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The right of peoples to self-determination: a European rebound of a neglected paradox

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1. Introduction

The right of peoples to self-determination is a spectre that has been haunting international law and politics for over a century. Throughout this time, it has been a proverbially indefinable entitlement of an elusive subject to rather unspecified actions. The famous quip attributed to Leo Trotsky ("the right of nations to self-determination is a right of whom to what?") turns this popular catchphrase, enshrined in various documents of international law, into a dynamic field of tensions. "The right of peoples to self-determination" is neither just a right, nor a principle; neither a purely legal concept, but even less—just a political slogan. Its meaning, scope and relation to other principles of international law are notoriously imprecise.[1]

Nevertheless, this "right" still has some mysterious force of attraction, not only for legal scholars, but also for the general public. It stems least partially from the fact

[1] James Summers, *Peoples and International Law*, Leiden: Brill, 2014, pp. 1, 568; Ved P. Nanda, *Revisiting Self-Determination as an International Law Concept: A Major Challenge in the Post-Cold War Era*, ILSA Journal of International and Comparative Law, vol. 3, 1997, pp. 443-444; Jörg Fisch, *Adolf Hitler und das Selbstbestimmungsrecht der Völker*, *Historische Zeitschrift*, vol. 290, 2010, p. 94; *idem*, *The Right of Self-Determination of Peoples. The Domestication of an Illusion*, tr. by Anita Mage, Cambridge: CUP 2015, p. 17; Valerie Epps, *The New Dynamics of Self-Determination*, *ILSA Journal of International and Comparative Law*, vol. 3 (1997), pp. 33, 442; Tal Becker, *Self-Determination in Perspective: Palestinian Claims to Statehood and the Relativity of the Right to Self-Determination*, Israel Law Review, vol. 32, 1998, p. 332.

that the "right to self-determination" straddles between law and politics[2] to a much greater degree than it is usual in international law. In fact, there would not be this right if it had not been for the rise of nationalism at the end of the 19th century, which gradually penetrated into the practice and theory of international law.[3] As a result, self-determination is a source of multiple paradoxes that concern the very construction of international order at the intersection of law and politics.

To make the situation even more complicated, historically the right to self-determination has been associated with some narrower concepts. Throughout the Cold War, and especially in the 60s and in the 70s, it was confined to the rights executed within the framework of decolonisation, especially the right to independence. After the end of the decolonisation process proper, it was heavily debated as the right of ethnically separate units to gain independence (in case of the former Soviet Union and Yugoslavia)[4] or to secede due to mass violations of human rights by the mother state (remedial secession). Simultaneously, at the beginning of the 90s there were numerous attempts to redefine it within the framework of the so-called right to democratic governance.[5] Yet none of these particular understandings of self-determination could claim to exhaust both legal and political aspects of the right. It has always been brimming over with connotations, whose elusiveness only contributed to the self-determination quagmire. States, courts and international lawyers often preferred to speak about it as little as possible, thereby accommodating the right formally while curbing excessive expectations. The image of Pandora's box of destructive nationalist sentiments has always been a more or less implicit background of self-determination, which explains why solemn declarations in this field have accompanied at best moderate practical application of this "right."

Quite recently, the right to self-determination was once again revived and transformed. This process has two faces. On the one hand, the recent cases of alleged exercising the right to self-determination—Kosovo and Crimea—have proved extremely controversial and were politically exploited to a large degree. [6] These events

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2 Cf. James J. Summers, *The Right of Self-Determination and Nationalism in International Law,* International Journal on Minority and Group Rights, vol. 12, 2005, pp. 329-331.

3 *Idem*, *Peoples and International Law*, pp. 158-161.

4 Wolfgang Danspeckgruber, *Introduction* in Wolfgang Danspeckgruber (ed.), *The Self-Determination of Peoples. Community, Nation and State in an Interdependent World*, London: Lynne Rienner, 2002, p. 7.

5 Ingrid Barnsley, Roland Bleiker, *Self-determination: from decolonization to deterritorialization*, Global Change Peace and Security, vol. 20, no. 2, 2008, pp. 121-133.

6 Bjorn Arp, *The ICJ Advisory Opinion on the Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo and the International Protection of Minorities*, German Law Journal, vol. 11, 2010, pp. 847-866; Tamara Jaber*, A case for Kosovo? Self-determination and secession in the 21st century*, The International Journal of Human

pertained to the legal dimension of self-determination, but their entanglement in political wrestling between the West, the Russian Federation and some other countries, anxious to criticise the Western approach to democracy, made self-determination a fragile issue. Admittedly, its application has always sparked political controversies,[7] but never has the right to self-determination been so distant from the ideal of objective right that exists uncontested and can be legally enjoyed with recognition from other subjects of international law.

On the other hand, self-determination rose from the grave on the political level. The populist wave which sweeps through many regions of the world and Europe in particular made this right surprisingly popular. This time, however, it has been confined mainly to political discourses which accentuate states' sovereign rights against the international order of governance built on globalisation. It could seem that if self-determination does not pertain to its current understanding in international law, it is not a matter for lawyers, but for political scientists. Yet the particular construction of self-determination at the intersection of law and politics does not allow of separating both aspects. As a consequence, the revival of self-determination in its political aspect can be detrimental to the functioning of international law. Not only does it fuel hostility against international organisations and rules that they produce, but it also contributes to generalised scepticism towards the rule of law, constitutionalism and democratic procedures. In this regard it cannot be treated as a politics-related phenomenon only, because—as in the case of Hungary or Poland—it directly influences states' relationship to international law.

It seems therefore that self-determination is returning to the game on both legal and political levels. In its both branches, it evolves in somewhat different directions, but draws its energy from tensions fuelled by globalisation. Its revival seems to be a backlash from the systematic undermining of the position of states that globalisation pushed to in the 80s and 90s. If so, new uses of self-determination might augur the end of the truce in which states and their populations seemed married for good.

In this paper, I would like to address the contemporary content of the right of peoples to self-determination in international law in the context of its porous boundary with political discourses, in which it is misused and abused. I will argue that self-determination is a nexus of paradoxes which—at least in the current state of international law—is still productive *outside of the realm of international law*

Rights, vol. 15, no. 6, 2011, pp. 926-947; Simone F. van den Driest, *Crimea's Separation from Ukraine: An Analysis of the Right to Self-Determination and (Remedial) Secession in International Law*, Netherlands International Law Review, vol. 62, 2015, pp. 329-363.

7 James J. Summers, *Status of Self-Determination in International Law: A Question of Legal Significance or Political Importance*, Finnish Yearbook of International Law, vol. 14, 2003, p. 271.

proper.[8] In contemporary Europe populism draws from the aporetical construction that this right is a part; thus it opens a spiral of endless demands that constitute an existential threat to international law and European integration.

Finally, a caveat is due at this point. This paper approaches the right of peoples to self-determination from the point of view of critical legal studies. Accordingly, it puts into question the positivist vision of international law as neatly separated from its political context. On the contrary, it approaches it as an aporetical, self-constituting mechanism ravaged by exceptionality. *Its legal quality must be retraced and maintained through series of discursive reiterations*. As a consequence, the right of peoples to self-determination cannot artificially abstract from the political context that it strives to channel into legal form. Naturally, this does not determine what content this right takes within the normative dimension of international law, but sheds light on the porous boundary that it maintains with its political context. The limited scope of this paper allows only of remarking some key issues and paves the way for further research.

2. A Brief History of Self-Determination

Whenever we speak about the right to self-determination of nations, we need to bear in mind that it is of relatively recent origin (especially in international law, where often decades are what years are for national legal systems). Much as it gained acceptance in international law and among the international community, it still remains an evolving concept, whose consequences and scope have not been fully determined. Moreover, it seems that nowadays we are at a crossroads in understanding of this term: its older forms have crumbled and new ones are budding. Therefore there can be no analysis of self-determination without a brief outline of its history.

Even if self-determination in international law emerged in the 20th century, it has its roots at the beginning of the modern era, that is at the time when the current relations between statehood, population and sovereignty began to form.[9] Beforehand the population had generally shared the fate of the territory and were ruled

[8] Perception of dangers triggered by the concept of self-determination accompanied the very emergence of this concept. Already Robert Lansing, United States Secretary of State under President Woodrow Wilson (the father of self-determination of nations), was acutely aware of that when he said: 'The phrase [national self-determination] is simply loaded with dynamite. It will raise hopes which can never be realized'. Han Liu, *Two Faces of Self-determination in Political Divorce*, ICL Journal, vol. 10, issue 4, 2016, p. 358. Jörg Fisch, *The Right of Self-Determination of Peoples*..., p. 135.

[9] See Antonio Cassese, *The Right of Nations to Self-Determination. A Legal Reappraisal*, Cambridge: CUP 2008, pp. 1-35.

by the territory's sovereign. The French Revolution and the independence of the United States inaugurated the era of popular sovereignty, based on personal relation between the population and the state apparatus, which in its name exercised sovereign rights.[10]

This epochal moment marked the beginning of pronounced interest of state power in its population, which was actively shaped into "nation": its language was normalised, while culture and traditions trimmed to produce a minimum level of common heritage. Simultaneously, state politics began to refer more often to national interest, thereby justifying both its existence and its actions. The gradual decline of essentially pre-modern empires, such as Austro-Hungary or the Ottoman Empire, demonstrates how multinational organisms first had to strike a compromise with mounting nationalist sentiments (by "nationalising" their dynasties and the language of their state apparatuses) and then crumbled under the unresolved national question. In the second half of the 19th century, nationalisms already flourished in entire Europe. The unifications of Italy (1861) and Germany (1871) were first harbingers of their potential, even if self-determination in these cases meant not secession or autonomy, but putting an end to the dispersion of Italian- or German-speaking[11] populations in numerous states and creating unified, nation-based countries.

However, it was not until the 20th century that self-determination left the domain of political doctrines of nationalism and penetrated international law. If epochal transformations can have individuals as their fathers, it were Vladimir Lenin and Woodrow Wilson who were responsible—at least at the beginning—for the unprecedented career of the right self-determination. The official, "whig history" of self-determination tends to favour the latter and belittle the former, even though Wilson's programme was directly forced by the success of the October Revolution.[12]

For Marxism, the national question was one of its weakest points. In its theoretical apparatus, it seemed at best peripheral to the class struggle and should not have attracted attention as a real political factor. For some Marxists—and even for Marx and Engels themselves—the national question was a matter of naturalisation: the existence of English, German or French nations were taken for granted. Accordingly,

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10 Andrés Rigo Sureda, *The Evolution of the Right of Self-Determination*, Leiden: Sijthoff, 1973, p. 17.

11 From the contemporary point of view, it is tempting to succumb to anachronist perception of unification as creating a one state for one nation, usually based on the language criterion. Nevertheless, it was states that effectively produces standardised Italian or German—through schools, armies and public services. Ethnicities or regionalisms that were not fortunate enough to produce strong nationalisms were trimmed to fit the new unified "nations."

12 Jörg Fisch, *The Right of Self-Determination of Peoples...*, *op. cit.*, p. 137.

both theorists analysed the chances of revolution in these European countries not questioning the division into nations, even if the overall revolutionary perspective augured some form of internationalism. Consequently, when nationalisms were on the rise at the end of the 19th century, Marxism did not develop a well-thought answer. It rather settled for a blend of imprecise intuitions and besides a general commitment to internationalism did not have a clear vision of how the national question should be solved. When the World War One put an end to the unity of social democratic movement, the problem of nationalisms became acutely palpable. Marxists provided different answers, from coherent cosmopolitanism (Rosa Luxemburg[13]), through personal corporate autonomy of nationalities (Otto Bauer[14]) to open endorsement of secession due to self-determination (Vladimir Lenin). Even if Lenin's support of self-determination was a tactical move (secession was meant to destabilise huge capitalist empires and satisfy nations' thirst for emancipation, but then they were expected to re-unite[15]), it proved influential enough to elevate self-determination to a broadly recognised principle of international law.

The success of the October Revolution forced Wilson to transform his scattered postulates for European nationalities (notably, restrained to those which lived on territories of the Central Powers and with the blatant omission of colonies) into a more general principle.[16] Apart from creating new states (not necessarily single nation states, as demonstrated by the examples of the Kingdom of Serbs, Croats and Slovenes or of the multi-ethnic inter-war Republic of Poland), Wilson's programme inaugurated a new link between state power and population. The former should no longer rely on what Max Weber described as "traditional authority" (based on self-grounded continuance of tradition),[17] but draw its legitimacy from the people's consent. It is in this respect that self-determination demonstrated its revolutionary

13 Rosa Luxemburg, *The Right of Nations to Self-Determination* (1909) source: https://www.marxists.org/archive/luxemburg/1909/national-question/ch01.htm; *The Junius Pamphlet. The Crisis of German Social Democracy*, tr. D. Hollis (Luxemburg Internet Archive (marxists.org, 2003).

14 Otto Bauer, *The Question of Nationalities and Social Democracy*, tr. J. O'Donnell, Minneapolis & London: Minnesota University Press, 2000, p. 454.

15 Vladimir Lenin, *Theses on the Socialist Revolution and the Right of Nations to Self-Determination*, in: *Selected Works*, London: Lawrence and Wishart, 1969, p. 160.

16 "A free, open-minded, and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable government whose title is to be determined." Woodrow Wilson, *Address of the President of the United States, delivered at a joint session of the two houses of Congress, January 8, 1918*, House doc. 765, 65th Cong., 2d sess. (Washington, 1918), pp. 6-7.

17 Max Weber, *Economy and Society. An Outline of Interpretative Sociology*, Berkeley: University of California Press, 1978, pp. 215-216.

potential. It cannot be narrowed down to granting independence to distinct nations; contrariwise, it is deeply immersed in the democratic imagery. Self-determination connotes also the government which is accepted by its people. In this sense, Wilson modelled his version of this principle on the guidelines of the American Constitution.[18]

Nevertheless, it was not until the period after the Second World War, marked by decolonisation, that self-determination made it to the grounding texts of international law.[19] It is declared in Art. 1 (2) and 55 of the UN Charter[20] (apart from its practical application in Chapters XI-XIII pertaining to non-self-governing and trust territories[21])—even if still as a state-centred principle rather than right—as well as Art. 1 of both the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights (even if the latter was not envisaged as granting the right to unilateral secession[22]). Moreover, the UN General Assembly strongly endorsed the rights of colonies in two famous resolutions: 1514[23] and 1541,[24] despite its incoherent approach to independence as principal means of self-determination.[25] Finally, the 1970 Declaration on Principles of International Law[26] significantly supports the right to self-determination,[27] although curbing it by territorial integrity of states.[28]

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18 Lauri Mälksoo, *The Soviet Approach to the Right of Peoples to Self-determination: Russia's Farewell to jus publicum europaeum*, Journal of the history of International Law, vol. 19, 2017, p. 202.

19 Cf. Han Liu, *op. cit.*, pp. 365-366.

20 Nevertheless, the approach of the UN and its member states to self-determination in the 40s was criticised for its half-heartedness. See Gerry J. Simpson, *The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age*, Stanford Journal of International Law, vol. 32, 1996, pp. 267-268.

21 Ved P. Nanda, *op. cit.*, p. 448.

22 Simone F. van den Driest, *op. cit.*, p. 337.

23 The UN General Assembly, Declaration on the Granting of Independence to Colonial Countries and Peoples, 14 Dec 1960, A/RES/1514(XV).

24 The UN General Assembly, Principles Which Should Guide Members in Determining Whether or not an Obligation Exists to Transmit the Information Called for under Article 73e of the Charter, 15 Dec 1960, A/RES/1541(XV).

25 Amy E. Eckert, *Free Determination or the Determination to Be Free: Self-Determination and the Democratic Entitlement*, UCLA Journal of International Law and Foreign Affairs, vol. 4, 1999, pp. 69-71; Gerry J. Simpson, *op. cit.*, p. 270.

26 The UN General Assembly, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 24 Oct 1970, A/RES/25/2625.

27 Gerry J. Simpson, *op. cit.*, p. 271.

28 Ved P. Nanda, *op. cit.*, p. 449.

Decolonisation marked self-determination in a twofold manner. First, it made it almost equivalent to secession, but limited only to colonial territories.[29] This identification, albeit its obviously advantageous for former colonies, left self-determination in limbo when decolonisation was complete.[30] Second, the newly emerging states were carved out on the basis of the already existing colonial units,[31] which popularised the *uti possidetis* rule, turning it into a principle of customary law.[32] Much as it was reassuring for other states, whose unity was not challenged in principle, such an understanding of self-determination was significantly limiting—principally for these regions which wanted to secede from the newly emerging post-colonial states, such as Katanga or Biafra. But, as a result, attempts to exercise the right to self-determination outside the scope of the decolonisation scheme, based on *uti possidetis*, have fewer precedents and still constitute exceptions, despite the lure of objective, executable right. The victory of the so-called "saltwater doctrine" (which assumes that "a people have a right of self-determination only when an ocean or a sea separates the secessionists from the metropolitan"[33]) confined the understanding of self-determination elaborated after WWI in the interest of existing states, but reduced the effectiveness of the safety valve that this right in fact consists in.[34]

The legacy of the decolonisation period continued[35] in the next wave of executing the right to self-determination after the fall of the Iron Curtain.[36] The new states were established according to the *uti possidetis* rule[37] and even if some commentators saw the return of the ethnic criterion of secession,[38] all of the new and internationally recognised post-socialist countries emerged from former administrative

[29] Nevertheless, according to some commentators even in the context of decolonisation international law does not contain a norm explicitly allowing of secession, but remains neutral. See: Milena Sterio, *Self-Determination and Secession under International Law: The New Framework*, ILSA Journal of International and Comparative Law, vol. 21, 2015, pp. 293-298.

[30] Cf. Gerry J. Simpson, *op. cit.*, p. 265.

[31] Hurst Hannum, The Right of Self-Determination in the Twenty-First Century, *Washington & Lee Law Review*, vol. 55, 1998, p. 775.

[32] Valerie Epps, *The New Dynamics of Self-Determination*, ILSA Journal International and Comparative Law, vol. 3, 1997, p. 435.

[33] Han Liu, *op. cit.*, p. 367; Bartram S. Brown, *Human Rights, Sovereignty, and the Final Status of Kosovo*, Chicago-Kent Law Review, vol. 80, 2005, p. 246; Theodore Christakis, *Self-Determination, Territorial Integrity and Fait Accompli in the Case of Crimea*, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, vol. 75, 2015, pp. 83-84. See also Gerry J. Simpson, *op. cit.*, pp. 272-273.

[34] Some commentators went that far as to challenge the very existence of the right to self-determination outside the decolonisation context. See Valerie Epps, *op. cit.*, p. 437.

[35] Cf. Jörg Fisch, *The Right of Self-Determination of Peoples...*, *op. cit.*, p. 220.

[36] Cf. Simone F. van den Driest, *op. cit.*, pp. 336-337.

[37] Ved P. Nanda, *op. cit.*, p. 451.

[38] Han Liu, *op. cit.*, p. 369; Gerry J. Simpson, *op. cit.*, p. 255.

sub-units of the Soviet Union, the Federal Socialist Republic of Yugoslavia or Czechoslovakia.[39] In this respect, this wave of self-determination was quite similar to decolonisation (also in the context of the demise of unwanted government).[40]

These countries notwithstanding, at that time a few *de facto* regimes were created that augured a new, fourth era of self-determination in international law, characterised by contested secessions supported by major world powers. Unrecognised states such as Transnistria, Abkhazia and Southern Ossetia were precedents for the future cases of self-determination in Crimea, the Lugansk People Republic, the Donetsk People Republic and, to a certain degree, Kosovo.[41] This era of self-determination produced another key text of international law: the United Nations Declaration on the Rights of Indigenous Peoples[42] (2007), which endorses the right to self-determination of these peoples (Art. 3 and 4). Nowadays self-determination as part of international law has inherited its territorial basis from times of decolonisation (as opposed to ethnic self-determination after WWI). Nevertheless, the not-yet-completed self-determination of Palestinians or the unfruitful struggle of the Kurds corroborates the older observations that this right outside of decolonisation context is still hardly effective and widely contested in practice.[43] Conditions of legal unilateral secession—formulated principally by the doctrine and restrained mostly to remedial secession—remain difficult to meet, which make this method of self-determination an essentially exceptional case.[44] All in all, self-determination became a particularly vague and open concept.[45]

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39 James J. Summers, *The Right of Self-Determination*..., *op. cit.*, p. 332.

40 Cf. Jörg Fisch, *The Right of Self-Determination of Peoples*..., pp. 223-230.

41 The annexation of Crimea by the Russian Federation—officially declared as an act of self-determination of the former—was juxtaposed by Russia with the independence of Kosovo [see Simone F. van den Driest, *op. cit.*, p. 330]. Despite the obvious difference between the two cases (independence of Kosovo, even if endorsed by the US and some other Western countries, did not lead to annexation, whereas Russia's involvement in Crimean "self-determination" evidently tended towards Crimea's becoming part of the Russian Federation), Kosovo—especially after the ICJ's advisory opinion in the case, which did not find violations of international law by unilateral declarations of independence—became a point of reference for ethnic-based secession supported by world powers.

42 GA Res 61/295, UN Doc A/RES/61/295 (13 Sept 2007), 46 I.L.M. 1013.

43 Cf. Daniel Philpott, *Self-Determination in Practice*, in M. Moore (ed.), *National Self-Determination and Secession*, Oxford: Oxford University Press, 1998, p. 86; Gerry J. Simpson, *op. cit.*, pp. 255-257.

44 Simone F. van den Driest, *op. cit.*, p. 341.

45 Cf. Ved P. Nanda, *op. cit.*, p. 445; Rodolfo Stavenhagen, *Self-Determination: Right or Demon?* in: Donald Clark, Robert Williamson (eds.), *Self-Determination. International Perspectives*, Basingstoke: MacMillan Press, 1996, p. 5.

3. Paradoxes of Self-Determination

Unlike some other principles of international law, the conceptual field of self-determination is notoriously ravaged by some major tensions. As a consequence, the notion is notoriously unstable and prone to be abused. In fact, its applications cannot be contained and the notorious ambiguity that shrouds self-determination is inevitable in the current form of international law. The tensions in question can be distinguished analytically, although in practice they intermingle and overdetermine themselves. Nevertheless, they are crucial for understanding how to put self-determination on the intellectual map.

3.1. Self-Determination and Territorial Integrity

Self-determination, accepted in principle and understood primarily as leading to secession, is often contrasted with and limited by an even more important cornerstone of post-war international law: territorial integrity.[46] Whenever self-determination is exercised by means of secession, it potentially undermines territorial integrity of the state from which the newly constituting subject of international law is going to secede. Unless the mother country accepts this move (as in the case of Scotland's potential secession in 2014, to which the UK consented in advance in case of independentists' success in the referendum) or it peacefully dissolves (as Czechoslovakia did in 1993), secession breaches the division of the world into states that international law takes for its essentially inviolable axiom.

The conflict between self-determination and territorial integrity touches upon the problem that international law abstracts from, circumscribing it within the domain of fact—namely the emergence of states.[47] The moment when the division of the world into states is corrected is nothing but an eclipse of international law which sanctifies the *status quo ante* and the order which emerges afterwards, but is dependent on the factual existence of effective government in between. International law—even if it uses the language of "nations" and "peoples"—is law that is created by and applied to states. "Nations" and "peoples" are subsidiary to states, although at the level of ideological justification it seems otherwise. The right to self-determination is essentially the only point in international law in which the real dependence follows its ideological representation. In its light, "nations" are no longer defined as population of a given state, whose belonging depends on the purely formal criterion of citizenship, but must be determined according to additional

[46] Ved P. Nanda, *op. cit.*, p. 446; James J. Summers, *The Right of Self-Determination...*, p. 333.
[47] See James Crawford, *The Creation of States in International Law*, Oxford: OUP 2006.

criteria (such as ethnicity, language, religion etc.) which in themselves open up an abyss of inconclusiveness.

Thus the tension between self-determination and territorial integrity points to the discrepancy between the actual self-groundedness of division into states and its official justification which refers to nations. By accepting self-determination as a principle, the international community allowed of a safety valve in the universal grid of states that are expected to match their "nations" understood as populations. It functioned well and was widely accepted in times of decolonisation (at least after the consensus established by the two 1960 GA Resolutions), when the emergence of new states had already had a foothold in international law (states were built upon separate colonial territories, usually inheriting their borders and administration). In this case, self-determination did not actually challenge the universal division of the world into states, but rather updated it with elevating some of colonial territories to the rank of independent states. After decolonisation, however, this safety valve seems to best function when it is never used. Whenever tensions between a state and a part of its population cannot be peacefully resolved and self-determination begins to be invoked, it is usually treated with circumspection.

Nevertheless, as Han Liu rightly pointed out, the usual opposition between self-determination and territorial integrity is not as self-evident as it is often portrayed.[48] Firstly, self-determination does not have to threaten the unity of a state. Obviously, such a tension appears when it concerns a minority within a country, but it cannot be omitted that the whole nation of this country also has a right to self-determination. In this respect, self-determination actually contributes to strengthening the unity and sovereignty of the country. Much as it is a principle and/or right of international law, it continues to have a strong link with nationalism of European hue that elevated to the international level the belief that the nation-state is the paradigmatical vehicle for freedom and self-expression of communties. Nationalism, however, in all its ambiguity[49] is (at least) two-faced. On the one hand, it may be understood as the ideology of the state which justifies its existence, accentuates the distinctiveness of state population from all the other peoples and inculcates loyalty to the state via various apparatuses (instruments of political participation, public ceremonies, curricula of public schools which teach specially adapted elements of language and culture etc.).[50] Self-determination related to this form of nationalism acts—to borrow Liu's term—as a centripetal force.[51] On the other hand, nationalism may be an ideology of a minority or a nation that does not

48 Han Liu, *op. cit.*, p. 358.

49 James J. Summers, *The Right of Self-Determination*..., *op. cit.*, p. 326.

50 Cf. *ibid.*, pp. 327-328.

51 Han Liu, *op. cit.*, pp. 358, 371.

possess "its" own state. In this form, it becomes an ideology usually concentrated on ethnicity, language, traditions and religion that characterise the population which struggles to mark its distinctiveness. Whenever self-determination is linked to this kind of nationalism, it becomes a centrifugal force, the one which at least threatens secession and undermines territorial integrity of the state. Therefore, the general claim that self-determination is at odds with territorial integrity obfuscates the fact that it might be anchored in various forms of nationalism, linked to different levels. It equally concerns the state that may emerge due to secession and the state from which the secession might occur.

Secondly, whenever self-determination leads to secession, it is not exercised by a state.[52] This might be a good ground to claim that nations, minorities or populations—however the subject of such form of self-determination may be called—are not bound by the principle of territorial integrity embodied in Article 2(4) of the UN Charter. Such a claim is not undisputable, given that some authors opted for the existence of international norms aimed at preserving territorial integrity which bind seceding intra-state entities.[53] Abstracting from broader disputes concerning the scope and meaning of territorial integrity, it must be once again remarked that from a theoretical point of view self-determination is a right that produces—in Agambenian parlance—a zone of indifferentiation between law and fact. It makes an extra-legal (or para-legal) subject enter the community of subjects of international law. Therefore opposing self-determination and principle of territorial integrity is not only incorrect from the strictly legal point of view, but it also overlooks the law/fact tension inherent in this concept. From this point of view, the ICJ's advisory opinion in *Kosovo*[54]—so often criticised in the doctrine[55]—is correct in dissociating the practical act of self-determination (in this case, the unilateral declaration

[52] Cf. also Simone F. van den Driest, *op. cit.*, p. 353.

[53] *Ibid.*, p. 355.

[54] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, p. 403.

[55] Snežana Trifunovska, The Impact of the 'Kosovo Precedent' on Self-Determination Struggles in James Summers (ed.), *Kosovo: A Precedent? The Declaration of Independence, the Advisory Opinion and Implications for Statehood, Self- Determination and Minority Rights*, Leiden & Boston: Nijhoff, 2011, p. 377; Elizabeth Rodríguez-Santiago, The Evolution of Self-Determination of Peoples in International Law in Fernando R. Tesón (ed.), *The Theory of Self-Determination*, Cambridge: Cambridge University Press, 2016, pp. 230-233; Richard Falk, *The Kosovo Advisory Opinion: Conflict Resolution and Precedent*, American Journal of International Law, vol. 105, 2011, pp. 50-53; Peter Hilpold, *International Court of Justice's Advisory Opinion on Kosovo: Perspectives of a Delicate Question*, The Austrian Review of International and European Law, vol. 14, 2009, pp. 309-310.

of independence) from either the right which it would be supposed to apply or from prohibitions that could ban it.

3.2. External and Internal Aspect of Self-Determination

Traditionally, the doctrine of international law distinguishes between external and internal limbs of self-determination.[56] The former concerns the right to decide on the external statist representation of the people; its crowning form is the right to secede, which was a basic method of self-determining in times of decolonisation, but since then became a bone of contention. The latter involves "group autonomy within a state,"[57] which is tantamount to "self-determination light": an entitlement which pays lip service to the solemn principles while bulwarking international law (and especially the sacred principle of territorial integrity) against their destructive potential. This distinction has proved quite influential, being propounded not only by academics, but also applied by courts (as in the case of Québec[58] and Kosovo[59]).[60]

In this view, external self-determination in contemporary international law has a limited scope. According to doctrinal reconstructions of *opinio iuris*—in itself fragmentated and contested, as evidenced by opinions of states submitted to the ICJ in *Kosovo*—secession seems to be allowed of only in exceptional circumstances. As to examples, the most often cited ones are the following: (1) continued and severe oppression of a people by the state,[61] (2) blockade of meaningful execution of internal self-determination with an absence of peaceful resolution of the conflict,[62] (3) gross human rights violations[63] or genocide,[64] (4) discrimination of a minority combined with its non-representation in the government[65] or the most vague (5) impossibility of further living together of ethnic groups.[66] Against this exceptional

[56] James Summers, *Peoples and International Law*, *op. cit.*, pp. 63, 341-343.

[57] Han Liu, *op. cit.*, p. 357; Nihal Jayawickrama, *The Right of Self-Determination: A Time for Reinvention and Renewal* in: *Self-Determination. International Perspectives*, p. 356.

[58] Cf. the *Reference re: Secession of Quebec* case of the Canadian Supreme Court, DLR 161 (1998), 4th Series, § 126.

[59] Cf. separate opinions of judges Trindade and Yusuf in *Kosovo (Advisory Opinion)*, pp. 596-597, § 184; pp. 621-622, § 9-10.

[60] Amy E. Eckert, *op. cit.*, p. 68.

[61] Han Liu, *op. cit.*, p. 357. See also Milena Sterio, *op. cit.*, p. 303.

[62] This formula was coined by the Canadian Supreme Court in the *Québec* case.

[63] Cf. Simone F. van den Driest, *op. cit.*, p. 345. See also Amitai Ezioni, *The Evils of Self-Determination*, Foreign Policy, Winter 1992-93, pp. 21-35.

[64] Hurst Hannum, *op. cit.*, pp. 776-777.

[65] Nihal Jayawickrama, *op. cit.*, p. 357; Frederick L. Kirgis, Jr., *Editorial Comment: The Degrees of Self-Determination in the United Nations Era*, American Journal of International Law, vol. 88, 1994, pp. 304, 306; Hurst Hannum, *op. cit.*, p. 777.

[66] Ved P. Nanda, *op. cit.*, p. 452.

form of self-determination, the internal type might be viewed the most preferred and endorsed. Nevertheless, it stops short of providing standards of democracy and representativeness for the newly constituted states, especially in the process of decolonisation.[67]

The distinction between external and internal self-determination is far from being a neutral doctrinal construct. In itself it reveals that self-determination is constructed as a promise—especially in its external dimension—that can hardly be enforced. Internal self-determination acts as a means of reabsorbing centrifugal forces into the framework of the international state order.

3.3. Self-Determination Between Right and Principle

It used to be a subject of a vivid debate whether self-determination is just a principle of international law or a developed right.[68] The confusion surrounding the issue at least partially stems from the fact that self-determination was from its very beginnings linked to the term "right," even if it was not understood as a right in the strictly legal sense, but more of a moral or natural entitlement backed up by modern nationalism. Nevertheless, self-determination in international law developed rather as a principle and not an executable right.

The crucial difference between the two statuses seems to consist in enforceability.[69] Self-determination as principle can be opposed to other principles of international law and its eventual application is dependent on how they are weighed in a given case. Contrariwise, self-determination construed as right is closer to practice and can be applied more directly than in the case of principle. The passage from self-determination understood as principle to self-determination as a legal right would therefore well match the evolution of this concept.[70] Nowadays the legal right to self-determination has vocal adherents.[71] Moreover, the language of the

[67] Gerry J. Simpson, *op. cit.*, pp. 278-279.

[68] James Summers, *Status of Self-Determination in International Law*..., *op. cit.*, pp. 278-280.

[69] As James Summers puts it, "Self-determination as a principle seems to be more general, neutrally framed, being applied to a subject rather than being held by a subject or against an object, and also visibly relative. Principles are weighed against each other to determine how they are to be applied. A right of self-determination, on the other hand, is seen to be held by a subject, a 'people', against an object, states, which have obligations towards that subject. It is seen as more active, being claimed by a people rather than being applied to them, and the word itself is emotionally and politically charged" [*Ibid.*, pp. 273-274].

[70] Apart from this discussion, another dispute concern the status of self-determination as potential part of *ius cogens* [see *ibid.*, pp. 283-292].

[71] James Summers, *Peoples and International Law: How Nationalism and Self-Determination Shape a Contemporary Law of Nations*, The Hague: Martinus Nijhoff, 2013, pp. 70-78; Hurst Hannum, *op. cit.*, p. 775.

UN Charter, 1966 Covenants[72] and the General Assembly's Resolution 1514, as well as the approach of the ICJ[73] gives them strong, although still ambiguous[74] endorsement (at least in the decolonisation context[75]). Nevertheless, shifting self-determination from the domain of principles to the rank of rights only accentuates conceptual problems related to the execution of this right.

Perhaps then self-determination should not be analysed within the opposition principle/right, but in a much more fruitful, although intellectually challenging dualism of norm and exception. Self-determination is heralded as a norm of international law, but its execution—which almost always undermines the sacrosanct division of the globe into nation states—functions as an effective exception. Consequently, self-determination would be a paradoxical right which is exercised through suspending of basic principles of international law.[76] It is for this reason that most solemn declarations about the liberty of self-determination are in principle limited by the indispensable mention of territorial integrity[77] and, in practice, by usually reluctant endorsement of secessionist claims by states.

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72 Amy E. Eckert, *op. cit.*, p. 68.

73 Advisory Opinion in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* Case, ICJ Reports 1971, pp. 16, 31; Advisory Opinion in *Western Sahara* Case, ICJ Reports 1975, pp. 12, 31.

74 James Summers, *Status of Self-Determination in International Law*..., *op. cit.*, p. 280.

75 Ved P. Nanda, *op. cit.*, p. 450.

76 Cf. Gerry J. Simpson, *op. cit.*, pp. 260-261.

77 Helsinki Final Act (1975) provides a good example in this regard. Principle VIII attempts to safeguard maximum liberty of self-determination with the admonition about respect of territorial integrity: "Equal rights and self-determination of peoples The participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States.

By virtue of the principle of equal rights and self- determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development. The participating States reaffirm the universal significance of respect for and effective exercise of equal rights and self- determination of peoples for the development of friendly relations among themselves as among all States; they also recall the importance of the elimination of any form of violation of this principle." [Organization for Security and Co-operation in Europe (OSCE), Conference on Security and Co-operation in Europe (CSCE) : Final Act of Helsinki, 1 August 1975, available at: http://www.refworld.org/docid/3dde4f9b4.html [accessed 18 March 2018]. See also Simone F. van den Driest, *op. cit.*, pp. 337-338, 340; James J. Summers, *The Right of Self-Determination*..., *op. cit.*, p. 333-334.

3.4. The Meaning of People's Consent

As I remarked earlier, since Wilson's programme the right to self-determination connotes the consent of the people to the government which holds power over them. For this reason self-determination is inextricably intertwined with call for democracy[78] and people's participation in government.[79] Nevertheless, the consent of the people is in itself a volatile concept. Its potentially dangerous vagueness is particularly visible when it is understood in its negative form,[80] that is when the right to self-determination is invoked against an illegitimate (unrepresentative) government. There are multiple ways in which a government may lose the consent of the people, but obviously not all of them trigger the context of self-determination. How then can we determine that self-determination is rightfully invoked?

Drawing from the example of decolonisation, the most undisputed case of a government that lacks people's consent is colonial administration. In this regard the illegitimacy stems from the act of subjugating an essentially foreign population by a colonial power. One can hardly imagine a more distinct discrepancy between the population and its government: usually the colonisers and the colonised speak different languages (or at least the official language, imposed by the colonial power, differs from the vernacular), there are of different ethnic origin and religions. If the colonial administration is autonomous from its mother state, the perception of rift between the population and the imposed government is even greater. Yet even then self-determination requires some degree of active people's decision: unless it matures, colonies' need of independence may be rightly doubted. Such a decision may have, however, quite a formal character. Self-determination in decolonisation does not require mandatory plebiscite or referendum. The active consent may be expressed just through emergence of a group that is ready to take power and constitute the new administration. In this case, people's consent may be taken for granted.

The situation is not far different in case of ethnicities living in multi-national states. As demonstrated by Wilson's programme, which concerned primarily Central and Eastern Europe—previously covered by great empires which were not, at least in the traditional sense, agents of colonisation—some ethnicities are deemed rightful subject of self-determination. In this case the stress is not, as in the case of colonies, on the separately administrated territories, but on the differences of language, religion or ethnicity that define the new "nation." It is assumed that these populations have the right of representative governments, even if in practice it often

[78] Cf. Reginald Ezetah, *The Right to Democracy: A Qualitative Inquiry*, Brooke Journal of International Law, vol. 22, 1997, pp. 495-504.

[79] Hurst Hannum, *op. cit.*, p. 778.

[80] Valerie Epps, *op. cit.*, p. 436.

meant that these governments should be free from European colonists and not necessarily representative of all minorities.[81] Nevertheless, their consent to the new government also must be somehow expressed. Self-determination after the World War I proved that it does not have to take form of an all-nation referendum: the activity of the newly emerging administration and the success in forming an effective government are sufficient. Currently, referenda are more popular, as demonstrated by the examples of South Sudan (successful), Scotland (unsuccessful) or Catalonia (unrecognised by the state).

All these cases are clearly different from a situation in which a country is ruled by a government that lacks people's consent as to its legitimacy and actions, but the unity of the state and its representativeness of the people is not contested. In this case, self-determination of nations enters a grey zone. Beyond doubt, the democratic component of this right justifies the demand of a representative government which enjoys popular approval. However, as international law does not seem to contain an undisputed norm of democratic entitlement (contrary to the doctrine elaborated in the 90s, which will be discussed later), it cannot be claimed that international law stipulates that the nation can demand a democratic government. [82] Moreover, it is at least dubious whether the democratic component can be separated from the core of the right to self-determination, which is usually viewed as equivalent to secession of a separate "nation." Obviously, self-determination is part and parcel of the same complex of ideas that grounds representative democracy, but it is hardly invokable if there is no structural discrepancy between the people and its government. This discrepancy is well visible in case of colonies or ethnic minorities occupying a determinable territory. Yet when a given government is simply undemocratic, but still "represents" the nation insofar as there is no common perception of an essential rift that could ground secession (as, for example, in the case of socialist governments in CEE/SEE before 1989), self-determination is latent at best.

It seems therefore that the general conception of people's consent inherent in self-determination has two aspects that must co-exist in order to justify an act of self-determination.[83] Firstly, there is a need of an actual consent of the people for the government: either for the existing one or for the one that is going to emerge in self-determination. Wilson's idea of plebiscites, still resounding in contemporary independence referenda, embodies the necessity of actual expression of people's

[81] See Gerry J. Simpson, *op. cit.*, pp. 273-274.

[82] Amy E. Eckert, *op. cit.*, p. 57.

[83] The following division resembles the classic distinction between objective and subjective criteria of determining what is a nation in the context of self-determination [cf. Simone F. van den Driest, *op. cit.*, pp. 338-340], but concentrates on grasping the paradoxes of people's consent.

views. Yet consent is not enough. It requires a substantial ground that justifies the separation of the entity that is to be a subject of self-determination. This ground must be not only the crucial object of consent, but also its justification. People's dissent concerning the legitimacy of the government itself is not sufficient: it must concern an essential, broadly perceived discrepancy between the government and the population, which makes the former unrepresentative regardless of any criteria of democratic elections.

As a consequence, self-determination combines two ideas in a paradoxical manner. On the one hand, it purports to guarantee some degree of democratic entitlement. Self-determining nations should have governments that—at some basic level—are representative and enjoy people's consent. On the other hand, this democratic entitlement is focused on the existence or inexistence of the fundamental discrepancy between the population and the government. History of the right to self-determination as part of international law clearly demonstrates that the people's consent does not concern the effective functioning of democracy (democratic elections, standards of law-giving, transparency, rule of law, people's participation in public matters etc.), because a perfectly legal execution of this right might lead to establishment of an undemocratic government (as it was the case of numerous post-colonial countries in Africa or majority of the post-Soviet republics). What matters in light of self-determination is the existence of a fundamental division, perceived among the self-determining group as an irremovable rift between the government and itself.

It may be argued that this rift conspicuously resembles Carl Schmitt's concept of the enemy as the ground for the most basic, unaccountable political distinction.[84] Naturally, it appears in most crystal forms in case of colonies or developed ethnicities living in multi-ethnic countries, where the rift has grounds in naturalised linguistic and cultural differences. But even in these cases latent ethnic and/or cultural divergences need to be fuelled and channelled into a fundamentally political rift, which is well demonstrated by cases of Scotland and Catalonia. To a certain degree, its emergence and development are unpredictable. Moreover, the political division may produce a field of fluctuating differences prone to be intercepted by nationalism. Portraying the government as "foreign" seems legitimate when it is a colonial administration effectively imposed by another country, but is much more disputable when it concerns a democratic and representative government of a multi-ethnic state in which a given minority does not find its demands met.[85] In such cases

[84] Carl Schmitt, *The Concept of the Political*, tr. G. Schwab, Chicago: University of Chicago Press, 2007, pp. 26-38.

[85] Cf. Valerie Epps, *op. cit.*, p. 439.

self-determination may clearly give preference to understanding the nation not as *demos* (a community of equal citizens, regardless of their ethnicity, language, religion etc.), but as *ethnos* (an organic community built upon ethnic, cultural and linguistic criteria).

Therefore self-determination combines democracy and a political division, which may work well in peaceful times but are susceptible to be intercepted by nationalism and fall into the spiral of defining who belongs to the nation and who is "foreign." The somewhat superficial claim that nations have the right to choose representative government—most recently highlighted by Judge Yusuf in *Kosovo*[86]—resembles a long jump over the abyss that sometimes produces the deadly spiral of nationalist welding of the state with "its" nation.

3.5. Conclusion: The Abyss of Self-Determination

The above-mentioned tensions clearly demonstrate that self-determination is far from being an objective, enforceable and effective right. It should be rather viewed as a conceptual lid which, under the varnish of solemn declarations, contains a pivotal nexus of paradoxes inherent in contemporary international law. It is much more than just impossibility of producing a convincing theory of self-determination, as Han Liu suggested:

> The hope for a normative theory of a general right to national self-determination fails, practically and conceptually. Practically, claims to such a right produces wars, terrorism, and even ethnic cleansing. Conceptually, the right to national self-determination fails to provide a standard for determining the division of populations and territories. That is because no theory can remove the contingency of national identities and the arbitrariness of territorial divisions. Theory cannot tell us whether a seceding group is a true nation, nor can it tell us where group belongs.[87]

Moreover, it would be an act of daydreaming to imagine that self-determination might be disposed of, altogether with nationalisms that fuel it. As long as international law is based on division of the world into states—which is a realm of facts retroactively created by international law through its withdrawal—self-determination will remain a powerful and potentially disastrous conceptual abyss in international order.

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[86] Separate Opinion of Judge Yusuf to *Kosovo* Advisory Opinion, § 9.

[87] Han Liu, *op. cit.*, p. 383.

4. The Return of Self-Determination in Its Democratic Claim

Just after the fall of the Iron Curtain and the subsequent spread of liberal democracies throughout the world, the right to self-determination, already in limbo after the end of decolonisation, was open for reinterpretations. Apart from its traditional scope, still applicable to post-Soviet and post-Yugoslav countries, some theorists returned to its essential relation with democracy. In this manner self-determination became part of the right to democratic entitlement which was optimistically praised as budding—but already binding—norm of international law.

According to Thomas Franck, probably the most influential proponent of this vision,[88]

> Self-determination is the historic root from which the democratic entitlement grew. Its deep-rootedness continues to confer important elements of legitimacy on self-determination, as well as on the entitlement's two newer branches, freedom of expression and the electoral right.[89]

As described above, in international law the right to self-determination of nations has a rather limited (although controversial) scope.[90] Franck wrote his article when this right had already undergone the process of re-adaptation to the new, post-colonial world, in which globalisation made appearances of undermining state sovereignty.[91] In his view, it was no longer a right of peoples, but also of individuals ("the right of everyone"[92]):

> It also, at least for now, stopped being a principle of exclusion (secession) and became one of inclusion: the right to participate. The right now entitles peoples in all states to free, fair and open participation in the democratic process of governance freely chosen by each state. When such participation is denied, when a people that, in the terms of the aforementioned 1960 General Assembly resolution, "is geographically separate and is distinct ethnically and/or culturally" has been placed "in a position or status of subordination," perhaps a secession option may reemerge as an international legal entitlement. That aspect of self-determination, however, is far less clear at present than the entitlement to democratic participation in governance.[93]

88 Amy E. Eckert, *op. cit.*, pp. 58-60.

89 Thomas M. Franck, *The Emerging Right to Democratic Governance*, The American Journal of International Law, Vol. 86, No. 1, January 1992, p. 52.

90 James Crawford, *The Creation of States in International Law*, Second Edition, Oxford University Press, Oxford 2006, pp. 107-128.

91 Gerry J. Simpson, *op. cit.*, p. 263.

92 Thomas M. Franck, *op. cit.*, p. 59.

93 *Ibid.*

The right to self-determination of nations in the decolonisation process was relatively easy both to execute and to theorise. Non-self-governing territories were already demarcated, which enabled secession according to the *uti possidetis* rule. Relative autonomy of colonial administrations allowed of their conversion into governments of new nations. And, most importantly, the delegitimisation of colonialism after the Second World War deprived colonial powers of recognised arguments for preservation of their control over seceding territories.

Nevertheless, the almost total accomplishment of the decolonisation process lead to crystallisation of the open clinch between the right to self-determination and territorial integrity of states as protected by international law. It is in this light that Franck's attempt to reinterpret the right to self-determination should be read. Instead of being an essentially provocative right of the whole political and ethnic entities to secede, it began to be linked rather with the right of individuals to be included in the political process.[94] In this view, secession would be only the final guarantee of democratic entitlement, a right of more theoretical than practical importance. It functioned as in the early modern theories of monarchic rule, in which the people were theoretically entitled to depose a ruler who resorted to tyranny.[95] In practice, however, both the right to secession and the right to depose a tyrant constituted an ideological fiction supporting the status quo, rather than an effectively executable entitlement.

Nevertheless, Franck's reinterpretation—in itself representative of the liberal spirit of the early 90s—reinvented self-determination in the post-colonial world. It attempted to disarm the dangerous potential of this right and sublime it to pro-democratic actions. But instead, it contributed to its vagueness and the possible interception of the democratic claim by anti-democratic movements.

5. Revival of Self-Determination in European Populism

Setting aside the question whether such a reinterpretation of the right to self-determination was justified, it seems that the understanding of this right reflects deep, tectonic transformations of socio-political perspectives on relations between the state and the population. In the 90s, the right to self-determination was dominated by liberal visions; international law promoted internal self-determination guaranteed by human rights protection and liberal institutions. External self-determination,

[94] According to Valerie Epps, this process goes hand in hand with the shifting focus of international law itself—from states and nations to individuals and groups. See Valerie Epps, *op. cit.*, p. 441.

[95] See for example John Locke, *Two Treatises on Government*, London 1689, Book Two, chapters XVII-XIX.

however, was still approached with suspicion; at best remedial secession was gaining acceptance, albeit in legal scholarship rather than in state practice.

At the end of the 2000s, however, perspectives on the right to self-determination began to change, alongside the eclipse of the liberal era. First, in international law this right became a field of contention. The UN-shaped version of self-determination seemed to reach the end of its applicability, but new forms were still vague and found no uniform *opinio iuris*. Second, self-determination brimmed over its international form and was rekindled in political discourses. Populist movements began to use it in order to (1) rebuild the concept of the nation, no longer understood in the liberal framework of *demos*, but more or less dangerously bordering on the idea of *ethnos*,[96] (2) accentuate autonomy of sovereign states against norms of international provenance, (3) challenge the international order based on cooperation, integration and international organisations.

In liberal democracies, "the nation" is usually a concept referring primarily to a community of individuals who are protected from abuses of state power by human rights. For this reason in European constitutions individuals' rights are usually much more detailed and concrete than any rights of the nation as such—in the line of tradition that harks back to French 1789 Declaration of the Rights of Man and of the Citizen. The nation, however, functions more as imaginary element which legitimises the state power as its alleged supreme supervisor and not as active political subject. It is in this sense that Slavoj Žižek (inspired by Claude Lefort) perspicuously noted how such "nation" appears only in the act of voting—always as a divided entity—and then miraculously dissolves into the particularised civil society.[97] In the triangle made up by the individual, the state and the nation the relation between the state and the nation are generally subservient to those that link the individual and the state. This order is perhaps most visible in the German constitution, which refers to the German nation (*das deutsche Volk*) only insofar as the collective subject of constitution- or law-making is required or the source of state power is to be named, for example in the Preamble[98] or Article 20(2).[99] Whenever rights of individuals,

[96] This process is well discernible in the Constitution of Hungary from 2011, which markedly prefers "nation" over "people." See Zsolt Körtvélyesi, *From 'We the People' to 'We the Nation'* in: Gábor Attila Tóth (ed.), *Constitution for a Disunited Nation. On Hungary's 2011 Fundamental Law*, Budapest–New York: Central European University Press 2012, pp. 111-139.

[97] Slavoj Žižek, *The Sublime Object of Ideology*, Verso, New York & London 2008, pp. 165-166.

[98] *Im Bewußtsein seiner Verantwortung vor Gott und den Menschen, von dem Willen beseelt, als gleichberechtigtes Glied in einem vereinten Europa dem Frieden der Welt zu dienen, hat sich* ***das Deutsche Volk*** *kraft seiner verfassungsgebenden Gewalt dieses Grundgesetz gegeben.*

[99] *Alle Staatsgewalt geht vom* ***Volke*** *aus. Sie wird vom* ***Volke*** *in Wahlen und Abstimmungen und durch besondere Organe der Gesetzgebung, der vollziehenden Gewalt und der Rechtsprechung ausgeübt.*

rights of the nation and entitlements of the state are juxtaposed, liberal democracy usually accords priority to the former, which is best exemplified by Article 1 of the German Constitution that states:

> (1) Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt.
> (2) Das Deutsche Volk bekennt sich darum zu unverletzlichen und unveräußerlichen Menschenrechten als Grundlage jeder menschlichen Gemeinschaft, des Friedens und der Gerechtigkeit in der Welt.
> (3) Die nachfolgenden Grundrechte binden Gesetzgebung, vollziehende Gewalt und Rechtsprechung als unmittelbar geltendes Recht.

The first paragraph posits dignity of human beings as inviolable object of state protection. Then it switches to the perspective of the international community, in which individuals are represented by their collective representation, namely the nation. And finally, in the third paragraph, the state in its three branches is determined negatively, namely as the entity bound by the rights of individuals.

Against this liberal, almost technical vision of the nation, which is *de facto* an artifact created by the law, the new wave of populism reinvigorates more essentialists concepts of the nation. As a consequence, it often loosens its direct link to the law—to which the liberal tradition is so attached—and gains its own momentum. It is often presented as a pre-legal entity, to which one belongs not according to criteria that are objectively verifiable and legally defined (such as citizenship or criteria that allow of recognising / granting citizenship), but vague and susceptible to political manipulation (ethnicity, race, religion etc.). The excluding potential of such a vision is noticeable especially in those discourses that praise the "defence" of European nations against other cultures. "Nations" in this meaning are constructed with the old-age nationalist methods and presented in the garb of quasi-mystical eternal hyper-communities that essentially transcend the sum of individuals.

The reinvention of European nations—against the spirit of liberal democracy of the early 90s and in accordance with older nationalist discourses—made the right to self-determination particularly prone to be intercepted by the new wave of populism. Thus adapted, self-determination laid bare some fundamental inconsistencies of the liberal discourse, so well discernible in Franck's reappropriation of this term. When Franck understood it as the right that "now entitles peoples in all states to free, fair and open participation in the democratic process of governance freely chosen by each state", he (1) effectively abstained from investigating the relation between individuals and "peoples", thus obfuscating the role of constituent power

which first determines the regime of a state and only retroactively seeks support for it, (2) did not specify the boundaries of "the democratic process of governance", especially its admissible exclusivity; this process may exist even if the self-governing community is based upon a fundamental exclusion of elements that are "foreign to the body of the nation", (3) provided too much fictional leeway for the states to choose "freely" the democratic process of governance. On the one hand, he included too many ideological fictions in his discourse in order to prevent the situation in which his conditions would not be adaptable to an anti-liberal vision of democracy but, on the other hand, opened the way for questioning the real sense of promises that liberal democracy made.

The intercepted usage of self-determination is well visible in the following quote from Marine Le Pen, a right-wing candidate in 2017 French presidential elections:

> The EU is deeply harmful, it is an anti-democratic monster. I want to prevent it from becoming fatter, from continuing to breathe, from grabbing everything with its paws and from extending its tentacles into all areas of our legislation. In our glorious history, millions have died to ensure that our country remains free. Today, we are simply allowing our right to self-determination to be stolen from us.[100]

In this neo-nationalist reappropriation, self-determination is clearly established against liberal democracy allegedly embodied by the international institutions, especially the EU. In this regard, it reapplies the old-age nationalist discourse against the international community. Yet what adds new value is the interception of the pro-democratic edge of self-determination. In a sense, it follows the liberal trend of reaffirming the right to self-determination as the right to democratic participation, but now it is presented as a kind of "arch-democratic" entitlement of the population to gain unique sovereignty over itself. The population, however, is not circumscribed according to legal criteria, but with a reference to a myth, modelled within the classically nationalist imagery of blood, death and national freedom.[101] Such re-appropriation of the right to self-determination demonstrates how easily this element democratic entitlement can be used within the nationalist discourse. Moreover, it does not act as a mere ornament, but as the core of anti-liberal

[100] Interview with Marine Le Pen by Mathieu von Rohr, *I Don't Want This European Soviet Union*, *Spiegel*, 3 June 2014, source: http://m.spiegel.de/international/europe/interview-with-french-front-national-leader-marine-le-pen-a-972925.html, last accessed: 31 March 2021.

[101] Cf. Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, Verso, London 1983.

argumentation. In this function, it parasites on promises that liberal democracy offered in the early 90s but was not able to prevent their abuse.

In his study *What Is Populism?*[102] Jan-Werner Müller convincingly demonstrated how populism is not essentially anti-democratic, but, on the contrary, draws from the democratic demand and exploits it for political purposes.[103] It calls for more direct and representative democracy, simultaneously switching off the fuses of the rule of law. It demands the replacement of elites in favour of "the majority of ordinary people." As far as self-determination is concerned, European populism—both in power, like in Hungary[104] and Poland, and still competing for it, like in France or Germany—attempts to vindicate the radically democratic potential of this concept in order to turn it against international law and European integration.

The problem of entities demanding self-determination in the classic understanding of the term concerns currently only few EU countries: the UK (Scotland, Northern Ireland) and Spain (Catalonia and the Basque Country). But against the latency of secessionist claims, self-determination is used as a concept that is meant to strengthen national sovereignty. The paradox of people's consent is here particularly visible. Neither Hungary, nor Poland need secession, as they are since long independent countries. Notwithstanding this fact, self-determination is invoked by the ruling populist majorities in order to combat international influences on these countries. In the classic populist short-circuit, they present some estranged, non-national elites as wielding true power.[105] From the point of view of international law, there is no fundamental division between the population and its government. Yet the populist movements use the conceptual armature of the right to self-determination in order to instil the basic rift between "ordinary people" and "international elites" of power. This division, of essentially political nature, automatically produces "the true nation" (supporting the populists) against the scapegoat of "elites." The will of the people, so often used in the language of international law of self-determination (for example by the ICJ in *Western Sahara*) is vague enough a concept to be intercepted by those who usurp to themselves the act of determining this will. The inherent paradox of this

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[102] Jan-Werner Müller, *What Is Populism?*, Philadelphia: University of Pennsylvania Press, 2016.

[103] See also Yves Mény, Yves Surel, *The Constitutive Ambiguity of Populism*, in: Y. Mény, Y. Surel (eds.) *Democracies and the Populist Challenge*, Basingstoke: Palgrave, 2002, pp. 5-6; Margaret Canovan, *Taking Politcs to the People: Populism as the Ideology of Democracy*, in: *Democracies and the Populist Challenge*, pp. 25-43.

[104] On the shift to populist nationalism in the new Hungarian constitution see generally: Gábor Attila Tóth (ed.), *Constitution for a Disunited Nation...*

[105] Yves Mény, Yves Surel, *op. cit.*, pp. 11-16.

formula was already denounced: if the people want to govern themselves undemocratically, they can democratically choose to do so.[106] Populist movements of Europe perform therefore a misuse analogous to that the exponents of the right to democratic entitlement applied: they accentuate one element of self-determination (its radically democratic component) against the embedding of this right in international law (and the rule of law).

6. Conclusions

The right of peoples to self-determination is a notorious minefield of international law. It was created to accommodate—within a legal framework—demands of modern nationalism, but it never escaped its complex character that links law and fact, politics and norms. After the fall of decolonisation, when it was channelled into the broadly accepted pattern of secession, it once again revealed itself as a source of paradoxes. Michael Kirby's remark about self-determination as a battleground in hearts of ordinary people[107] seems now pertinent more than ever. Self-determination combines a radical democratic kernel with creation and diffusion of a fundamental political division. As such, it is easily adaptable to be intercepted by populist politics. On the one hand, self-determination as a tool in the wrestling between major world powers (as in the case of Crimea). On the other hand, it is used beyond the context of international law in domestic politics of some European countries (for example Poland, Hungary and France), where it acts as means to propagate a rift between illegitimate "elites" and parties that represent "true, national majority." In the latter form, it acts not only against international law, but the rule of law as such.

Self-determination is nowadays a field of geopolitical and ideological battle rather than an established and unequivocal corpus of law. As such, it might be useful tool of populist politics, thriving on the fundamental division that this concept assumes. We can no longer pay lip service to the importance of self-determination (so often invoked in international law despite its very questionable enforceability[108]) and hope it will not be exercised. Now, more than ever, it requires reconsideration. Re-examination of the right of peoples to self-determination should not have as its aim, however, the utopian goal of finally establishing its 'correct' meaning or circumscribing its effects within neat definitions of

[106] Amy E. Eckert, *op. cit.*, pp. 71-72.

[107] Michael Kirby, Self-Determination: *A Consideration of the Present and a Glimpse into the Futur*e in *Self-Determination. International Perspectives*, p. 382.

[108] Gerry J. Simpson, *op. cit.*, p. 258.

international law. It should rather attempt to identify and expose inherent paradoxes of self-determination which make it such a malleable tool of international and domestic politics.

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Abstract

The paper aims to re-examine crucial aporias of the right of peoples to self-determination in the light of its contemporary misuses in the parlance and practice of the so-called "populist" regimes. The right to self-determination, traditionally identified as rife with paradoxes and uncertainties, is since long at a crossroads. After the ICJ's advisory opinion in *Kosovo* it was revealed as ravaged by an internal abyss dissociating its content from its applicability. As a result, the meaning of self-determination in international law—on the one hand corroborated by ample *opinio iuris* but on the other hand not corresponding to the actual possibilities of its application—is more unstable than ever. This restores its pre-legal qualities and fuels the revival of self-determination imagery centred on the nation understood as *ethnos* in populist discourses.

Key words: self-determination, democratic governance, populism, nationalism

Prawo ludów do samostanowienia. Europejski powrót zaniedbanego paradoksu
Streszczenie

Celem artykułu jest analiza kluczowych aporii prawa ludów do samostanowienia w kontekście jego współczesnego wykorzystania i nadużywania w dyskursach politycznych tzw. reżimów populistycznych. Prawo do samostanowienia w samym prawie międzynarodowym jest zwykle uznawane za nieprecyzyjne i pełne paradoksów. Stanowiąc inskrypcję nacjonalizmu do prawa międzynarodowego, zajmuje ono aporetyczną pozycję pomiędzy prawem *sensu stricto* a doktryną polityczną. Od czasu wydania przez MTS opinii doradczej w sprawie *Kosowa* jest dotknięte fundamentalnym pęknięciem rozdzielającym treść tego prawa od jego stosowalności i egzekwowalności. Co za tym idzie, prawo do samostanowienia – z jednej strony potwierdzone mocnym *opinio iuris*, a zarazem nieodpowiadające faktycznym możliwościom jego zastosowania – jest w dzisiejszych czasach wyjątkowo niestabilne

i nieprecyzyjne. To zaś sprawia, że jego polityczna warstwa powraca poza wymiarem ściśle prawnym, prowadząc do odrodzenia imaginarium samostanowienia opartego na narodzie rozumianym jako *ethnos*.

Słowa kluczowe: samostanowienie, prawo do rządów demokratycznych, populizm, nacjonalizm