The Right of Self-Determination: Its Emergence, Development, and Controversy

Hak Menentukan Nasib Sendiri: Kemunculan, Perkembangan, dan Kontroversinya

Munafrizal Manan

Dosen Universitas Al-Azhar Indonesia, Jakarta
Jalan Sisingamangaraja, KebayoranBaru, Jakarta Selatan
munafrizal@uai.ac.id

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Abstract

This paper discusses the right of self-determinationfrom international law and international human rights law perspective. It traces the emergence and development of self-determination from political principle to human right. It also explores the controversy of the right of self-determination. There have been different and even contradictory interpretations of the right of self-determination. Besides, there is no consensus on the mechanism to apply the right of self-determination. Both international law and international human rights law are vague about this.

Keywords: *Self-determination, the right of self-determination, secession.*

Abstrak

Paper ini membahas hak penentuan nasib sendiri dari perspektif hukum internasional dan hukum hak asasi manusia internasional. Paper ini menelusuri kemunculan dan perkembangan penentuan nasib sendiri mulai dari sebagai prinsip politik hingga menjadi hak asasi manusia. Paper ini juga mengeksplorasi kontroversi atas hak penentuan nasib sendiri. Ada perbedaan dan bahkan petentangan penafsiran tentang hak penentuan nasib sendiri. Di samping itu, tidak ada konsensus tentang mekanisme melaksanakan hak penentuan nasib sendiri. Baik hukum internasional dan hukum hak asasi manusia internasional kurang begitu jelas mengatur tentang ini.

Kata Kunci: Penentuan nasib sendiri, hak penentuan nasib sendiri, pemisahan diri.

INTRODUCTION

Self-determination has long been debated in both international law and international human rights law. Although it has been admitted that people should enjoy the right of self-determination, there have been adversarial opinions on the application of this right. While its application has resulted in decolonization and the emergence of new states,[1] the debate still continues in the post-colonial period. Basically, the debate stems from the application of the principle of self-determination. Some argue that it was intended to be applied universally, while others argue that it was deliberately designed to a particular category of people.[2]

It is a fact that many peoples around the globe are still claiming the right to self-determination[3] and they have been slaughtering each other to pursue national self-determination.[4]A historical figure shows that at least fifty-five states had become independent and benefited from the right of self-determination from 1945 to 1970.[5] There are some parts of the world struggling to achieve the right to self-determination for minorities which shows that the right to self-determination remains highly relevant. It is estimated that 140 minority groups in every corner of the globe asserting their right to self-determination today.[6] They have been struggling by both armed conflict and peaceful movement. Some have successfully achieved the right to self-determination in terms of independent statehood, such as East Timor, Kosovo, and Southern Sudan. But others are still tirelessly struggling to achieve it such as Tibetans, Kashmiris, Palestinians, Chechens, South Ossetians, and the Abkhaz. Weller succinctly notes:

> *At present, there are about 26 on going armed self-determination conflicts. Some are simmering at a lower level of irregular or terrorist violence; others amount to more regular internal armed conflicts, with secessionist groups maintaining control over significant swathes of territory to the exclusion of the central government. In addition to these active conflicts, it is estimated that there are another 55 or so campaigns for self-determination which*

[1] A figure shows that "[t]he growth of UN membership from its original 51 members States in 1945 to 149 in 1984 was essentially due to decolonization. The increase in this figure from 151 in 1990 to 191 at present has been essentially due, broadly speaking, to secession". Marcelo G. Kohen, Introduction, in Marcelo G. Kohen (ed.), *Secession: International Law Perspectives* (Cambridge: Cambridge University Press, 2006), p. 2.

[2] Helen Quane, "The United Nations and the Evolving Right to Self-Determination", *International and Comparative Law Quarterly*, Vol. 47, Issue 03, July 1998, p. 554.

[3] Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995), p. 1,

[4] Charles Tilly, "National Self-Determination as a Problem for All of Us", *Daedalus*, Vol. 122, No. 3, Summer, 1993, p. 31.

[5] Jan Klabbers, "The Right to be Taken Seriously: Self-Determination in International Law", *Human Rights Quarterly*, Vol. 28, No. 1, February 2006, p. 192.

[6] S. Eban Ebai, "The Right to Self-Determination and the Anglophone Cameroon Situation", *The International Journal of Human Rights*, Vol. 13 No. 5, 2009, p. 635.

may turn violent if left unaddressed, with another 15 conflicts considered provisionally settled but a risk of reignition.[7]

International law and international human rights law do not provide a clear mechanism how and in what circumstances enforcing the right to self-determination, unfortunately.[8] As a consequence, there are different interpretations of the legal status and application of the right to self-determination. The case of Kosovo and the recent case of Crimea, for example, confirmed such a view. This is the reason why the right to self-determination remains controversial today. In the famous words of the U.S. Secretary of State Robert Lansing, the right of self-determination is simply "loaded with dynamite". Moreover, according to Lansing, "[i]t will raise hopes which can never be realized" and even "cost thousands of lives".[9] Although such a view probably sounds pessimistic, this is particularly true in describing the realm of the right to self-determination.

The present paper aims to explore the issues of the right of self-determination from the perspective of both international law and international human rights law. There are two main issues will be addressed here. First, it proceeds with the normative status and scope of the right of self-determination in accordance with international legal perspective. It intends to explore what international human rights law say about the status and the scope of the right of self-determination. Second, if the right of self-determination has now been recognized as a human right, then why it is still viewed as a controversial right. Furthermore, if the right of self-determination is a controversial right, then how to enforce it in practice. To construct the argument, it is necessary to look at historical aspect of the emergence and development of the right of self-determination. The controversy of the right of self-determination should not, or perhaps cannot, be divorced from historical context.

ANALYSIS

A. From Self-Determination to the Right of Self-Determination

The attention to self-determination has emerged long before it then became a human right. Cassese has sketched well the emergence and development of

[7] Marc Weller, "Settling Self-Determination Conflicts: Recent Developments", *The European Journal of International Law*, Vol. 20, No. 1, 2009, p. 112.
[8] In this regard, Musgrave notes that "the exact parameters of the legal right of self-determination remain unclear. The post-war international instruments which invoke the 'right to self-determination' do not define that term in any detail". Thomas D. Musgrave, *Self-Determination and National Minorities* (Oxford: Clarendon Press, 1997), p. 91.
[9] As cited by Antonio Cassese, *op.cit.*, p. 22.

self-determination from historical perspective. He noted that the origin of self-determination can be traced back to the American Declaration of Independence of 1776 and the French Revolution of 1789. During this period, the meaning of self-determination was viewed from philosophical perspective that was influenced by the enlightenment ideas. The attention to self-determination spread out to across the world following the wake of the First World War, the Second World War and the Cold War. During this interwar period, the notion of self-determination was seen from political perspective.[10]

After the Second World War, the notion of self-determination was increasingly viewed from legal perspective and adopted into written positive law. The signing of the United Nations Charter in 1945 marked for the first time the world admitted self-determination as an important international law principle.[11] It was also for the first time self-determination was adopted into a multilateral treaty. Article 1(2) of the UN Charter states that one of the purposes of the UN is "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples".[12] However, the UN Charter "did not define the concept or distinguish between various forms of self-determination", "did not impose direct legal obligations on member states", and "did not translate into the right for minority groups to separate from sovereign mother states, or into the right for colonized peoples to achieve independence".[13] When proclaiming the principle or right self-determination of peoples, the UN Charter only pays attention to a people who has been denied their status and political right.[14]

Its culmination was probably the 1960 General Assembly Declaration on Granting of Independence to Colonial Countries and Peoples which is then often viewed as a milestone of the decolonization. Paragraph 2 of the 1960 Declaration states that "[a]ll peoples have the right of self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".[15] Indeed, the emergence of a legal right to self-determination has a close relationship with the movement for decolonization

[10] Antonio Cassese, *ibid.*, especially Chapter 2, p. 11-32.
[11] Quane points out that "[t]he development of the legal right to self-determination is based on the UN Charter". Helen Quane, *op.cit.*, p. 539. However, in the view of Mansell and Openshaw, "[t]he principle of self-determination was acknowledged in the UN Charter, but not as a legal right". Wade Mansell and Karen Openshaw, *International Law: A Critical Introduction* (Oxford and Portland, Oregon: Hart Publishing, 2013), p. 55.
[12] Malcolm D. Evans, *Blackstone's International law Documents 11th Edition* (Oxford: Oxford University Press, 2013), p. 10.
[13] Milena Sterio, *The Right to Self-Determination under International Law: "Selfistans,"Secession, and the Rule of the Great Powers* (Oxon, New York: Routledge, 2013), p. 10.
[14] Heribert Franz Koeck, Daniela Horn, and Franz Leidenmuehler, *From Protectorate to Statehood: Self-Determination v. Territorial Integrity in the Case of Kosovo and the Position of the European Union* (NWV: Vienna, Graz, 2009), p. 75.
[15] Malcolm D. Evans, *op.cit.*, p. 78.

during the 1960s.[16] The elaboration of the right of self-determination in the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations needs also to be taken into account here. The 1970 Declaration states that "all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development".[17] The 1970 Declaration was therefore intended to emancipate colonial peoples and countries from colonial powers and colonial regimes.[18]

Going further, self-determination has now been recognized as a human right by international human rights law which is well-known as the right of self-determination or the right to self-determination. The right of self-determination can be found in the two international covenants: the International Covenant on Civil and Political Rights (the ICCPR) and the International Covenant on Economic, Social and Cultural Rights (the ICESCR). The two Covenants, which are part of the so-called International Bill of Human Rights, were adopted in 1966 and came into force in 1976 after a sufficient number of state had ratified the Covenants. Since then, the right of self-determination is formally admitted as a human right. Article 1 of these Covenant states that:

> *All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development … The State Parties to the present Covenant, including those having responsibility for the administration of Non-self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.*[19]

The guarantee of the right of self-determination can also be found in the Declaration on the Rights of Indigenous Peoples. Article 3 and 4 of the Declaration provides 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 … Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or*

[16] Matthew Saul, "The Normative Status of Self-Determination in International law: A Formula for Uncertainty in the Scope and Content of the Right", *Human Rights Law Review*, Vol. 11 No. 4, 2011, p. 613.
[17] Malcolm D. Evans, O*p. Cit.*, p. 174.
[18] Heribert Franz Koeck, Daniela Horn, and Franz Leidenmuehler, O*p. Cit.*, p. 75.
[19] Sandy Ghandhi, *Blackstone's International Human Rights Documents*, 8th Edition, (Oxford: Oxford University Press, 2012), p. 35-36.

> *self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.*[20]

On 18 December 2007, the General Assembly of the United Nations adopted a resolution namely Resolution for Universal Realization of the Right of Peoples to Self-Determination explicitly stating that "the universal realization of the right of all peoples, including those under colonial, foreign and alien domination, to self-determination is a fundamental condition for the effective guarantee and observance of human rights and for the preservation and promotion of such rights".[21] The resolution reaffirms the legal character of the right of self-determination and obliges the States to respect it.

Although the right of self-determination is explicitly admitted by international law and international human right law, the debate remains arise regarding the exact meaning and scope of the right. It is not an easy task to define it precisely given that the meaning attributed to the right of self-determination has evolved over the last decades both with respect to its status and its scope.[22] Since norms have evolved, the interpretation of the right of self-determination has also evolved.[23] Accordingly, a working theory of the right of self-determination can even be interpreted differently.[24]

According to Saul, there are four different normative levels for the right to self-determination: human right, association with sovereignty, *erga omnes* and *jus cogens*.[25] First, with regard to human right, it should be noted that self-determination is not an absolute; hence its exercise must be subject to limitations and balances with other human rights. The problem with the right to self-determination is the lack of formal mechanism to enforce it.[26] Self-determination is therefore probably the most controversial provision included in the ICCPR.[27]

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[20] *Ibid*., p. 230.

[21] The UN General Assembly, Universal Realization of the Right of Peoples to Self-Determination, Resolution Adopted by the General Assembly, A/RES/62/144, 28 February 2008, p. 2, available at <http://www.refworld.org/docid/47cfd2b32.html> (accessed on June 19, 2014).

[22] Helen Quane, *op.cit.*, p. 538; Simone van den Driest, *Pro-Democratic Regime Change and the Right to Political Self-Determination: A Case Study of Iraq* (Nijmegen, the Netherlands: Wolf Legal Publishers, 2009), p. 1.

[23] Simon M. Weldehaimanot, "The ACHPR in the Case of Southern Cameroons", *SUR-International Journal on Human Rights*, Vol. 9 No. 16, June 2012, p. 89.

[24] Klabbers, for example, argues that "judicial and quasi-judicial bodies have, since the 1970s, reconceptualized the right of self-determination to come to terms with the (virtual) end of decolonization. Now that self-determination can no longer simply be construed as a right of colonies to independence, it has evolved into a right of peoples to take part in decisions affecting their future". Klabbers adds that "the right to self-determination is best regarded as a procedural right: the right to be taken seriously". See Jan Klabbers, O*p. Cit.*, p. 189.

[25] Matthew Saul, O*p. Cit.,* p. 626.

[26] *Ibid*., p. 627-628.

[27] McGoldrick as cited by Matthew Saul, *Ibid*., p. 628.

From the beginning, international law introduced the right to self-determination in vague terms. Both the legal content and normative status of the right to self-determination remains unsettled in international law.[40] As a result of the vagueness and indeterminacy of the normative status of the right to self-determination, states interpret the right to self-determination differently and selectively since this right is politically sensitive issue at the domestic level. The interpretation is suited with the context, interest, and changing political situation. This is why states are reluctant to decisively expose their views on the scope and content of the right to self-determination as a norm in international law. By so doing, it hopefully allows states to have plausible interpretation and anticipate unforeseen circumstances.[41]

Both in theory and State practice, the debate of the right of self-determination is dealing with the issues of "whether self-determination was in fact a legal norm or still only a political principle", "whether self-determination in international law is a legal rule or a legal principle", and "whether self-determination is a human right or a general international legal norm".[42]Also, there is a debate about the conflict between the principles of territorial integrity of states and the right of self-determination.[43]

Another crucial issue regarding the debate over self-determination is about the term "people", which is probably the most sensitive part of the topic self-determination. It has been debated which peoples would be entitled to the right of self-determination. Some scholars have simply argued that a "people" who are entitled to the right are only peoples under colonial rule, foreign occupation, or alien domination.[44] Some others argue that a "people" who are entitled to the right of self-determination refers, *mutatis mutandis*, to any distinct group as long as they have sufficient size living in a separate settlement area and are the victims of discrimination.[45] In the ICJ's Kosovo Case, "common suffering" was added as an identity to identify the "people", and is believed as the basis for a strong sense of identity.[46] For the Human Rights Committee of the ICCPR, "the scope of self-determination is not restricted to colonized peoples but continues to regulate

[40] *Ibid*., p. 610, 643.
[41] *Ibid*., p. 609, 611, 612, 621.
[42] *Ibid*., p. 625-626.
[43] Simon M. Weldehaimanot, *Op. Cit.*, p. 88.
[44] *Ibid*., p. 90; Milena Sterio, *Op. Cit.*, p. 3.
[45] Heribert Franz Koeck, Daniela Horn, and Franz Leidenmuehler, *op.cit.*, p. 99.
[46] Simon M. Weldehaimanot, Op. Cit., p. 91.

the constitutional and political processes within states".[47] However, "the United Nations and particularly the General Assembly in its numerous resolutions has restricted the meaning of "all peoples" to peoples living under colonial and racist regimes and those under alien occupation".[48]

It is obvious that there is no a consensus on the meaning of "all peoples" for the purpose of the right of self-determination. Therefore it leaves room for interpretations. The restrictive view argues that the phrase of "all peoples" merely refers to them who have been colonized by external power and therefore they are entitled to a right to secede. In contrast, the broad view argues that the phrase of "all peoples" suggests that the right covering a wider group of people than colonized peoples. The phrase of "all peoples" should not be restricted to colonized peoples, but rather should be interpreted broadly to cover peoples living in post-independent countries.[49]Cassese has advanced the argument that the meaning of "all peoples" phrase can be applied "not only to the peoples of territories that have not yet attained independence but also to those of independent and sovereign states".[50] Nevertheless, the broad view is probably more reasonable. If it is assumed that the right of self-determination is only for colonized peoples, then this right is actually not relevant to be adopted by post-independent states.

It is more complicated if the term of "peoples" is related to minority groups. Issues arise here whether all minority groups are included in the "peoples" or they must be distinguished from the "peoples" who are entitled to the right. It is worth noting that both Wilson and Lenin, when they spoke of self-determination after the First World War, actually did not imagine that the right of self-determination in terms of self-governance would be entitled to every minority group across the globe.[51]It should be noted that before the First World War self-determination for minority groups has not been discussed by international law.[52]Most states do not admit minorities have the right to secede as they view secession as a violation of the territorial integrity guaranteed by the UN Charter and also violation of

[47] *Ibid*., p. 90.
[48] Michael K. Addo, "Political Self Determination within the Context of the African Charter on Human and Peoples' Rights", *Journal of African Law*, Vol. 32, No. 182, 1988, p. 183.
[49] *Ibid*., p. 186.
[50] Antonio Cassese, The Self Determination of Peoples, in Louis Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981), as cited by Michael K. Addo, *Ibid*., p. 186.
[51] Milena Sterio, *Op. Cit.*, p. 2.
[52] *Ibid*., p. 9.

the doctrine of *uti possidetis juris*.[53] In such a view, *uti possidetis* has been used to restrain the proclaimed right of self-determination.[54]

Seen from historical context, the core meaning of the legal right to self-determination cannot be divorced from the idea of freedom from subjugation.[55] However, it is not clear whether the meaning and scope is within the context of colonial or post-colonial. In this regard, put it simply, there are two oppositional views on the scope of the right to self-determination: restrictive and dynamic view. The former argues that the right self to determination is applied within the colonial context, while the latter argues that it can be applied outside the colonial context. As Ebai points out that:

> *For some, the right to self-determination is limited strictly to those individuals who are under colonial rule or foreign occupation. This is known as external self-determination, and it gives those under the aforementioned circumstances the right to conduct their own affairs without any foreign interference. Yet for others, the right to self-determination is not limited to those under colonial rule or foreign occupation, but rather is given to all peoples, including minorities and indigenous people who live within the boundaries of an existing nation state. This is known as internal self-determination, which gives minorities and indigenous people the right to determine their own destiny".*[56]

With respect to the restrictive view, Frank argues that there a tendency to simply treat the notion of *uti possidetis* (territorial integrity) and self-determination as aspects of the same entitlement. To entitle the right of self-determination, a people must be inhabitants of a colony.[57]Thus, in order to exercise the right of self-determination, a people must previously be within colonial boundaries and then changing their status in accordance with their preference.[58] The view of

[53] S. Eban Ebai, *Op. Cit.*, p. 647.
[54] Wade Mansell and Karen Openshaw, *Op. Cit.*, p. 59.
[55] Matthew Saul, *Op. Cit.*, p. 613.
[56] S. Eban Ebai, *Op. Cit.*, p. 633. Original emphasises.
[57] As cited by S. Eban Ebai, *Ibid*.,p. 633. It is worth adding that the notion of *uti possidetis*"has its origins in Roman private law as a Praetorian Edict to settle property ownership … At the dawn of decolonization, *uti possidetis* evolved to be a binding principle of international law protecting territorial borders of states … The first application of *uti possidetis* as a principle of international law principle was during the decolonization of Latin America at the turn of the nineteenth century. Within the Latin American context, *uti possidetis* marked an end to the concept of *terra nullius* by recognizing the decolonized states as possessors of all territories presumed to have been possessed by their colonial predecessors." See Freddy M. Mnyongani, "Between a Rock and a Hard Place: The Right to Self-Determination versus *Uti Possidetis* in Africa", *Comparative and International Journal of South Africa*, Vol. 41, 2008, p. 468-469. Moreover, "[t]he principle of *uti possidetis* established that the boundaries of the newly established states (i.e. the Latin American Republics) would be the frontiers of the Spanish provinces or colonies which they were succeeding." See S. Kwaw Nyameke Blay, "Changing African Perspectives on the Right of Self-Determination in the Wake of the Banjul Charter on Human and Peoples' Rights", *Journal of African Law*, Vol. 29, No. 147, 1985, p. 147. Furthermore, "[u]tipossidetis, "as you possess" in Latin, is a principle in international law that territory and other property remains with its possessor. The principle was used to require that former colonies develop into states following colonial boundaries." See Simon W. Weldehaimanot, *Op. Cit.*, p. 97.
[58] S. Eban Ebai, *Op. Cit.*, p. 633.

Shaw is typical of a proponent of restrictive self-determination arguing that the doctrine of international law as a legal principle has restricted the right of self-determination to colonial situation. Accordingly, once a non-self-governing has attained independence, its territorial unity is protected by both the principle of self-determination and territorial integrity. Thus, in explaining a right of self-determination, Shaw pays more attention to resident minorities in an independent state and rejects that secession from a state is based on the right of self-determination.[59]

Within the context of colonialism, territorial aspects were more important to define the scope of self-determination than factors such as history, culture, and language of the colonial inhabitants.[60]This explains why nationalism spirit and the development of the scope of self-determination did not hand in hand influencing the application of the principle of self-determination during decolonization period.[61]Both nationalism and decolonization in fact took its own way rather than a mutual influence way regarding the development of the principle of self-determination.[62] Thus, it may be argued that the main focus of the restrictive view of the right of self-determination is dealing with territorial aspects rather than identity. In other words, the identity of people was not considered to exercise the right of self-determination within the colonial context.

Contrary to the restrictive view above, the dynamic view argues that right of self-determination should equally be applied to all peoples regardless of whether they belong to a non-self-governing state.[63] Franck, a proponent of dynamic view, points out that entering the post-Cold War and post-colonial era the meaning of self-determination entitlement and its territorial integrity has evolved in accordance with the context of post-modern tribalist secessionism including separatist movements in the disintegrating Soviet Union and Yugoslavia, Eritrea, Kurdistan, the Basque and the Corsican regions, Scotland, Wales, Tibet, Slovakia. It has also occurred in Quebec and in various homelands of Canada, Australia, New Zealand and the United States.[64] For Franck, based on the history of the emergence of the right to self-determination as a universal right, there are three phases of the development of the universal right of self-determination. First, the

[59] *Ibid*., p. 633-634.
[60] Heribert Franz Koeck, Daniela Horn, and Franz Leidenmuehler, *Op. Cit*.., p. 73.
[61] *Ibid*.
[62] *Ibid*.
[63] S. Eban Ebai, *Op. Cit*., p. 634.
[64] T. M. Franck, as cited by S. Eban Ebai, *Ibid*..

post-First World War applied to the territories of the defeated European powers, Germany and Turkey. Second, the post-Second World War and then followed by the establishment of the United Nations. The adoption of the Universal Declaration of Human Rights in this phase, made the right to self-determination has been applicable to everyone. Third, it was after the adoption of the two 1966 Covenants. This phase has transformed the status of the right to self-determination from a process of decolonization to a human right that applicable for all peoples.[65]Similar to this point, Koeck, Horn, and Leidenmuehler also reject the argument restricting the right of self-determination only to peoples who are and were colonized by foreign power. For them, any and all peoples must therefore be entitled to the right of self-determination.[66] From the perspective of this camp, the right of self-determination is an exercisable right that should continuously be applied beyond the colonial context.

In discussing the right of self-determination, the literature mostly distinct two parts of the legal concept of self-determination: internal self-determination and external self-determination. Internal self-determination is a kind of collective right that gives "essentially the protection of minority rights within a state", while external self-determination or secession is "the right of the people to be independent and free from outside interference".[67] It is internal self-determination if the realization of the right to self-determination does not affect the territory of the state, whereas it is external self-determination or remedial secession if it affects the territory.[68] In fact, external self-determination or remedial secession is generally disfavoured by states and almost no state has agreed to recognize a right to self-determination for a group within its own territory.[69] Some argue that external self-determination will encourage the territorial disintegration of states, the international anarchy, the failure of nation-states system, and the secession of indigenous communities.

Sterio explains the difference between the two in more detail. According to Sterio, internal self-determination can be applied to all peoples within their central state. The mother state should respect the cultural, social, political, linguistic, and religious rights of peoples. Accordingly, the people has no a lawful reason to

[65] S. Eban Ebai, *Ibid*., p. 635.
[66] Heribert Franz Koeck, Daniela Horn, and Franz Leidenmuehler, *Op. Cit.*, p. 76.
[67] S. Eban Ebai, *Op. Cit.*, p. 635 & 637.
[68] Simon M. Weldehaimanot, *Op. Cit.*, p. 89.
[69] S. Eban Ebai, *Op. Cit.*, p. 635; Malvin Halberstam as cited by S. Eban Ebai, *ibid*..

secede from its mother if those rights are respected by the mother state.[70] With respect to external self-determination, Sterio notes that the oppressed peoples, whose fundamental rights are not being respected and are abused by the mother stats, can apply a right to external self-determination, which includes a right to remedial secession and independence.[71] Moreover, Sterio underlines the distinction between internal versus external self-determination both in theory and reality as follows:

> *In theory, the distinction between internal versus external self-determination is easy to draw, and a scholar or judge should have no difficulty deciding which minority groups should accrue the more drastic right to external self-determination. Simply look to the human rights record of the mother state, and, if the record shows violations, then the minority group should be allowed to separate. In reality, the distinction is very difficult to draw. Numerous minority groups around the globe have been mistreated and have asserted their rights to external self-determination, only to find themselves rebuffed by the world community.*[72]

The difference between the two is somewhat easy to be understood at the conceptual level, but it is rather difficult to be applied at the practical level. The difference between the two remains one of the main controversies surrounding the right to self-determination.

In the context of self-determination, the violation of human rights can be used as evidence to claim the right to self-determination. Such an argument is perhaps desirable for two reasons. First, a repressive approach committed by an independent state breaches the principle of equal right and self-determination;[73] second, discrimination of a national religious or linguistic minority can probably be a basis for becoming a people and claiming self-determination.[74]

Arguably, peoples are entitled to use remedial secession as the last resort if a state seriously and persistently, or even systematically, violates the rights of minorities.[75] Such an argument that is based on the premise that oppression legitimizes secession (the oppression theory) has been used to justify the secession of Bangladesh from Pakistan. Interestingly enough, the United Nations recognised

[70] Milena Sterio, *Op. Cit.*, p. 1.
[71] *Ibid.*, p. 1-2.
[72] *Ibid.*, p. 2.
[73] Michael K. Addo, *Op. Cit.*, p. 187.
[74] Heribert Franz Koeck, Daniela Horn, and Franz Leidenmuehler, *op.cit.*, p. 89; Marcelo G. Kohen, *Op. Cit.*, p. 10-11.
[75] Christine Griffione, *Self-Determination as a Human Right: The Emergency Exit of Remedial Secession* (Utrecht: Science Shop of Law, Economics and Governance, Utrecht University, 2010), p. 89 & 93.

Bangladesh as an independent state which indicates that the oppression theory can be a valid basis for secession.[76] The case of Bangladesh demonstrated that a "non-people" is possibly able to transform into a 'people' when the remedial secession has succeeded creating a new state.[77]

Similarly, the precedent Kosovo also confirmed that human rights issues are important to pursue the right of self-determination. The issues have made the Kosovo claim was highly reasonable in the view of the ICJ. One of the reasons why Serbia had lost its sovereign authority over Kosovo was because the persistent and massive gross violations of fundamental rights of Kosovars committed by Serbia authority. Referring to the Kosovo precedent, it may be argued that any "people" who have been suffering from gross human rights violations, have a right to claim sovereign independence and statehood.[78]

Another term which is a part of the right of self-determination that has now been much discussed by many scholars is *remedial secession*. The very basic notion of remedial secession is that it functions as an *ultima ratio* or *ultimum remedium* in the sense that groups with a particular identity (minority and indigenous peoples) are entitled to remedial secession on the grounds that their political participation have been discriminated, their fundamental human rights have been violated systematically and persistently by a majority within a certain territory, and every local remedies available to find a peaceful solution to self-determination conflict have exhausted. Thus remedial secession is basically a consequence of the failure of a state to respect those matters. The above extreme circumstances can justify a right to secede unilaterally from the existing sovereign State. It means that remedial secession is an emergency exit only when the right of internal self-determination is breached and the right of external self-determination is almost impossible to be achieved consensually.[79]

To put simply, remedial secession is a unilateral secession. Both external self-determination and remedial secession are used to achieve an independent state. However, while the former may be achieved with consent from the

[76] Thomas D. Musgrave, *Op. Cit.*, p. 188-191.
[77] Marcelo G. Kohen, Op. Cit., p. 12.
[78] Richard Falk, "The Kosovo Advisory Opinion: Conflict Resolution and Precedent", *The American Journal of International Law*, Vol. 105, No. 1, January 2011, p. 56-58.
[79] See, Simone F. van den Driest, *Remedial Secession: A Right to External Self-Determination as a Remedy to Serious Injustice*. Volume 61 of School of Human Rights Research Series (Cambridge: Intersentia, 2013), especially Chapter IV, V, and VI p. 97-295; Christine Griffione, *op.cit.*, p. 94-98 &140-143; Antonello Tancredi, A Normative 'Due Process' in the Creation of States through Secession, in Marcelo G. Kohen (ed.), *Secession: International Law Perspectives* (Cambridge: Cambridge University Press, 2006), p. 175-177; John Dugard, *The Secession of States and Their Recognition in the Wake of Kosovo* (The Hague: Hague Academy of International Law, 2013), p. 141, 227, 277.

parent state, the latter *vice versa*. In other words, external self-determination is, to a certain extent, a consensual secession, whereas remedial secession is, mostly, a unilateral secession.[80] Remedial secession is especially applied beyond decolonization. Nevertheless, it must be borne in mind that, from a legal point of view, the application of remedial secession has been hotly debated by many scholars and very controversial issue. There is no consensus so far whether it is lawful or unlawful act in both contemporary international law and international human rights law.

Whether a remedial secession is lawful or unlawful, it very much depends on the recognition of other states and international organizations such as the United Nations and the International Court of Justice. It is important to note that in practice the right of self-determination is not only a legal issue, but also a political issue. Just because the right has now been adopted into both international law and international human rights law, it does not mean that the application of the right can be divorced from political aspect. More importantly, external self-determination and remedial secession cases have proved that political aspect is as important as legal aspect to successfully achieve the right of external self-determination or remedial secession.

Within that context, international recognition is necessary in order to be qualified as a separate and independent state. Unquestionably, this is a determining factor since the success of secession to build a newly statehood usually depends on the recognition of other states. As Dugard emphasizes, "[n]o secession can succeed without some measure of recognition".[81] Indeed, almost all secessionist movements without the recognition of a large number of states would likely be meaningless.[82]In this regard, Dugard also underlines the importance of the role of the United Nations in determining the success or failure of the secession of a territory from a parent state. According to Dugard:

> *By admitting a seceding entity to membership of the United Nations, the United Nations confers the imprimatur of statehood on that entity. Admission to the United Nations constitutes "legal" or "general" recognition that will be respected by all Member States of the United Nations. Conversely when the political organs of the United Nations call on States to refuse recognition*

[80] Glen Anderson, "Secession in International Law and Relations: What Are We Talking About?",*Loyola of Los Angeles International and Comparative Law Review*, Vol. 35, Issue 3, 2013, p. 350-355.
[81] John Dugard, *Op. Cit.*, p. 35-36.
[82] Heribert Franz Koeck, Daniela Horn, and Franz Leidenmuehler, *Op. Cit.*, p. 107.

> *to the seceding entity and withhold admission to the United Nations, the United Nations in effect denies the international legal personality of that entity. For this reason the success or failure of a secession is in large measure determined by the United Nations.*[83]

Likewise, Milena Sterio has suggested that the most important international support for external self-determination is by the most powerful states (the great powers in terms of potent military, economic and political powerhouses such as the United States, China, Russia, Japan, the United Kingdom, France, Germany, and Italy) since the fact has shown that peoples who have enjoyed supports by most of the great powers were able to exercise external self-determination right. These great powers often play their influences in global affairs to dictate the application of external self-determination right. Conversely, it is also a fact that people who have not enjoyed support by the great powers were denied their external self-determination right.[84]In this connection, Sterio asserts that:

> *The great powers' rule dictates that for every self-determination people must demonstrate the existence of four criteria: that it has suffered heinous human rights abuses; that its mother state's central government is relatively weak; that the international community has already gotten involved through a form of international administration of the secessionist territory; and that it enjoys the support of most of the great powers ... that self-determination outcomes have been dictated over the past decades by the support, or lack thereof, of the great powers, and that the fourth criterion of the great powers' rule is the most important one.*

From international politics point of view, the four criteria above suggest that, in fact, it is not easy to pursue the right of self-determination unless the criteria have been fulfilled. This perhaps explains why the struggles to the right of self-determination in many places across the world have often failed.

CONCLUSION

The meaning and the scope of self-determination has evolved from time to time in accordance with the spirit of the age (*zeitgeist*). Self-determination has been viewed from philosophical, political, legal, and human right. Today, self-determination has become the right of self-determination and has been enshrined

[83] John Dugard, *Op. Cit.*, p. 85.
[84] Milena Sterio, *Op. Cit.*, p. xiv.

in human rights instruments. This suggests that the notion of self-determination is not only controversial, but also dynamic. However, there is no a consensus on the notion of the right of self-determination so far and therefore it leaves to different interpretations. To conclude, the problem of the right of self-determination has neither in theory nor in practice been solved satisfactorily.

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