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The Search for a New Normativity: Thomas Franck, Post-modern Neo-tribalism and the Law of Self-determination

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1 Introduction

National self-determination is one of the most fundamental and enduring principles of the post-war international legal system. Yet its overt politicization and the fact that both its meaning and the scope of its application remain fundamentally contested detract from its viability as a legal norm. If international law is to have legitimacy, even in minimal and value-neutral Hohfeldian terms, then its content must reflect, *inter alia*, a measure of coherence and certainty. These attributes evade self-determination, and the debilitating inconsistency in its application since 1945 has provoked the rebuke that, 'in perhaps what has become the most important legal issue in the international order, international law remains largely irrelevant.'¹

The issue of self-determination has been addressed by Thomas Franck at various times, but most fully in *Fairness in International Law and Institutions*,² where he considers the principle in both descriptive and normative terms. In terms of the latter, Franck does not explicitly endorse the emergence of a wider right of secession under international law, but he does offer the possibility that, in the context of his 'fairness' discourse, the scope of application of self-determination should be broadened. In discussing this option, however, he remains conscious of the competing interests which are at stake as self-determination claims arise in real world conditions. He is also aware that the task of reinterpreting the law in response to a changing international environment might well be a problematic exercise if it confuses

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¹ Eisner, 'A Procedural Model for the Resolution of Secessionist Disputes', 33 *Harvard International Law Journal* (1992) 413.

² T. M. Franck, *Fairness in International Law and Institutions* (1995) [hereinafter *Fairness*].

descriptive and normative approaches to the law.³ But this danger is perhaps unavoidable in relation to a concept like self-determination, which is regularly conscripted by multifarious political movements in support of widely differing claims. In this area more than most, law's legitimacy depends upon a negotiated balance between the need for order and the need for change,⁴ even though such a balancing exercise is itself risky. For example, a position which allows self-determination to be reinterpreted so as to accord a right to statehood in response to new generations of group rights claims may, on the one hand, help provide law with its intuitive plausibility as a responsive mechanism, but, on the other may also expose its inherent vulnerability in the event that its meaning is open too readily to a process of re-negotiation which threatens to undermine the very concept of statehood itself.⁵ Although in *Fairness* Franck seems sympathetic to a more expansive application of self-determination in certain contexts, and indeed suggests that fairness discourse may require it,⁶ in *The Empowered Self: Law and Society in the Age of Individualism*,⁷ by contrast, his concerns are, in moral terms, the promotion of individual rights and, in pragmatic terms, the need to secure international peace and stability. Entertaining with some alarm the vision of 'a world of 2000 nation-states'⁸ he returns in this, his most recent book, to the issue of self-determination with considerably less enthusiasm for a principle which may endanger both the rights of the individual and world order itself.

In this paper I will examine the development of Franck's approach from *Fairness* to *The Empowered Self* in the context of related work undertaken by political philosophers who have also addressed the normative dimensions of self-determination. In the next section, Part 2, I will discuss how Franck's treatment of self-determination in *Fairness* (which will be returned to in more detail in Part 4) is situated within his broader theory of fairness, and in doing so I will mention briefly how Franck's analysis serves to highlight some of the lingering problems which continue to beset self-determination as a legal principle. Self-determination is not only a site of contestation for lawyers, but is also at the centre of a number of ongoing debates within contemporary political philosophy in terms of the competing rights and interests at stake in the quest for the better accommodation of ethnic and national identity. I will consider some of this theoretical work in Part 3, focusing solely upon liberal theories of self-determination since these provide the most relevant points of comparison with Franck's theoretical approach. Writers such as Harry Beran and Daniel Philpott argue

³ Franck has, nonetheless, been criticized for eliding at various points in his discussion what international law is with what it ought to be. See Chin Lim, Book Review of T. M. Franck, *Fairness in International Law and Institutions*, 16 *Legal Studies* (1996) 258.

⁴ *Fairness*, at 23.

⁵ A paradox brought out by Koskenniemi, 'Theory, Implications for the Practitioner', in P. Allott *et al* (eds), *Theory and International Law: An Introduction* (1991), at 7.

⁶ *Fairness*, at 147 and 168–169.

⁷ T. M. Franck, *The Empowered Self: Law and Society in the Age of Individualism* (1999) [hereinafter *The Empowered Self*].

⁸ *The Empowered Self*, Ch. 2.

for the existence of a wider right of self-determination than that which exists under international law; Beran indeed goes as far as to argue for a *prima facie* right of secession for territorially concentrated groups.

In Part 4, I will return in more detail to Franck's work on self-determination and will focus upon similarities and differences which occur between his critical analysis of self-determination as a legal principle and some of the normative prescriptions which emerge from modern liberal theory as discussed in Part 3. I will ask whether Franck's 'fairness' model may in fact lead to similar, although more qualified, conclusions to those reached by theorists like Beran and Philpott. Franck's agenda is clearly normative but it is a normativity informed by legal pragmatism, structured as it is within the prevailing realities of the international body politic. As an exercise in the art of the possible, it reflects moral ideals but applies these ideals to real-world dilemmas such as Balkanization and global instability. In *Fairness*, however, he seems to leave open the possible development of some limited right of secession under international law for groups denied the opportunity to retain their cultural identity.

In Part 5, I will turn to a possible tension in Franck's approach which emerges with his notion of post-modern neo-tribalism discussed in *Fairness*, and with his treatment in *The Empowered Self* of the moral and practical problems which attend the growth of contemporary nationalist movements. I will focus upon how in *The Empowered Self* Franck's methodological and normative critique of contemporary nationalism becomes much clearer, as does his disagreement with those he characterizes as 'secessionist group rights claimants'. In doing so, I will end in Part 6 by contrasting Franck's approach in *The Empowered Self* with the recent and highly nuanced approaches brought to this subject by liberal theorists such as Will Kymlicka, and here I will ask whether Franck in his most recent book perhaps underestimates both the capacity of liberalism to accommodate group rights and the role such rights might play in helping to pre-empt the Balkanization he so fears. It may be that, in exaggerating both the threat of the 'new nationalism' and the dichotomy between liberalism and group rights, he moves away unnecessarily from that part of his fairness discourse which promised better accommodation for oppressed cultural groups and which left open the possibility of a limited right of secession in extreme circumstances which other liberal writers seem able to fit within a broader framework of improving the protection of individual rights.

2 Franck's Theory of Fairness and Self-determination

For Franck, in his seminal work *Fairness*, the fairness of international law can be judged by two factors. One is the procedural expectation of due process, the other, substantive expectations of distributive justice: 'The fairness of international law, as of any other legal system, will be judged, first by the degree to which the rules satisfy the participants' expectations of justifiable distribution of costs and benefits, and secondly by the extent to which the rules are made and applied in accordance with what the

participants perceive as right process.⁹ Franck's theory owes much to John Rawls — indeed his notion of fairness seems in many ways to be interchangeable with early explications of Rawlsian justice.¹⁰ The emphasis on fair process in the search for just outcomes leads Franck to emphasize the importance of democratic government within the fairness model, and hence to the conclusion that the right to democratic government 'while not yet fully encapsulated in law, is now rapidly becoming a normative rule of the international system'.¹¹

What Franck takes to be a growing global democratic entitlement has developed through three phases, the first of which was the principle of self-determination established at the end of World War I.¹² Although Franck sees self-determination as being, to some extent, the source of the emerging norm of democratic governance, he does not consider the right of self-determination and the right to democratic government to be one and the same thing, as certain liberal theorists seem to suggest.¹³ For the international lawyer, the right of self-determination is of course a term of art, albeit a contested one, and, accordingly, Franck addresses self-determination as a legal principle rather than simply a normative concept.

The distance which Franck puts between self-determination and the emerging norm of democratic governance reflects both the very specific way in which the meaning of self-determination is shaped by international law but also the confusion which continues to blur its meaning as an international legal right. This confusion is engendered both by the way in which the principle's scope of application was redefined at different points in the twentieth century, and by its highly politicized nature which, in turn, has resulted in radically differing visions of its intended effect. In this confused context, Franck's revisitation of the self-determination issue in *Fairness* is certainly timely. When a legal norm, even one accorded by many the rarefied status of *jus cogens*, is unclear in terms of its meaning and scope of application, its force as a legal principle is necessarily weakened. As Deborah Cass argues, borrowing Hart's distinction between the 'core' meaning of a legal concept and its 'penumbra of uncertainty': 'The point has been reached where . . . the "penumbra of

⁹ *Fairness*, at 7.

¹⁰ J. Rawls, *A Theory of Justice* (1971). In particular, in a way similar to Rawls, Franck stresses the importance of due process and appropriate procedural mechanisms which both give law its legitimacy and are capable of leading to more just substantive outcomes.

¹¹ *Fairness*, at 84.

¹² 'Self-determination is the historic root from which the democratic entitlement grew.' *Fairness*, at 91. The other two phases are the development of freedom of expression as part of the growth of a human rights commitment since the 1950s, and the more recent establishment of free and open elections, for example, the UN observation of the Eritrean plebiscite of 1992.

¹³ See the discussion of Harry Beran's work below. Franck, instead, observes: 'self-determination is not an early version of democracy. While democracy invokes the right of each person to participate in governance, self-determination is about the social right of a people to constitute a nation state.' *Fairness*, at 92: *infra* notes 19 and 20 (and accompanying text).

uncertainty” surrounding the concept of self-determination is so pronounced that it obscures the term’s “core of settled meaning”.¹⁴

For lawyers the principle of self-determination is, of course, a much more narrowly constructed creature than that with which political philosophers tend to engage. The distinction between the ‘external’ and ‘internal’ manifestations of self-determination and the limitation of the latter to the decolonization process in the post-war period are familiar stories for international lawyers. According to this position, international law offers no right of secession,¹⁵ and even Article 1 of the ICCPR, which declares self-determination to be the right of *all* peoples, certainly does not create or describe a right of sub-state territorial units to statehood. Franck is cautious in his criticism of the ongoing confusion surrounding self-determination, but there are hints that he might favour some extension of the principle, and in identifying a possible starting point for the emergence of a wider application of self-determination, it is to Article 1 of the ICCPR that he turns. By means of Article 1, Franck writes, ‘somewhat serendipitously, the groundwork was laid for another rebirth of self-determination, now adapted to the post-colonial era soon to come into being.’¹⁶

Although Franck makes clear that he is not, in *Fairness*, attempting to predict what outcomes the application of ‘fairness’ discourse might have for self-determination, and does not therefore explicitly endorse a more permissive approach to external self-determination than the colonial model permits, moral arguments in favour of widening the principle’s scope of application are to be found in the work of a number of liberal theorists. It is in turning to these theorists that we find a closer connection being drawn between self-determination and the idea of democratic entitlement than Franck, from his perspective as an international lawyer, arrives at.

3 Liberal Theories of Self-determination

The literature on the subject of nations and nationalism has grown exponentially in recent decades with sociologists, anthropologists, political scientists, philosophers, historians and social geographers addressing the ostensible paradox that sub-state ethnic and national ties remain as resilient as ever and threaten international fragmentation at the same time as the world, in economic and technological terms, undergoes an unprecedented process of globalization which brings with it ever more

¹⁴ Cass, ‘Re-thinking Self-Determination: A Critical Analysis of Current International Law Theories’, 18 *Syracuse J. Int’l & Com. Law* (1992) 21, at 22–23. Franck himself, when discussing self-determination, talks of ‘the disarray in legal doctrine’: *Fairness*, at 148.

¹⁵ Except possibly in the very rare scenario envisaged by GA Res. 2625 (GA Res. 2625 and its Annex, UN GAOR, 25th Sess., Supp. No.28, UN Doc. A/8028 (1970)).

¹⁶ *Fairness*, at 155.

entangled networks of interdependence.¹⁷ Although it is difficult, given the amount of overlap which exists, to divide the various disciplines at work in this area into discrete categories, two prominent areas of study are relatively self-contained. On the one hand, there are those sociologists and anthropologists who have sought to explain the re-emergence of nationalism as a political force in the past 30 years.¹⁸ Theirs is a descriptive attempt to explain the dynamics of national identity as a sociological force; nationalism as an ideology or series of ideologies; and the relationship between the two phenomena. Secondly and more recently, the persistence of ethnic and sub-state national identities and the political claims they generate have attracted the attention of political philosophers who have attempted to assess these claims in rights-based terms.¹⁹

As I suggested in my introduction, it is this latter area of work with which I intend to engage in this paper, both because space would permit no more than a cursory outline of some of the major theories of nationalism and because it is, in any event, the normative aspects of national identity and its accommodation which offer the most interesting comparisons with Franck's analysis of the related legal issues. Turning to this latter set of concerns and to the theorists who currently address them, I will further narrow my enquiry by focusing exclusively on the work of liberal thinkers since they approach the question of self-determination from a philosophical position similar to Franck's, and therefore, their conclusions offer more useful comparisons with Franck's fairness model. In particular, I will consider liberal theories of secession, and in Part 4 I will compare aspects of these theories with the way in which Franck approaches self-determination through his fairness model.

Various liberal political philosophers have in recent years turned their attention to self-determination and, in particular, to its most controversial manifestation, secession. Within this group I would like to concentrate on advocates of what we might call the 'pure' liberal theory of self-determination. To contextualize their position relative to international law, it can be said that they tend to elide the internal and external aspects of the right of self-determination, treating the principle as

¹⁷ These scholars investigate a range of issues, including the origins and development of national identity; the ideologies of nationalism; and, of course, moral questions immanent within the demands of sub-state ethnic and national groups to greater political accommodation.

¹⁸ I do not intend to consider this issue but noteworthy writers on the subject include Ernest Gellner, Eric Hobsbawm, Michael Hechter, Tom Nairn, Anthony Smith, John Breuilly, John Hutchinson and Charles Tilly.

¹⁹ E.g. Beran, 'A Liberal Theory of Secession', 32 *Political Studies* (1984) 21; and H. Beran, *The Consent Theory of Political Obligation* (1987); A. Buchanan, *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (1991). Other works include, Gauthier, 'Breaking Up: An Essay on Secession', 24 *Canadian Journal of Philosophy* (1994) 357; Wellman, 'A Defence of Secession and Political Self-Determination', 24 *Philosophy and Public Affairs* (1995) 142; Philpott, 'In Defence of Self-Determination', 105 *Ethics* (1995) 352; de-Shalit, 'National Self-Determination: Political, not Cultural', 44 *Political Studies* (1996) 906 and Moore, 'On National Self-Determination', 45 *Political Studies* (1997) 900.

synonymous with secession, an assumption which stems from their model of democracy and their vision of legitimate state creation.²⁰

The proponents of the pure liberal theory of self-determination have, in examining the roots of liberal government, stressed a close corollary between, on the one hand, the right of individuals enjoying moral autonomy to a democratic form of government and, on the other, the right of these people to found a state within which such a system might operate. The state has instrumental value as a prerequisite for democracy, in other words as a secure environment for the exercise of the individual's moral autonomy.²¹ The idea of voluntary association as the root of legitimate statehood is, of course, an extension of contractarian individualism in the tradition of Hobbes and Locke. For the contractarian liberal theorist, there is implicit within the idea that a group of individuals can come together to form a society, the assumption that in doing so they might establish a jurisdiction specific to themselves within which their own laws will run free from outside interference.²²

Applying the same principles of autonomy and democracy, they are able to declare that a group of individuals who are entitled to join together for the purpose of collective self-government may, by extension, also secede from existing arrangements. In other words, an association entered into voluntarily is open to continuous assessment, a principle which was recognized in the American Declaration of Independence.²³ The notion that moral autonomy ought to permit the creation of new states if a group of individuals so chooses, is expressed by Daniel Philpott: 'any group of individuals within a defined territory which desires to govern itself more independently enjoys a *prima facie* right to self determination — a legal arrangement which gives it independent statehood or greater autonomy within a federal state'.²⁴ That this *prima facie* right to self-determination is fundamental to the individual's 'political' self is accepted almost intuitively: 'Self-determination is inextricable from democracy; our ideals commit us to it.'²⁵

Philpott's linkage of self-determination and democracy is not an explicit endorsement of secession *per se* for any territorially concentrated group, the alternative of

²⁰ Advocates of this radical version of the right of self-determination include Beran, 'Liberal Theory', *supra* note 19 and *idem*, *Consent Theory*, *supra* note 19; Philpott, *supra* note 19 and McGee, 'A Third Liberal Theory of Secession', XIV *Liverpool Law Review* (1992) 45. Other theorists who endorse a more restricted right to secede include most prominently, Buchanan, *supra* note 19.

²¹ Below I will discuss Will Kymlicka's related idea that a societal culture, rather than a state, provides an instrumentally important context for the exercise of individual autonomy.

²² This same principle can also serve to justify state sovereignty. As Martti Koskenniemi has written: 'Without a principle that entitles — or even perhaps requires — groups of people to start minding their own business within separately organised "States", it is difficult to think how statehood and everything that we connect with it — political independence, territorial integrity and legal sovereignty — can be legitimate.' Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice', 43 *ICLQ* (1994) 245.

²³ This principle was also asserted by the 'states' rights' theorists of the American South, such as John Calhoun, and was the basis of the constitutional and moral justifications which were presented at the secession conventions of 1860–1861.

²⁴ Philpott, *supra* note 19, at 353.

²⁵ *Ibid.*

‘greater autonomy’ is also available. Such an endorsement is, however, not difficult to find. Harry Beran deals not with a loosely defined notion of self-determination but rather with the clear act of secession when he writes, ‘liberal political philosophy requires that secession be permitted if it is effectively desired by a territorially concentrated group within a state and is morally and practically possible’.²⁶ This is not an unqualified right. There are for Beran six conditions under which a state is entitled to oppose secession. Three of these, which limit the right of a group to secede, concern the territory they occupy. For secession to be permissible the group must not seek to secede with a piece of territory which, firstly, rests on the borders of the state so that it would create an enclave; secondly, is culturally, economically or militarily essential to the existing state; and thirdly, contains a disproportionately high share of the economic resources of the existing state. The other three exceptions concern the secessionist group’s viability as a state and possible human rights abuses by it.²⁷

Beran’s justification for a general right of secession as the exercise of free political will by a group is clearly in the tradition of contract theory. Given that adults are ‘self-governing choosers’,²⁸ liberalism, according to Beran, embodies a commitment to individual freedom. Adopting the idea that the ideal society is one that comes ‘as close as a society can to being a voluntary scheme’, it is important that agreement to enter this voluntary scheme is not irrevocable.²⁹ For Beran this leads inexorably to a right to secede. He writes: ‘it seems that a commitment to the freedom of self-governing choosers to live in societies that approach as closely as possible to voluntary schemes, requires that the unity of the state itself be voluntary and, therefore, that secession by part of a state be permitted where it is possible.’³⁰ Again Beran, like Philpott, falls back on the individual’s moral autonomy to justify this conclusion. That adults are self-governing choosers is simply to describe their behaviour as being in some minimal sense rational. In normative terms, this rationality entitles adults to exercise their moral autonomy in choosing the political arrangements under which they will live. Calling this moral autonomy ‘sovereignty’,³¹ Beran submits that it ‘amounts to a moral claim’, and with this ‘sovereignty’

²⁶ Beran, ‘Liberal Theory’, *supra* note 19, at 23.

²⁷ *Ibid.*, at 30–31. It would appear that these qualifications may limit what is *prima facie* a very broad right to the point of virtual impotence. It has been argued by Anthony Birch that few contemporary secessionist movements can overcome all of these exceptions: ‘in practice most would-be separatists are likely to be left with a moral entitlement to secession which is rendered nugatory by political and economic circumstances.’ Birch, ‘Another Liberal Theory of Secession’, 32 *Political Studies* (1984) 597. Beran draws no conclusions as to how restrictive in practice his theory is likely to be. However, Philpott (*supra* note 19, at 364), who bases his argument for the right of self-determination on individual moral autonomy (the central premise of Beran’s argument for secession), concludes that within the right to self-determination, ‘[s]ecession, the starkest, most consequential separation, on which injustice is most likely to be parasitic, will in most cases be ruled out’.

²⁸ Beran, ‘Liberal Theory’, *supra* note 19, at 24.

²⁹ *Ibid.*, at 24. This obviously contrasts with the ‘one-shot’ approach of the colonial model of self-determination under international law. See *Fairness*, at 154–162.

³⁰ Beran, ‘Liberal Theory’, *supra* note 19, at 25.

³¹ *Ibid.*, at 25–26. See also Philpott, *supra* note 19, at 356.

individuals have a moral right to 'decide their political relationships'.³² Accordingly, we can trace by way of a four-step process his conclusion that there exists a moral right to secede. First, individuals are capable of rationally choosing their political arrangements. Secondly, this rationality applies both when they voluntarily choose to enter a political arrangement and when they, as members of a territorially concentrated group, choose to secede to form a new political arrangement. Thirdly, at the heart of liberalism is a commitment to the moral value vested in the sovereign, rational self, choosing to exercise his sovereignty in forming the social contract. In the final step, having combined the methodology and the normativity of the social contract project, Beran concludes: 'liberalism must also grant that territorially concentrated groups can exercise their sovereignty, i.e. their moral right to determine their political relationships, through secession'.³³ In short, for Beran, the moral right to enter a social contract extrapolates to a moral right to secede from this contract.³⁴

It would not be unfair to summarize that for Beran, Philpott and others³⁵ territorially concentrated groups will often have a moral right to secede, and that, accordingly, international law should facilitate this right by working to define proper processes and necessary conditions which acts of secession should follow and meet respectively. There are of course a range of practical problems which result from theorizing in such an 'idealistic' way, many of which are pointed out by the theorists themselves, whilst for the international lawyer the sweep of such decontextualized generalizations can be breathtaking. Nonetheless, simply within the moral framework of liberal contract theory, Beran's right of secession has intuitive appeal.

4 Franck and Self-determination

A consideration of the problems implicit in a permissive approach to secession is provided by Thomas Franck in *Fairness*, where he focuses on one particular set of issues, namely the competing interests of other affected groups and of the international community.³⁶ I will now return to Franck's general treatment of self-determination and to his broader discussion of democracy. In a similar way to Beran and Philpott in their theories on self-determination and secession, Franck's argument for an emerging right to democratic governance can also be located within the contractarian tradition. He seems to trace his notion of democratic governance (as Beran traces his theory of secession) back to the American Revolution, with its declaration that governments enjoy legitimacy in so far as they govern with consent. This is central to Franck's idea that valid national systems of government are those with established rules and processes which validate that governance, i.e. those which have established a system of autochthonous validation or which have 'made a

³² Beran, 'Liberal Theory', *supra* note 19, at 25.

³³ *Ibid.*, *supra* note 19, at 26.

³⁴ Bearing in mind the exceptions mentioned above.

³⁵ e.g. McGee, *supra* note 20, and Walzer, 'The New Tribalism', 39 *Dissent* (1992) 164.

³⁶ *Fairness*, at 145–146. In particular, the integrity of neighbouring states may be jeopardized. On this point see also Cass, *supra* note 14, at 39. It has been observed that Beran too is aware of these concerns.

farsighted bargain comparable to John Locke's social compact'.³⁷ Franck, the international lawyer, suggests that the American Declaration of Independence also contains a second proposition, namely that 'a nation earns "separate and equal station" in the community of states by demonstrating "a decent respect to the opinions of mankind"'.³⁸ These two ideas form the basis of Franck's normative project which is the developing right to democratic governance, as he argues:

For two hundred years, these two notions — that the right to govern depends on governments having met both the democratic entitlement of the governed and also the standards of the community of states — have remained a radical vision. This radical vision, while not yet encapsulated in law, is now rapidly becoming a normative rule of the international system.³⁹

I have noted that Franck, unlike theorists such as Beran, does not hold the right to democratic governance and the right of self-determination to be synonymous. I have also noted that Franck refers to the competing interests of other groups and of the international community which might militate against a wider application of the law of secession. Another important issue for Franck is the avoidance of conflict and he suggests that the strictly defined application of self-determination to the decolonization process was not simply an end in itself, bringing liberation to oppressed peoples, but also became an important tool in helping to prevent wars.⁴⁰

Despite these concerns, Franck does nonetheless suggest that fairness discourse should be applied in order to deconstruct the existing colonial model of self-determination and the tension which exists between self-determination and the principle of *uti possidetis*.⁴¹ In discussing the possibility of extending the application of the law of self-determination, he gives the example of 'a minority within a sovereign state . . . which is persistently and egregiously denied political and social equality and the opportunity to retain its cultural identity'.⁴² Franck does not go so far as to suggest that his fairness discourse would necessarily require that such a group be accorded the right to secede, but he does seem to conceive of this outcome as a possibility.⁴³

Franck's call for a re-engagement in normative terms with the principle of self-determination makes comparisons between his work and that of theorists like Beran and Philpott very pertinent. In many ways the task of applying fairness discourse to the principle of self-determination is one which these thinkers have themselves undertaken as they attempt to locate the moral foundations for the

³⁷ *Fairness*, at 90.

³⁸ *Ibid.*, at 84.

³⁹ *Ibid.*

⁴⁰ As an international lawyer, Franck is of course not alone in elevating peace as an overriding value in international relations. Antonio Cassese contends that of the three overarching values of inter-state relations: peace, human rights and self-determination, 'peace must always constitute the ultimate and prevailing factor'. Cassese, 'Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?', 10 *EJIL* (1999) 24.

⁴¹ *Fairness*, at 144–5.

⁴² *Fairness*, at 160.

⁴³ Other situations in which he suggests that the *uti possidetis* principle may be weakened are provided at the end of his chapter on self-determination: *ibid.*, at 168–169.

accommodation of secession within the liberal tradition. It also seems that their work bears more specific similarities to Franck's. The example of a shared contractarian approach has already been alluded to. Another is distributive justice. I have noted that one of the factors by which the fairness of international law can be assessed, according to Franck, is distributive justice,⁴⁴ and it is also the case that this principle is central to a number of philosophical arguments for the existence of a moral right of secession. For example, David Gauthier in his theory of self-determination, suggests that secession can be justified if a group suffers from discriminatory redistribution within an existing state.⁴⁵ Making reference to such similarities of method and general philosophical approach is of course not to suggest that Franck's fairness model necessarily implies a right to secede, but it is worth noting that other liberal thinkers using similar models and methodologies have arrived at just such a right. I have also noted that these theorists have tended to limit the right with numerous caveats in terms of the competing interests at stake and again there are suggestions that this is the direction in which Franck's fairness discourse seems to be leading.

In the next section I will turn to Franck's discussion of the phenomenon he terms 'post-modern neo-tribalism' and will discuss where tensions may arise in *Fairness* over the issue of self-determination, tensions which become more explicit with his critique of contemporary nationalism in *The Empowered Self*.

5 Franck, Post-modern Neo-tribalism and the Rights of National Minorities

The possible implication in *Fairness* that secession may be a fair solution for a group denied political and social equality and the opportunity to retain its cultural identity contrasts markedly with the strong objection which Franck takes, as a matter of principle, to secessionist movements in *The Empowered Self*. Indeed, Franck's objection in principle to secessionist movements, although stated most strongly in *The Empowered Self*, first emerges in *Fairness* with his discussion of the phenomenon he calls 'post-modern neo-tribalism'. By this term, Franck characterizes the rise of a new form of nationalism as a political phenomenon in the 1990s. It is post-modern because it goes against the generally recognized trend of modernism towards globalization and homogenization,⁴⁶ and neo-tribal because tribalism in its post-modern form is not as it was once perceived 'the exclusive property of so-called backward peoples'; instead it is 'now flaunted everywhere, unapologetically, with zealously raised arms and firearms'.⁴⁷ It is to be found in the old nations of Europe, the

⁴⁴ *Ibid.*, at 7.

⁴⁵ Gauthier, *supra* note 19. The same principle is at the heart of Allen Buchanan's argument for a limited right of secession: Buchanan, *supra* note 19.

⁴⁶ *Fairness*, at 140–141.

⁴⁷ *Ibid.*, at 143.

nineteenth-century nations of the Americas, the post-World War I nations of Europe and the newest nations of the developing world.

Franck, in a very engaging part of the book, also offers suggestions as to why post-modern neo-tribalism might have emerged as such a formidable political development. He advances a number of inter-relating factors, from the political, ‘a centrifugal bucking of the overwhelming afferent trend’;⁴⁸ to the psychological, suggesting that it may in part be a reaction by peoples against centralizing bureaucratic institutions such as the EU;⁴⁹ to the historical, citing the collapse of communism as especially significant;⁵⁰ and to the material, with the possibilities now offered to small groups that they might flourish outside the existing state but within larger international systems such as the EU and NAFTA.⁵¹ Whatever the causes, the outcome of this process has been the growth of the forces of separatism, a development of which Franck disapproves. Post-modern neo-tribalism, he suggests, advances a ‘neo-apartheid agenda’,⁵² and expropriates the principle of self-determination in support of it.

Although Franck is critical of this process, he declares that in light of the crises caused by post-modern neo-tribalism, ‘[a] search for a new normativity is almost inevitable’,⁵³ whereby international lawyers must ‘rethink their most fundamental norms, in particular those concerning title to territory, and its relation to human personality and group identity’.⁵⁴ Therefore, a tension begins to emerge in *Fairness* because, on the one hand, Franck disapproves of the separatist agenda which he associates with post-modern neo-tribalism, but on the other, his broader moral framework leads to the conclusion that international lawyers should find more appropriate responses to these nationalist claims by way of a fairness discourse which, in turn, may lead to a deconstruction of the colonial model and to the possibility of a right of secession for groups denied the opportunity to retain their cultural identity.⁵⁵

In *The Empowered Self*, in an impassioned defence of liberalism and the methodological individualism which underpins it, Franck continues to emphasize the need to rethink fundamental norms, and in this work he again confronts the issue of identity. Addressing the recent re-emergence of nationalism as a political force, Franck

⁴⁸ *Ibid.*, at 141.

⁴⁹ ‘Retgression to tribal consciousness could ... [restore] ... to the individual some ennobling and enabling participation and control’: *ibid.*

⁵⁰ *Ibid.*, at 142.

⁵¹ *Ibid.*, at 142–3.

⁵² *Ibid.*, at 144.

⁵³ *Ibid.*, at 143.

⁵⁴ *Ibid.*, at 144.

⁵⁵ I have noted that this is not an endorsement of secession by Franck, but it is a call for the international system to take seriously the new nationalism or ‘tribalism’ as well as the new rights claims which have emerged from it and which challenge fundamental principles of the international legal order such as territorial integrity and state sovereignty. This call for a rethinking of norms is another manifestation of Franck’s belief that law must be able to change: ‘legitimacy and distributive justice are indicators of law’s and especially *fair* law’s, primary objective: to achieve a negotiated balance between the need for order and the need for change’. *Fairness*, at 23 (emphasis in original).

suggests that, in the wake of the collapse of communism, important elements of traditional identities are being called into question, creating a global identity crisis which requires us to re-examine our prior certainties.⁵⁶ In contrast to his approach in *Fairness*, Franck now engages more directly with the normative questions which surround nationalism and secession. In this work he is even more critical of the new nationalism (which he now links more clearly with secessionism) and also now questions its prospects of political success. Contemporary nationalism constitutes a threat to individualism and is, on this basis, doomed to failure since individualism has emerged in the new era as the preferred alternative to the supposedly 'authentic' identities which this type of nationalism seeks to impose.⁵⁷ Franck's critique is, therefore, at once an attack on the methodological assumptions which he takes to underpin the newly emergent nationalism and, at the same time, a critique of its normative implications.

In the early chapters of *The Empowered Self*, Franck traces the historical development of nationalism and in particular he distinguishes the 'romantic' or ethnic nationalism of the nineteenth-century, which was based on commonality 'of blood or a shared history and culture', from the civic nationalism of the French and American Revolutions, which resulted instead from 'shared republican ideas' and tended to resist the notion of difference based on nationality.⁵⁸ The force of Franck's critique is reserved for contemporary nationalism — 'post-modern neo-tribalism' — which generally takes the form of the former, ethnic nationalist model. Beyond this, however, he sees emerging in the third millennium a challenge to both models. The romantic nationalism of Herder and the civic nationalism of Jefferson ('the nationalism of a multicultural liberal state'⁵⁹) share similarities:

Both kinds of nationalism have persistently claimed to be the right answer for everyone: a one-size-fits-all cloak of identity. Both kinds of nationalism have had a global mission. Neither was in the least inclined to accommodate the liberal individualism now emerging in much of the world, challenging all claims by any authority to determine everyone's personal identity.⁶⁰

In particular, both fail to accommodate the individual properly:

They each postulate a nationalism that firmly anchors persons to a community of institutions and values. Neither nationalism accommodates the idea that individuals are entirely free to choose: to compose their identity, detached from history, culture, language, religion, and territory. Both have traditionally relied on a 'given': a social unity based on deeply rooted things from which we all draw our telos.⁶¹

This, for Franck, is to miss the transformations taking place in processes of identity

⁵⁶ *The Empowered Self*, at 3.

⁵⁷ *Ibid.*, at 1.

⁵⁸ *Ibid.*, at 54.

⁵⁹ *Ibid.*, at 44.

⁶⁰ *Ibid.*, at 43–4.

⁶¹ *Ibid.*, at 45–6.

formation in the late twentieth and early twenty-first centuries. ‘Today, a person’s loyalty is increasingly likely to be a compound of subjectively chosen external references: to family, culture, religion, ideals, institutions, the state, colleagues, and even to humanity.’⁶² Therefore, ‘[a]t the beginning of the third millennium . . . both kinds of nationalism are being challenged by another kind of self-identification, a new notion of community’.⁶³ Although the moral critique in Franck’s argument is directed at romantic or ethnic nationalism, his methodological differences with nationalism run deeper and seem to apply to both models, since both now come under challenge in the new age of the individual.

On a methodological level he assails contemporary nationalism for positing identity as ‘situationally, not personally, determined’. For Franck, collective loyalties are ‘too ephemeral’ to support such a determinist approach to identity. Accordingly, he sets out to challenge ‘the authenticity of *a priori* claims on our identities made by nations, ethnic, and other exclusive loyalty systems’.⁶⁴ Instead, Franck puts forward an avowedly individualist vision of the human condition in which man, in the Kantian tradition, is capable of choosing his own ends and, importantly, is best able to do so.⁶⁵ In particular, the individual is not dependent upon the group to make collective choices on his behalf. Particularly in the modern age, technology has helped create an environment wherein identities are so highly nuanced and the sites of identity so interwoven, that the self has a vast degree of locations to choose from and has the technical and communicative opportunities to make these choices by aligning himself in a selective manner with a wide array of differing associations. It is, therefore, becoming ever more the case, given the range of options and the technical facilities available to indulge them, that the individual is both capable and indeed more than ever best able to form his own identity.⁶⁶

The principal normative implication of Franck’s analysis is that individual rights bear moral priority over the claims of other possible rights-bearers, in particular, the group and the state. Compared to both of these collectivities ‘only the person has a natural right to be’. The rights of states or groups ‘are non-inherent historico-social constructs’ in contrast to which ‘a person’s rights are implicit and inherent in the objective fact of being.’⁶⁷ Franck goes so far as to say that individual rights have ‘natural’ priority over the rights of the group or the nation; unlike group rights they are inherent, not contingent, a reality he terms a ‘moral intuition’.⁶⁸ His emphasis on the irreducibility of individual rights leads us to his preferred political outcomes and to his predictions for a world in which technological development is leading to the

⁶² *Ibid.*, at 46.

⁶³ *Ibid.*, at 58.

⁶⁴ *Ibid.*, at 3.

⁶⁵ Franck also endorses the Kantian mantra that the person is ‘an end in itself’. *Ibid.*, at 252, see also at 61.

⁶⁶ *Ibid.*, at 100.

⁶⁷ *Ibid.*, at 252.

⁶⁸ *Ibid.*, at 253.

diffusion of sites of identity and a more cosmopolitan environment.⁶⁹ Franck equates freedom with individualism, and real freedom is the capacity of the individual most fully to choose his identity.⁷⁰

Franck's critique of contemporary nationalism can, therefore, perhaps be summarized thus: in methodological terms he sees nationalism, particularly its 'ethnic' variant, as a collective enterprise which, in asserting '*a priori* claims' to identity, is clearly out of step with the complex realities of modern processes of identity formation.⁷¹ On a normative level, ethnic nationalism is one of a number of ideologies which he believes threaten to undermine individual human rights. Therefore, contemporary nationalism both misunderstands man's individualistic nature, and in doing so leads to political norms which endanger the rights that stem from this essential individuality.

6 National Identity and Minority Rights

I would now like to return to political theory and to another group of philosophers who, unlike Beran and Philpott, apply more concrete formulations of liberalism to the issues of nationalism and the political aspirations which spring from it and who, rather than constructing grand arguments for the existence of *prima facie* rights to secession, have in recent years addressed in more incremental ways the theory and praxis of minority rights. In the past 10 years a number of liberal theorists have addressed the rights-based claims advanced by national minorities, arguing that there is greater scope for the accommodation of the collective rights of national minorities within liberalism than, traditionally, liberals have been prepared to concede.⁷² I will now discuss some of this work, particularly that of Will Kymlicka, comparing his approach to Franck's. In doing so, I will continue to limit my discussion to disagreements over the rights of national minorities which take place *within* liberalism rather than address communitarian critiques which challenge Franck, and indeed Kymlicka, on more fundamental bases.⁷³ In this regard, it is worth noting that in

⁶⁹ He seems to endorse the cosmopolitan alternative advocated by, amongst others, Jeremy Waldron. See, *ibid.*, at 2 (note 1) and Franck's discussion at 46.

⁷⁰ He argues, with characteristic flair, that there is a new idea that identity is 'a *personal* attribute and that an individual's identity is increasingly self-chosen, rather than imposed by accident of birth or some liege-lords' fiat. New is the dawning of a spirit of individual assertiveness: a refusal to accept, as absolutely determinative, the ideas traditionally handed out to persons by those claiming to be ordained by God, history, or the law to tell us who we are.' *Ibid.*, at 60 (emphasis in original).

⁷¹ His clearly prescriptive agenda is set out at the very beginning of his book with a dramatic paradox which recalls the opening sentence of Rousseau's *Social Contract*. As Franck would have it, the world appears to be in a deep crisis of 'militant nationalisms' but, in fact, the deeper reality is that 'nationalism is in retreat ... change is coming'. *Ibid.*, at 1, and see also 235.

⁷² W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1995) and *Politics in the Vernacular* (2001); Margalit and Raz, 'National Self-Determination', 87 *Journal of Philosophy* (1990) 439; and Y. Tamir, *Liberal Nationalism* (1993).

⁷³ E.g. Addis, 'Individualism, Communitarianism, and the Rights of Ethnic Minorities', 67 *Notre Dame Law Review* (1992) 615, and Parekh, 'Dilemmas in a Multicultural Theory of Citizenship', 4 *Constellations* (1997) 54.

many ways the debate over minority rights has moved on from an early and fairly crude polarization whereby liberalism was considered to entail a commitment only to individual rights, whereas those who advocated discrete group rights for national minorities were generally considered to be ‘communitarians’. Now, minority rights of this kind are widely advanced by liberals, and many of the most pressing debates surrounding the accommodation of national minorities occur within liberalism, with many suggesting that the liberal project not only permits the existence of national minority rights but may indeed require it. Indeed, Kymlicka argues that the real debates over minority rights increasingly take place within liberalism, and for him, ‘[t]his is where the real action is’.⁷⁴

A Context of Choice

Franck, it will be recalled, argues that nationalists, primarily of the romantic or ethnic type, posit a vision of identity as situationally, not personally, determined, and that this runs counter to his notion that the individual is, in most cases, capable of making free and unencumbered choices.⁷⁵ Liberals who advocate national minority rights contend that individual choice is of supreme importance but they contextualize an individual’s scope for choice in relation to his ‘societal culture’. Societal cultures, in the terminology of Kymlicka, are territorially-concentrated cultures with shared characteristics, particularly a common language, which is used in a range of public and private societal institutions.⁷⁶ Although Kymlicka is committed to individualism and to individual choice, he has famously expressed the view that meaningful choices for individuals often take place within the context of a societal culture, thereby interposing what seems to be an important point of methodological distinction from the vision Franck advances of the unencumbered self at the end of the twentieth century.⁷⁷ Societal cultures, for Kymlicka, assume instrumental value since they provide for the better realization of individual choices and the better exercise of individual rights. As Kymlicka puts it, ‘[l]iberalism rests on the value of individual autonomy . . . but what enables this sort of autonomy is the fact that our societal culture makes various options available to us’.⁷⁸ Kymlicka would argue that real opportunities for choice can be severely limited in supposedly neutral venues. For example, a person in Louisiana who chooses to live within a French-North American culture and make further identity choices against that setting would have a much more limited (if any) prospect of doing so than a resident of Québec, precisely because a French-North American culture has survived in Québec. In Louisiana, and throughout the USA, such a culture has largely if not totally died out, replaced by the dominant English-speaking culture. American culture may be pluralistic, tolerant

⁷⁴ Kymlicka, *Multicultural Citizenship*, *supra* note 72, at 73 and *Politics in the Vernacular*, *supra* note 72, at 63.

⁷⁵ *The Empowered Self*, at 3. His critique also applies to some extent to civic nationalism, see *ibid.*, at 45–46, cited at notes 60 and 61 above.

⁷⁶ Kymlicka, *Politics in the Vernacular*, *supra* note 72, at 25.

⁷⁷ Kymlicka, *Multicultural Citizenship*, *supra* note 72, esp. 75–93.

⁷⁸ Kymlicka, *Politics in the Vernacular*, *supra* note 72, at 53.

and very permissive in terms of life-style choices, but the notion of choosing a French linguistic culture, whilst perhaps technically possible, is in practice meaningless.

Franck, it might be argued, parodies theorists like Kymlicka by contending that they advance their claims not 'on behalf of individuals who happen to be members of the group, but on behalf of the group itself'.⁷⁹ This is at least arguable, since Kymlicka presents his advocacy for minority rights in largely instrumental terms with the ultimate goal being the better facilitation of individual choice.⁸⁰ Furthermore, Kymlicka is not alone in identifying a close connection between a person's culture and his individual freedom within a liberal framework. A similar approach is taken by Joseph Raz, who also considers that individual autonomy is in part dependent upon a person's access to his culture and with the health of that culture in relation to others.⁸¹ Kymlicka, like Raz, continues to assert that individual rights are inherent and of the highest moral importance, but argues that in certain situations individual rights might be better secured by recognizing both the broader social context within which individuals are situated and the importance to individuals of identity, culture, recognition and language.

Despite Franck's critique of writers like Kymlicka (see below), there is much common ground between them. Franck elsewhere contends that his version of liberalism can sufficiently accommodate collective identities on the basis of choice. He also suggests that the idea of individualism 'is not necessarily incompatible with chosen affiliations with community, group, nation or state. It does not necessarily even preclude individuals choosing to be quite ethnic or nationalistic',⁸² a position which is of course consistent with his general view that identities are increasingly chosen. The main point of departure seems to be that cultural identity is, for Franck, simply one site of identity to which he does not appear to accord elevated priority, whereas for Kymlicka, cultural identity is often embedded and, therefore, takes on particular importance for many individuals because it encompasses many aspects of their identity and is often the broadest contextual site within which meaningful choices are made.

B Group Rights and Separatism

Franck, in *The Empowered Self*, characterizes a category of theorists, which seems to include Kymlicka, as 'secessionist group-rights claimants'.⁸³ One point which can be made is that secessionists need not be 'group-rights' claimants. I have already discussed the work of Beran and Philpott, both of whom, as liberals, are intuitively attached to some right of secession as an individual right. From this perspective one might argue that, if one can choose one's identity, why is it inconsistent for

⁷⁹ *The Empowered Self*, at 226.

⁸⁰ It can perhaps be asked whether Franck's critique is something of a return to the strict classification whereby minority rights advocates are held to be, by definition, communitarians.

⁸¹ Raz, 'Multiculturalism, A Liberal Perspective', 41 *Dissent* (1994) 67. See also, Margalit and Raz, *supra* note 72; Tamir *supra* note 72; and M. Walzer, *On Toleration* (1997).

⁸² *The Empowered Self*, at 2.

⁸³ *The Empowered Self*, at 226–227.

individuals to choose a national identity and to vote for autonomy for that national group? A claim of secessionist self-determination within the Beran/Philpott models need be nothing more than the pursuit, by a collection of individuals, of the right to found a territorially-bounded liberal society. Therefore, it is difficult to see why secession, although potentially dangerous in practical terms is, in purely moral terms, precluded by liberalism as an essentially communitarian enterprise. It will also be recalled that Franck himself seemed open to the possibility that some limited right of secession might emerge after a thorough review of the issue through the prism of fairness discourse.

Secondly, and conversely, writers like Kymlicka and Tamir, whilst conceding that they are group-rights claimants would take issue with the label 'secessionist'. Generally their approach is to advocate better accommodation of minority national cultures *within* existing states. Returning to Kymlicka's theory, it can be noted that he does not make declarations of *prima facie* rights to secede in the manner advanced by Beran, but instead confronts the importance to individuals of minority national cultures and the incremental ways in which, through both individual and group rights, they might be better accommodated within the existing state. Indeed, Kymlicka argues that by addressing the ways in which the rights of national minorities might be better respected, separatism may be made less likely since 'it is the *absence* of minority rights which erodes the bonds of civic solidarity'.⁸⁴ The question then is to assess whether the threat to the modern multinational state results from the secessionism of post-modern neo-tribalism or whether secessionism is itself, in many cases, the result of the modern state failing adequately to accommodate the interests of sub-state national minorities.

In contrast to his tone in *The Empowered Self*, Franck in *Fairness* seems to be far less disapproving of group rights claimants. He notes, seemingly with approval, that the current trend of efforts to redefine self-determination under international law is to recognize an international legal right not to secession but rather to cultural autonomy and democracy.⁸⁵ In many ways writers like Kymlicka argue for precisely this and in so far as they do argue that a right to secede should exist in certain circumstances, it tends to be in terms of the scenario Franck himself raises, namely that of the minority group which is persistently and egregiously denied the opportunity to retain its cultural identity. It must also be noted that even in *The Empowered Self*, despite his strongly anti-secessionist stance, Franck remains alive to the injustice of the dominant state, that he calls for the greater representation of sub-state groups at an

⁸⁴ Kymlicka, *Politics in the Vernacular*, *supra* note 72, at 36 (emphasis in original), where he continues, 'recognizing minority rights would actually strengthen solidarity and promote political stability by removing the barriers and exclusions which prevent minorities from wholeheartedly embracing political institutions.' At the beginning of *The Empowered Self*, at 14, Franck in fact endorses Kymlicka's view that forced assimilation can be counterproductive, which again suggests that at various levels their values are shared ones, a point made by Professor Franck at the colloquium held at the University of Glasgow on 1 June 2001.

⁸⁵ *Fairness*, at 167–168.

international level,⁸⁶ and that he is aware that better accommodation might make secessionist demands less likely.⁸⁷ Here, though, his appeal seems to be for greater participation rather than autonomy,⁸⁸ which echoes both the argument for a right to democratic governance set out in *Fairness* and the importance of process in Franck's fairness model. As such, this may mark a point of departure between his approach and that of minority rights theorists like Kymlicka who place more emphasis on autonomy for minority groups.⁸⁹

7 Concluding Remarks

Thomas Franck's theory of fairness challenges international lawyers to address international law in the context of the normative values which underpin it as a legal order. In the area of self-determination this challenge is particularly pertinent given the political, and potentially open-ended, nature of the concept. In *Fairness*, Franck confronts the inadequacy of the colonial model and hints at the possibility of a limited right of secession which, when compared with the work of other liberal writers like Beran and Philpott, raises points of at times close comparison. Franck as an international lawyer is, however, more aware of competing interests and is particularly conscious of the threat to peace and stability which the spectre of 'a world of 2000 nation-states' raises, and it is this, as much as his advocacy of individualism, which seems to influence his critique of nationalism in *The Empowered Self*.⁹⁰

The Empowered Self, therefore, seems to mark something of a withdrawal from the more open approach to secession which he at the very least entertains in *Fairness*. His disapproval of contemporary nationalism, which was first voiced somewhat ambivalently in *Fairness*, is now more clearly expressed in an approach which at times characterizes contemporary nationalism and national minority rights claimants as secessionist. *The Empowered Self* is a book of striking scale which takes the reader on a lyrical journey through modern history culminating in a very personal and thought-provoking reflection by Thomas Franck on the contemporary human condition. Throughout, the normative driving force of the book is its advocacy of individual freedom and as such it provides a welcome and eloquent reminder of man's individual worth and of the threats which doctrinaire political movements can pose to humanity. With any book covering such an extensive area, inevitably some questions still remain. For example, it might be asked whether *The Empowered Self*, despite

⁸⁶ *The Empowered Self*, at 30–35.

⁸⁷ *Ibid.*, at 34–35.

⁸⁸ *Ibid.*, at 35–37.

⁸⁹ For example, whilst both would reject the imposition of internal restrictions by minority groups upon internal minorities, it is not clear that Franck would fully endorse Kymlicka's contention that national minorities are entitled to external protections.

⁹⁰ Franck discusses the political and economic problems which would flow from widespread Balkanization at 23–29.

having much in common with the works of liberal nationalists like Kymlicka, perhaps underestimates, first, the full flexibility of liberalism to accommodate group rights within an individualistic project and, secondly, in practical terms, the ways in which accommodation of group rights may help pre-empt rather than fuel the Balkanization which the author so fears. Franck's vision of the future is one in which the atomization of traditional social bonds such as nation, state and culture will continue apace as the capacity for individual choice rolls back the grip of traditional loyalty claims. Whether his vision will be vindicated or not remains to be seen. For now, however, collective cultural and national loyalties remain strong and it may well be that for so long as they do continue to play a significant role as pre-eminent sites of identity location, both fairness and the pre-emption of rampant separatism require the more nuanced approaches to self-determination which Thomas Franck advocates in *Fairness* but seems to move back from in *The Empowered Self*.