The right of self-determination in 21 century: comparative and international law perspective

Jana ILIEVA[1*]

[1] Ss. *University of Tourism and Management in Skopje, the Faculty of Human Recourse Management, Republic of Macedonia & Associate Fellow of the World Academy of Arts and Science*
[*] Corresponding author E-mail address: *j.ilieva@utms.edu.mk*

Abstract
The right of self-determination is a core and universal legitimating principle of international law. Yet, is one of the most contested right in the 21 century whose meaning is still ambiguous and has always been dependent on the actual political circumstances of the international community. The absence of broader international and political consensus on the content of this issue together with the legalistic deficit or regulation in the international law has opened many possibilities for political crisis and instabilities, worldwide. Many composite states have seen a very romantic vision for better future in this principle. Unification of Germany, independence of East Timor, South Sudan, Kosovo, the struggle for a secession of Catalonia are just examples of the significance but also problematical nature of this principle. The international law has never provided clear regulation for replying to minority aspirations and secession issues. As a result, in the 21 century, in the times of globalization when the international setting is quite different, the exercise of this right for the reasons of "secession" mostly because of its political context may become an "unhappy ending adventure" with unforeseeable consequences for the states.

Keywords: self-determination, secession, people(s), Kosovo, Catalonia

1 Introduction

Self-determination is core but very debatable part of political as well as legal discourse. The proposition that every people should freely determine its own political status and freely pursue its economic, social, and cultural development has long been one of which poets have sung and for which patriots have been ready to lay down their lives (Humphrey, 1984: 193). It has two aspects: internal and external aspect of self-determination. Under internal self-determination, it presents a people's pursuit of its political, economic, social and cultural development within the framework of an existing state (Connolly 2013: 73-74). Whereas in external self-determination, the people have the right to determine their own political status which may lead to the creation of their own Independent state. The realization of the second aspect of self-determination is a subject of different opinions and interpretations, mostly because the International Law instruments are scarce and does not provide clear and indisputable rules to address this issue. In addition to this problem, there exist increasing separatist movements in the worlds (such as Catalan, Flemish, Scottish), justifying their demands in the language of the self-determination right. The interrelated concepts of sovereignty, self-determination, and the territorial integrity of states form a Gordian knot at the core of the public international law. (Borgen: 2007: 477). Hence, the article investigates whether, and under which exact circumstances, international law provides for external self-determination? Where are the boundaries between the state sovereignty and the right to self-determination?

Another debatable issue refers to the question who is concerned with this right i.e. who is the titular of self-determination. The right to self-determination can be exercised by a group qualified as people. What constitutes a people? At stance there is common legalistic deficit for definition of the term "people(s)"[1] thus the exercise of this right differs from state to state whereas possibilities of political instabilities and crisis are open.

Finally, can self-determination leading to succession be a final instance in case of massive violation of human right, as some authors indicate?

All these questions shall be addressed in this article, trying to open new perspectives in the manner in which are perceived in the theory and practice today.

2 Methodology

The complexity of the subject and the objective of the article require complex methodological instrumentation thus both qualitative and quantitative research methods are being used. Research begins with the normative approach embracing clear theoretical framework and later focus on empirical research of the defined subject.

Content analysis is used in the research of the primary literature, i.e. international legal documents on the right of self-determination as well as all relevant documents and texts from which this principle is compiled.

[1] Also there is no agreed-upon definition of the word minority and often it is overlapped with the term people.

The comparative legal method and the historical-legal method have been applied to performing relevant comparisons of the right to self-determination guaranteed by the international legal instruments for human rights, as well as the manner in which this right is exercised in the countries where there exist, i.e. there were evident secessionist movements, such as Catalonia, Kosovo, Canada, etc.

To accomplish this, the historical-legal method has been used first of all, for exploration of the historical development and for legal interpretation of this principle, primarily oriented as a right of the colonial peoples up to the contemporary interpretation of this right belonging to people(s) that consider themselves special and different.

The method of induction is applied in systematizing the world literature and cases from various sources applied in research on alternative solutions to the eventual overcoming of the conflict "sovereignty and territorial integrity of states" vis-à-vis "the self-determination (secession) right".

The deduction method is applied in drawing own conclusions based on the aforementioned primary sources.

3 History background

Self-determination was preliminarily defined after the World War I, in the words of Woodrow Wilson who was the first to use this term in public in 1918, before it became a principle of international law.[2] The roots of this right granting people's will to define their own destiny in political terms may be traced back to the history i.e. in the time of emergence of states. However, the first indications of the notion of self-determination in the modern sense are reflected in the American Revolution, i.e. emancipation of British colonies in North America (Gavrilovic 2013:8). Later, the political origins of the modern concept of self-determination are established in the Declaration of Independence of the United States of America of 4 July 1776, which proclaimed that governments derived 'their just powers from the consent of the governed' and that 'whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it' (Thürer, Burri 2008:1).

Several years later, leaders of the 1789 French Revolution used this doctrine but in a different context or as Alfred Cobban remarks, "the nation-state ceased to be a simple historical fact and became the subject of a theory," that a people's right to determine its destiny in international as in domestic affairs was first articulated and applied (Kolla 2013: 717-718). In line with the mentioned, the young French Republic established by the 1791 French Constitution used the concept of self-determination to introduce a strong argument for the abolition of the monarchy. This revolutionary step for the role of the people in deciding their domestic and international affairs was an unconceivable precedent as the power of the monarch was legitimated by God's and not people's will. American and European conceptions of the state and the citizen within took slightly different shapes, and this had consequences for how self-determination came to be formally codified as an international legal norm. (Manji 2012: 1).

As noted above, self-determination, as a political principle, gained in importance after the end of the World War I represented by the US President Woodrow Wilson. According to him, the self-determination is "an imperative principle of action" that would lead to a better world, a world without wars. His initiatives in this regard were directed towards the creation of nation-states in order to avoid conflicts in future because nation-states were considered a fundamental and natural form of political organization. However, due to the strong opposition, even from among his own advisors, Wilson's attempts to incorporate the self-determination principle into the Covenant of the League of Nation were unsuccessful. This Covenant did not contain any provision, or even mentioning of this concept. As a result, in Shaw's words; "in the ten years before the Second World War, there was relatively little practice regarding self-determination in international law" (Cop & Eymirioglu 2005: 117).

By the end of the Second World War, this political principle had developed into a clear international legal norm; with the 1941 Atlantic Charter setting out a framework for how the US and UK wished to proceed. (Manji 2012: 8). Namely, in this famous Charter, The President of the United States of America and the Prime Minister, Mr. Churchill, "they respect the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them."[3]

The conflict between promoting democracy whilst preserving state's current interests was a constant friction during the drafting debates and contributed to a somewhat softer implementation of self-determination within the UN Charter (Manji 2012: 9). As a result, this principle for the first time was formally acknowledged and introduced in article 1.2 of the UN Charter[4] (self-determination of peoples as one of the purposes of the UN) and article 55 (as a principle upon which the peaceful and friendly relations among nations are based). However, according to Shaw, "it is disputed whether the reference to the principle in these very general terms was sufficient to entail its recognition as a binding right, but the majority view is against this. Not every statement of a political aim in the Charter can be regarded as automatically creative of legal obligations" (Shaw 2017: 119). Since the

[2] On the 1945 San Francisco Conference on the UN, the Soviet Union, for the first time insisted on this principle

[3] Preamble of the Atlantic Charter. Full text is available at the following link: http://avalon.law.yale.edu/wwii/atlantic. asp

[4] Full text of the UN Charter is available at the following link: http://www.un.org/en/sections/un-charter/chapter-ix/inde x .html

United Nations Charter did not give a full meaning of the self-determination, it was left to the later international documents and state practices will develop this principle and give it the actual meaning.[5]

In the decades following the adoption of the UN Charter, self-determination became almost exclusively associated with the process of decolonization (Conolly 2013:70). In this light and in order to accelerate the process of decolonization and reinforce the right to independence of colonized people the United Nations passed the Declaration on the Granting of Independence to Colonial Countries and Peoples in 1960. This Declaration postulated a new international law-based right for the first time in the history and although it does not have a mandatory force, the Declaration has acquired the status of an imperative norm of international law (jus cogens) with authoritative interpretation of the Charter's norms and entering into general international law in the result (McWhinney 2008: 2).

In 1966, the two Covenants on Civil and Political Rights and Economic, Social and Cultural Rights were adopted and together with the mentioned Declaration all three documents contained the same article on self-determination, which stated "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" (Manji 2012: 9).

However, although the right of self-determination becomes an imperative norm of the international law, the authors of these international documents have emphasized the priority of the state unity. Hence, in article 6 of the mentioned Declaration, it was prescribed that "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".

This concept of preservation of state unity was questioned by the scholars after adopting the 1970 Declaration on Principles of International Law concerning Friendly Relations[6] according to the GA Resolution 2625 (XXV) under pressure from the West. Although this Declaration disclaimed any intent to authorize or encourage the dismemberment of states, in its penultimate provision: "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", the interpretation of this provision became very controversial in the international law. Some of the questions provoked with the text were: Does this article entitle secession right to the minority groups? Does this article entitle secession if the States are not conducting themselves in compliance with the principle of equal rights and self-determination of peoples? What exactly is compliance with the self-determination?

We're coming here to a key issue that is still quite unclear and it reads: When a certain ethnic minority inside sovereign states and outside of the colonial context acquire the right to use the external self-determination, i.e. secession? (Gavrilovic 2013: 13). Jose Woerhling interprets the Declaration on Friendly Relations as granting a right to secede where there is a denial of this option, as well as where there is an absence of representative government, unequal and discriminatory treatment or the violation of human rights (Knopp 2002: 76). Existing states with established borders, thus, are supposed to meet the obligations associated with the right to self-determination of all peoples, of whatever size or nature, by safeguarding their linguistic, ethnic, and cultural heritage and by guaranteeing both their enjoyment of fundamental rights and the possibility of access to government on an equal footing with the rest of the population (Mancini 2008:557). However, it is unclear, the disregard of which rights, individual, collective or maybe both, can activate the right to secession? (Gavrilovic 2013: 14)

All these questions are subject to different responses and interpretations which makes life of the self-determination so difficult nowadays. Some international lawyers today are in position that the secession is a final remedy, an ultima ratio mean when a state is massively violating the human rights of its citizens or so-called remedial secession.[7] In other words: right to secession is attributable to peoples who are suffering from discrimination, from the denial of a government that is representative, and only where the discriminatory behavior is so penetrating, ramified, and systematic as to threaten, concretely, their very existence and where there is no strong likelihood of the discrimination coming to an end. (Mancini 2008:557). However, recalling to gross human rights violation as a basis for the right of secession does not have sufficient support in the international community and law. Who and how will determine that the certain situation means a gross violation of human rights? What are a people that qualify as secessionist? What is the relationship between the humanitarian intervention and remedial secession than? These are the questions that remain uncertain and open today.

[5] Worth mentioning is that in the 1948 Universal Declaration of Human Rights the concept of self-determination was omitted.
[6] Full text of this Declaration is available at the following link http://www.un-documents.net/a25r2625.htm
[7] An example for this kind of secession is Eastern Pakistan (Bangladesh) from Pakistan.

Finally, Declaration on the Rights of indigenous peoples[8] has the most accurate text on the right to self-determination but yet it is criticized as the access to this right is questioned. In article 3 it stipulates that "Indigenous 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" furthermore in article 4 "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions. The self-determination process as per this Declaration has to be peaceful and without disruption of the national unity and the territorial integrity of a country.

Application of the right to self-determination, therefore, has been "selective and limited in many respects (Cassese 1995: 317). In fact, in the post-colonial era, it would appear that the right to self-determination never amounts to a unilateral right to secede (Conolly 2013: 68).

Yet despite its gradual acceptance as a legal right, self-determination has continued to suffer from a fundamental problem: nobody can agree on exactly what it means (Ibid, p. 70).

4 Self-determination, Secession vs. State sovereignty

Besides the legal framework of self-determination being questionable and ambiguous, there is another critical question to be addressed in the self-determination debates. What is the relation between the self-determination and territorial unity? Is the question of secession related to the relationship between the self-determination and the territorial integrity of a state? When speaking about succession under international law, it refers to the separation of a portion of an existing state, whereby the separating entity either seeks to become a new state or to join another state, and the original state remains in existence without the separating territory (Dunoff et al. 2006: 112). It represents a biased act that most often happens without the consent of the home state, hence the republic, autonomy or area - a secessionist region must establish a factual control over the assumption that is in favour of integrity and legitimate power of the state territory (Milutinovic et al. 2014: 44). Hence, it is obvious that self-determination exists in intension with the principles of sovereignty and territorial integrity that form the foundation of the international system of states, (Conolly 2013: 53) because any secessionist attempt precludes the respect for sovereignty.

The international law does not hold clearly defined attitude in the possibility for secession: sometimes it is partly intervening the process of creation of new states, although on the one hand, the principle of self-determination promotes creation of new states, on the other hand very strict requirements are set up for emergence of new states leading to different accesses in the secession process (Milutinovic et al. 2014: 21). But, on the other hand, even under a presumption that there is a clear international norm, there are no independent arbiters that possess the power to sanction and adjudicate disputes related to the sovereignty of states.

These debates are not new in international law arena. In the famous Aaland Islands Case[9] the commissions rejected the notion of self-determination in favor of maintaining the territorial integrity of existing states (Conolly 2013: 69) self-determination leading to secession "would be to destroy order and stability within states and to inaugurate anarchy in international life; it would be to uphold a theory incompatible with the very idea of the State as a territorial and political unity.[10] Similarly, the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States strikes a balance between the right to self-determination and territorial integrity by conditioning the right of non-colonial people to separate from an existing state on the denial of the right to a democratic self-government by the mother state (Dunoff et al. 2006: 112). This statement was further confirmed in the Judgement of the Canadian Supreme Court in Quebecois 1995 referendum case on independence stating "the international law principle of self-determination has evolved within a framework of respect for the territorial integrity of existing states."[11] Given the many similarities between Quebec and the stateless nations of Europe, the Canadian Supreme Court's analysis of the right to self-determination has important implications for Flanders, Scotland, and Catalonia (Conolly 2013: 75) but not in the case of Kosovo.

5 Catalonia vs. Kosovo right to self-determination

The Kosovar separation from Serbia is unique in the history of international relations: it represents a secession, which is heavily discouraged under traditional international law; it was peaceful, which is typically not the case in state-break-ups; and it was politically supported by the west, which is traditionally critical of separatist movements, as they undermine state borders and world stability.

[8] Full text of Declaration on the Rights of indigenous peoples is available at the following link: http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

[9] Decision of the Council of the League of Nations on the Åland Islands Including Sweden's Protest (Sept. 1921) is available at the following link:
http://www.kulturstiftelsen.ax/traktater/eng_fr/1921a_en.htm

[10] The Aaland Islands Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs, League of Nations Doc. B.7 21/68/106, at 27 (1921)

[11] Reference re Secession of Quebec, [1998] 2 S.C.R. 217, at 66, 71, 67

In order to resolve the Kosovo crisis and negotiate with both parties, UN Special Envoy Martti Ahtisaari was appointed in 2005. A year later he submitted to the UN Security Council his Comprehensive Proposal for the Kosovo Status Settlement (the "Ahtisaari Plan"). According to this Plan "parties are not able to reach an agreement on Kosovo's future status and that the only viable option for Kosovo is independence, to be supervised for an initial period by the international community"

Kosovo's Parliament unanimously declared Kosovo's independence from Serbia on October 17, 2008, after the brutal armed conflict in the country. The same night, the Declaration was rejected as being illegal by the Government of Serbia and the next day the Declaration was annulled by the Serbian Parliament. This Declaration had diverse effect in the international relations hence so far 69 countries including the USA have recognized Kosovo as independent State out of which 22 EU countries. Following Serbia diplomatic efforts for annulment of this "illegal" Declaration, the UN General Assembly referring to article 65 of the ICJ Statute, requested an advisory opinion on the following question: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?" The ICJ claimed (nine votes to five) that "the Declaration of independence of Kosovo adopted on 17 February 2008 did not violate international law"[12]

The importance of Kosovo advisory opinion derives from the fact that for the first time such an internal issue was brought on the international legal sphere, which makes it a sui generis case (Pechalova 2017: 43). The controversial aspects of the ICJ's reasoning prove that the Court was unable to give a clear response to such a highly political question (Ibid) i.e. to reply if pursuant to international law provisions, the Kosovo unilateral declaration of independence is allowed. Instead, the Court considered that "it is entirely possible for a particular act — such as a unilateral declaration of independence — not to be in violation of international law without necessarily constituting the exercise of a right conferred by it."[13] To put it simplified, the Court avoided replying whether Kosovo independence was in compliance with the international law and instead it ruled that the Kosovo Declaration of independence was in line with international law. The International Court of Justice found itself in an extremely delicate situation where it was more than difficult to find a way out without suffering severe wounds (Oeter 2015: 55). For that reason, besides the ICJ findings that Kosovo declaration did not violate international law, it does not mean that the Court recognized the right of Kosovo to separate from Serbia.

As for the abovementioned relationship between the sovereignty and territorial integrity in such cases as in Kosovo, where a secessionist attempt happened, the Court embraces the view that the principle of territorial integrity is not applicable, as the authors of the declaration are a non-state entity (Pechalova 2017: 50). Based on that conclusion it can be assumed that it is possible a non-state entity to proclaim independence and might not be opposing to the international law (Wilde 2011:152).

The Kosovar Declaration of independence represents a fascinating case in international law which poses concerns over its precedent-setting secessionist ideology (Sterio 2009: 304). One such example is the recent Catalonian independence referendum to separate from Spain which has been declared illegal by Spain.

There are continuous discussions nowadays on the similarity but at the same time dissimilarity on the exercise of the self-determination right in Catalonia and Kosovo. The claims for secession, or for a right to secede, raise exceptionally large questions about the theory and practice of constitutionalism. It is therefore an especially important time to explore the relationship between secession claims and constitutionalism in general (Sunstein, 1991: 634). Both countries' Constitutions do not recognize the right of referendum for claiming independence yet Kosovo has unitarily acquired its independence (without a referendum) and the Catalonian referendum was considered unconstitutional.

Apart from the Kosovo referendum[14] where the international community and especially the EU countries immediately compliment the will of the Kosovo people, in this case, they insisted that it was an internal issue for Spain and that the Spanish constitution has to be observed. For this EU's different stance the Serbian President, Aleksandar Vucic will state "How come you're [EU] declared Kosovo's secession from Serbia legal, violating international law and the foundations of European law.[15] Can we really draw a parallel between these two cases of (un)successful secession?

In the vast literature which can be found on this topic, the majority of scholars are on a position that the Catalonian independence referendum was illegal and this case should not be compared with the Kosovo independence case, as the second is sui generis case. However, solid argumentation of these statements is lacking. One of the arguments favoring Kosovo secession refers to the remedial secession right: apart from Kosovo where a violation of human rights was evident, the Catalans have not been oppressed by Spain and have enjoyed

[12] ICJ Advisory Opinion, 2010: para 122, available at: http://www.icj-cij.org/files/case-related/141/141-20100722-A DV-01-00-EN.pdf

[13] ICJ Advisory Opinion, 2010, para 56

[14] Referendum was held on 1 October 2017 and according to the organizers, 2.2 million of 5.3 million voters participated in the referendum, out of which 90% voted for the secession of Catalonia from Spain.

[15] https://www.theglobeandmail.com/news/world/nationalist-movements-aim-to-learn-from-catalonias-bid-for-independence/article36455896/

meaningful internal self-determination rights.[16] However, remedial succession, as discussed above is far from accepted by the international community (Conolly 2013: 72). In its 2010 advisory opinion on the legality of Kosovo's secession from Serbia, the ICJ sidestepped the thorny issue of remedial secession altogether, choosing instead to confine itself to the narrower question of whether Kosovo's declaration of independence violated international law (Ibid).

On the other hand, almost the same time with Catalonian referendum, an independence referendum was held in Kurdistan,[17] where the infringement of human rights and gross tragedies are evident every day, yet international community response is absent. Therefore, it is expected that Iraqi Kurdistan has little chance to achieve sovereignty because of the unfavorable international recognition regime and lingering internal disunite (Danilovich 2017:1)

Another argument herein is that there is no clear international rule on the right of succession. As professor Varadi states: There is no clear position in international law as to how a unit could be separated from a state through self-determination, but I do not see the basis for differentiating between Kosovo and Catalonia, all the more so since there was actually no referendum in Kosovo[18] arguing further that at the highest level, the answer to this very complex question - the issue of the right to self-determination - is being avoided (Ibid).

By referring to the leading cases of exercising the right of self-determination one may conclude that they are characterized by embedded inequalities.

Conclusion

Self-determination is a core principle of international law protected by the United Nations Charter and several international documents on human rights. Although it was primarily exercised in the process of decolonization and formation of independent states, this right remained applicable outside of colonial milieu. However, the content of this right is very ambiguous especially with respect to whether the international law authorizes external self-determination i.e. unilateral secession from existing state.

In addition to this, there lays the conflict between the two parallel phenomena nowadays: first, the globalization which necessary means deregulation and integration of the independent states and second, the contemporary social movements with secessionist aspirations which may lead to the creation of newly independent countries. As a result, these debates are nurtured with the example of Kosovo's secession from Serbia, which according to the US Secretary of State Condoleezza Rice was sui generis case, i.e. a unique set of circumstances. But also, one cannot disagree with the opposite arguments that Kosovo is a dangerous precedent and will have butterfly effect for other separatist movements, such as the one in Catalonia, which, according to the aforementioned argumentation is not the much different case than Kosovo.

These opposing debates on the right to secession in the international arena are expected as, as previously mentioned, the international law does not contain norms to approve or prohibit the right to secession. As Hannum writes "the so-called ethnic principle of self-determination has never been seriously considered by the international community to be the primary factor in evaluating claims to statehood". Nor there will be some shift in this direction in the near future as the primacy of statehood is essential in the international system. In such legal vacuum, it is obvious that the interest of the Great Powers will fill the gap and will determine when a state's right to prevent its territorial integrity does (not) trump a group's aspirations to secede.

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[17] An independence referendum in Kurdistan was held on September 25, 2017. Similarly, to Serbia and Spain, the Iraqi constitution does not grant the right to secession. Overwhelming majority has decided to separate from Iraq and form an independent state of Kurdistan. Government of Iraq refused the results of referendum.

[18] Text of Varadi's statement is available at the following link: https://www.b92.net/eng/news/politics.php?yyyy=2017&mm=10&dd=04&nav_id=102474

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