

THE NEW DYNAMICS OF SELF-DETERMINATION

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I. INTRODUCTION

The term *self-determination* still teeters on the borders of evolving legal precept, expression of political will, and universal human aspiration. The concept never quite settles down into a black letter law pronouncement or a clearly understood political dynamic. Nor does it find full expression by being regarded merely as the rallying cry of the dispossessed. It is this very fact of the amorphous and evolving nature of the concept of self-determination that makes it both fascinating and frustrating.

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II. HISTORICAL DEVELOPMENT OF THE MEANING OF SELF-DETERMINATION

The term *self-determination* has undergone considerable historical transfiguration since it was first launched on the international arena by President Woodrow Wilson. After World War I, when the victorious powers were busy redrawing state boundaries, *self-determination* became the touchstone for the creation of new states that arose out of the rubble of the Austro-Hungarian and Ottoman empires. President Wilson stated: "National aspirations must be respected; peoples may now be dominated and governed only by their own consent. Self-determination is not a mere phrase. It is an imperative principle of action, which statesmen will henceforth ignore at their peril."¹ There is a certain irony to this statement as that was definitely the era of a few well-placed men disappearing into smoke-filled rooms with old maps and emerging with newly drawn borders although there were some plebiscites among sections of the male population of certain areas that were supposed to guide the line drawing.

The Covenant of the League of Nations did not mention self-determination though the Mandate System was supposed to work towards the development of colonial peoples. A series of treaties were signed after World War I for the protection of minorities within certain defeated states. Neither of these regimes, the Mandate system or the minority treaties, however, offered political participation as a right to the governed group. The right to separation from the larger state was firmly rejected by the Commission of Jurists in its ruling on the status of the Aaland Islands in 1920: "Positive International Law does not recognize the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish, anymore than it recognizes the right of other States to claim such a separation."²

III. THE UNITED NATIONS CHARTER AND SELF-DETERMINATION

The United Nations Charter mentions self-determination twice. Article 1(2) mentions as one of the Purposes of the United Nations: "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. . . ." Article 55 notes that "stability and well-being . . . are necessary for peaceful and friendly relations among nations [which should be] based on respect for the

1. Woodrow Wilson, *War Aims of Germany and Austria*, in 3 THE PUBLIC PAPERS OF WOODROW WILSON: WAR AND PEACE, 177 (Ray Stannard Baker & William E. Dodd eds. 1927).

2. Report of the International Committee of Jurists . . . upon the Legal Aspects of the Aaland Islands Question, LEAGUE OF NATIONS O.J. Spec. Supp. 3, at 5 (1920).

principle of equal rights and self-determination of peoples. . . ." Clearly, the United Nations system was based on the idea of equality of existing sovereign states and, to a lesser extent, on moving dependent states towards independence.

IV. DECOLONIZATION

The rapidly increasing demands for an end to colonialism were the occasion for raising self-determination to a *right* and for linking the right to political participation in governance. In 1960, the General Assembly declared that: "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."³ This Declaration on the Granting of Independence to Colonial Countries and Peoples concludes, however, with a clear statement against reading the right to self-determination as a right to secession. "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."⁴ Much more recently the principle of *uti possidetis juris*, the principle whereby colonial countries claiming independence have to accept their preexisting territorial boundaries, has been declared part of customary international law by the International Court of Justice in its 1986 decision concerning the frontier dispute between Burkina Faso and the Republic of Mali⁵ and its 1992 decision on the land, island and maritime frontier dispute between El Salvador and Honduras.⁶ Although these decisions concerned issues of title to territory in border disputes, the principle of *uti possidetis* was affirmed because the fracturing of preexisting sovereign boundaries was seen as destabilizing the whole international system.⁷ A system that was, and continues to be, built on the sanctity of "the territorial integrity . . . [and] political independence"⁸ of sovereign states is unlikely to allow a doctrine to

3. G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 67, U.N. Doc. A/L. 323 and Add. 1 - 6 (1960).

4. *Id.* at para. 6.

5. Frontier Dispute (Burk. Faso v. Mali), 1986 I.C.J. 554 (Dec. 22).

6. Land, Island, and Maritime Frontier Dispute (El Sal. v. Hond.), 1992 I.C.J. 351 (Sept. 11).

7. "Its [the principle of *uti possidetis juris*] obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power." *Supra* note 5, at para. 20.

8. U.N. CHARTER, art. 2, para. 4.

develop that undermines part of the bedrock of the theoretical construct, namely the state with a defined territory, which is one of the traditional requirements for statehood.⁹

The move from a colonial system, which meant that vast numbers of people were ruled by alien governments, to the achievement of independent status for almost all of the old colonies and protectorates did not dismantle the state system. Rather it imposed rules on who had rights to govern. The notion of democracy had begun to take hold as a right attaching to persons within the framework of the state. In the decolonization era the right to self-determination became linked to an emerging democratic right, but the right is best understood in negative terms: it was the right not to be governed by foreigners. Professor Thomas Franck notes that "Self-determination postulates the right of a people organized in an established territory to determine its collective political destiny in a democratic fashion and is therefore at the core of the democratic entitlement."¹⁰ Whatever the *democratic entitlement* was, its initial formulation did not seek to dismantle the state.

V. BEYOND DECOLONIZATION

Once we move beyond the decolonization context, the scope of the rights encompassed by self-determination becomes unclear, and the question of the entity to whom the right attaches engenders fierce debate with, as yet, no resolution.

The introduction of the notion of rights in international law that attach to human beings as individuals has been one of the more remarkable developments of international law since the end of World War II.¹¹ Although this movement had much earlier political antecedents, as our own Constitution and Bill of Rights bear witness, it is only in the latter half of the twentieth century that these human rights have become an accepted feature of international law.

9. See, e.g., RESTATEMENT THIRD OF THE FOREIGN RELATIONS LAW OF THE U.S. § 201 (1987).

10. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 52 (1992).

11. There was, of course, a much older branch of international law known as Responsibility of States for Injury to Aliens under which states were obliged to treat aliens within their borders with a minimum level of due care but this obligation did not traditionally extend to a state's own citizens.

VI. HUMAN RIGHTS AND SELF-DETERMINATION

Both the International Covenant on Economic, Social and Cultural Rights¹² and the International Covenant on Civil and Political Rights¹³ contain an article on self-determination. Article 1 (of both Covenants) states: "1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources. . . ." The debate since the introduction of the two Covenants has focused on two questions: What does the right to self-determination encompass? and who are the peoples that have this right?

Professor Hurst Hannum has carefully examined a variety of United Nations materials relating to the meaning of these terms as they were understood at the time of the drafting of the Covenants. He concludes that "a careful examination of the legislative history of the covenants leads to the conclusion that a restrictive interpretation of the right of self-determination comports with the views of the majority of the states that supported the right."¹⁴ Self-determination at that time was understood "as a right belonging only to colonial peoples, which once it had been successfully exercised could not be invoked again, and it would not include a right of secession except for colonies."¹⁵ Subsequent occasional discussion of the scope of the right of self-determination by the Human Rights Committee has failed to produce any agreement beyond the colonial context.¹⁶

VII. SELF-DETERMINATION AND THE DEMOCRATIC RIGHT

What is it that the self determines? It has been suggested that the central right is "to determine . . . collective political status through democratic means"¹⁷ and this indeed may be a structural necessity for

12. International Convention on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 (1967) (Annex to G.A. Res. 2200, 21 GAOR, Supp. 16, U.N. Doc. A/6316 at 490) (entered into force Jan. 3, 1976).

13. International Convention on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967) (G.A. Res. 2200, 21 GAOR, Supp. 16, U.N. Doc. A/6316, at 52) (entered into force Mar. 23, 1976).

14. Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT'L L. 1, 23 (1993).

15. *Id.* quoting the contemporary Director of the U.N. Division of Human Rights John P. Humphrey, HUMAN RIGHTS AND THE UNITED NATIONS: A GREAT ADVENTURE 129 (1984).

16. *E.g.*, Report of the Human Rights Committee, U.N. GAOR, 39th Sess., Supp. No. 40, at 142-43, U.N. Doc. A/39/40 (1984).

17. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 58 (1992).

protecting other rights falling within the scope of self-determination, such as the right to "freely pursue . . . economic, social and cultural development."¹⁸ Although the United Nations Charter does not impose or require democratic systems of governance, from a whole host of subsequent declarations, covenants, and other articulated human rights a convincing argument can be made that the right to participate in government is now an established norm of international law.¹⁹ Indeed the General Assembly's 1970 Declaration on Principles of Law Concerning Friendly Relations²⁰ links self-determination with the requirement of a government representing the whole people while at the same time rejecting the right of secession if the government meets the requirement of representing the whole people.

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color.²¹

Three questions naturally present themselves upon reading this Declaration. What rights do people have if the government does not represent them? Do they then have a right to secession? What, in fact, is a representative government for a group that, in some way or another, perceives itself as dominated by an alien group?

Professor Kirgis reads the language in the Declaration as indicating:

a right of 'peoples' . . . to secede from an established state that does not have a fully representative form of government, or at least to secede from a state whose government excludes people of any race, creed or color

18. Covenants on Economic, Social and Cultural Rights, art. 1, *supra* note 12. Covenant of Civil and Political Rights, art. 1, *supra* note 13.

19. *See generally*, FRANK, *supra* note 17.

20. Declaration on Principles of International Law concerning Friendly Relations and cooperation among States in accordance with the Charter of the U.N., G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970) *reprinted in* 9 I.L.M. 1292 (1970).

21. *Id.* at 124, 9 I.L.M. at 1296.

from political representation when those people are the ones asserting the right [to self-determination].²²

The notion here is that discrimination against certain groups with regard to eligibility to participate in the political process may legitimize the claim to secession. Some writers go beyond participation in the political process and suggest much broader rights of participation. Professor Nanda writes of the "right to participate in all value processes—power, wealth and resources, respect and rectitude, enlightenment and skill, and affection and well-being."²³ The lower the degree of participation in all of these aspects of life, the greater the right to secede. The underlying tacit premise of these lines of argument is that if the subgroup has full access to political participation or fully participates in *all value processes*, the claim to secession is illegitimate. While I do not dispute that the prevalence of claims for secession reduces where the subgroup does fully participate in the national life and that the world will be less tolerant of and less sympathetic towards subgroups with full participatory rights, I do not think that full participation should be the measure of the legitimacy of secessionary claims. My principal reason for rejecting full participation of the subgroup as the litmus test of legitimacy for secession is the argument based on numbers. If, for example, a particular subgroup who wishes to secede only make up ten percent of the population, that subgroup will never find itself living in a nation where its characteristics, however they may be perceived, are dominant and that is precisely what the subgroup may wish to achieve by secession. Conversely, where the dominant group perceives itself as likely to be outnumbered by the dominated group and likely to have to grant full participatory rights to all governed people it may well encourage secession, or at least full autonomy. Some writers have used this latter principle to explain why Israel will, in fact, eventually recognize a Palestinian state.

VIII. THE SELF OR THE PEOPLE

This takes us directly to the difficult issue of defining the *self* or the *peoples* to whom the right of determination attaches. Certainly it belongs to the citizens of a state but does it attach to any subgroups? There is a long trail of lawyerly scholarship that attempts to define groups which can claim a right of self-determination. Most of these writings

22. Frederick L. Kirgis, Jr., Editorial Comment: *The Degrees of Self-Determination in the United Nations Era*, 88 AM. J. INT'L L. 304, 306 (1994).

23. Ved Nanda, *Self-Determination Under International Law: Validity of Claims to Secede*, 13 CASE W. RES. J. INT'L L. 257, 276 (1981).

focus on particular characteristics that the group must possess in order to qualify for the right. Prime contenders in these lists of distinguishing characteristics are race, ethnicity, culture, religion, language, history, tradition, and mutual loyalties, though some authors have rejected an objective criteria test and recommended a *psychological perceptions* test.²⁴ Some writers point out that the group must have ties to a specific area of territory otherwise the claim to recognition as a group is likely to fail.²⁵ These writers often conclude that provided the group has at least a certain minimum combination of these characteristics then the group has a right to self-determination which might consist of a considerable level of autonomy from the dominant group or might consist of the right to secession. Though there have been examples of peaceful secession, for example, Singapore from the Malaysian Federation, secession is usually achieved in the wake of armed uprisings which are seen as threatening international peace and security, thereby undermining the United Nations system. The unsuccessful attempts by Biafra to secede from Nigeria and Katanga from the Congo were both accompanied by bloodbaths and were viewed as major contributors to destabilization. Thus, the resistance to claims of secession has continued, though less so in fully democratic states than in more autocratic systems of government.

IX. THE LEGITIMACY OF THE CLAIM TO SECESSION

Once a claim to secession has been voiced, the literature shifts to focus on criteria or methodology for judging the legitimacy of the claim. Authors have noted the lack of any formal machinery in the international arena where such claims can be presented and suggestions have been made to expand and develop some of the existing machinery to permit it to hear and determine such claims.²⁶

The suggested criteria for judging the legitimacy of a claim to secession are often related to the deprivation of human rights, particularly political rights, for the group claiming secession. Professor Kirgis isolates two key variables in the test for legitimacy of the claim: "the degree of representative government . . . and the extent of destabilization that the international community will tolerate. . . ."²⁷ He concludes that "a claim of a right to secede from a representative democracy is not likely to be

24. *Id.*

25. Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177 (1991).

26. NANDA, *supra* note 23, at 279-80.

27. Frederick L. Kirgis, Jr. Editorial Comment: *The Degrees of Self-Determination in the United Nations Era*, 88 AM. J. INT'L L. 304, 308 (1994).

considered a legitimate exercise of the right of self-determination. . . . Conversely, a claim to secede from a repressive dictatorship *may* be regarded as legitimate."²⁸ "If a government is quite unrepresentative, the international community may recognize even a seriously destabilizing self-determination claim as legitimate."²⁹

X. SUMMARY OF THE EVOLUTION OF THE RIGHT OF SELF-DETERMINATION

What has happened to this right of self-determination? It started out as a right attaching to dominated nations; it gradually transformed into a right of citizens within a nation; it then became indissolubly linked with the right of citizens to participate in governance within a nation; later the notion of participation was expanded to include full participation in the life of the nation; then the focus shifted onto the groups that were not experiencing full political or other forms of participation and self-determination was seen as attaching to those groups; and finally self-determination has become a declared right for a group to break away from the nation state and form a new state, at least when full participation (how ever that is defined) is not guaranteed to the group.

This evolution of self-determination has, to some extent, mirrored the developments in international law that have moved it from a nation state focus to a group and individual rights focus. The demise of sovereignty, which by now has been so frequently noted as to require little more than a mention, might be thought to be at odds with the movement towards ever more claims of sovereignty for ever smaller groups, but I am not sure that it is. Movements towards regionalism, such as the European Union, or supra-nationalism, such as the deployment of United Nations forces, is certainly a reflection of both functional necessity and a movement towards reducing national divisions, but it is worth noting that all of these larger-than-state structures operate almost entirely through state participation. The aspiration of a group within a nation to secede and form a new nation may be seen as an attempt to achieve greater participatory rights within the supranational structures, not as a rejection of those structures.

28. *Id.*

29. *Id.* at 310.

XI. FUTURE DEVELOPMENTS OF THE RIGHT TO SELF- DETERMINATION

The next move that I perceive is that the right to secede will be recognized as attaching to any self-declared group (provided it has claims to territory) even though it may have full political and other participatory rights. For example, the Quebecois, the Scots, the Basques, even the Northern Italians may be recognized as having legitimate claims to self-determination. This type of right is in fact much more likely to be recognized by fully democratic states, as opposed to dictatorial states, because democratic states have become accustomed to the notion of ruling by the consent of the governed. Many social scientists tell us how modern society fails to support the family and how modern men and women desperately seek a sense of connectedness. Perhaps smaller units, linked to larger structures, do provide a better quality of life for their inhabitants. Recently a student showed me a beautiful map of Europe drawn up in 1992 and neatly divided into seventy five states.³⁰ The lines were allegedly drawn on ethnic and cultural lines. Ancient kingdoms such as Wessex and Aquitaine were resurrected. I couldn't help wondering if I was looking at a map of the past or a map of the future.

30. A.H. HEINEKEN, *THE UNITED STATES OF EUROPE (A EUROTOPIA?)* (1992).