



A theoretical balance for self-determination of people in international law

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Abstract

The principle of self-determination has been subject to a conceptual evolution with an eventual legal grounding as a peremptory legal norm. Yet, although the United Nations adopted the right as expressed in the UN Charter, there is still reluctance on the part of states to honor or implement the right where it is justified. The internal aspect of self-determination is today much more emphasized and several states seem to find no rationale for permitting the secession of a people from a sovereign state. It is reasoned that the legal dynamics of self-determination motivates no political resolve to respect the law as a right. In order to maintain its validity, the concept of self-determination should be appreciated from a theoretical perspective in order to give meaning to it within the human right context. This work therefore, using the doctrinal research method, examines certain theories that justify self-determination as a human right that accrues to a people. It finds that there are justifications for the laws on self-determination which enables a people to exercise the right to form a new state in certain strict circumstances.

Keywords: self-determination, UN Charter, international law

Introduction

Over the last few years, the agitation for self-determination of peoples has gained considerable force. In consolidated sovereign states and also warring states, more political groups have continued to appeal to the legal right of self-determination to either demand for a restructuring of state interest, review of borders or secession from a state. This is in line with the various facets of the right of self-determination which can be situated within three positions. The first is the right of a colonial people to become a state; the right of minorities of a state to become autonomous or to join another state, and lastly, the right of ethnic minorities to benefit from certain collective rights. In a constricted sense, the three categories are obviously interconnected, and a certain population as a people can assert its rights by employing any one of the three meanings as circumstances demand. A people can, for instance, demand certain collective rights from its own state, and where the rights are not furnished, such people can claim political independence as a means of achieving such rights. In a few fortunate cases, new states have been formed and recognized without conflict. Yet in many others, the aspirations of some peoples to become autonomous or secede clashed with other aspirations. In the most controversial cases, which sadly, have multiplied recently, demands for secession has been met with brutal resistance in defiance of the right as stipulated in the UN Charter. The international community has not shown the capacity to propose solutions that would define the borders of states, or guarantee the rights of peoples in sovereign states to secede for reasonable cause. Basically the international community has not been able to impose peace and respect for human rights within each political community. It does seem that the notion of self-determination cannot be asserted to the full, with legal norms and institutions alone, since states tend to establish relations with states that also make up the international community. The nature of inter-state relations is essentially political and founded on self-interest as opposed to legality.

At the level of institutions charged with the responsibility of protecting and implementing international laws, the UN-even though it played a significant role in the decolonization process- proved incapable of aiding peoples who were becoming states to achieve internal self-determination. The obstructive concepts of sovereignty and territorial integrity as specified in the UN Charter, constricts the options of the UN and often limits it to the odd use of weapons at its disposal to defend peoples from their own dictators. Even in the widely accepted case of the self-determination of colonial peoples, the notion of the right of peoples was not and is still not enough to solve essential problems such as, the matter of internal self-determination and that of the redefinition of existing frontiers. More so, sovereignty remains a major concept in international law which appears to obstruct the implementation of the right of self-determination. In context, sovereignty is given credence under the United Nations Charter as it stipulates that all members of the international community are prohibited from using threat or use of force to breach the sovereignty, territorial integrity and political independence of any state^[1]. Yet substantively self-determination remains a right that is often achieved through the intervention of states. It is important to review the principles of territoriality in order to reduce its effectiveness in international law over exceptional situations where the only hope of an oppressed people may lie in secession as a component of the right of self-determination. It is considered apt therefore to review the concepts of sovereignty and fit the notion of self-determination within a broader theoretical framework to enable political assimilation and tolerance for a wider recognition and implementation of the right.

Conceptual Analysis of Sovereignty as an obstructive Concept to Self-Determination

The nature of the exercise of the right of self-determination is one that essentially requires external actors to help foster. More so, the current understanding of sovereignty would

mean that there can be no internal movements that undermine the architectural form of a state. Sovereignty^[2] may be defined as the power of the state to make law and enforce the law with all the coercive power it cares to employ. It is “*that characteristic of the state in virtue of which it cannot be legally bound except by its own will or limited by any other power than itself.*”^[3] It is the full right and power of a governing body over itself, without any interference from outside sources or bodies. Secessionist movements are internal threats to a nation’s sovereignty that inevitably require the international community’s involvement due to the potential impact it could cause to the state’s political structure. Yet a people oppressed often seek external intervention to implement their right to self-determination. The outside world is a relevant audience because no seceding nation exists in a vacuum. The breakaway entity must depend on at least some foreign nations and ideally the entire international community, including the United Nations and other International Organizations. Today it is crucial to situate the concept of sovereignty into a definitive scope of relativity rather than absolute. This way, it will be clear as to the right which the international community may have acquired over interfering with the affairs of a state. This will help to foster the right of self-determination by external actors. The need to adopt a relativist approach to sovereignty became pronounced during the two world wars and contextually the aim was to *de-absolutize* sovereignty in an increasingly independent international community^[4]. It has also been severally proposed to assume sovereignty as relative rather than absolute^[5]. The supposed relative manifestation of sovereignty implies that sovereignty can be subordinated to international law which extricates absolutism of the concept in reality. It is submitted that the relative nature of sovereignty must operate to permit external interferences in the affairs of other states particularly when it is deemed necessary to do so on humanitarian grounds. Whenever crises situations arise, the interpretation of state sovereignty with regards to determining the actual status of a state in terms of whether its sovereignty is absolute and as such constitutes a bar to external interferences, becomes apt. The interpretation of state sovereignty is often a decisive issue in determining whether international actors, United Nations or other intervention is warranted. The NATO^[6] intervention in Kosovo sets an example of where intervention becomes imminent on humanitarian grounds. Although NATO intervention spurred criticisms as a violation of *jus cogens* principles of state sovereignty, non-intervention, and non-use of force, it nonetheless provokes the thought that there is no longer an absolute state sovereignty. Incidentally other multinational interventions that aimed to protect civilians against intolerable persecution, such as in Iraq, Haiti, Rwanda, Bosnia and Herzegovina and East Timor, have provoked similar opposition from critics of such actions by multinational forces. Nevertheless the principle of non-interference in the internal affairs of a state is being challenged by the international community’s position in its responsibility to protect when it is required to do so^[7]. Such interventions must be seen from a humanitarian perspective which becomes necessary in cases of grave injustice and oppression of a people or where a state has failed in the protection of its citizens or has begun meting out injustice on a section of the community. Human rights must be seen from a global view and it is necessary to accord every

person the right and responsibility to protect lives and rights. Thus the posited justification for humanitarian intervention is that the survival of people as well as their well being matter most, and that states, as well as the rest of the international community, have some obligation to protect them. Consequently where a state fails to perform the inherent obligation to protect, it is the duty of other actors – no matter whether they are external actors- to help the victims^[8]. As such, the principle of sovereignty can no longer be employed in the 21st century to shield against the actual suppression of a relative and popular sovereignty that allows interferences^[9]. Accordingly a third party intervention to restore the rights of a people in a state where the political order has failed to achieve same should be considered legitimate. As the effect of bad governance can often lead to extreme cases of human rights abuse, it is pertinent to have external interventions without the consent of the state. Such intervention which results to interferences should be considered legitimate as human rights have steadily evolved from the internal affairs of individual states to a globally guaranteed functionality which is protected through various mechanisms^[10].

Theoretical basis of the right of Self-Determination

a. The Marxist Revolutionary Theory:

The Marxist theory of the right of nations to self-determination was adopted in this study. The theory emerged from the line of reasoning of radical philosophers such as Marx and Stalin^[11]. The theory postulates that there is a dialectical relationship between the resolution of the national question and the right to self-determination. In essence the freedom to secede births the establishment of new states or a fusion of states. It essentially guarantees the freedom of all peoples and creates a way for oppressed people to gain freedoms from the oppressive government. Against this backdrop, the national liberation struggles or secessionist agitations by entities in a state is seen as a democratic movement. Thus its condemnation gains no support as far as the Marxist theory is concerned. In this regard, the Marxist revolutionary theory of the right of nations to self-determination posits that peoples may be dominated and governed only by their own consent. The imposition of a government upon a people who have not consented to being part of a system may be undemocratic. Such people may choose to determine their fate by pulling out of the state. According to the Marxist postulations, self-determination is an imperative principle of action, which statesmen will henceforth ignore at their peril. Thus all peoples have the right to self-determination and by virtue of the right they freely determine their political status and freely pursue their economic, social and cultural development^[12]. In line with their thought, revolutions are historical facts of life. Almost all major states in today’s world are born from revolutions. Revolutions have been, and will remain, facts of life because of the structural nature of prevailing relations of production and relations of political power. Precisely because such relations are structural, because they do not just fade away-as well as because ruling classes resist the gradual elimination of these relations to the very end-revolutions emerge as the means whereby the overthrow of these relations is realized. Prevailing economic and political power relations can be eroded, undermined, increasingly challenged or can even be slowly disintegrated, by new dynamics of political strength.

The sudden overthrow of ruling structures is, however, one certain characteristic of an entity with an imbalanced political structure. Such overthrow often occurs through massive popular mobilization and active intervention of large masses of ordinary people in political life and political struggle^[13]. Whether a state comes within the context of such imbalance is a matter of assessment. One of the great mysteries of class society is the prolonged tolerance of exploitation and oppression of the masses by relatively small minorities. This tolerance has its root in facts of economic compulsion, ideological manipulation, cultural socialization, political-juridical repression as well as psychological processes etc. Generally oppressed people feel weak before their oppressors and revolution often occurs precisely when that feeling of weakness and helplessness is overcome by the people.

b. Natural Law Theory

The natural law tradition has a long history. Hints of its beginning can be found in the writings of the ancient Greek philosophers Plato and Aristotle, and natural law was the dominant view of the Greek stoics. It was widely adopted by Roman jurists and Orators such as Cicero. The natural law theory had such influential advocates such as Hogo Grotius, Samuel Pufendorf, Francisco Suarez, and John Locke in the 17th Century.

The natural law theory helps consolidate the point in this study on freedom and choice of government by a people. Thomas Aquinas asks whether there is in us a natural law^[14]. First he makes a distinction to the effect that a law is not only in the reason of a ruler, but may also be in the thing that is ruled^[15]. Within the context of Aquina's postulations, the things of creation that are ruled by that law have it imprinted on them through their nature or essence. Since things act according to their nature, they derive their respective inclinations to their proper acts or ends according to the law that is written into their nature. Everything in nature, insofar as they reflect the order by which God directs them through their nature for their own benefit, reflects the eternal law in their own natures^[16].

The natural law is properly applied to the case of human beings, and acquires greater precision because of the fact that we have reason and free will. It is our nature as humans to act freely by directing ourselves toward our proper acts and end. That is, we human beings must exercise our natural reason to discover what is best for us in order to achieve the end to which our nature inclines. Furthermore, we must do this through the exercise of our freedom, by choosing what reason determines to be naturally suited to us, i.e what is best for our nature. Thus the natural inclination of humans to achieve their proper end through reason and free will encompasses the choice to secede where a government is either oppressive or unrepresentative^[17].

This unchanging and universal law is contrasted with human law, which of course is often changing and only governs a particular group of people in a particular place and time. The pivotal point in the philosophy of law has been thought to be that of providing a definition, or general explication, of law. Natural law theorists had to provide a definition that covered both natural and human law which largely became normative. In its normative context, the natural law does not merely order the world, but orders it well. Similarly, human law, which directs the behavior of persons, does not merely seek to direct behavior, but to direct it aright. What is

distinctive to the natural law position is the insistence that the direction provided by law must be toward ends that are rationally defensible or objectively good; law must direct behavior toward the common good^[18]. It is this requirement that all genuine law aims at what is viable, good and beneficial, not just for the rulers of state but also for the citizens, that distinguishes natural theory from other theories. It is aimed here to establish a logical connection between the positivist theory and the natural law in the sense of situating moral and generally acceptable laws in legislation so as to achieve a binding document that captures the rights of a people to freedom exercised by an act of secession. It has been mentioned that while natural law applied to all humans and was unchanging, human law could vary with time, place, and circumstance. Aquinas defined this last type of law as "an ordinance of reason for the common good" made and enforced by a ruler or government. He warned however that people were not bound to obey laws made by humans that conflicted with natural law. From the positivist perspective, it can be said that legal rules or laws are valid not because they are rooted in natural law, but because they are enacted by legitimate authority and are accepted by the society as such. Thus, as the position of positive law is dominant in societies run by constitutions, it is essential to appreciate the existent rights to freedom from the natural perspective. This will aid a transcript of such natural rights into positive legislation that is generally accepted and caused to have effect. The matter of self-determination as a right may then be popular if legislated upon and entrenched in national constitutions.

c. National Self-Determination Theory:

The theory holds that different nations in a multination state have the right to secede. JS Mill believes that among people who spoke different languages there can be no common public opinion and no equal representative government because of lack of common feeling amongst the multi-ethnic units^[19]. The right of a people to self-determination is a cardinal principle in modern international law, binding as such, on the United Nations as authoritative interpretation of the Charter's norms^[20]. The theory of national self-determination is a moral issue which dominated much of Europe's politics during the latter half of the nineteenth century. The theory has become universalized and legalized. Today, many international jurists agree that national self-determination is no longer solely a moral demand and a political principle but, in many circumstances, a legal right recognized by international law. Indeed the theory was crested in many important documents after 1945 relating to the organization of the international community. For instance, the UN Charter speaks about 'the principle of equal rights and of self-determination of peoples, while the International Covenant of Human Rights stipulates that 'all peoples and nations shall have the right of self-determination.

d. Choice or Plebiscitary Theory:

A plebiscitary right of secession grants a right to a majority in any portion of the territory of a state to form its own independent state if it so chooses, even if the majority of the state as a whole opposes their bid for independence^[21]. For Beran all people have the right to determine their own political relationships. He posits that a state cannot be the ultimate holder in realm of liberal democratic theory. In his view, the state is an agent of the people and a substantial

part of the state can revoke the agency relationship they have with the state and withdraw from the territory^[22]. The theory holds that an identifiable group of people can secede from a state through voting. The theory seems to be very permissive and the conditions for secession can easily be met by a majority approval in a referendum. Secession according to the theory is made lucrative and can as well lead to fragmentation of states in international systems. Under the theory, the only requirement for secession is for majority to affirm the withdrawal of such group. The two cardinal approaches to a plebiscitary right is one grounded on basic individual liberties and rights, including right to self-determination and the right to secession. The second is the widely misinterpreted proposal that defends only a primary right to self-determination, leaving secession as a solution for exceptional cases. One fundamental argument structures the primary right theories: the link between democracy and self-determination created by individual moral autonomy. Based on John Stuart Mills 'Harm Principle,' a defense of individual moral autonomy implies that an individual must be free from restraint to act and choose, as long as doing so does not harm another individual's same freedoms. In this sense, a person's right can only be conceived as fully respected if she is allowed to determine without restraints her political fate. The individual moral autonomy that classic liberal democratic thought has defended since its foundations would imply a person's right to choose her own political associations and hence, self-determine her will to remain under a political system to affiliate with another. Thus a group's right to self-determination would be founded upon the aggregate individual autonomy of each of its members. This leads to the second argument for primary right theories: since democracy implies an individual's right to self-determination, then a plebiscite with a majority vote in favor of self-determination should justify a group's right to govern its own affairs. Consequently the good of the member's autonomy is in itself sufficient to justify self-determination. As such, the theory stipulates that a group's right to self-determination should be seen as fundamental to liberal democracies because it represents the unified will of all of its individual members. Primary right theories avoid the moral complications of justifying special group rights by bestowing it on every individual as part of their liberal freedoms. A group's self-determination does not require it having any inherent characteristics, such as ethnicity or nationality; it largely depends only on the willingness and voluntary political choice of each person. For this reason, the primary right is opposed to remedial right theories as their justification does not require a group to suffer from grievances or injustice in order to bear this right: every individual, from a liberal perspective, has a right to choose her political life and associations freely, as long as the same freedom of others is respected.

e. The Remedial Right Theory

The proponents of the theory are Anthony Birch and Allen Buchanan. Birch justifies secession for the following reasons: in cases of forceful annexation of a region; where a government fail to protect the rights and security of a people in a region of the state; where the political and economic interest of a region is not protected and where out of bias or ignorance, a government ignores the contract with sections of a state^[23].

For Buchanan, secession is the last option for groups whose basic human rights are permanently violated. Where the only remedy for quelling the injustice is secession, then it is morally permissible for the affected group to secede. The challenge about the theory is that it is restrictive as it considers secession a remedy of last resort^[24]. Generally the remedial right theory approaches the matter of secession from the perspective of justification. The approach argues that there has to be a relevant motive for a right to secession to be justified. Secession is legitimate if it can be proven that a group or people have been a victim of injustice that only secession can remedy. There are two distinct proposals for a remedial right to secession: one limited to groups that have suffered grave injustices and human rights violations or unjust annexation by a state and another that includes in its remedial justifications the infringement of specific collective rights and the lack of constitutional recognition of minorities by the state. The fundamental position of the theory is that there is no right for a group to secede from a just and equitable state in so far as such state has not infringed on the rights of part of its population. Thus the remedial right theory supports the secession of a group that has suffered certain injustices from the state, and when there is no alternative solution to remedy this group's grievances. According to Buchanan, the basic reason that justifies such a restriction is that institutions require stability in order to protect individual rights. If a right to secession were available under all circumstances, stability might be compromised and, therefore, the state would have no chance to guarantee the fundamental rights of its citizens^[25]. From this perspective, Buchanan gives four reasons that justify a secessionist claim: first, if the survival of the members of the group is imperiled by actions of the state, or if the latter has severely violated other basic human rights of a group; second if a group's sovereign territory has been illegally occupied by a foreign power; three, if there is a discriminatory, persistent and severely unjust redistribution of the state's resources and finally, where there is a persistent infringement of constitutional rights as legitimizing force for secession.

Conclusion and Recommendation

The right of self-determination is clogged by legal uncertainty due to the obstructive effect of sovereignty and the principles of non interference in international law, as well as the reluctance of states to cede any part of its geographic formation. Demands for secession have been met with brutal resistance in defiance of the right that accrues to a people to form their own government in certain situations as stipulated in the UN Charter. The international community has also not shown the capacity to propose solutions that would define the borders of states, or guarantee the rights of peoples in sovereign states to secede for reasonable cause. Basically the international community has not been able to impose peace and respect for human rights within each political community. It does seem that the notion of self-determination cannot be asserted to the full, with legal norms and institutions alone, since states tend to establish relations with states that also make up the international community. The scope of the right of self-determination is taken out of a legal context and the amorphous nature of legal concepts may not have allowed a wider appreciation and respect of its principles. More so, the principle of sovereignty in international law appears to

obstruct the implementation of the right as provided in the UN Charter. It was shown that the case is one of a wrong assumption of the contemporary status of the concept of sovereignty which can no longer be conceived as absolute. Thus the relative sense, in which sovereignty should apply, is one that allows and justifies international interference in a state where there is evident abuse of human rights resulting to clamors for secession by a section of its population. In all certain philosophical theories as reviewed above provide a basis for respect and implementation of the right beyond the traditional legal perspective from which the right is viewed. Essentially the theories are intended to persuade a review of the relevant instruments on self-determination as well as urge institutions and state actors to respect and give credence to an inalienable human right such as self-determination.

References

1. See Article 2 (4) of the Charter of the United Nations, 1945.
2. The word 'sovereignty' is derived from the latin word *superanus* and means 'supremacy'.
3. Lehre von den Staateenverbindungen, p. 34; cited by J. w. Garner in his Introduction to Political Science, p. 239.
4. One of the prominent theory in this view was that of the Vienna or the Normativist School founded by Kelsen and Verdross. It builds on the monistic vision of the legal system and considers that the original norm of the entire legal system should be sought in international law. The system as enunciated by these proponents pontificates on sovereignty as merely signifying the delimitation of a state's sphere of competence. Thus the confines of a states jurisdiction are drawn by international law. See Kelsen, *Das Problem der Souveranitat und die Theorie des volkerrechts*, Tubigen, 1920. Cited in Nincic, *Ibid* n. 68 at p. 10.
5. More emphasis has been on relativity of sovereignty. In Garner, *Recent Developments in International LAW*(1925) 812. "The task of reconstructing and increasing the effectiveness of international law raises the question of how far certain changes of this character are desirable...The theories of absolute sovereignty and equality of states which have heretofore been recognized as basic principles should be definitely eliminated so that law will conform more nearly to the facts." See also EAGLETON, *International Government* (1932) 29. "Sovereignty is not a unit, which a state either has or does not have; it is a relative term." Cf. 1 OPPENHEIM, *INTERNATIONAL LAW* (5th ed. By Lauterpacht, 1935) 117. "The very notion of international law as a body of rules of conduct binding upon States irrespective of their Municipal Law and legislation implies implies the idea of their subjection to international law and makes it impossible to accept their claim to absolute sovereignty in the international sphere." On absolute sovereignty see SUKIEN-NICKI, *LA SOUVERAINETE DES ETATS EN DROIT INTERNATIONAL MODERNE* (1927) 59. See also, SOTWELL, *THE GREAT DECISION* (1944) 202. "Absolute, unqualified and unchecked sovereignty is a conception of anarchy."
6. North Atlantic Treaty Organization.
7. See International development Research Centre, the Responsibility to protect: report of the international commission on intervention and state Sovereignty (2001).
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10. See Johan van der Vyver, "Sovereignty and Human Rights in Constitutional and International Law" 5 emory INT'L L. REV. 321 (1991). See also Antony D'Amato, "Human Rights as Part of Customary International Law: A Plea for Change of Paradigms, 25 GA. J. INT'L & COMP. L. 47, 75-80 (1995-1996).
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12. See article 1 of the International Covenant on Civil and Political Rights of the General Assembly, Dec. 16, 1966.
13. See Ernest Mandel 'The Marxist Case for Revolution Today' at <https://afoiceemartelo.com.br> accessed 20, 10, 2023.
14. Constitutional Rights Foundation Bill of Rights in Action Fall 2006 (22:4) <https://www.crf-usa.org/bill-of-rights-in-action/bria-22-4-c-st-thomas-acquinas-natural-law-and-the-common-good>. (22:4)
15. *Ibid*
16. *Ibid*
17. This point is reflected in Aquinas thesis that people are not bound to obey laws made by humans that conflict with natural law. See Kretzmann, Morman and Stump, Eleanor, eds. "The Cambridge Companion to Aquinas" Cambridge: Cambridge University Press, 1993.
18. See Klosko, George "History of Political Theory, An introduction" Vol 1. Forth Worth, Tex: Harcourt Brace College Publishers, 1994.
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