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## **Separatism and the Democratic Entitlement in International Law**

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## SEPARATISM AND THE DEMOCRATIC ENTITLEMENT

The panel was convened at 9:25 a.m., Friday, April 3, by its Chair, Siba Grovogui, who introduced the panelists: Mortimer N. Sellers, University of Baltimore, Center for International and Comparative Law; Deborah Cass, Australian National University Law School; Fernando Tesón, Arizona State University College of Law; and Diane Orentlicher, Washington College of Law, American University.

### SEPARATISM AND THE DEMOCRATIC ENTITLEMENT IN INTERNATIONAL LAW

by *M.N.S. Sellers\**

With the collapse of the Soviet Union, and the emergence of democracies, or quasi-democracies, in Russia, South Africa, and throughout South America, the most powerful and persistent opponents of popular sovereignty have receded, or admitted their mistakes, and a new democratic triumphalism has entered the legal literature. Where Hugo Grotius once boldly rejected the idea that supreme power necessarily resides in the people, frankly viewing certain peoples (he mentions Cappadocians) as fit to be slaves,<sup>1</sup> some scholars now assert an “emerging right of democratic governance” such that no government should be considered legitimate without free, fair and frequent elections.<sup>2</sup> At the same time, and in some of the same places, new states have emerged from the ruins of the Soviet Union and the former Yugoslavia. Czechs, Slovaks, Scots, Quebecois, and many others in the provinces or former provinces of larger states have asserted their separate national identities, seeking plebiscites and claiming democratic support. If democracy is the measure of legitimacy, then such votes should be decisive, and the subjects of nondemocratic states should have the right to secede, or rebel. Yet proponents of the right to democracy remain extraordinarily vague about which groups should vote and be free. The peoples of non-self-governing colonial territories enjoy the most widely recognized right to secession, but beyond that democrats often equivocate.<sup>3</sup> If democracy by means of general votes of the population is the ultimate source of governmental legitimacy, then there can be no principled basis for dividing the world into groups for voting. The larger the group, the greater the legitimacy, one might suppose. If so, a consolidated universal world democracy would be the most just form of government.

Democrats do not always seem to want this. To the extent that they do not, democracy is not their fundamental value. Something else must explain the persisting separation between peoples of the world, and justify democrats in accepting such divisions.<sup>4</sup> But any rule that justifies separation faces the opposite problem—of escalating fragmentation. If minorities can separate from larger groups too easily, then they will do so, and each minority will find minorities of its own, until each state is a state of one citizen, alone and unloved. So separatists must have regulating values too, like democrats, to draw the line between isolation and oppression.

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<sup>1</sup>HUGO GROTIUS, *DE JURE BELLI AC PACIS* I.iii., 52–53 (1646).

<sup>2</sup>*E.g.*, Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AJIL 46 (1992); Henry Steiner, *Political Participation as a Human Right*, 1 HARV. HUM. RTS. Y.B. 77 (1988).

<sup>3</sup>Franck, *supra* note 2, at 55.

<sup>4</sup>*E.g.*, Thomas M. Franck, *Is Personal Freedom a Western Value?*, 91 AJIL 593 (1997) (advocating individual “autonomy”).

### Republicanism

In this paper I will address the limits of separatism and the democratic entitlement from a republican perspective, by which I mean the perspective that views laws and legal systems as justified, if at all, only when they serve the common good.<sup>5</sup> In fact, nearly all legal systems purport to do so, or at least to serve “justice.” This assertion of justice is the essence of law, without which impositions of power lose the normative element that gives them validity in any legal system.<sup>6</sup> Republicans equate justice with the common good,<sup>7</sup> and see the purposes of government and society in promoting a harmony of interests, so that the good of each individual contributes to the benefit of all.<sup>8</sup>

Republican doctrine developed primarily to serve the common good *within* states, such as the Roman republic, Florence, England and the United States.<sup>9</sup> Republican authors agreed that popular sovereignty, the rule of law, the separation of powers, checks and balances, representation, and elections would all be necessary to prevent any individual or group of individuals from seizing control of government and running the state to serve private or factional interests.<sup>10</sup> Republican conceptions such as the *populus* (people), *libertas* (liberty) and *jus gentium* (law of nations) developed to serve this conception of separate peoples, each united around its own sense of justice and agreement about the common good.<sup>11</sup>

When republicans contemplated international relations, they did not seek a world republic, despite their belief in universal human community,<sup>12</sup> but rather an overarching federation of republics, to coordinate their mutual relations.<sup>13</sup> For example, the framers of the U.S. Constitution self-consciously established a federal system, guaranteeing separate republican governments to each of the thirteen states.<sup>14</sup> The problem for republicans over the centuries has been the question now faced for the first time by democrats, as they assert their new right to plebiscites and voting: Who are the people? The boundaries between peoples determine the jurisdiction of each republic, and the province of international law.

### Democracy

*Democracy* in its strictest sense means “rule by the people,” which is to say direct participation in all decisions by every citizen, or at least by some large group of citizens chosen, as in Athens, by lot. The excesses and ultimate failures of the Greek demagogues made the Greek term *democracy* an epithet of abuse for two millennia, until the “Democratic Republican” and later “Democratic” parties in the United States embraced certain aspects

<sup>5</sup>See Mortimer Sellers, *Republican Impartiality*, 11 OXFORD J. LEGAL STUD. 273 (1991); PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* (1997).

<sup>6</sup>Mortimer Sellers, *The Actual Validity of Law*, 37 AM. J. JURIS. 283 (1992).

<sup>7</sup>E.g., *The Federalist* 51 (James Madison) (1787), in *THE FEDERALIST PAPERS*, 322 (Isaac Kramnick, ed., 1987).

<sup>8</sup>MARCUS TULLIUS CICERO, *DE OFFICIIS* III. vi. 26; *DE RE PUBLICA* I. xxv. 39.

<sup>9</sup>See MORTIMER SELLERS, *THE SACRED FIRE OF LIBERTY: REPUBLICANISM, LIBERALISM AND THE LAW* (1998); J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975).

<sup>10</sup>E.g., *The Federalist* 9 (Alexander Hamilton) (1787) in *THE FEDERALIST PAPERS* 119 (Isaac Kramnick ed., 1987); see MORTIMER SELLERS, *AMERICAN REPUBLICANISM: ROMAN IDEOLOGY IN THE UNITED STATES CONSTITUTION* (1994).

<sup>11</sup>JOHN ADAMS, *DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA* LXXI (1787–1788); CICERO, *supra* n. 8, *DE RE PUBLICA* I.xxv.39.

<sup>12</sup>CICERO, *supra* note 8, *DE OFFICIIS* III. xvii. 69.

<sup>13</sup>IMMANUEL KANT, *ZUM EWIGEN FRIEDEN* (1795); CHRISTIAN WOLFF, *JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM* (1764).

<sup>14</sup>U.S. CONST. art. IV, § 4.

of the Athenian model, to differentiate themselves from their “Federalist Republican” and later “National Republican” rivals. Alexis de Tocqueville’s famous description of democracy in America used the word in a new way, to describe a state in which the people really did seem to rule, albeit indirectly, through their elected representatives.<sup>15</sup> When contemporary lawyers write of the “right to democracy,” they probably mean to require “periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures” (Universal Declaration of Human Rights, Article 21).<sup>16</sup>

Proponents of the democratic entitlement assume its value as a source of legitimacy in international law.<sup>17</sup> Republicans value democracy too, but not as an ultimate value. Republican popular sovereignty depends on the perception that unelected or unremovable governments will always subvert the common interest to serve their own ends. Republican doctrine requires democracy, not for its own sake, but because democracy facilitates the finding (or creation) of a common good for all citizens. Democracy is valuable because it serves republican ends, by keeping rulers focused on the common good. The underlying purpose is not to decide every issue by popular vote, but rather to secure good government by periodic elections.

This instrumental value of democracy is important, because it explains the limits of voting, and offers criteria for drawing boundaries between districts. The rule of law and balance of powers play at least as large a role in republican government as does democracy, by preventing majority tyranny, or thoughtless populism.<sup>18</sup> Republicans such as James Madison<sup>19</sup> and Immanuel Kant<sup>20</sup> made a point of distinguishing republicanism from democracy precisely because democracy often imposes injustices, while republics should not. Kant followed Livy in believing that peoples must be made ready for democracy, and constrained by republican structures of government, before they can safely assume their freedom and independent sovereignty.<sup>21</sup>

### *International Law*

The democratic entitlement first entered international law as part of the republican complex of ideas that revived the *jus gentium* after the Protestant Reformation in Europe and culminated in the writings of Hugo Grotius and Emmerich de Vattel.<sup>22</sup> Grotius believed that sovereignty (“*imperium*”) over peoples (“*populi*”) can be transferred only by means of inheritance, lawful war,<sup>23</sup> or consent,<sup>24</sup> because peoples should never be understood to yield

<sup>15</sup>ALEXIS DE TOCQUEVILLE, *DE LA DÉMOCRATIE EN AMÉRIQUE* (1835): “Du principe de la souveraineté du peuple en Amérique” (ch. 4).

<sup>16</sup>See, e.g., Conference on Security and Co-operation in Europe (CSCE), *Document of the Copenhagen Meeting of the Conference on the Human Dimension, June 29, 1990*, reprinted in 29 I.L.M. 1305; Franck, *supra* note 2, at 67.

<sup>17</sup>CSCE, *supra* note 16, at 1309: “[T]he will of the people, freely and fairly expressed through periodic and genuine elections, is the basis of the authority and legitimacy of all governments.” *Id.* at 1309.

<sup>18</sup>See PETTIT, *supra* note 5, at chs. 6, 7.

<sup>19</sup>See THE FEDERALIST PAPERS, *supra* note 7, at X, 126–27.

<sup>20</sup>KANT, *supra* note 5. See his earlier discussion of the “erster Definitivartikel zum ewigen Frieden.”

<sup>21</sup>*Id.*, at 16; TITUS LIVIUS AB URBE CONDITA II.1.

<sup>22</sup>Mortimer Sellers, *Republican Principles in International Law*, 11 CONN. J. INT’L L. 403 (1996).

<sup>23</sup>Grotius, *supra* note 1, at III. xv.1.

<sup>24</sup>*Id.* at I.iii.3.

their “liberty” involuntarily.<sup>25</sup> Rulers who violate the laws and the “republic” may be resisted by force, Grotius suggested,<sup>26</sup> as may those who prove themselves to be enemies of the people as a whole.<sup>27</sup> Vattel confirmed that all sovereignty originates with the people, who may (if they so choose) confer it on a senate or a monarch,<sup>28</sup> but only for the purpose of serving the common good of all citizens.<sup>29</sup> When a tyrant arises, such as Philip II of Spain, his subjects may properly take arms to protect their liberty, as did the people of the Netherlands, and create a new republic that serves the common good.<sup>30</sup>

This underlying conception of popular sovereignty provides the law of nations with its most important and enduring claim to obedience and respect. As Vattel explained it, nations or states are political bodies or societies united to obtain their citizens’ common good and security.<sup>31</sup> This political union creates a new moral person, with obligations and rights of its own.<sup>32</sup> The law of nations governs relationships between such states.<sup>33</sup> Vattel suggested that since nations are composed of individuals who are by nature free and independent, nations must be free and independent too,<sup>34</sup> subject only to the law of nature and their own commitments, freely made.<sup>35</sup> Without this principle—that states in some sense speak for the peoples they represent—international law would lose its moral authority. The UN Charter recognizes the importance of this claim in its preamble, which purports to derive constitutional authority from a mandate provided by “We the peoples of the United Nations.”

Contemporary international law endorses popular sovereignty through several other charter provisions, and related resolutions and conventions of various international bodies. The UN Charter maintains as one of its fundamental purposes “to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples” (Article 1[2]).<sup>36</sup> This includes the peoples of non-self-governing territories, whose metropolitan powers must help to develop each territory’s “free political institutions” (Article 73[b]), with a view toward their eventual “self-government” or “independence” (Article 76[b]). The Universal Declaration of Human Rights provides that “everyone has the right to take part in the government of his country, directly or through freely chosen representatives” (Article 21[1]), as selected in “periodic and genuine elections which shall be by universal and equal suffrage” (Article 21[3]). This right reappears in the International Covenant on Civil and Political Rights, which reaffirms that “the inherent dignity” and the “equal and inalienable rights of all members of the human family [are] the foundation of freedom, justice and peace in the world” (Preamble), so that “all peoples have the right of self-determination,” by virtue of which “they freely determine their political status” (Article 1[1]) through “genuine periodic elections which shall be by universal and equal suffrage” (Article 25 [b]).

<sup>25</sup>*Id.* at II.ix.1.

<sup>26</sup>*Id.* at I.iv.8.

<sup>27</sup>*Id.* at I.iv.11.

<sup>28</sup>EMMERICH DE VATTEL, *LE DROIT DES GENS OU PRINCIPES DE LA LOI NATURELLE APPLIQUÉS À LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS* I.iv.38 (1758).

<sup>29</sup>*Id.* at I.iv.39.

<sup>30</sup>*Id.* at I.iv.51.

<sup>31</sup>*Id.* at *Préliminaires* 1.

<sup>32</sup>*Id.* at *Préliminaires* 2.

<sup>33</sup>*Id.* at *Préliminaires* 3.

<sup>34</sup>*Id.* at *Préliminaires* 4.

<sup>35</sup>*Id.* at *Préliminaires* 24–27.

<sup>36</sup>*Cf.* UN CHARTER art. 55.

### *Peoples*

The validity of international law rests on the self-determination of peoples in the same way that the legitimacy of the world's separate states rests on the ultimate sovereignty of their various populations. From Cicero to Vattel to the UN Charter, the law of nations has claimed binding force because states speak for the peoples that they represent. Even nondemocracies have endorsed democratic principles in international relations, because these give each state protection and an independent voice. Republican principles would insist that every people deserves a voice in international affairs, because without it, as in domestic politics, the common good will not be found, or realized. This makes the actual identity of "peoples" a vital question. If every people, including subject peoples, enjoys the right to self-determination, then what counts as a "people" will have significant legal implications.

The use of the word *people* (*populus*) in international law derives from the republican tradition in Rome ("*res publica res est populi*"),<sup>37</sup> according to which ultimate sovereignty ("*imperium*") belonged to the "people," or ordinary citizens, of Rome, whose state existed to serve their common good.<sup>38</sup> As Rome gradually conquered its neighbors in Italy and around the Mediterranean basin (always, the Romans insisted, after "just" wars), the Romans either incorporated the conquered populations into the Roman people, or made the conquered territories provinces, and their inhabitants subject peoples. Both Grotius and Vattel cited the example of the southern Italian city of Capua to illustrate national servitude, since Capua lost every vestige of republican government after its total submission to Rome.<sup>39</sup> The underlying assumption in the traditional sense of the word *people*, or *populus*, was that individuals coalesce as a people by forming a state, which derives its sovereignty from their consent. This sovereignty can be transferred by consent to others, but doing so undermines the integrity of the people, by ceding their "liberty" to someone else.

The historical use of the word *people* to signify the citizens of a state, or residents of a non-self-governing territory or province, was perpetuated by the United Nations, through which existing states, including many multiethnic states, spoke as "peoples" to ratify the UN Charter (Preamble; Article 110), forbidding interference with the territorial integrity or political independence of states (Article 2[4]) and equating "peaceful and friendly relations among nations" with the "equal rights and self-determination of peoples" (Article 55). "Peoples" were described as the "inhabitants" of specific territories, and as such considered deserving of "free political institutions" (Articles 73, 73[b]). This usage should be familiar to citizens of the United States, whose own constitution rests on the consent of the "people of the United States" as a whole (Preamble), confirmed by the peoples of its territorially distinct substates, meeting in their own local conventions (Article 7). Ethnic affinities do not create a people without political and territorial independence, and many "peoples" have expressed their right to self-determination through decolonization, despite extreme ethnic, religious and cultural diversity, as in Africa and South America.<sup>40</sup>

### *Secession*

The republican origin and understanding of "peoples" in international law as essentially territorial and political constructs suggests the missing criteria for evaluating claims to separatism and popular sovereignty that simple assertions of a "democratic entitlement" cannot supply. Each republican "people" shares a homeland, political institutions, and a

<sup>37</sup>CICERO, DE RE PUBLICA, *supra* note 8, at I.xxv.39.

<sup>38</sup>GROTIUS, *supra* note 1, at II.ix.3.

<sup>39</sup>*Id.*, II.ix.6; VATTEL, *supra* note 28, at I.16.194.

<sup>40</sup>Under the doctrine *uti possidetis juris*.

strong claim to collective sovereignty. Subject peoples, whose sovereignty has been denied, deserve their “liberty,” according to republican doctrine, which is to say, they deserve to enjoy those institutions of government best designed to serve the common good, including popular elections, the rule of law, the separation of powers, and governmental checks and balances.<sup>41</sup> The first test of what constitutes a “people” is existing political boundaries. Every sovereign state has a “people” within its borders—the people of Britain, the people of Canada, the people of the United States, and so forth.

As these examples should illustrate, some states also contain subordinate or component peoples, such as the peoples of Scotland, England, Maryland, Pennsylvania, or Quebec. All these peoples enjoy stable borders and a measure of self-determination or popular sovereignty in that they elect their own rulers, both at the provincial and the federal levels. Republican principles would deny such “peoples” the right to secession, unless the federal government abuses its power and violates the common good by discriminating against the subgroup or province. Purposely to exclude some minority or subgroup of the population from the common good of the citizens as a whole expresses the state’s view that that group does not in fact belong to the “people” that the state must serve and protect. Denying elections, the separation of powers, independent judges, or any of the other basic attributes of republican government to any portion of the population expresses that group’s nonmembership in the body politic, and therefore its right to secede.

This right to separation may have a strong ethnic component when states discriminate by ethnicity, but ethnicity does not justify separation without a clear expression of exclusion by the existing authorities. Even a showing of exclusion may not justify separation, without geographic realities to support it. Secession necessarily follows the territorial principle, while ethnicity does not. Finding a new and geographically distinct homeland for oppressed minority populations may often be so impractical (or unwelcome to its putative beneficiaries) that such solutions should not be pursued. In such situations, the proper remedy for violations of the republican principle would be reform or revolution, to prevent ethnic discrimination in the future.

### *Conclusion*

Republican principles reconcile separatism and the democratic entitlement in international law by explaining how both relate to the common good of particular states, and to that of the international community as a whole. Human nature naturally seeks community. Many human goods would be impossible without cooperation between neighbors, including large-scale cooperation in states. Cultures develop through proximity, which suggests certain limitations on the optimum size of each political community. History has produced states that avoid the natural limits of imperial consolidation. When states get too large they need provinces, to bring government closer to the people.

The optimum size of such republics will vary according to circumstances, reflecting ordinary happenstance, including historical, cultural, linguistic, religious, ethnic and geographical realities. The dominant projects of international law have been to stabilize the boundaries between states and to bring their peoples into harmony for the common good, in the same way that states should do so for individuals. Just as states should be republics, to serve the good of their citizens, so the world community should respect republican principles, to serve the good of all peoples. These principles include popular sovereignty (applied through the democratic principle of election), but also the separation of powers, checks and balances, an independent judiciary and other fundamental human rights. Denying these rights may justify revolution, or the creation of new and smaller separate republics.

<sup>41</sup>PETTIT, *supra* note 5; SELLERS, *supra* note 9.