

Right to Self Determination: Nature, Scope and Evolution

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ABSTRACT

The right to self-determination was properly identified from the French revolution, though the notion that people have the right to decide their own fate for livelihood, politics and territory has always been there. Its inception took place in the nineteenth century merging two values of popular sovereignty and nationalist resentment. This paper covers the different aspects of the right to self-determination and how it has developed over the years.

Keywords: Self-determination, Nature, Evolution.

1. INTRODUCTION

The right to self-determination is generally fulfilled through internal self-determination. This includes a democratic ability of a people to determine its political destiny within a state. The right to external self-determination, on the other hand, includes a right of a people to establish an independent and sovereign state, to freely associate and integrate with an independent state, or to freely emerge into any other political status. Several relevant legal instruments concerning the principle of self-determination however refer to the principle of territorial integrity as well, and it is stated that self-determination is not to be construed as authorizing or encouraging any action that would dismember or impair the territorial integrity of a state¹. The right of self-determination may still arm a population with the power to choose its own political destiny².

Internationally the principle of self-determination was first recognized as a general principle through Articles 1(2) and 55 of the UN Charter of 1945. Article 1(2) states that one of the *raison d'être* of the UN is “to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples” (authors italics). Article 55 further states that the UN “shall promote” various policies relating to economic and social conditions and respect for human rights, in favor of achieving the goal set forth in Article 1(2). Through the Charter the principle of self-determination was considerably strengthened.

The two International Human Right Covenants of 1966: the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR), also refer to the principle of self-determination. Phrased with the same wording, Articles 1(1) stipulate that “[a]ll peoples have the right of self-determination”, and [b]y virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development” (authors italics). Due to the adoption of these two covenants the notion of self-determination shifted from a legal obligation, in essentially the area of decolonization, to a universally recognized human right.

The on-going character of the right of self-determination is also reflected in several other important international instruments, such as the Friendly Relations Declaration of 1970 and the Helsinki Final Act of 1975. These instruments, among others, confirm that the principle of self-determination is part of international law and the law of the United Nations.

1.1 Nature and Scope

Simply put, it is the right claimed by people to control their destiny despite such people not achieving statehood as per international law. In the more traditional times, statehood was the only element that could confer legal personality and its related rights and duties upon the group of people.

¹ Secession of Quebec, Judgement of the Supreme Court of Canada, para. 127-128.

² Brownlie Ian, Principles of International Law, 6th ed. Oxford University Press, 2003.

The right to self-determination is looked upon by people who feel that they have been unjustifiably excluded from the community of states as under international law. According to the United Nations General Assembly Resolution 1514 (1960), "All people have the right to self-determination; by virtue of that right they may freely determine their political status and freely pursue their economic, social and cultural development."

This right complements the public international law principles like that of the sovereignty of states, the equality of states, and territorial integrity, including the prohibition of force and the principle of non-intervention. As for human rights, it contains equal rights of people within the state.

There are also economic and political aspects related to self-determination and principles of non-intervention and non-interference which aim to guarantee territorial integrity. It also looked upon liberation movements, rebels, aid, and assistance or intervention among these. It could be external or internal.

External in the sense of decolonization context which requires the state to take action and form their independent recognition and aid in people's aspiration to become independent. Internally in a way by uplifting people to pursue their economic, social, and cultural development.

However, this raises a paradox as to how is international law supposed to recognize such a right which by its own norms, lacks such international existence. This also makes us question the acquisition and recognition of statehood. Though there is no universal definition of statehood as of today, the Convention on Rights and Duties of States provides the criteria for statehood as having:

1. a permanent population;
2. a defined territory;
3. government; and
4. the capacity to enter into relations with other states.

Though this has been disputed as it implicates a challenge to the stability of the international legal community as for applying the claims of legal rights of self-determination, these non-state group seekers have to appear as a state. However, there has been strong recognition and basis of these rights as seen in decisions of the International Court of Justice, resolutions of the United Nations General Assembly, state practice, and the writings of commentators.

Thus, the right to self-determination can be framed as the right of people who do not govern themselves, whose identities and desires cannot be ascertained.

1.2 Evolution

Self-determination, like all human rights, is essentially of philosophical origin. In the evolution of this essentially political postulate into a legal right, an attempt has been made here to study in brief its status before 1945, followed by a detailed analysis of its evolution post World War II. The pronouncements of States before, during, and after the adoption of the two norm-creating resolutions of the General Assembly, namely 1960 resolution 1514 (XV) and the 1970 resolution on Friendly Relations, in conjunction with the actual behavior of States in international dealings, constitute important elements of state practice. Likewise, treaty-making has also contributed to the emergence of customary rules.

1.2.1 Status of the Principle of Self Determination Before 1945

Self-determination, found its early expression in the writings of Emmanuel Kant, John Locke, and Jean Jacques Rousseau (Mani 1993: 222). The origin of the principle of self-determination, in the form of a political and constitutional principle, can be traced back to the American Declaration of Independence (1776) and the French Revolution (1789), which marked the demise of the notion that fate of the peoples, as subjects of the King, was to be disposed in accordance with the interests of the monarch. The core of the principle of self-determination lay in the American and French insistence that the government be responsible to the people³.

With the First World War, which was referred to as the war of self-determination (Manchester Guardian, 6 February 1920 reporting Mr. Asquith's speech), the principle emerged on the international scene. Lenin saw self-determination as having three components. First, it could be invoked by ethnic or national groups intent on deciding

³ Mani, V.S. (1993), *Basic Principles of Modern International Law*, New Delhi: Lancers Books

their own destiny freely. Second, it was a principle to be applied during the aftermath of military conflicts between sovereign States, for the allocation of territories to one or another Power. Third, it was an anti-colonial postulate designed to lead to liberation of all colonial countries. For him, the principle of self-determination would lead to the liberation of oppressed peoples which was, in turn, to contribute to the success of the socialist revolution. US President Wilson, however, advocated a formulation of self-determination not considered by Lenin: that the principle required that peoples of each State be granted the right freely to select State authorities. Thus Wilsonian self-determination originated from typically western democratic theory that governments must be based on 'the consent of the governed'. However, as the World War I progressed, Wilsonian self-determination took on 'external' dimension. People were no longer to be, in the words of Wilson, 'bartered about from sovereignty to sovereignty as if they were mere chattels and pawns in a game'⁴.

The progressive ideals that came in the wake of the World War I were translated into practical reality in the form of mandates system. Though self-determination was not stated clearly to be the goal of the system, the Court held that the principle applied to these peoples as well. The peoples under the system were held by selected powers as a trust to the civilization at large until they were able to assume full responsibility. The mandated and trust territories are the primary type of self-determination territory⁵. Though the mandates system set in motion a process of self-assertion that eventually led in every instance to political independence and full statehood⁶, the fact remains that in the era after the First World War, self-determination was in vogue as a political postulate and was not a part of the body of general international legal norm as confirmed by the Committee of Jurists appointed by the Council of the League of Nations to study the Aaland Islands situation.

1.2.2 Evolution of Self Determination Post World War II

Self-determination is expressly mentioned in the Charter of the United Nations twice: in Article 1(2) and in Article 55. Article 1(2) states that one of the 'purposes of the United Nations' is to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace. Article 55 states: 'With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: (a) highest standards of living, full employment, and conditions of economic and social progress and development; (b) solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinctions as to race, sex, language, or religion.' All Member States, under Article 56, "pledge themselves to take joint and separate action in co-operation with the Organization for the achievement" of these objectives set out under Article 55.

The membership of the United Nations grew from 51 in 1945 to 76 in 1955 and to 99 in 1960. In the years following the adoption of the 1960 Declaration, some 60 colonial Territories, inhabited by more than 80 million people, attained self-determination through independence, and joined the United Nations as sovereign members. The sudden increase in the membership was matched by the new approach that the new members brought with them. "What has been called the 'geography' of international law has radically changed...The majority in this expanded world community consists of small, weak, poor, underdeveloped, former colonies filled with resentment against their colonial masters, and needing and demanding the protection of the international society. The new majority has new needs and new demands and they want law to serve their needs and heed to their demands. The alteration in the sociological structure of the international society...must be accompanied by an alteration in law"⁷. It is extremely important to appreciate the feelings and aspiration of these new States in terms of what they expected from the world body, and the world order it represented.

The Soviet conception of self-determination was developed by Soviet international lawyers G.B.Starushenko, G. Tunkin, and three of their East German counterparts, Arzhinger, Steiniger, and Graefrath, who underlined that, above all else, self-determination meant the liberation of peoples subject to racist regimes and colonial domination and its 'after-effects'. Their emphasis was on the right to external self-determination. Though the socialist jurists did not ignore internal self-determination, they argued that in a sovereign State internal self-determination, that is, the right of a

⁴ Cassese, Antonio (1995), *Self-determination of Peoples: A Legal Re-appraisal*, Cambridge: Cambridge University Press

⁵ Crawford, James (1979), *The Creation of States in International Law*, Oxford: Clarendon Press

⁶ Falk, Richard (2002), "International Law: The Coherence of Doctrine Versus the Incoherence of Experience", in Wolfgang Danspeckgruber (ed.) *Self-determination of Peoples: Community, Nation, and State in an Interdependent World*, Colorado: Lynne Rienner Publishers

⁷ Anand, R.P. (1972), *New States and International Law*, New Delhi: Vikas

people to freely choose their rulers, meant the right to choose a socialist government (Cassese 1995: 45). Implicit in their arguments was the notion that self-determination could only be fully realized in a socialist country⁸.

For the newly independent Afro-Asian States, self-determination mainly means three things: (1) the fight against colonialism and racism; (2) the struggle against the domination of any alien oppressor illegally occupying a territory (largely due to the insistence of the Arab States, after 1967, with the case of Palestine in mind); (3) the struggle against all manifestations of neo-colonialism and in particular the exploitation by alien Powers of the natural resources of developing countries. The end of colonialism and racialism has become a matter of faith with them which takes precedence over other obligations of international law, including the prohibitions relating to the use of force. "Ethnic and tribal conflicts being rife in many developing countries, the Third World group ignored or even explicitly denied the rights of minorities or nationalities living within sovereign States. For the most part, the Third World championed 'external', not 'internal' self-determination"⁹.

The desire of the developing nations to rid themselves of obligations resulting from "unequal treaties" or other sources of law in the establishment of which they were not instrumental, all these aspirations were readily noted by Eastern European state which could not fail to see some striking resemblances to their own interpretation of international relations. Socialist countries and the increasing number of newly independent Third World countries soon joined hands because of their common anti-colonial orientation of self-determination¹⁰.

Article 73 of the UN Charter refers to territories whose peoples have not yet attained a full measure of 'self-government', and binds 'Members of the United Nations, which have or assume responsibilities for the administration of such territories to the obligations set out. And the obligations set out are (a) to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses; (b) to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement; (c) to further international peace and security; (d) to promote constructive measures of development, to encourage research, and to cooperate with one another and, when and where appropriate, with specialized international bodies with a view to the practical achievement of the social, economic, and scientific purposes set forth in this Article; and (e) to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which chapters XII and XIII apply.

1.3 Self-Determination as a Human Right

Earlier the notion of human rights was completely ignored during the colonial times when everyone was divided by nationality from the king to his subjects. As the height of imperialism rose even in the 20th century, human rights were mercilessly violated in various regions of the world due to wars and disturbances (including the two World Wars) and the advent of dictatorial regimes with credos of class discrimination or racial discrimination. Universal acceptance towards human rights became widespread only after World Wars. In 1948, the UN General Assembly adopted the Universal Declaration of Human Rights

It declared that human rights are universal rights that are to be shared by all mankind, irrespective of any differences in race, national origin, religion, and class, which is the foundation of freedom, justice and peace in the world. To add to it was the International Covenant on Human Rights adopted by the UN General Assembly in 1966 which further defined in intricate detail the substance of human rights and also stipulated the obligations of each signatory state to promote the observance of human rights. This International Covenant on Human Rights is divided into "International Covenant on Economic, Social and Cultural Rights" and "International Covenant on Civil and Political Rights".

The principle of self-determination is recognized as a human right though there are other references in General Assembly resolutions, it has been proclaimed only in the two legally binding documents which are the two international covenants. Although the definition of the common Article 1 lacks the answers to several questions, some areas of it have been made clear through interpretation.

⁸ Cassese, Antonio (1995), *Self-determination of Peoples: A Legal Re-appraisal*, Cambridge: Cambridge University Press

⁹ *Ibid*

¹⁰ *Ibid*

According to the Human Rights Committee, it has been made clear that the violation of it cannot be raised under the First Optional Protocol. The jurisprudence that has been developed around it also clarifies that this right is of people and not minorities.

This right is emphasized to this extent because it will secure the basic rights of people as a group. As for the twenty-first century, it can derive more meaningful content by considering two other human rights. These are the protection of the cultural, religious, linguistic and ethnic identity of people and the rights of the participation of individuals and groups in the economical and political matters of the country¹¹.

However, participation goes beyond democracy and recently, the belief of a new democratic era to have arrived has reinforced the participation. The definition of self-determination today as a suggestion should be to impose a limit/price on its exercise. It means that any groups which triumph in establishing a new state for them based on the principles of ethnicity, religion, language, or culture should then be willing to allow other such people to be able to exercise their right of self-determination.

2. REVIEW OF LITERATURE

Escudero Espinoza (2017)¹² in his book addresses questions in connection with the international legal regime on demands for secession, which have arisen in various States. In second chapter of the book, the right of self determination in international law has been discussed. The United Nations charter of 1945 has been quoted several times to substantiate the legal validity of this principle in the field of international law besides other internationally recognized legal sources as under Article 38 of the Charter International Court of Justice. The confusion arising from the interpretation of Article 1(2) of the United Nations Charter and its associated articles of whether the principle of self determination is binding on all member states or not has been examined at a great length. Various juristic opinions on the issue of 'secession' and its relation to the right of self determination of people has been examined and on the basis of these legal considerations, the author explores how the international community can respond when faced with situations that may violate international law, together with the effectiveness of various measures. It also discusses whether certain situations might be legitimate as a concept could now be emerging that secession may be justified in specific circumstances, such as serious and widespread violations of basic human rights.

Gurdip Singh (2003)¹³ provides an authoritative and stimulating overview of International law. This text covers international law right from its origins to the recent challenges faced by it. The latest edition of this text has been fully revised and updated to include all recent developments, events, resolutions and legal documents on the subject. The book is divided into two parts. Part 1 deals with origin, nature of international law, sources of international law, relation between international law and municipal law, position of individual in international law, recognition, State responsibility, mode of acquisition or loss of territorial sovereignty, individual and the State, law of treaties, jurisdictional immunities of State, diplomatic and consular relations, and law of the sea. While its Part 2 deals with "Conflict resolution, War, Neutrality and Human Rights" covers diplomatic modes of conflict resolution, arbitration, International Court of Justice, United Nations, peacekeeping operations, compulsive methods: short of war, war, economic warfare, nuclear warfare, star wars, implementation of human rights and International Criminal Court. The book involves a thorough examination of different elements of international law, be it public or private international law. A chapter on international criminal law has also been added which elaborates on the role, functioning, authority and powers of the International Criminal Tribunal based in Hague, Netherlands. Also it has detailed notes on the Rome Statute as well as analysis of the International Criminal Tribunal of Yugoslavia and International Criminal Tribunal of Rwanda. The chapter on recognition provides valuable insight into the laws of recognition of a state and quotes various examples to expound law on the same. The instance of Bangladesh has also been referred to by the author as Bangladesh was erstwhile East Pakistan before 1971. The rule of General Yahya Khan and due to the look west policies of Pakistan in that time, the Bangla nation and its struggle for recognition has been analyzed in the text. It is relevant to the principle of self determination of people as the public representatives of East Pakistan felt abandoned and oppressed and after the failed discussions of political as well as economic autonomy, they decided that secession was the only way out. The principle of self-determination in the text has been analyzed from the perspective of international legal documents of United Nations and its organs.

¹¹ Jennings, R.Y. (1963), *The Acquisition of Territory in International Law*, Manchester: Manchester University Press

¹² Escudero Espinoza, *Self-Determination and Humanitarian Secession in International Law of a Globalized World*

¹³ Gurdip Singh, *International law* (Fifth edition, Lexis nexis publications, New Delhi).

Another valuable bone of contention taken by the author is the nexus between right to self determination of peoples and the issue of secession. Secession has been explained by gathering information from writings of international law jurists and several other sources. In the chapter about Recognition, various theories of recognition in international law have been discussed as well as a linkage has been made with secession of territories from an existing state.

3. PROBLEM PROFILE

The concept of self determination is highly ambiguous and lacks certainty which might be the result of interplay of nations across the globe. It is evident from the fact that when the declarations for independence on part of Croatia and Slovenia were resisted by federal governments which in turn pressurized the other European nations to ponder over the fact to recognize the states or not. The concept of self determination became an example of political agenda than being a legal principle. Post the legitimization of the principle of self determination a magnanimous increase was seen in conflicts all around the world based on leadership issues within groups/ sub-groups or with dominant states. At present, there are numerous ongoing (armed) self-determination conflicts around the world which are operating at either low level of violence or as regular internal armed conflicts where the secessionist groups are holding a part of territory to exclude the ruling government. The catena of problems faced around the world is a result of paradoxical and powerful nature of this principle.

4. SCOPE OF THE STUDY

The researcher aims to present a detailed study regarding the Nature, Scope and Evolution of Principle of Self Determination. There are impediments in analyzing the scope and application of the right to self determination. Thus, an extensive research pertaining to it shall definitely be helpful to analyze the issues at hand. The recommendations in this research will help to clarify the scope and applicability of the right to self determination and will better equip either of the affected parties to fortify their case pertaining to this right in the present scenario where there has been mounting up of such conflicts. This study aims to discuss about the Right to self determination with nature, scope and evolution.

5. OBJECTIVES OF THE STUDY

1. To study the Nature and scope of Right to Self Determination.
2. To discuss the concept of Evolution of Right to Self Determination.
3. To analyze the Self determination as a human right.

6. RESEARCH QUESTIONS

1. How nature of the Principle of Self determination can be explained?
2. In what ways, the scope of the right to self determination can be discussed?
3. Can Self-Determination be discussed as a Human Right?

7. HYPOTHESES

Considering the nature and scope of the study, the following is hypothesized that if a definitive legal framework is set up then the claims regarding the principle of self determination can be settled in real sense.

8. RESEARCH METHODOLOGY

Doctrinal research strategy is method applied for conducting investing and research work. This method of research helped in pointing out that how and in which way research is conducted and also find out the techniques applied to get analysis of research work done. Secondary sources are used to conduct this research work for data collection such as books, magazines, newspapers, websites etc.

9. RESEARCH GAP

The principle of self-determination is widely recognized as a fundamental legal principle generating specific rights and duties, and in contemporary international law the principle has developed to one of the few and peremptory, non-derogable norms. To avoid claims of external self-determination and secession states should hence make every effort they can to promote the full respect of the right of peoples to self determination by national governments, i.e. internal self-determination. Therefore, the present research focuses on Right to self determination with special reference to its nature, scope and evolution.

10. CONCLUSION

The concept of self-determination has gone through some political upheaval. International stability can only be achieved when there is a certainty of definition and clear application of mind. The topic of self-determination will not disappear anytime soon as a potential issue of creating serious conflict. There is still a need to guard the issue and prevent its use as a symbol of the purely partisan political tool by the disaffected groups as well as the governments. The issue has an emotional aspect to it and therefore appeals by the ethnic groups will always be likely to create an atmosphere in which violence of human rights would be greater. Although it does not on its own result in secession and independence, there is a fear by representative states in permitting a broad right to self-determination. This fear must be remedied by the international system itself in order to establish stability and integrity. Developing a procedural model might help to reflect on the issues at hand giving the people and the nation a clear indication of where they are going and allow them to pose greater confidence in the system.

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