.dur.ac.uk/7942/1/7942_4940.pdf) [Accessed 10 January 2017]; Roham Alvandi, 'Muhammad Reza Pahlavi and the Bahrain Question 1968-1970' (2010) 37(2) British Journal of Middle Eastern Studies 159,162

<sup>1104</sup> Roham Alvandi, (n 1103) 159,164

<sup>1105</sup> Hussain M. Al-Bahrana, (n 1100) 541,545, 552

British Ambassador in Tehran, a plebiscite could increase a danger of instability in Bahrain and the Gulf state due to the sectarian tensions between Sunni and Shia communities. The British Ambassador also believed that the use of a referendum would increase tension between Iran and Bahrain because holding a referendum was considered by the latter to be an elite control mechanism.<sup>1106</sup> This long-term dispute exemplifies the necessity of a mediator such as the ‘UN good offices’ and a public consultation to avoid any elite control of the outcome.

#### 1969: the first stage of Bahrain’s public consultation

In 1968, the British government declared its intention to withdraw military troops from the Gulf area by the end of 1971, because of the 1965 financial crisis. This led to a significant change in Iran’s attitude towards Bahrain’s territorial administration.<sup>1107</sup> They believed they may now have a chance to officially claim Bahrain as part of their country. Thus a negotiation of a peaceful settlement between Britain and Iran began in 1968. The Bahraini officials suggested a mediation process in order to resolve the territorial conflicts. In January 1969, the question of Bahrain and the possibility of allowing the Bahraini population to decide its future territorial status was posed at a press conference which was held by the Shah of Iran.<sup>1108</sup> He implicitly expressed his willingness to offer the Bahrainis people the chance to exercise their right to self-determination in accordance with the principles of the UN Charter. Finally, in March 1969, a bilateral agreement between Iran and Britain was drawn up called ‘the terms of reference’. It specified the use of a peaceful settlement in the case of Bahrain’s sovereignty, stressing that:

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<sup>1106</sup> Roham Alvandi, (n 1103) 159,164

<sup>1107</sup> Hooshang Moghtader, ‘The Settlement of the Bahrain Question: A Study in Anglo-Iranian-United Nations Diplomacy’ (1973) 26(2) Pakistan Horizon 16, 20

<sup>1108</sup> Hussain M. Al-Bahrana, (n 1100) 541, 544

“Having regard to the problem created by the differing views of the parties concerned about the status of Bahrain and the need to find a solution to this problem in order to create an atmosphere of tranquility, stability and friendliness throughout the area, the Secretary General of the United Nations is requested by the parties concerned to send a Personal Representative to ascertain the wishes of the people of Bahrain”.<sup>1109</sup>

The method of operation was left entirely to the UN Secretary-General (SG) and its special representative, Mr. Vittorio Winspeare Guicciardi, who, alongside five secretariat members, organized ‘a UN fact-finding mission’ in 1970.

#### 1970-1971: from the UN fact-finding mission to Bahrain independence

After Iran and Britain requested that the UNSG discover the local population’s wishes by peaceful means, Mr. Winspeare (with approval from the SG) decided to set up a collective consultation process in order to ascertain the facts.<sup>1110</sup> During this process, Mr. Winspeare suggested that both parties (i.e. Iran and Great Britain) could send personal representatives to determine the wishes of the Bahrain population.<sup>1111</sup> Iran did not send any representatives to observe the consultation process. According to the Shah (the Iranian leader), the UN would perform its duty independently, and Iran did not want to interfere. If the wishes of the Bahraini people were clearly expressed, Iran would accept the UN’s findings.<sup>1112</sup> Britain also did not send any representatives, believing that the UN should be able to perform their duty freely without interference. It is interesting to note here that both Britain and Iran deliberately avoided interfering

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<sup>1109</sup> Hussain M. Al-Bahrana, (n 1100) p.544-545

<sup>1110</sup> UNSG S/9726 ‘Good offices of the UN Secretary-General with regard to Bahrain’ 28 March 1970  
[http://repository.un.org/bitstream/handle/11176/74779/S\\_9726-EN.pdf?sequence=1&isAllowed=y](http://repository.un.org/bitstream/handle/11176/74779/S_9726-EN.pdf?sequence=1&isAllowed=y) accessed 15 February 2017

<sup>1111</sup> Chapter 8 Maintenance of international peace and security, (n 1039) 151

<sup>1112</sup> Roham Alvandi, (n 1103) 159,172

with the public consultation process, or influencing the local population about their future.<sup>1113</sup> Indeed, prior to the UN establishment of a public consultation in 1970, Bahrain and Iran officials only had an indirect contact through British diplomatic channels in order to reduce the chance that Iran might exert control over the Bahraini people.<sup>1114</sup> The actions of both parities reflect the characteristic of non-domination which republican liberal theory emphasizes as necessary for a government to be considered a legitimate authority.

The main purpose of the UN good offices was to be a mediator, alleviating tensions particularly between Iran and Bahrain.<sup>1115</sup> In March 1969, there had been a final meeting between Iran and Britain, where Bahraini officials provided a list of designated groups which the UN special representative should consult during the 20-day process.<sup>1116</sup> The public consultation therefore involved Mr. Winspeare and his staff meeting with these groups (and others) which were cross-sector partnerships: organizations, societies, institutions, groups, and ordinary citizens.<sup>1117</sup>

By carrying out this mission, the Permanent Representative of Iran and the United Kingdom sent letters to the Secretary-General to endorse the UN good offices as a mechanism to seek out the true wishes of the Bahraini population.<sup>1118</sup> The letters stated that:

“The government of Iran formally requests Your Excellency to exercise your good offices with a view to *ascertaining the true wishes of the people of*

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<sup>1113</sup> Ibid 164

<sup>1114</sup> Ibid 167-168

<sup>1115</sup> Ibid 168-169

<sup>1116</sup> UNSC ‘Note by the Secretary-General’ S/9772 (n 1099) p.3

<sup>1117</sup> Roham Alvandi, (n 1103) 159, 174

<sup>1118</sup> UNSG S/9726 ‘Good offices of the UN Secretary-General with regard to Bahrain’ 28 March 1970 (n 1097)

*Bahrain* with respect to the future status of the Islands of Bahrain by appointing a Personal Representative to carry out this mission”.<sup>1119</sup>

“I am authorized, on behalf of the Government of the United Kingdom (for Bahrain), to inform Your Excellency that the proposal of the Imperial Government of Iran that Your Excellency should exercise your good offices by sending a personal representative to *ascertain the wishes of the people of Bahrain is acceptable*”.<sup>1120</sup>

Between 30<sup>th</sup> March and 18<sup>th</sup> April 1970, a public consultation was conducted throughout the Bahraini territory. Mr. Winspeare took responsibility for ensuring that the people of Bahrain were ready and able to express their wishes to himself and his staff freely and privately, without fear of personal consequences.<sup>1121</sup> Understanding the genuine will of the people was of central importance to the mission. Consequently, Mr. Winspeare submitted his report to the SG, who conveyed it to the Security Council for consideration and endorsement. In his report, he stated that “the majority of the people of Bahrain wished to gain recognition of their identity in a fully independent and sovereign state”.<sup>1122</sup> In addition, he stressed that the public consultation mechanism was sufficient to ascertain the wishes of the population.<sup>1123</sup> The UN adopted his findings in creating the UN Security Council Resolution 278 in 1970. This resolution endorsed the fact-finding mission of the UN Secretary-General, specifying:

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<sup>1119</sup> Ibid para4

<sup>1120</sup> Ibid para5

<sup>1121</sup> Ibid para9

<sup>1122</sup> UNSC, ‘Note by the Secretary-General’ S/9772 (n 1099) para57

<sup>1123</sup> UNSC, ‘Note by the Secretary-General’ S/9772 (n 1099) para52



“the overwhelming majority of the people of Bahrain wish to gain recognition of their identity in a fully independent and sovereign state free to decide for itself its relation with other states”.<sup>1124</sup>

The public consultation in Bahrain in 1970 was a mechanism to gather the collective will of the local populations. The consultation consisted of three continuous stages. Firstly, when the genuine will of the people was clearly ascertained, it was conveyed to the UN Security Council. Secondly, after this initial presentation, the UN Security Council had a final say in endorsing the collective consultation of the UN special representative. Evidence for this can be seen in the 1536<sup>th</sup> meeting of the Security Council on 11 May 1970.<sup>1125</sup> For instance, the American and Spanish delegates’ statements supported the public consultation process as a peaceful mechanism to resolve conflicts. They stated that:

“We are also happy to note in Mr. Winspeare’s report that all those he consulted in Bahrain wished for tranquillity, stability and friendliness in the area, as well as being virtually unanimous in wishing for recognition of their identity in a fully independent and sovereign state”.<sup>1126</sup>

“The fact that the Secretary-General has found a formula acceptable to the Governments of Iran and the United Kingdom is a source of satisfaction, for this has doubtless prevented a conflict between the two Governments and a continuation of the tense situation caused by their differences of opinion.

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<sup>1124</sup> UNSC Res 278 (1970), ‘The Question of Bahrain’ (n 1052) para2

<sup>1125</sup> UNSC Official Records 1536<sup>th</sup> meeting, (11 May 1970) S/PV/1536

[http://repository.un.org/bitstream/handle/11176/75128/S\\_PV.1536-EN.pdf?sequence=17&isAllowed=y](http://repository.un.org/bitstream/handle/11176/75128/S_PV.1536-EN.pdf?sequence=17&isAllowed=y) [Accessed 1 February 2017]

<sup>1126</sup> Ibid para55

Action by the Secretary-General to solve problems arising between States is acceptable in our view, for this means using the good offices of a highly qualified person, the Secretary-General of the Organization”.<sup>1127</sup>

However, the Pakistan representative created controversies over the public consultation. The Pakistan representative pointed out that the use of a public consultation was a strategy for avoiding challenges from two competing parties (i.e. Britain or Iran). In his view, the use of public consultation provided similar outcome to a plebiscite.<sup>1128</sup> He stated that:

“We note that neither of the two parties who requested the Secretary-General’s good offices, Iran and the United Kingdom, exercised any direct administrative control over Bahrain. If either had been doing so, the avoidance of the method of plebiscite for consulting the popular will could have been open to challenge by the other”.<sup>1129</sup>

Thirdly, Bahrain’s status as independent was recognized domestically and internationally. The Security Council passed a Resolution to endorse the public consultation in measuring the will of the people.<sup>1130</sup> Then, the Iranian National Assembly confirmed the Security Council resolution 278 by a vote of 186 in favour and 4 against.<sup>1131</sup> In other words, the public consultation was deemed to be a

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<sup>1127</sup> Ibid para64

<sup>1128</sup> Hussain M. Al-Baharna, *The Arabian Gulf States: Their legal and political status and their international problems* (2<sup>nd</sup> edn Manchester 1975) 326; Hussain M. Al-Bahrana, (n 1068) 541, 552

<sup>1129</sup> UNSC Official Records 1536<sup>th</sup> meeting, (n 1125) para148

<sup>1130</sup> UNSC Res 278 (1970) (n 1052)

<sup>1131</sup> Hooshang Moghtadar, (n 1107) 16; Roham Alvandi, (n 1103) 159,176

potentially successful method of ascertaining the will of the people. A year later, Bahrain became an independent state and was admitted to the UN membership.<sup>1132</sup>

In conclusion, the Bahraini collective consultation provides an example of how a public consultation should take place, reflecting the non-domination characteristic of republican liberalism. On the one hand, it provided an opportunity for ordinary citizens to be involved freely and independently in the decision-making process. On the other hand, the UN personal representative took action without any interference from Iran or Britain, as previously noted. In this example, the free will of the people was not influenced by any governmental authority and thus their clear will was reliable, increasing the legitimacy of any state authority's actions as a consequence of the consultation.

## *2.2 Effective participation of the people in a public consultation*

A public consultation aims to increase the effective participation of minority groups in political activities. The establishment of a public consultation requires 'communicative action' between various groups: the people, including ethnic minorities and remote populations; representatives from international institutions; independent organizations from civil society; political parties; the media and governmental bodies. If political equality is present, during this period, then the outcome of the decision-making process is more likely to be accepted by the people,

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<sup>1132</sup> UNGA Res 2752 (XXVI) 'Admission of Bahrain to membership in the United Nations' (21 September 1971) Available at: <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/327/68/IMG/NR032768.pdf?OpenElement> [Accessed 10 November 2016]

even if they disagree with it, as their voice has been heard. The efficacy of the participation can be measured by two characteristics of the consultation process. Firstly, it is necessary to allow all groups of people to express their political opinions. ‘The will of the people’ does not only mean the majority of the population, but also includes indigenous people or other minority groups who are directly affected by the final decision.<sup>1133</sup> Secondly, the demands of the local population are taken into consideration by representative bodies. Before implementing a policy or law, the people’s representatives should make decisions based on the diverse opinions deriving from *all* the people.<sup>1134</sup> If all the people have effectively taken part in the collective consultation, then the government can claim that any consequent actions regarding the territorial alteration are based on political equality, and are therefore legitimate.

In West Papua, the majority of the people were largely Melanesians who had no ethnic or historical connections to Indonesia.<sup>1135</sup> The word ‘Melanesians’ was used in relation to ethnic and linguistic differences of West Papuans. They have ethnic and social similarities to Papua New Guineans rather than Indonesians.<sup>1136</sup> According to the census in 1960, only 2.5 % of the population identified as Indonesian, while indigenous people represented approximately 97%. Meanwhile, in 1971, there was a slight increase of Indonesians immigrants, rising to 4% and indigenous people were 94% of the total population.<sup>1137</sup> Thus, the collective consultation needed to include all groups of people to find an acceptable solution.

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<sup>1133</sup> Michla Pomerance (n 1056) 38, 43

<sup>1134</sup> Ibid 45

<sup>1135</sup> Leslie B. Rollings, ‘The West Papua dilemma’ (Master of Arts thesis, University of Wollongong 2010) p.10 <http://ro.uow.edu.au/theses/3276> [Accessed 4 January 2017]

<sup>1136</sup> Ibid p.12

<sup>1137</sup> Julius Cesar Trajano, ‘Ethnic Nationalism and Separatism in West Papua, Indonesia’ (2010) 16 *Journal of Peace, Conflict and Development* 12, 20

In order to analyze the effective public participation in a public consultation, it is necessary to look at two interrelated issues: West Papua Regional Councils composition and the reaction of people's representatives in the Regional Councils to carry out their duty in responding to the public opinions.

West Papua consultative assemblies composition was a combination of the people's election and Indonesia's selection. The status of local populations was classified by their place of residence instead of their racial or cultural background.<sup>1138</sup> The division of the territory consisted of eight areas covering the regions of Merauke, Djajawidjaja, Paniai, Fak-Fak, Sorong, Manokwari, Tjenderawasih and Djajapura.<sup>1139</sup> Each region was allocated different days for the collective consultation process, each had to conclude the outcome within one or two meetings.<sup>1140</sup> Each assembly was comprised of three different groups. Firstly, representatives from social, cultural and political organizations were selected by Indonesia. Secondly, the tribal chiefs were chosen by the local councils. There was no specific criterion by which to identify who was entitled to take part because the local councils could make a choice based on their arbitrary will. Thirdly, the existing Regional Councils, who were directly elected by the West Papuans, were included in the consultative assembly.<sup>1141</sup>

The outcome of public consultation was announced to the public by each region. All eight regions mentioned that West Papuans agreed to integrate with Indonesia. Even though the consultative process provided unity of people throughout the West Papua territory, the genuine will of the local populations was in doubt. Firstly, when considering the composition of the consultative assembly, Indonesia took part in

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<sup>1138</sup> Michla Pomerance, (n 1056) 38,51

<sup>1139</sup> Melinda Janki, (n 1094) 1,13

<sup>1140</sup> UNGA A/7723 (n 1084) 33

<sup>1141</sup> Melinda Janki, (n 1094) 1,13; Michla Pomerance, (n 1056) 38,51-52

selecting certain members of the assembly, leading to the partiality of the assembly.<sup>1142</sup> Secondly, Indonesia was not able to provide any evidence that local populations understood the legal effect of the consultation. West Papuans did not adequately receive accurate information to understand the proposed question of a public consultation. In addition, West Papuans had no opportunity to express their opinions individually to the Regional Councils. Only the leaders of the Papuan community could speak on the future of the territory because ordinary citizens were not categorized as ‘motivated or informed’ people to determine their future.<sup>1143</sup> On this point, Indonesia contended that it was impossible to comply with Western democratic standards in collective consultation. All ethnic inclusion was not suitable for the West Papua because there was a large number of undeveloped people (i.e. indigenous people who have insufficient knowledge of self-government).<sup>1144</sup> Through the lens of republican liberalism, the West Papuans was not equally considered as constituents in territorial alteration. The effective participation of both Indonesians and Melanesians in collective consultation did not create political equality between populations.

With regard to Bahrain, the official census was conducted every nine years: 1941, 1950, 1959, 1965 and 1971. The community was equally 50% Shiite and 50% Sunni.<sup>1145</sup> The last two censuses in 1965 and in 1971 revealed that the majority of the local population was Bahraini (i.e. 79% and 82% respectively).<sup>1146</sup> The remainder were 7% Omanis and Muscatis, 4% Iranians, 3% Indians, 2.2% Pakistanis, and 5% of

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<sup>1142</sup> John Saltford, (n 1073) p.61

<sup>1143</sup> Michla Pomerance, (n 1056) 38,51

<sup>1144</sup> Michla Pomerance, (n 1056) 38,56

<sup>1145</sup> Abbas Busafwan and Stephan Rosiny, ‘Power-Sharing in Bahrain: A still-Absent Debate’ (November 2015) German Institute of Global and Area Studies 7

<sup>1146</sup> Al-Pumaihi Mohammed Ghanim, (n 1103) p.44

other nationalities.<sup>1147</sup> Approximately 70% of the Bahraini population were young people (i.e. under 30 years old). Prior to the public consultation in 1970, Bahrain officials had provided a list of designated people, organizations and institutions with whom they recommended the special representative, Mr. Winspeare consult. Instead, the UN special representative made a decision not to follow a list of designated people. He included a number of additional clubs and professional groups which covered all 85 registered Bahraini clubs<sup>1148</sup>, for example, the Hidd Nahha club, the Samaheej club, lawyers, and pharmacists. In the view of Mr. Winspeare, the collective consultation could receive all diverse opinions from all representatives of all organizations.<sup>1149</sup>

One observation was that there was no consultation with non-Bahrainis organizations. Indian, Omanis, or Pakistanis representatives were excluded from the list. These groups of people were also affected from the collective consultation outcome. Since non-Bahraini populations did not have opportunity to express their views in the collective consultation, this would decrease the degree of fairness and accuracy of the will of the people.

During the process in 1970, consultations were held in the six municipal councils in Bahrain: Manama, Muharraq, Hidd, Rafaa, Jidhafs, and Sitra. The participants comprised different groups and organizations: religious leaders, municipal councils and other administrative committees, welfare societies, clubs and other community

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<sup>1147</sup> UNSC Res s/9772 (n 1099) para19; Hussain M. Al-Bahrana, (n 1128) 541

<sup>1148</sup> UNSC Res s/9772 (n 1099) para28, annex list of councils, committees, associations and other recognized organizations and groups in Bahrain p.1-4; Hussain M. Al-Bahrana, (n 1128) 541, 547

<sup>1149</sup> UNSC Res s/9772 (n 1099) para29, annex list of councils, committees, associations and other recognized organizations and groups in Bahrain p.1-4

centres as well as professional groups, sports and recreational associations.<sup>1150</sup> These groups of people enfranchised citizens both in the principal towns (i.e. Manama and Muharraq) and rural villages (i.e. Daraz, Hidd, Isa town, Karzakkan).<sup>1151</sup> Each organization sent its representatives (at least three people) to convey the local population's wishes to Mr Winspeare and his colleagues. The representatives came from both the principal town of Manama or Muharraq and the outlying villages.<sup>1152</sup> If the collective will of the people were collected from every part of the territory, this would increase the credibility of public involvement in public consultation.

In addition, the religious leaders (i.e. Shia and Sunni communities) were involved in expressing their opinions. Mr. Winspeare visited some village heads and talked to the assembled members of the community.<sup>1153</sup> It is notable that approximately 200,000 inhabitants were unanimous in their aspirations in demanding a fully independent sovereign state.<sup>1154</sup> By doing this, the UNSR put effort into gathering all public opinions. Shia and Sunni communities were equally encouraged to participate in the consultation, creating political equality.

### *2.3 Human rights protection*

The legitimacy of a public consultation depends on the level of the promotion and protection of human rights. People's freedom of expression, movement, and association should be protected throughout the consultation period. The upholding of these human rights correlates with the functioning of three inter-related entities: political parties, the media, and civil society. Ideally, if these three inter-related

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<sup>1150</sup> UNSC Res s/9772 (n 1099) para29

<sup>1151</sup> Ibid para34,36

<sup>1152</sup> Ibid para36

<sup>1153</sup> Ibid para37

<sup>1154</sup> 'UNSC Official Records' S/PV.1536 1536<sup>th</sup> meeting (n 1125) para42,101



entities function well, then the genuine will of the people can be assessed, and the distortion of the will of the people can be avoided. These three actors (i.e. political parties, the media and civil society) can ensure the protection of human rights, and therefore the people can enjoy the right to political participation, which in turn increases the legitimacy of the public consultation process.

In the pre-consultative process in particular, sharing accurate information is an important factor that affects people's decisions. Political parties represent specific local populations' wishes during the consultation process-in formal meetings for example. When political parties carry out these activities, freedom of expression and movement flourish.

The role of the media and civil society are also crucial, as they function as a channel of communication to present the facts on territorial alteration matters to the people, and to reflect the people's reactions to these issues. The media and civil society are two important actors in public consultations which uphold the human rights to freedom of expression, thus contributing to the people being able to share their political views without interference from state authorities. When they run campaigns or political activities by peaceful means, the people's fundamental freedoms (of assembly and association in particular) are upheld.

The advantage of the media is the creation of an atmosphere of informed and motivated citizens. Media coverage also plays an important role in monitoring formal and informal institutions, which are carrying out their duties in accordance with public opinion. The media provides the people with updated information on the

process and practices within the government. In addition, through sharing information about political activities, the media broadcasts the movements and campaigns in civil society, often attracting public attention and influencing political parties. The media and civil society work together to raise public awareness around particular issues, such as, in this instance, territorial alteration.

Civil society enables groups of people to work together using campaigns and movements, demonstrating the collective will of the people to the state. There are two features of civil society which demonstrate the collective will of the people in action. Firstly, public consultation expresses the bottom-up characteristic of people's influence over their representatives' decision-making. Secondly, an independent agency should exist free from state intervention, which protects individual autonomy and empowers people to be involved in deliberative decision-making.<sup>1155</sup> Moreover, if such independent civil organizations exist in society then opportunities develop which allow diverse groups of people (often minorities) to express their opinions.<sup>1156</sup>

In West Papua, the New York Agreement 1962 ensured the right to freedom of expression, freedom of movement and freedom of assembly of the West Papuans populations. Article 22 specified that:

“The UNTEA and Indonesia will guarantee fully the rights, including the rights of free speech, freedom of movement and of assembly, of the inhabitants of the area. These rights will include the existing rights of the

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<sup>1155</sup> Philip Pettit, (n 17) 160-161

<sup>1156</sup> James S. Fishkin, *When the People Speak: Deliberative Democracy and Public Consultation* (Oxford University Press 2009)

inhabitants of the territory at the time of the transfer of administration to the UNTEA”.<sup>1157</sup>

According to the SG report in November 1969, it was necessary to distribute adequate information both to literate and illiterate people. On the one hand, the dissemination of information was an efficient way to communicate amongst literate people.<sup>1158</sup> The simple terms and consequence of ‘the Act of Free Choice’ could be clearly explained to local populations. On the other hand, direct communication with illiterate people is also a crucial factor in raising public awareness. Local officials, school teachers, tribal chiefs and missionaries can convey information to illiterate people.

However, the Indonesian government interfered with the circulation of information. This governmental action could lead to one-sided information and had a direct influence on ethnic minorities in expressing their will. West Papuans were intimidated if they did not agree with the pro-Indonesia campaign.<sup>1159</sup> The people’s freedom of expression was restricted because they were not categorized as ‘free and informed’ people. In addition, Indonesia had the supreme power to authorize the existence of political parties to influence public opinions.<sup>1160</sup>

In terms of freedom of movement, before the implementation of the Act of Free Choice 1969, Indonesian government released a communiqué to allow West Papuans to return home. It appeared that *only one family* returned to the territory following the issuance of the communiqué.<sup>1161</sup> West Papua’s freedom of movement was controlled

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<sup>1157</sup> New York Agreement 1962, art 22 (n 1074)

<sup>1158</sup> UNGA Res 1752 (XVII) (n 1076) Annex 1 p.19

<sup>1159</sup> Melinda Janki (n 1094) 1,15-16

<sup>1160</sup> Ibid 18

<sup>1161</sup> UNGA Res 1752 (XVII) (n 1076) Annex 1 p.26

by Indonesia on the basis that West Papuans were forced from their original homeland to a new place, a particular area that Indonesia set up for the purpose. Hence, they became minorities in this new land because they were assimilated into Indonesian-possessed territory, which already contained a high number of Indonesian immigrants.<sup>1162</sup> In addition, according to the UNSR findings, the UN sent a request to Indonesia to release approximately 300 political detainees, who supported West Papua independence.<sup>1163</sup> Indonesia did not comply. This is an example of how Indonesia suppressed its political opposition. In practice in West Papua, although the fundamental freedoms of the people were ignored and the public consultation was therefore not reliable, this did not undermine the Indonesian government's position as an authoritative body because the UN was relatively powerless to intervene.

Regarding the civil society movement, 'the Free Papua movement' (OPM) was established in 1965 to demand independence from Indonesia.<sup>1164</sup> It was the central vehicle of the West Papuans' nationalism.<sup>1165</sup> The strategy of the OPM was guerrilla attacks on the Indonesian military troops and multinational companies who had taken Papuan land and resources.<sup>1166</sup> Even though the OPM claimed to represent the majority of the West Papuans, it was a weak organization for bargaining for power with the Indonesian government. Independence aspirations were conducted mostly in the form of civilian protests.<sup>1167</sup> The leaders and civilian demonstrators were arrested or severely punished by Indonesian authorities. In April 1969, there was a popular uprising against Indonesian government. An organized group was consisted of 90

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<sup>1162</sup> Julius Cesar Trajano, (n 1137) 12,19

<sup>1163</sup> Michla Pomerance, (n 1056) 38,53

<sup>1164</sup> Peter King, *West Papua and Indonesia since Suharto: Independence, Autonomy or Chaos?* (UNSW 2004) 28

<sup>1165</sup> Ian Bell, Herb Feith and Ron Hatley, 'The West Papuan challenge to Indonesian authority in Irian Jaya: Old Problems, New Possibilities' (1986) *Asian Survey* 539,546

<sup>1166</sup> 'West Papua's Act of Free Choice-45 years on'

[http://www.theecologist.org/News/news\\_analysis/2311015/west\\_papuas\\_act\\_of\\_free\\_choice\\_45\\_years\\_on.html](http://www.theecologist.org/News/news_analysis/2311015/west_papuas_act_of_free_choice_45_years_on.html) accessed 7 December 2016

<sup>1167</sup> Jacques Bertrand, 'Indonesia's quasi-federalist approach: Accommodation amid strong integrationist tendencies' (2007) *International Journal of Constitutional Law* 1,15

well-armed, Papuan policemen, 30,000 local Kapakua (Ekari) and the OPM fought against Indonesia troops.<sup>1168</sup> There was large-scale killings and abused of tribal people rights by Indonesia troops.<sup>1169</sup>

During the public consultation process in 1969, the OPM ran a campaign for the ‘one man one vote’ system among the West Papuan populations. The OPM emphasized the West Papuans’ entitlement to take part in collective consultations rather than solely relying on representative bodies of the leaders of the Papuan community to speak out on their behalf.<sup>1170</sup> The OPM’s campaign had a purpose to promote individual and collective rights of local populations in determining their territorial status. In terms of individual autonomy, every West Papuan had a right to express his political opinion based on ‘one man one vote’ basis. Meanwhile, the collective will of the West Papuans was simply to promote their own welfare.<sup>1171</sup> The OPM worked as the civil society alongside the UN in West Papua, gathering public opinions and conveying information to local populations.

In the context of Bahrain, non-governmental organizations in Bahrain were categorized based on different tribal groups of people.<sup>1172</sup> This categorization aimed to share power between different ethnic groups of people through proportional representation. During the public consultation in 1970, individual and collective groups freely expressed their political opinions. Individuals were free from state intervention to express their views.<sup>1173</sup> They were able to express their political opinions with a written communication directly to the UN special representative.

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<sup>1168</sup> John Saltford, (n 1052) 135

<sup>1169</sup> Ibid 138

<sup>1170</sup> Michla Pomerance, (n 1056) 38,51

<sup>1171</sup> John Saltford (n 1052) 105-106

<sup>1172</sup> Abbas Busafwan and Stephan Rosiny, (n 1145) 4

<sup>1173</sup> UNSC Res s/9772 (n 1099) para43

Meanwhile, collective groups of people in the form of clubs or professional groups also expressed their opinions. These became the centre of communities and their representatives conveyed local populations' concerns to formal state institutions.<sup>1174</sup>

In the absence of political parties, these 'clubs' were recognized as a substitute.<sup>1175</sup>

The establishment of the clubs was under the control of the 1959 Bahrain Licensing of Societies and Club Ordinance.<sup>1176</sup> In order to form a club, written permission must be obtained from the Ministry of Labour and Social Affairs.<sup>1177</sup> The majority the members were elite men who gathered together to develop and articulate political opinions.<sup>1178</sup> In practice, each club was separated from the others and did not have influence over the other clubs' decisions in any political affairs. They had their own forum for members to exchange political opinions.<sup>1179</sup> However there was no specific rule to prohibit people from holding memberships to more than one club. Several members of Al-Uruba also held memberships to the Alumni club, particularly college graduates and professionals. This raised a controversy over how diverse opinions of people were expressed because the collective will of the people was clearly ascertained from the same groups of people.

During the consultation in 1970, Bahraini clubs played an important role in political mobilization and in convincing the UN special representative and his assistant to recognize Bahrain as an independent state.<sup>1180</sup> However, there were some controversial issues regarding the diversity of public opinion. In order to tackle this

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<sup>1174</sup> UNSC Res s/9772 (n 1099) para34

<sup>1175</sup> Emile A. Nakhleh, *Bahrain: Political development in a modernizing society* (Lexington Books 1976) 5

<sup>1176</sup> *Ibid* 45

<sup>1177</sup> Article 4 of the Bahrain Licensing of Societies and Clubs Ordinance 1959, Notice No.5/1959 in Emile A. Nakhleh, *Bahrain: Political development in a modernizing society* (1976 Lexington Books) (n 1175)

<sup>1178</sup> *Ibid* 41

<sup>1179</sup> Fuad I. Khuri, *Tribe and state in Bahrain: The Transformation of Social and Political Authority in an Arab State* (Chicago Press 1980) 185

<sup>1180</sup> Emile A. Nakhleh, (n 1175) 42

problem, it was necessary to consider the gender-based, ethnic-based, religious-based composition of club membership.

Firstly, there was a clear distinction between men and women in the political domain. It was obvious that men had political importance in decision-making whereas women had supreme power in the domestic, household arena.<sup>1181</sup> Most clubs were limited to male memberships, such as Al-Arabi club and the Uruba club. Only 6 women welfare clubs were established. There were only two women clubs which aimed to contribute political development. The first women's club in Bahrain (and also in the entire Gulf state) was founded in 1955 and was called 'the Bahrain Young Ladies Society'.<sup>1182</sup> There were approximately 75 members, consisting mostly of merchant families and educated women. The objective of the clubs was to provide a channel for wealthier and better-educated women to assist poor families. Politically, the group ran its campaign to support women to take part in the election for the constitutional and national assemblies position in the early 1970s.<sup>1183</sup> Another political involvement club was the Awal Women's Society. It was established in 1969 at Muharraq. The main task was to support women's rights, especially the right to vote and other efforts toward building democratic institutions.<sup>1184</sup>

Secondly, it was inevitable that the social sectors of Bahrain were divided into Sunni and Shia communities. The administrative power was in the hands of the Sunni ruling family since 1783 but the local populations were mostly Shia.<sup>1185</sup> The Shia community was regarded as second-class citizens. Both communities lived separately

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<sup>1181</sup> J.E. Peterson, 'The political status of women in the Arab Gulf states' (1989) 43(1) Middle East Journal 34

<sup>1182</sup> Emile A. Nakhleh, (n 1175) 54; J.E. Peterson, (n 1181) 34,38

<sup>1183</sup> J.E. Peterson, (n 1181) 34,38

<sup>1184</sup> Emile A. Nakhleh, (n 1175) 55; J.E. Peterson, (n 1181) 34,38

<sup>1185</sup> Al-Pumaihi Mohammed Ghanim, (n 1103) p.46

in their own village, except in the capital Manama and to a small extent in Muharraq. In terms of club membership, the local populations knew which clubs belonged to the Sunni or Shia communities, for example the Ahli club was reserved for rich, Sunni merchants, and the Al-Uruba for Shia merchants and high civil employees.<sup>1186</sup> When the Sunni community had administrative power in their hand, public opinion was under control of such an 'elite' who designated which groups of people should be involved in the public consultation.

Thirdly, in terms of the ethnic and cultural dimension, different ethnic groups of people lived separately in their own villages. They did not intermingle, except those residing in Manama and Muharraq. Ethnic classification was divided based on their original nationalities. The existence of clubs was dependent upon the similarity between public opinions and the ethnic backgrounds of people, for example, the Goa Youth Club (only reserved for people who originally came from Goa), Western based clubs (only reserved for the British and Americans).<sup>1187</sup> In addition, the governmental authority denied a license to any club that extended its membership beyond a specific locality. For instance, the Muslim Youth Society was prohibited from recruiting new Shia members in other villages except to Diraz village.<sup>1188</sup>

The media's function was controlled by the press law in 1965. There were two local Arabic-language presses which were privately owned: Al-Adwa and Sada al-Usubu. These two presses contributed to the formation of a national political opinion.<sup>1189</sup> The media's freedom of expression included the right to impart and receive information or ideas to people. The Bahraini population was advised of their rights through a variety

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<sup>1186</sup> Fuad I. Khuri, (n 1179) 174

<sup>1187</sup> Ibid 186

<sup>1188</sup> Ibid 185

<sup>1189</sup> Emile A. Nakhleh, (n 1175) 5



of media broadcasts.<sup>1190</sup> One of the most motivated media was the written press (i.e. newspapers) which was an integral part of the communication process between the Bahrainis and the Bahraini governmental authority. However, after implementing the Press Law in 1965, the press did not fully function because of the restrictions imposed by the government. Based on the law, the government was able to suspend publication or interfere violating the fundamental right to freedom of the press.<sup>1191</sup> However, according to the UN special representative's report, local media performed their task appropriately in order to influence people in a collective consultation.<sup>1192</sup> The media acted as an intermediate organization to share information between the people and the UN special representative.

### **3. Conclusion**

Republican liberal theory holds that the involvement of 'informed and motivated people' is an important criterion for an effective public consultation. All people should have the opportunity to express their political opinions whether assenting or dissenting. In order to claim legitimacy of a governmental authority, public consultation can be assessed by the reflection of public opinion in communicative actions and the level of ethnic inclusion within the process. In addition, public participation and political communication is also reliant on the function of media and civil society in order to develop an 'informed and motivated people'.

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<sup>1190</sup> UNSC Res s/9772 (n 1099) para39

<sup>1191</sup> Emile A. Nakhleh, (n 1175) 63

<sup>1192</sup> UNSC Res s/9772 (n 1099) para39

After gathering the differing views of local populations in a collective consultation, the interdependence between local populations and governmental authorities illustrates a continuous action of external self-determination practical application. In terms of the governmental authority, if they carry out public demands, this will lead to an acceptable outcome for all citizens. At least, their differing opinions are heard and conveyed via sharing and discussion processes. For citizens, the establishment of a public consultation increases political equality in decision-making process. The informal communicative action is a way to predetermine the demands of local populations.

The public consultations in West Papua and Bahrain provide different images of how states control over public opinions in expressing their views to determine their territorial status. Within a pluralistic society, it is assumed that democratic equality and the participatory rights of people are two important factors in influencing policy formation. Public opinions from the various racial, religious, organized groups and political groups contribute to an increased level of legitimacy. In order to attain political equality among population, the importance of ethnic inclusion in the collective consultation is a way to ensure that all affected people participate in sharing and expressing their political opinion in boundary-making process. If all differing public opinions are taken into consideration in formal state institutions, this will substantially increase the degree of popular acceptance of the existing governing regime.

However, the effective participation of the people in public consultations was limited by the state authority. The local populations had no chance to elect their representatives to convey their opinion into state institution, for example in West

Papua in 1969. There was no clear framework to guarantee that all the people are involved in exchanging their views within state institutions. In Bahrain's public consultation in 1970, the freedom of the people to express their will or to assemble was restricted to certain groups of people. The establishment of a club was reserved to men and those who could pay for membership. Thus, it is difficult to say that all people were involved in consultative process.

## **Conclusion**

This thesis intended to propose republican liberal theory as an alternative to liberalism and communitarianism in measuring public, political participation in external self-determination practices. Firstly, applying republican liberal theory to external self-determination can contribute to the improvement of public participation in decision-making processes. Unlike liberalism and communitarianism, republican liberalism supports that the whole population residing within a territory is entitled to exercise their territorial status independently and freely. Republican liberalism attempts to fill the gap of individual rights of people in liberalism and group rights of people in communitarianism. The people should actively engage in deciding their territorial status independently and freely. Secondly, unlike any other theory, republican liberalism states that institutional frameworks are key to increasing the legitimacy of territorial alteration processes. The existence of such domestic and international institutions can protect the participation of the people and can balance the power of the state. In addition, republican liberalism mandates the importance of *non-state* institutions alongside governmental organisations during decision-making processes. The presence and activity of these non-state bodies increase the legitimacy of the outcome. Thirdly, unlike the other theories, republican liberalism mandates the recognition of the people's rights within the constitution of a state. This is another strengthening tool to increase the people's authority in territorial alteration processes. Thus republican liberalism can make such processes more systematic by emphasizing the continuous action of the people's will, and how this can most effectively be the centre of any decision-making process.

Using the core principles of modern republican liberal theory to establish a process of measuring the will of the people (instead of liberalism or communitarianism) foregrounds the participation of the people in the decision-making process. Therefore as a theory, republican liberalism reflects the values of democratic governance and the moral reasoning of public participation. This theory stresses the people's value in public, political participation. The application of republican liberal theory to external self-determination processes can create political equality among populations. Public deliberation and political equality among citizens are supposed to provide liberty and freedom. Republican liberalism holds that formal (i.e. state institutions and international institutions) and informal institutions (i.e. civil society) have a role in motivating people to express their will. It advocates continuous interaction between public opinion, state, international, and non-state institutions to ensure the legitimacy of the decision-making process through public participation. Public, political participation would be meaningless if there was no existing institution to take public opinion into account. Meanwhile, the expressed will of the people is recognized as legitimate if the people have the right to communicate with governmental authorities through various channels, for example representative processes or sharing their opinions in public consultations processes. Public, political participation is a way of reducing the supremacy of the territorial integrity of a state. This participation does not involve only the people as constituent powers but also encompasses other actors or entities that influence public opinion, for example political parties, the media, and civil societies. These non-state institutions are crucial to increasing the legitimacy of elections and public consultations.

Legislation must exist to guarantee the people's right to participate and a way to implement public opinions in state institutions. In particular, republican liberalism emphasizes the role that legal frameworks play in acknowledging and guaranteeing public participation in decision-making processes about territorial alteration. Legal frameworks must ensure that non-governmental institutions can work independently from state control. Through its advocacy of legal mechanisms to create a robust system for safeguarding the will of the people, republican liberalism recognizes that bottom-up law-creation is one of the principle components of ensuring public, political participation.

If these three conditions of republican liberalism are aligned properly, public opinion will be meaningful and fairly ascertained. Then, the negotiation between government and the secessionists, which is based on the will of the people, is considered to be legitimate. In other words, if the free and fair will of the people is ascertained and implemented, any resulting secession will be considered duly legitimate, by both states and the international community, and a peaceful resolution can therefore be found.

When applying republican liberal theory to different process-based mechanisms, this research does not look at the outcome of a new state-creation. Instead, it focuses on the varying degrees to which procedural designs produce legitimate or illegitimate actions in external self-determination practices. International lawyers propose that bringing people into any decision-making process can increase the legitimacy of the outcome. The degree of public participation is supported by the concepts of moral reasoning and democratic governance. Republican liberal theory upholds these two

concepts, as it advocates a number of practical actions to ensure public, political participation. These include the interdependence between ordinary citizens, processes, the function of existing institutions and legal regulations. These principles encourage the people's authority as a supreme power which balances state authority.

In the context of external self-determination practices, there are three mechanisms that states or international institutions choose to assess the will of the people: referendums, elections, and public consultations. Referendums may produce, at least superficially, a straightforward assessment of what can be considered the will of the people. It allows direct participation by the people, and it is a simple mechanism which allows them to say yes or no to the proposed question. However, the nature of a referendum is not a dynamic and ongoing process. The people cannot act as active participants because the governmental authority is in control of the institutional and legal frameworks, as well as setting the question, and can use its power to limit the involvement of certain groups of people. Therefore the people have no freedom to express their will freely and independently during an external self-determination process.

When looking at some practical examples, during an independence referendum, there is no state or international framework to implement public opinion. In addition, if there is no clear constitutional framework to uphold the supremacy of the people's will, the referendum can be ignored. For example, in Catalonia 2012, holding a referendum was considered to be unconstitutional as it was held without the validity of domestic law. Thus, the Spanish governmental authorities overruled public opinion. Sometimes, public opinions will not clearly be ascertained if the people are misled by

a biased question. In the Southern Cameroons (1961) and Croatian (1991) independence referendums, setting the referendum questions was in the hands of elites or executives bodies. The questions did not reflect the people's wishes. In addition, enfranchising or disenfranchising certain groups of people are controversial matters as this can change the final outcome of the referendum. For example, in Western Sahara in 1975, the UN took action to resolve the dispute between Morocco and the Frente Polisario. Each side wanted to include a specific group of the population to alter the final outcome of the referendum. Eventually, the UN could not find a compromise between conflicting parties and the referendum did not take place. From these difficulties, it is clear that holding a referendum does not work in accordance with republican liberalism because there is no recourse for the people to ensure that their will is taken into consideration.

The nature of elections and the peoples' representatives reflects how the latter carries out the will of the people. There are a number of distinct advantages to elections and representative processes. Through the lens of republican liberalism, the people are able to check, revise, or contest their representatives' actions. Because the people's representatives want to be re-elected, they are likely to act in response to public opinion rather than their own. In addition, because elections rely on a pre-identified system, all people have the chance to claim their voting right before the election is held. Finally elections provide a channel for every ethnic group's representative to work toward the people's interests within a state institution. These advantages make elections dynamic and flexible.



However, in external self-determination practices, it could be argued that even representative processes do not reflect the people's will. Firstly the people might select their representatives not based on the campaign but on that particular personality. For example, the East Pakistan (Bangladeshi) leader in the 1970 general election who was elected due to his popularity despite not having a mandate for independence. Secondly public demands and the people's representatives' actions are not necessarily compatible with each other. For example the Czechoslovakian National Assembly had proportional equality between the people's representatives for the Czech and Slovak ethnic groups. However despite this, the people's demand for dissolution in the 1992 election was unclear. The vote for dissolution in 1993 did not necessarily therefore reflect their will. Rather, it was a consensual negotiation between the Czech and Slovak representatives. Another example of this is in Kosovo, where the involvement of minority groups of people (i.e. Kosovo-Serbs) were not respected when the Kosovo Assembly (dominated by the Kosovo-Albanians) released the Unilateral Declaration of Independence in 2008. Finally, in the aftermath of an election, the process of constitution-making can be difficult due to violent conflicts, for example after the Namibian election in 1978. The limitations outlined above affect the legitimacy of the demands made by the people.

Public consultations encourage the people to be active participants in external self-determination processes through communicative action. The establishment of a public consultation reduces tension among different ethnic groups of people in a pluralistic society by increasing minority involvement and creating political equality. All people are able to express their political views whether they agree or disagree on a particular issue. If the population is not under the control of the state authorities, the minority

voices at least will be heard. Another advantage is that public consultations prepare the readiness of the people to express their will by increasing civic education about the issues. However, the effective participation of the people in public consultations can be limited by the state authorities. For example, in West Papua in 1969 there was no clear framework to guarantee that all the people were involved in exchanging their views within state institutions. In addition, the freedom of the people to express their will or to assemble has been restricted to certain groups of people for example men or those who could pay for participating in a political arena, as exemplified in Bahrain in 1970. However, in the Bahrain consultative process in 1970, the UN made a lot of effort to include all diverse backgrounds of people (e.g. religious, profession, area of living) to be involved in deciding their future.

Historically, using either referendums, elections or public consultations separately for assessing the will of the people in external self-determination practices has been restricted by governmental domination and the tyranny of the majority within a state. This research found that referendums should not be held on their own without either an election or a public consultation to increase the legitimacy of the will of the people. The people should play an active role in the state-framing process. Public, political participation is a way of reducing the supremacy of the territorial integrity of a state. This participation does not involve only the people as constituent powers but also encompasses other actors or entities that influence public opinion, for example political parties, the media, and civil societies. These non-state institutions are crucial factors in increasing the legitimacy of elections and public consultations, therefore using either of these processes in conjunction with referendums provides a two-stage process of measuring the will of the people.

Applying republican liberal theory to external self-determination processes can help international law development in the following areas: acknowledging the people as right-holders, broadening the content of the rights themselves, and recognizing the value of domestic, constitutional law in the international law arena. The three core ideas of republican liberalism (the people's rights, the presence of institutions and constitutional frameworks) provide guidelines for the international legal community on how to carry out self-determination which is legitimately based on the expressed will of the people. In terms of ordinary citizens, 'peoples' are recognized as subjects of international law and accepted as right-holders in deciding their future destiny. The whole population within a particular territory is equally entitled to express their will. The classification of people based on 'ethnic sense' is eradicated in the republican liberalism model. Meanwhile the content of external rights to self-determination can be assessed by their interactive and communicative actions in states, international, and non-state institutions. These participative processes can ensure that the will of the people is taken into consideration in the existing institutions. At least the voice of the people is heard - whether they agree or disagree with the proposed topic. Republican liberalism provides public recourse for when the people are dissatisfied with governmental actions. Last but not least, the recognition of public opinion within a legal framework is another significant factor in ensuring that the determination of the will of the people is under the protection of law. If domestic law can guarantee individual rights protection during any decision-making process, the people's collective decision-making is considered to be legitimate in the eyes of international lawyers.

Taking all of the above into consideration, using republican liberalism can increase the level of legitimacy in external self-determination processes, in particular, external recognition from other states. In theory, the application of the right to self-determination is generally limited but not prohibited. Thus, public involvement in an external self-determination process is a way to ensure that the people's will is respected as they are stakeholders of territorial change. The practical application of external self-determination is legitimized if all people have equal political status. In addition, republican liberalism can help to solve a 'one-off exercise' (or discontinuous action) of external self-determination. The establishment of public discourse through institutional and legal frameworks strengthens the people's authority in any decision-making process. This can provide a systematic and a continuous action of public involvement in external self-determination process in a peaceful manner.

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