

# SELF-DETERMINATION AFTER KOSOVO AND EAST TIMOR

Valerie Epps\*

I. INTRODUCTION: THE EVOLUTION OF THE CONCEPT OF SELF-DETERMINATION .....	445
II. THE SUPREME COURT OF CANADA'S REFERENCE OPINION ON QUEBEC'S RIGHT TO SECESSION .....	446
III. NEW PRINCIPLES ENUNCIATED IN THE QUEBEC CASE .....	449
A. <i>The Right to Secession</i> .....	449
B. <i>The Effectivity Principle</i> .....	450
IV. THE EXAMPLE OF KOSOVO SUPPORTS THE RIGHT TO SECESSION .....	450
V. THE EXAMPLE OF EAST TIMOR SUPPORTS THE RIGHT OF SECESSION .....	452
VI. CONCLUSION: THE NEED FOR A MECHANISM TO DETERMINE THE RIGHT TO SECESSION AND TO IMPLEMENT IT .....	454

## I. INTRODUCTION: THE EVOLUTION OF THE CONCEPT OF SELF-DETERMINATION

The concept of self-determination presents a useful example of how change comes about in legal norms, particularly in the international arena. Most scholars recognize self-determination as a concept that has already undergone considerable transformation. This paper will try, again, to grasp the evolving nettle of self-determination in light of the recent events in Kosovo and East Timor. Nettles may sting if not handled properly, but they also have a range of restorative properties. Struggles for self-determination tend to inflict injury or loss, but the pain is usually considered worth bearing if it results in larger measures of autonomy for the group initiating the struggle. The progressions in the development of the concept of self-determination have often been noted:<sup>1</sup> the steps proceed from Wilsonian pronouncement, to United Nations Charter inclusion, through the overthrow of colonialism to the development of individual and group human rights generally; they move towards the increasing specificity of the right, first to participate in governance

---

\* Professor of Law, Suffolk University Law School.

1. See, e.g., Valerie Epps, *The New Dynamics of Self-Determination*, 3 ILSA J. INT'L & COMP. L. 433 (1997).

and then to participate fully in the life of the nation; they continue through examination of the characteristics of the groups that may claim non-full participation, culminating in a declared right of "full autonomy" or even a right of "secession" for groups not fully experiencing participation in the larger society.

## II. THE SUPREME COURT OF CANADA'S REFERENCE OPINION ON QUEBEC'S RIGHT TO SECESSION

A recent opinion from the Supreme Court of Canada<sup>2</sup> presented a rare judicial opinion on the international law surrounding the issue of self-determination and secession. In the summer of 1998, the Court issued a reference opinion answering, among other things, the following question:

Does international law give the National Assembly, legislative or government of Quebec the right to effect secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislative or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?<sup>3</sup>

Though the Court was willing to concede the right of a people to self-determination as a general principle of international law, the Court stated that the right must "be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states."<sup>4</sup> In general then, the right of self-determination, whatever it may mean and whoever may claim it, can usually only be exercised within the framework of the existing state structure. The Court did, however, go on to say that it is only in "exceptional circumstances [that] a right of secession may arise."<sup>5</sup> Before addressing those circumstances, the Court turned its attention to defining the "peoples" who may claim the right to self-determination.

The Court's discussion of the definition of "peoples" never really got off the ground because the Court decided that it was "not necessary to explore this legal characterization"<sup>6</sup> because, regardless of the correct definition, the Court was not willing to find that the Quebec population had a unilaterally right to secession. The Court did not explore the question of whether the population of

---

2. Reference re Secession of Quebec, 2 Can. S.C.R. 217 (1998) [hereinafter *Secession of Quebec*].

3. *Id.* ¶ 2.

4. *Id.* ¶ 122.

5. *Id.*

6. *Id.* ¶ 125.

Quebec was a "people" for the purposes of claiming self-determination because, even if they were, the Court remained convinced that the circumstances necessary to trigger the right of self-determination, in the sense of secession, did not exist in Quebec. The Court did note however that "a people" may include "only a portion of the population of an existing state,"<sup>7</sup> thus recognizing that the right of self-determination, including the right of secession in certain circumstances, may attach to certain sectors of the population located within a larger territorial unit of the state.

The Court noted that self-determination will normally be "fulfilled through *internal* self-determination - a people's pursuit of its political, economic, social, and cultural development within the framework of an existing state"<sup>8</sup> and that the "right to *external* self-determination (which [may take] the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances."<sup>9</sup>

The Court cited the 1989 concluding document of the Vienna Meeting of the Conference on Security and Co-operation in Europe on the follow-up to the *Helsinki Final Act* which referred to "peoples having the right to determine 'their internal and *external* political status',"<sup>10</sup> but noted that the statement of this right is "immediately followed by express recognition that"<sup>11</sup> the state will always act in conformity with the United Nations Charter including those principles relating to territorial integrity of states. The states participating in the Vienna Meeting specifically stated in Principle 5 of the concluding document that any action aimed "at violating the territorial integrity, political independence or unity of a state"<sup>12</sup> will not be recognized as legal by the participating states. Leading scholars have interpreted this to mean that "no territorial or other change can be brought about by the central authorities of a State that is contrary to the will of the whole people of that State."<sup>13</sup> The Court concluded that a:

[S]tate whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determina-

---

7. Secession of Quebec, *supra* note 2, ¶ 124. The Court also stated that it was not "necessary to examine the position of the aboriginal population within Quebec." *Id.* ¶ 125.

8. *Id.* ¶ 126. (Emphasis added).

9. *Id.* (Emphasis added).

10. *Id.* ¶ 129. (Emphasis applied).

11. Succession of Quebec, *supra* note 2, ¶ 129.

12. *Id.*

13. A. Cassese, *Self-determination of Peoples: A Legal Reappraisal*, at 287 (Cambridge University Press) (1995).

tion in its own internal arrangements, is entitled to the protection under international law of its territorial integrity.<sup>14</sup>

What then are the “extreme cases” in “defined circumstances”<sup>15</sup> that may justify piercing the territorial integrity of the state framework? The Court lists three examples of a people’s right to secession. It is ready to agree that the “right of colonial peoples to exercise their right to self-determination by breaking away from the ‘imperial’ power is now undisputed.”<sup>16</sup> Similarly, where a people “is subject to alien subjugation, domination or exploitation outside a colonial context,”<sup>17</sup> there is a right to external self-determination. Lastly the Court gives credence to the proposition that “when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession,”<sup>18</sup> although that proposition may not yet be “an established international law standard.”<sup>19</sup>

The problem for Quebec was that, in the Court’s view, the province does not fit within any of the above three “extreme cases.” The Court documents the dominant position of Quebecers in national politics, in the legislative, judicial, and executive branches of government and concludes that since Quebecers are in no way in “a disadvantaged position,”<sup>20</sup> the “exceptional circumstances [giving rise to a right to secession] are manifestly inapplicable to Quebec.”<sup>21</sup> The Court is therefore quite clear in its view that Quebec, at the present time, has no right under international law to unilateral secession.

The last part of the Court’s opinion addresses what it calls the *Recognition of a Factual/Political Reality: The ‘Effectivity’ Principle*.<sup>22</sup> Here the Court demonstrates its appreciation that the world does not necessarily arrange, or rearrange, itself according to legal rights. The Court recognizes that “international law may well, depending on the circumstances, adapt to recognize a political and/or factual reality, regardless of the legality of the steps leading to its creation.”<sup>23</sup> The Court is fully aware that if a clear majority of Quebecers voted, on a clear question, for secession, the federal government of Canada would have to negotiate with the leaders of Quebec and that there might eventually be recognition of an independent Quebec both by Canada and by

14. *Id.* ¶ 130.

15. *See* *Secession of Quebec*, *supra* note 2, ¶ 126.

16. *Id.* ¶ 132.

17. *Id.* ¶ 133.

18. *Id.* ¶ 134.

19. *Id.* ¶ 135.

20. *Secession of Quebec*, *supra* note 2, ¶ 137.

21. *Id.* ¶ 138.

22. *Id.* ¶ 140.

23. *Id.* ¶ 141.

other countries. The Court, nevertheless, took the view that at present, an act of unilateral secession would be illegal, even though the illegal act of secession might eventually lead to a recognized state within the international framework. The possibility of subsequent legitimacy of the newly created state would not, in the Court's view, provide a retroactive basis for declaring that a present act of secession would be legal.<sup>24</sup>

### III. NEW PRINCIPLES ENUNCIATED IN THE QUEBEC CASE

#### A. *The Right to Secession*

Commentators have been asking whether the Quebec decision breaks new ground for the law of self-determination. I think it does in two ways. First, the Court by recognizing the right to secession when "a people is blocked from the meaningful exercise of self-determination internally"<sup>25</sup> clearly links self-determination to secession. This right of secession arises when there is no meaningful exercise of internal self-determination. The Court, in discussing "internal self-determination," defines it as "a people's pursuit of its political, economic, social, and cultural development within the framework of an existing state."<sup>26</sup> This language comes from the Declaration on Friendly Relations, the Vienna Declaration, and the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations.<sup>27</sup> The Court does not, however, expand upon the meaning of political, economic, social, or cultural development. The Vienna Declaration requires that a government represent "the whole people belonging to the territory without distinction of any kind."<sup>28</sup> This, together with the whole backdrop of the United Nations Charter and human rights law generally, requires equality of representation certainly in the political process and presumably also in the economic, social, and cultural arenas too. This much is clear from the Court's opinion. The exact nature of what can be claimed by "peoples" beyond the democratic right to equal political representation in the context of self-determination is less clear. We are given no clue to the content of the pursuit of economic, social or cultural development, or the minimum necessary level of the facilitation of their exercise.

---

24. *Id.* ¶ 155.

25. Succession of Quebec, *supra* note 2, ¶ 134.

26. *Id.* ¶ 126.

27. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations; G.A. Res. 2625, 24 Oct. 1970; Vienna Declaration and Programme of Action, A/CONF. 157/24, 25 June 1993; Declaration on the Occasion of the Fiftieth Anniversary of the United Nations; G.A. Res. 50/6, 9 Nov. 1995.

28. Vienna Declaration and Programme of Action A/CONF. 157/24, 25 June 1993.

### B. *The Effectivity Principle*

The second way in which the Quebec opinion breaks new ground is its wise discussion of the “effectivity” principle in law. The Court does not shy away from recognizing the “after-thought” aspect of legal legitimacy. The law changes in both neat and not-so-tidy ways. A new norm of international law can burst on the scene by a new multilateral treaty signed and rapidly ratified by virtually all states. Such change is neat and clean and satisfies all the legal niceties. But in the area of “rights,” change seldom comes about through such means except at the end of a process where it may well be possible to declare the right’s existence even before a treaty’s confirmation.

Much eighteenth and nineteenth century legal/philosophical debate centered on trying to define rights. When anyone announced a new right, the legal philosophers would boldly denounce the claim because it did not fit the rigid rules laid down by whichever philosophical school was in vogue. The modern rights philosophers are much happier to recognize that rights are often statements of a preference for how the world should be ordered. Such preferences are not to be dismissed as mere whimsy because it is now firmly understood that if the particular “right” catches hold of the public’s imagination and enough people, over a long enough time, declare the right to exist, it may eventually come to exist through the convergence of a variety of norm-creating mechanisms. The non-governmental organizations, often predominantly populated with non-lawyers, appreciate this fully — so do political crusaders.<sup>29</sup>

The development of the concept of self-determination as incorporating a right of secession under certain circumstances follows the same legal route from the “ought” to the “is.” Kosovo and East Timor are two examples of a people’s “ought” helping to transform a principle into an “is.” The Quebec court understood this “legality follows reality” maxim in the context of self-determination and its exposition on the “effectivity principle” broke new ground, not because no one had ever recognized the effectivity principle before, but because the principle was linked to the specific right of secession in the context of self-determination.

## IV. THE EXAMPLE OF KOSOVO SUPPORTS THE RIGHT TO SECESSION

Alistaire Cooke wrote an enlightening column in March of 1999 where he described in detail the negotiations of the Versailles Treaty at the end of World

---

29. Take the statement “Americans have a right to health insurance” as lawyers, we know that is not true. Indeed, we know that forty-five million Americans have no such insurance. But we also know that it is really a statement that all Americans ought to have health insurance and, sooner or later, the crusaders believe they will convince the people and the Congress that they should press for and pass legislation to that effect, so that the right will exist.

War I and the redrawing of the map of Europe based in part on Woodrow Wilson's concept of "self-determination." Cooke calls Wilson's fourteen point plan "a sublime example what can be called begging the question — which means taking for granted as having happened what you dearly want to happen."<sup>30</sup> Cooke was convinced that the present break up of Yugoslavia can be traced to its creation in 1919, together with the creation of the concept of self-determination.<sup>31</sup> The Kosovars were a minority guaranteed protection in 1919 in return for Serbia's being granted sovereignty. It is unclear whether the Kosovars of 1919 are the same "people" who inhabit Kosovo today. Certainly, there have been large ethnic shifts in the region since that time. Cooke's observations are, as ever, astute, but he offers us no alternative to a Wilsonian utopia.

How should we view the experience of Kosovo in the context of self-determination? Kosovo certainly was not a colony of Yugoslavia under any common understanding of the term. The Albanians, who make up over ninety per cent of the population of Kosovo, certainly have a claim to be a "people" on the basis of ethnicity, language, religion, and culture. They were, and are, a group distinct from the ruling dominant Serbian group. They inhabit a distinct area of territory.<sup>32</sup> Their lack of representation in the national government and their brutal oppression by Milosovic's regime is well documented.<sup>33</sup> In terms of the Supreme Court of Canada's opinion Kosovo fits the "extreme circumstances" exception to the general rule against secession.

But, of course, the Kosovo example broke new ground because this was the first time that a powerful, regional, military force (NATO) threw its weight in on the side of the oppressed and overrode the rule of no break up of territorial integrity. The NATO forces violated article 2(4) of the Charter and no theory of self-defense under article 51 can be credibly advanced to authorize the invasion. Nor, in my view, can any credible theory of Security Council permission be supported. The fact that the Security Council rejected a vote to condemn the NATO invasion<sup>34</sup> does not constitute authorization, though it

---

30. Alistaire Cooke, Letter From America, *The Pursuit of Self-Determination*, BBC News (visited Mar. 1, 1999) <<http://www.bbc.co.uk.com>>.

31. See generally Nathaniel Berman, *THE INTERNATIONAL LAW OF NATIONALISM: GROUP IDENTITY AND LEGAL HISTORY*, 25 (David Whippman ed. International Law and Ethnic Conflict 1998).

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

33. See, e.g., Christine Chinkin, *Kosovo: A "Good" or "Bad" War*, 93 *AM. J. INT'L L.* 841, 843 (1999).

34. Twelve out of fifteen members of the Security Council voted to reject the Russian resolution of March 26, 1999, condemning the NATO action. The argument has been made that Security Council Resolution 1244 (June 10, 1999), "effectively ratified the NATO action and gave it the Council's support." Louis Henkin, *Kosovo and the Law of "Humanitarian Intervention"*, 93 *AM. J. INT'L L.* at 826 (1999).

certainly represents the extreme ambivalence of the Council's attitude towards NATO's action.

In evaluating NATO's invasion of Yugoslavia, the international law rule on no use of force absent an armed attack or Security Council authorization and no intervention in the internal affairs of sovereign states came slap up against the great body of human rights law which sets standards for a government's treatment of its own people and declares violations of those standards to be violations of international law, though it does not provide any external enforcement mechanisms to ensure those rights, absent a state's consent. This immutable convergence was bound to happen sooner or later and the international community is now busy fashioning the rules of justifiable forceful "humanitarian intervention."<sup>35</sup> Despite the fact that the Rambouillet Accords only speak of "autonomy" for Kosovo, no one doubts that Kosovo will become independent (or possibly merge with Albania) and will not be ruled by Serbia.

What would have happened without NATO? I suspect rather the same scenario as we are witnessing in Chechnya. The Chechens had some sporadic success but will, at least for the time being, be crushed. When there is no credible outside threat from national, regional, or international forces, minority group claims to secession are seldom successful.

Kosovo is an example of those extreme circumstances giving rise to the right to unilateral secession enunciated by the Supreme Court of Canada. The fact that secession will no doubt eventually take place will provide one more case of state practice moving the secession principle towards crystalization of the norm.

## V. THE EXAMPLE OF EAST TIMOR SUPPORTS THE RIGHT OF SECESSION

With the fall of President Suharto in Indonesia in 1998, the stage was set for the possibility of reversing the 1975 invasion of East Timor by Indonesia. As a result of an extraordinary amount of international attention and pressure, and through the facilities of the United Nations Secretary-General's Office, Indonesia and Portugal signed an agreement in New York on May 5, 1999,<sup>36</sup> agreeing to allow the Secretary-General to arrange for "popular consultation"<sup>37</sup> of the East Timorese people by means of a "direct, secret and universal ballot"<sup>38</sup> on whether they wished to become part of a special autonomous unit within the framework of the Republic of Indonesia. In the event that the East Timorese

---

35. See generally Sean Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order*, 26 GA. J. INT'L & COMP. L. 115 (1996).

36. Agreement Between the Republic of Indonesia and the Portuguese Republic on the Question of East Timor, May 5, 1999, New York [hereinafter *Agreement*].

37. *Id.* at art. 2.

38. *Id.* at art. 1.

rejected the special autonomous unit, the Indonesian government was to "terminate its links with East Timor,"<sup>39</sup> and there was to be a "peaceful and orderly transfer of authority in East Timor to the United Nations . . . to begin a process of transition towards independence."<sup>40</sup>

Amazingly, this process has occurred, although with a heavy toll of loss of life. Perhaps the paramount error of the agreement was to provide that the "Government of Indonesia will be responsible for maintaining peace and security in East Timor in order to ensure that the popular consultation is carried out in a fair and peaceful way in an atmosphere free of intimidation, violence or interference from any side."<sup>41</sup> Everyone now knows that the ballot was not free from violence and intimidation, but no one doubts that Indonesia would not have signed the May, 1999 agreement without such a provision, and the people of East Timor refused, often at great personal cost, to be intimidated.

The events in East Timor do not result in much credit for the international community. One-quarter of the population of East Timor is dead and, by all accounts, the country is devastated. Nothing short of massive reconstruction aid will be necessary to help rebuild East Timor. East Timor then is yet another example of the lack of adequate international machinery and political will to prevent patent illegality. There was ample warning of pending disaster<sup>42</sup> and the international law was, for once, relatively clear.

East Timor was recognized by the United Nations as a non-self governing territory and therefore had the right to self-determination in the sense of secession<sup>43</sup> from the colonial power of Portugal. The political reality was, however, that East Timor had been effectively ruled by Indonesia for a quarter of a century. The independence of East Timor will be a great victory for the East Timorese people. It will not set a huge uncharted precedent in international law if viewed as a case of independence from a colonial power. Perhaps, however, it is too easy to say that East Timor was a colony and therefore had the right to self-determination in the sense of independence. After all, Indonesia had been the *de facto* government of East Timor for twenty-four years. If viewed as wresting independence from Indonesia, then the East Timor example does set a more radical precedent. East Timor would then be a successful example of a people claiming the right to rule themselves because they were not fully represented in the Indonesian government, and indeed suffered gross violations of human rights. The fact that the United Nations was

---

39. *Id.* at art. 6.

40. *Id.*

41. Agreement, *supra* note 36, at art. 3.

42. See, e.g., Geoffrey Gunn, *East Timor and the U.N.: The Case for Intervention* (1997).

43. Catriona Drew, *The East Timor Popular Consultation: Self-Determination Denied*, 4 HUM.

available to broker and, more or less, supervise both the final deal and the vote and will also provide the transitional regime, permitted the current outcome.

The cup is both half empty and half full. Viewed as a colony finally moving to independence, the international community must answer first, for not resisting and then, for supporting the government who invaded East Timor. Viewed as a people's successful bid for independence from a non-representative and repressive government, East Timor moves the norm of self-determination towards secession, at least when the government does not treat its citizens equally and practices widespread violations of human rights.

#### VI. CONCLUSION: THE NEED FOR A MECHANISM TO DETERMINE THE RIGHT TO SECESSION AND TO IMPLEMENT IT

What the world needs is an international mechanism authorized to determine whether a people has manifested the "extreme circumstances" outlined in the Supreme Court of Canada's opinion, and if so, we need a body authorized to implement that decision. As long as those mechanisms are not there, it will only be in a haphazard conglomeration of circumstances that the results will follow East Timor or Kosovo and even then with colossal loss of life. There may be a few national courts, such as the Canadian Supreme Court, with the necessary impartiality to render such a decision and a few governments willing to implement decisions in favor of secession, but these will be few and far between. Kosovo and East Timor must spur us on to create the mechanisms for peoples to be able to secede. At the moment, we tend to run around picking up the broken pieces in the hope of salvaging something.

What might these mechanisms look like? First we need an impartial body that can be appealed to in order to determine the right to secede by peoples claiming "extreme circumstances." Obviously, the definition of "extreme circumstances" will have to become much more concrete than it is at present. Secondly, we need a body with the power to implement any such decision granting the right to secede. This body might have a number of functions ranging from monitoring abuse to supervising plebiscites. These bodies would clearly begin to crack the barrier that sovereignty and territorial integrity present to secession. Sovereignty and territorial integrity would begin to be eclipsed in favor of equality of treatment and the right of self-governance. The international community has yet to make its views clear that this is the direction it wishes to pursue, but the Quebec decision and the examples of Kosovo and East Timor begin to provide the shadow of a useful blueprint.