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Из материалов VI Конгресса Международной ассоциации конституционного права (секция "Право на самоопределение")
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VI Конгресс международной ассоциации конституционного права. Чили, Сантьяго, 12-14 января 2004 г.

С 12 по 14 января 2004 года в столице Республики Чили - городе Сантьяго состоялся VI Конгресс международной ассоциации конституционного права под девизом "Конституционализм: старые концепции - новый мир". В работе Конгресса приняли участие 461 представитель из 61 страны, из 20 конституционных судов со всех континентов мира, в том числе из стран СНГ - делегации Армении и Литвы.

В ходе работы Конгресса состоялись 4 пленарных и 13 секционных заседаний. На пленарных заседаниях были обсуждены следующие проблемы: "О важности государства", "Конституционные модели в изменяющемся мире", "Разработка и изменение Конституций и демократия", "Практика сравнительного конституционализма".

Обширная тематика секционных засерданий была посвящена нижеупомянутым вопросам: "Права, государства, народы и коренное население", "Внешние влияния на национальные Конституции", "Свобода выражения, частная жизнь и Интернет", "Права человека и частное право", "Право на самоопределение", "Социальные и экономические права", "Конституция, местная демократия и представительство", "Права транснационального гражданства", "Международное воздействие на разработку национальной Конституции", "Конституция, правовое государство и миграция", "Конкурирующие модели конституционных изменений", "Неписаные конституционные нормы и принципы".

В общей сложности, на Конгрессе было заслушано около 100 докладов ученых-конституционалистов, специалистов в области конституционного права.

Вестник "Коституционное правосудие" периодически будет обращаться к вопросам, поднятым на Конгрессе, и публиковать доклады, представляющие наибольший интерес. В настоящем выпуске вестника публикуются некоторые доклады, заслушанные на секции "Право на самоопределение".

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Houston, Texas

Dr. Sabyasachi Ghoshray

Resolving Conflict between Self-Determination of Peoples and the Sovereignty of Nations: Analyzing the Case of Kashmir in India

Introduction

Academic perspective on the issue of self-determination is in abundance as the International Standards with respect to the Rights of Peoples and their Rights to self-determination and sovereignty have taken huge steps and advanced in the last two decades. But with these advances comes the violence that often evolves around self-determination. Furthermore, when these movements of self-determination find themselves linked with terrorism, we find ourselves immersed in a quagmire hitherto seen in the world stage. Against this backdrop, this paper will revisit the issue of "self-determination" within the context of International Law as well as the right of sovereign nation, by making a distinction between "internal" and "external" rights of self-determination. This is critical in our study for both the comprehension of those asserting their rights and for the defense of those being accused of illegally depriving those very rights. Additionally, more often than not, international politics and the alignment of nations either over dramatize or trivialize the legitimacy of claims for self-determination by casting blinders on the real issue, or lumping the two separate branches of this self-determination under one thread. This monograph is an attempt to clarify some of these misconceptions between internal and external rights of self-determination.

The controversy surrounding the legitimate rights of people for sovereignty gets murkier in the quagmire of international politics as the rights of a minority within a Nation State gets misconstrued as the rights of a people. Often times a Nation State is accused of demeaning and degrading the status of People to that of a minority by use of state power and thereby hindering their legitimate right of sovereignty. On the other side of the coin, rogue states, or terrorist outfits utilize the misguided concept of self-determination for the fulfillment of their nefarious intentions. How is this possible, when and if in fact, the status of People is clearly defined in International Law? We will examine this very premise.

An issue that is relevant not only to International Law but also to political scientists, is to what extent a government may redefine fundamental questions with respect to the right of self-determination by the use of referenda and legislation. This is inextricably linked to the idea of a Nation State changing the constitutional ground rules affecting citizens without their consent? Again, this will be best analyzed within the context of whether the issue of self-determination is an external one or an internal one. Because, this will also address the question of legitimacy for various secessionist movements by either recognizing them as a violation of people's fundamental rights by the Nation State or a treason threatening the sovereignty of a nation.

Finally, international covenants, working groups, legal writings in this regard have been very successful in developing contexts and scopes regarding self-determination and the whole International Law has gone through a tremendous metamorphosis during the last decade. But questions still remain. Therefore, the objective of this study is to establish that self-determination must be addressed in

the context of original secession of the relevant Nation State during de-colonization. This will help us examine the right to self-determination in the case of Kashmir, where the evolving legal framework on the very concept of self-determination being pitted against the historical context of the region.

Self-Determination as a Right for the People

The right to self-determination of peoples, alongside the equality of nations large and small, has been recognized as a basic norm of International Law. In this context, we can remind ourselves of the International Covenant on Civil and Political Rights and Self-determination, as currently perceived, entails the following principle:

"In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

Religious, ethnic and cultural minorities have come to be recognized in International Law as "peoples" that have a right to self-determination. Although states remain the main subjects of International Law, social institutions other than the state have long been recognized as entities with standing in international relations. Peoples have thus come to be repositories in International Law of a right to self-determination.

History of Self-Determination

Before we begin to apply the concept of self-determination in specific situations, let us analyze the evolution of the theory of self-determination. In this context, our thought process is influenced by three main caveats. First, the concept of self-determination has evolved over the years. As a result, we must clearly distinguish among the different shades of meaning the concept has attained. This then leads us to the meaning to be attributed to the self-determination in any particular instance, such as, to determine the identity of the "people" who have a claim to that right. Finally, the concept of secession should not be considered as a necessary condition for the right to self-determination. Because, right to self-determination is not the only vehicle through which secession is achieved. Current state practices have shown that the right of secession can stand on its own feet.

Delving into the archives of recorded history, we find the right to self-determination dates back to World War I, when it was introduced as a norm of international relations. Since then the concept has evolved in its meaning, and has gone through the maturation process via distinct stages. While trying to develop a legal framework for the secession of peoples from the old empires, the process of legitimizing the right to self-determination witnessed the first phase of its development. It was made clear during the negotiations that ensued, that the right of disposing of national territory is not in conflict with the right of sovereignty. In this context, we must be cognizant of the fact that the positive International Law does not legitimize the rights of national groups to secede any more than the states to dispose of their national territory. Therefore, the right to self-determination cannot be invoked by a simple expression of interest, nor could

certain disenfranchised community within a state use it as a political tool. When can then the right of self-determination be exercised? According to Nathaniel Berman,

"The formation, transformation and dismemberment of States as a result of revolutions and wars create situations of fact which, to a large extent, cannot be met by applying the normal rules of positive law" that "peoples" may either decide to form an independent state or choose between two existing ones. In circumstances where sovereignty has been disrupted, "the principle of self-determination of peoples may be called into play."

Thus, the legal framework for the concept of self-determination originated from the end of colonial rules, and was incorporated as a vehicle to provide rights to the peoples dominated by the colonial powers. However, as the colonial powers started crumbling, the right to self-determination started assuming different hues. The right to self-determination was extended to peoples subjugated by racism by expanding the concept of "peoples" from the populations in colonial rule to a larger community under foreign occupation or racist regime. This began the process of an evolving legal framework where the concept of self-determination encapsulates a larger section of people.

The scope of the right to self-determination has further broadened by the United Nations General Assembly's *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty* of 1965, in which the United Nations called on all states to:

"Respect the right of self-determination and independence of peoples and nations, to be freely exercised without any foreign pressure, and with absolute respect for human rights and fundamental freedoms," and to this end proclaimed that "all States shall contribute to the complete elimination of racial discrimination and colonialism in all its forms and manifestations."

Self-determination has further been given legal grounds within Article 1 of the International Covenant on Civil and Political Rights of 1966. This constituted a newer development in the rights of self-determination that evolved after the colonization phase has passed. Additionally, this entitlement signified the entitlement of a broader spectrum of peoples, coming from independent, non-racist states. The International Covenant on Economic, Social and Cultural Rights of 1966 was not restricted to only peoples subjugated under foreign powers, but also to peoples belonging to national or ethnic groups. Several important references can be made in this context. The UN Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in accordance with the Charter of the United Nations of 1970 guaranteed the right to self-determination applicable to "all peoples." Similarly, the Helsinki Final Act of 1975 defines the principle of equal rights and self-determination of peoples as entitlement that belongs to "all peoples always ...in full freedom, to determine, ...without external interference, and to pursue as they wish their political, economic, social, and cultural development" certainly seems to include the peoples of independent states. Again in this context, we are reminded of the definition of

self-determination as the right of peoples "freely [to] determine their political status and freely [to] pursue their economic, social and cultural development" does not in itself exclude ethnic sections within a political community. More recently, the peoples within an independent and sovereign state with a claim to self-determination have been more clearly identified as national or ethnic, religious and linguistic minorities.

Changing norms of Self-determination

The above historical exposition has shown that the right to self-determination developed over time and that its substantive meaning has changed over the years. Most of the current threats to international peace and security emanates from the struggles of groups of people claiming or trying to assert their rights to self-determination. Whether legitimate or not, these claims are creating tensions among states, casting doubts in the nature of democracies, to say the least. In this context, the concept of democracy and self-determination are interconnected and we must take a closer look at this concept.

One of the controversies surrounding the concept of self-determination is that it immediately conjures up the notion of territorial secession. But as will be clarified here that self-determination should not be misconstrued to mean session at all times; rather it should lend legitimacy to retention of territorial integrity.

We begin by identifying a path of evolution for self-determination in International Law. Self-determination has originated as enforceable right to freedom from colonial rule. In this context, the UN has recognized three types of situations where the right of self-determination is deemed inalienable and enforceable. First and foremost, the peoples right of self-determination emanating from the colonial rule. Second case arises when people claim self-determination as a result of having been under the occupation of foreign power. Thirdly, the UN has given legitimacy to the situation when racist domination enables the emergence of peoples right of self-determination.

Let us examine the concept of self-determination in the context of de-colonization a bit further. Impregnated in the concern for people under colonial rule was the realization that conflict and chaos as a means to break the shackles of the colonial power could also easily escalate into total chaos and destruction of balance of power in the globe. Therefore, it was asserted in the Declaration on Granting Independence to Colonial Countries and Peoples at the UN General Assembly on December 14, 1960 that, " The subjection of peoples to alien subjugation, domination and exploitation (i.e., the denial of self-determination) constitutes a denial of fundamental human rights ".

Not only does this interrelates with the concept of self-determination and the human rights movement but also enshrines self-determination under solid legal principles. However, this provides legal binding to the idea of peoples right to self-determination only when it relates to peoples rights under colonial rule. Subsequently the word "self-determination" finds its way as an emancipated principle in the UN charter as linked to the notion that "peoples have equal rights".

This has alone been incorporated into the preamble to the International Covenant on Economy, Social and Cultural Rights and the International Covenant on Civil and Political rights.

Now going back to our discussion to identify the roots of self-determination in International Law, we talked about three main themes under whether the UN has legitimized the peoples right of self-determination. There are several means through which people can exercise the rights to self-determination. One of which is the Declaration of Principles of International Law concerning Friendly Relations and Cooperation among states that,

"It stipulates that the creation of a sovereign and independent state, the free association or integration with a independent state or the acquisition of any other friendly decided political states"

In spite of all the above, the international instruments do not provide a succinct definition of the contents of the rights to self-determination of peoples, nor does there exist a perfect definition of self-determination. This has therefore, created more shades of gray in today's global arena when we are confronted with trying to determine whether a certain peoples claim for the right to self-determination is truly legitimate or not. This therefore, leads us to examine the two distinct divisions of the concept of self-determination. The first is concerned with the right to external self-determination, i.e., the right of a people to undertake external roles, such as foreign policy and defense, issues reserved for sovereign states to deal with. The second is the internal self-determination, i.e., the concept of self-determination that asserts the right of people or minorities to variety of jurisdiction over affairs internal to state, and which could range from enhanced participation in governance to autonomy under a sovereign states control. One such case is the situation in Kashmir in the Indian sub-continent. In the following, we present our analysis of the right to self-determination related to Kashmir.

Self-determination of Kashmir

The present situation in Kashmir presents a faulty de-colonization process that has led to a political quagmire lasting decades. In some parlance, it is viewed as a disputed territory, whereas in some quarters, there is no question about the legality of Kashmir as an integral part of India. The issue before us is then to analyze this situation with respect to the existing concepts of self-determination. Before getting into the legitimacy of the claim for self-determination, let us take a look at the historical context through which Kashmir was annexed as part of India.

History and legitimacy of Annexation

The State of Jammu and Kashmir (J&K) acceded to the dominion of India on the 26th October 1947, as one of the remaining acts of de-colonization of British territory. In order to understand the Kashmiri's right to self-determination, the legality of this accession of Kashmir has to be analyzed. The accession took place under the provisions of the Constitution of India as in force on 15th August, 1947 i.e., the Government of India Act 1935 as adopted under provisions of the Indian Independence Act 1947, both of which were enactments of the British Parliament. The provision is stipulated as follows:

"... An Indian State shall be deemed to have acceded to the dominion, if the Governor General had signified his acceptance of an instrument of accession executed by the ruler thereof...".

Consequently, when the ruler of Kashmir executed the Instrument of Accession (26 October, 1947) and Lord Mountbatten, then Governor General, accepted the Instrument (27 October 1947), the whole of Kashmir became an integral part of India. This accession was provided within the stipulations granted by the British Government for the independence of the India. Under this plan, the Muslim majority area in British India would constitute the Dominion of Pakistan and the Hindu majority would constitute the Dominion of India. Additionally, it also was made clear that the decision about Partition related only to British India and the Rulers of the Princely States would be restored their earlier Paramount power. In other words, the Princely States were to become 'independent' and the communal basis of the division of India would not affect those States at all. Therefore, the rulers of the princely states were free to choose where they accede to, as long as the accession is agreed upon by the powers granting them that.

Since, the Act was enacted by the British Parliament to create the Dominions of India and Pakistan, it cannot be questioned either by India, Pakistan or the United Kingdom, parties to the agreement. One of the players sponsoring the current air of illegitimacy of Kashmir as part of India is Pakistan. However, historical events point out that the Government of the Maharaja of Kashmir was recognized by Pakistan. It was with this Government that Pakistan signed a Standstill Agreement by the exchange of telegrams on August 12 and 16, 1947. At that time the Pakistan Government did not question the validity of the Agreement with the Government of Maharaja of Kashmir.
India's right as well as its duties with regard to Jammu and Kashmir flowed from the fact of accession was recognized from the beginning. Mr. Warren Austin, the representative of the United States in his speech on February 4th 1948, during the 240th meeting of the Security Council, where he asserted the following, which further corroborated that,

"The external sovereignty of Jammu and Kashmir is no longer under the Maharaja. With the accession of Jammu and Kashmir with India, this sovereignty went over to India and is exercised by India."

It is significant that the legality of the accession has never been questioned either by the Security Council or by the United Nations Commissions for India and Pakistan (UNCIP). On the contrary, on the question of accession the UNCIP legal advisor examined this issue and found that it was legal and authentic and could not be questioned. This fact clearly influenced the proposals made by the UNCIP. The most significant recognition of India's legal status in Kashmir was contained in the Commission's reply to protests from the Pakistan Government against the decision of the Indian Constituent Assembly to reserve four seats for the representatives of Jammu and Kashmir. The Commission declined to take up this matter and observed, "In the Commission's view, it is difficult to oppose this measure of the Indian Government on purely legal grounds,"

The issue of armed conflict with Indian Military forces has been raised in several quarters in trying to establish legitimacy of the self-determination of Kashmiri people. However, based on the legality of accession of Kashmir to India, there should be no confusion to the use of force for the law and order situation in Kashmir. Because, an essential attribute of sovereignty is the right to maintain an army for national security. Based on the UNCIP resolutions of August 13th 1948 and January 5th 1949, there has always been recognition of the rights and obligations of the Government of India to maintain a sufficient force "for the support of the civil power in the maintenance of law and order." In this way, the UNCIP, and authorized World body, not only recognized the right of India to retain her troops in Jammu and Kashmir in sufficient numbers consistent with the security of the State but also recognized the responsibility of India for the maintenance of law and order throughout the State.

It is imperative that the right of self-determination in Kashmir is analyzed within the context of the instrument of accession discussed above. Because, the concept of self-determination was born as a result of de-colonization that started the disintegration of empires. The independence of India and Pakistan came about as a result of this de-colonization, which was in essence driven by a broader concept of self-determination. In granting the territory of Kashmir to India via the process of instrument of accession again invokes the concept of self-determination. Any further granularization of this self-determination by legitimizing a call for self-determination of any territory within a sovereign state therefore would question the legitimacy of the de-colonization process that in the first place started this chain of events. It is therefore, of utmost importance to take out the blinders of political rhetoric and try to understand the legitimacy of the accession via historical truths.

The Instrument of Accession executed by the Kashmir Maharaja was in no way different from that executed by some 500 other Princely States. It was unconditional, voluntary and absolute. It was not subject to any exceptions. And as Alan Campbell-Johnson wrote in 1951, "The legality of the accession is beyond doubt..." The legitimacy of Kashmir's accession to India has further been corroborated as recent as February 11, 1975 Sheikh Abdullah, the Lion of Kashmir, wrote a letter to India's prime minister saying, "The accession of the state of J&K is not a matter in issue. It has been my firm belief that the future of J & K lies with India because of the common ideal that we share." More than twenty years thereafter, the same sentiments are being reiterated by the present chief minister of the state, democratically elected by his people.

Discussions

Taking a peek at history of the United States of America, we can compare the accession of Kashmir to India is with the annexation of Texas by the USA in 1845. Threatened by the menace of predatory incursions from Mexico, independent Texas requested the US government to annex it. The US Congress sanctioned the proposal. When Mexico protested, the US government did not consider its action of annexation as a violation of any of the rights of Mexico. However, when Texas opted out of the Union in February 1861 so as to be

unhindered in preserving and propagating slavery, Lincoln battled against the secession, committed as he was to freedom and democracy. If, therefore, a minority of Kashmiris, instigated and nurtured by Pakistan, is alienated against India, should not India act like Lincoln?

Even as arguments on the Kashmir issue lingered in the United Nations Security Council for years, two important events of historical significance has further ratified the issue of accession. Firstly, in June 1949 the Prince of Kashmir, on the advice of his council of ministers, nominated four representatives to the Indian Constituent Assembly which was then framing a Constitution for free India. At that time, it was made clear by the Kashmir government that "while the accession of the J&K State with India was complete in fact and in law," the state would be governed by its own Constitution as permitted by the Instrument of Accession. Secondly, the Jammu and Kashmir Constituent Assembly comprising representatives duly elected in August 1951 on the basis of universal adult suffrage started deliberations, ratified the accession on February 15, 1954 and irrevocably incorporated the state as an integral part of the Union of India in the non-amendable Section 3 of its Constitution that came into effect from January 26, 1957.

Both the above series of acts by the state of Kashmir did not at all violate its legal status vis-a-vis India or the UN Security Council. Moreover, no one, not even the worst critic, ever doubted the representative nature of Jammu and Kashmir's Constituent Assembly. Because as we mentioned earlier self-determination is a one-time slot, and because the elected representatives of the people of Jammu and Kashmir had taken a final decision regarding their future status, the question of any further ''self-determination'' or ''plebiscite'' does not arise either legally or morally. Therefore, it must be recognized that the Security Council was exceeding its reach with its plebiscite proposal.

The situation today therefore is that if the accession of Kashmir is reopened, it would imply going 56 years back and reopening the whole question of the independence of India and Pakistan for the simple reason that the same document as provided for the accession of the Princely States, granted independence to India and Pakistan. That reopening and dividing Kashmir on the basis of religious compulsion will surely lead to a replay of the communal Indian holocaust of 1947.

We are reminded by a more recent reaffirmation by the United Nations General Assembly where the conflict between the peoples' right to self-determination and the sovereignty of a nation has been addressed. The declaration says:

"The right of self-determination of all peoples, taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, and recognize[d] the right of peoples to take legitimate action in accordance with the Charter of the United Nations to realize their inalienable right of self-determination. This shall not be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-

determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind."

Conclusion

The concept of self-determination has broadened since the formative days of the post World War I. Along the way, various international bodies, human rights groups and the comity of nations worked hand-in-hand to ensure freedom for all groups. The issue of Kashmir however opened up a whole set of new questions. Firstly, can the right to self-determination be conferred upon a community, a group of people more than once? This situation is somewhat akin to attaching double jeopardy in common Law criminal jurisprudence when a defendant cannot be tried twice. If the right to self-determination is enshrined in the framework of International Law, can people's right of self-determination be judged more than once.

This brings us to the legitimate issue of considering whether the current modalities of determining the right of self-determination can actually work in the future. When the claim of self-determination is mixed with terrorism, as has been in the case of Kashmir, can the sovereign State ignore the threat to fracture its territorial and political unity? Especially, if we consider that the legitimacy of the instrument of accession has once fulfilled the Kashmiri's right to self-determination. Because, re-opening the issue of Kashmir's self-determination vis-a-vis the sovereignty of India would mean nullifying the instrument of accession. Which in turn would nullify the independent status of both India and Pakistan. Can the world body afford to open that Pandora's box?

Finally, the right to self-determination has to be analyzed in the context of the regions original secession from the colonial rule. Because, the rise of certain fundamentalist idealism coupled with political agendas of States have indeed created a fertile ground for communities in every nook and corner to cry for "peoples' right of self-determination". The issue of Kashmir, and so many other territories in the world should be dealt with as internal self-determination. Any future legal framework should therefore address it as such. Otherwise, the whole issue of self-determination, in the worlds of President Woodrow Wilson's Secretary of State, Robert Lansing, "would likely breed discontent, disorder and rebellion". And the world would indeed be a less safer place than today.

РАЗРЕШЕНИЕ КОЛЛИЗИЙ МЕЖДУ НАЦИОНАЛЬНЫМ САМООПРЕДЕЛЕНИЕМ И СУВЕРЕНИТЕТОМ ГОСУДАРСТВ:
анализ проблемы Кашмира в Индии

С. Хошрай
Хьюстон, Техас

Резюме

В работе доктора Сабясачи Хошрая анализируются вопросы, посвященные праву на самоопределение в контексте кашмирской проблематики. Автором в частности подчеркивается, что право на самоопределение возникло, как право освобождения от колониального ига. В этой связи ООН выработала, по словам автора, три основных ситуации при наличии которых осуществление права на самоопределение является неотъемлемым и позволяющим применение силы. Первая ситуация охватывает случаи, которые исходят из необходимости освобождения народа или нации от колониального ига; вторая охватывает случаи освобождения от иностранной оккупации и третья ситуация включает случаи освобождения от расистского господства. Автор отмечает, что международные договоры не устанавливают четкого определения права на самоопределение, что вызывает множество проблем при выяснении правомерности борьбы того или иного народа. В связи с этим предлагается рассмотреть два различных аспекта реализации права на самоопределение - внутренний и внешний. Под внешним аспектом права на самоопределение подразумевается право народа осуществлять внешние функции, включая внешнюю политику и оборону, а также вопросы входящие в компетенцию суверенного государства, под внутренним аспектом права на самоопределение имеется ввиду концепция самоопределения, в соответствии с которой народам или национальным меньшинствам предоставляется определенный объем юрисдикции в отношении вопросов входящих во внутренние дела государств и могут включать различные проявления начиная с права участия в управлении государством и заканчивая правом создания автономии в рамках данного государства.

В работе тщательным образом исследуется решение Верховного суда Канады 1998 года относительно права Квебека в одностороннем порядке отделится от Канады, в котором в частности подчеркнуто, что как правило право на самоопределение осуществляется в форме внутреннего самоопределения, право же внешнего самоопределения возникает лишь в экстремальных случаях и даже в этом случаях при наличии строго определенных обстоятельств. Суд отметил также, что нет никаких обязательных противоречий между сохранением территориальной целостности существующих государств, в том числе и Канады и правом «народа» достичь всех уровней самоопределения. Государство, чье правительство на равных началах и без дискриминации представляет все население или все народы проживающие на его территории и соблюдает принцип самоопределения в внутригосударственных отношениях в соответствии с международном правом, имеет право на сохранение территориальной целостности.

С особой тщательностью в работе представлена история присоединения Кашмира к Индии в контексте основных правовых проблем. Автор проводит параллели между аннексией независимого Техаса со стороны Соединенных

Штатов Америки в 1845 году и присоединением Джамму и Кашмира к Индии, отмечая далее, что самоопределение является единичным актом и учитывая тот факт, что избранные представители населения Джамму и Кашмира приняли окончательное решение относительно их будущего статуса, то вопрос о последующем «самоопределении» или «плебисците» невозможен ни в юридическом, ни в моральном отношении.

В работе отстаивается точка зрения согласно которой гарантированное нормами международного права право на самоопределение должно предоставляться определенному народу или нации не более одного раза.

Автор выражает сомнения относительно того могут ли современные рамки понятия права на самоопределение действительно применятся в будущем, отмечая, что если право на самоопределение взаимосвязано с терроризмом, как в случае с Кашмиром, то может ли суверенное государство игнорировать угрозу разрушения своего политического или территориального единства.

В заключении подчеркивается, что право на самоопределение должно анализироваться в контексте первичного освобождения территорий от колониального господства, а проблема Кашмира также как и проблемы иных территорий на земном шаре должны быть разрешены в рамках внутреннего самоопределения.

Mahulena Hofmann

The Right to self-determination: THE CASE OF GERMANY

Introduction

At the outset, it must be stated that, at present, the right to self-determination does not play a significant role in German constitutional law and practice: Subsequent to the restoration of German unity in 1990, German constitutional law as embodied in the 1949 *Grundgesetz* in its present version, does not refer to the right to self-determination; rather it could be said that the re-unification of Germany in 1990 is seen as the implementation of this right, held by the German people as a whole. Moreover, in view of the ethnic homogeneity of the population of the Federal Republic of Germany, it is not surprising that no ethnic groups in Germany – other than the German people - are presently considered to be holders of that right. Therefore, the views put forward by German scholars as to the holders, the contents and other aspects of the right to self-determination are to be understood as views of a more general nature which might, however, be applicable to situations in other countries; the same applies with regard to the pertinent practice of German state organs.

This was, however, fundamentally different before the restoration of German unity: During this period, the right to self-determination was of considerable relevance for the foreign policy of the Federal Republic of Germany. Therefore, it seems justified to present, by way of introduction, how this right was referred to by the government and other organs of the Federal Republic of Germany before addressing, one by one, the various questions identified by the organisers of this conference with regard to several aspects of the right to self-determination.

THE RESTORATION OF GERMAN UNITY AND THE RIGHT TO SELF-DETERMINATION

The right to – or principle of – self-determination played quite a significant role in the political efforts made by the various governments of the Federal Republic of Germany in order to bring about the reunification of Germany. In their pertinent practice, three different phases can be distinguished: The first one started in 1949 with the restoration of German statehood, i.e. the foundation of the Federal Republic of Germany and the German Democratic Republic, and ended in 1969 with the advent of the *Ostpolitik*; the second phase commenced with the initiatives resulting in the conclusion of the treaties between the Federal Republic of Germany and her Eastern neighbours, including the German Democratic Republic, and was terminated by the restoration of German unity on 3 October 1990; and the present phase in which the right to – or principle of - self-determination has ceased to be of relevance concerning the legal situation of Germany herself but is referred to in the context of other issues.

a) The first phase (1949 - 1969) was characterised, *inter alia*, by the political claim of the government of the Federal Republic of Germany to constitute the sole and only legitimate representative of the German people and of Germany as a whole (*Alleinvertretungsanspruch*); this position which was, at last in the 1950s, shared by the Western Allies, implied that the government of the German Democratic Republic was not considered as being entitled to represent the population of that territory which, moreover, in the opinion of the government of

the Federal Republic of Germany, did not constitute a subject of public international law.

In such a situation, the restoration of German unity or re-unification (*Wiedervereinigung*) constituted one of the major political goals of any federal government in this period. From a domestic, constitutional law point of view it was based on the formulation of the *Preamble* to the *Grundgesetz* which clearly stated that this constitution was to be understood as a temporary, provisional document adopted by those parts of the German people which were able to participate in that process; it also stated that this constitution had been drafted with the resolve to safeguard the national and political unity of the German people and to restore unity and liberty of Germany by means of exercising free self-determination. This goal was also reflected in Article 23 of the *Grundgesetz* which provided for a right of accession, to the Federal Republic of Germany, by any part of Germany not part of the territory of the Federal Republic of Germany. This provision served, on 1 January 1957, as the legal basis for the accession of the Saar to the Federal Republic of Germany.

On the international plane, the government and other representatives of the Federal Republic of Germany, consistently invoked the right to self-determination, held by all peoples and enshrined, *inter alia*, in the Charter of the United Nations, as the legal basis, under international law, of this political goal to bring about the restoration of the unity of Germany.

b) In light of the factual developments in Europe and elsewhere, the government led by Chanceller *Brandt* gave up, in 1969, the claim to constitute the sole and only legitimate representative of the German nation. It initiated the process known as *Ostpolitik* which resulted in the conclusion, in 1970, of treaties with Poland, the Soviet Union, and Czechoslovakia, and, in 1972, with the German Democratic Republic (*Grundvertrag*) which, in 1973, paved the way for the membership of both German states in the United Nations and other international organisations.

However, in view of the clear wording of the *Grundgesetz* and in order to secure a parliamentary majority for the ratification of these treaties, the government developed a formula which came to be used, by all subsequent governments, as a standard formula until 1989: The government pledged that it was a primary goal of its policy to bring about a situation in Europe in which the German people would be in a position, by freely exercising its right to self-determination, to restore its unity.

It should also be noted that the government of the Federal Republic of Germany acted, on the international plane, to secure the applicability of the right to self-determination for the German people: Therefore, it declared, on 15 August 1980, as unacceptable a reservation made by India upon the ratification of the 1966 International Covenants of Civil and Political Rights, and of Economic, Social, and Cultural Rights respectively in which India had stated, with respect to Articles 1 of the Covenants that the exercise of the right to self-determination was limited to peoples under colonial occupation; the government of the Federal Republic of

Germany stressed that the right to self-determination which was to be based upon the provisions of the Charter of the United Nations, was held by all peoples.

This political goal became reality in autumn 1989 and spring 1990 when, subsequent to the „fall of the wall", the freely elected *Volkskammer*, the parliament of the German Democratic Republic decided to invoke Article 23 of the *Grundgesetz* as the legal basis for the accession of the German Democratic Republic to the Federal Republic of Germany. After most intensive negotiations held in 1990 between the two German states among themselves, and between them and the four Allied Powers, two treaties could be concluded, the *Einigungsvertrag,* regulating the internal legal aspects of the restoration of German unity, between the two German states, and the *2 + 4 - Treaty*, regulating the external legal aspects thereof, concluded by the two German states and the four Allied Powers.

During this period, this process was consistently declared to reflect the free exercise of the right to self-determination by the German people.

c) Subsequent to the restoration of German unity, German authorities continued to refer to the right to self-determination - now, however, with respect to other situations. During the 1990s, they developed a formula which linked the right to self-determination with, in particular, the right to free elections as enshrined, *inter alia*, in Article 25 ICCPR and stressed that a balance had to be found between the right of any state to territorial integrity and the right of any people to self-determination; in most cases, this resulted in statements calling for establishment of cultural and other autonomies.

As regards Germany, it should be noted that the restoration of German unity resulted in three significant changes in the *Grundgesetz* which clearly indicate that Germany considers the process of unification to be finalised: This is reflected in the new wording of the *Preamble* since 1990; the fact that Article 23 of the *Grundgesetz* was repealed in 1990 and replaced, in 1992, by a wording which enabled Germany to ratify the *Maastricht Treaty Establishing the European Union* - so, the constitutional provision which served, in 1990, as the legal basis for the restoration of German unity now enables Germany to participate in the process of European integration; and finally the reference in Article 146, the final provision of the *Grundgesetz*.

THE MEANING OF A CONSTITUTIONAL RIGHT TO SELF-DETERMINATION

In the German doctrine of constitutional and international law, several forms of a manifestation of the right to – or principle of – self-determination can be distinguished:

In the broadest sense, this principle is conceived as a right freely to determine a people's own state and social order, its internal political status and the direction of its economic, social and cultural development. This *internal* aspect of the right to self-determination is implemented in a continuous process of the daily political and legal life. One of the forms of the expression of these internal aspects of self-determination can be, e.g., the federal structure of a state or the establishment of

an autonomy status within the framework of a territorial state, one of the models of granting autonomy being local or regional government.

Furthermore, this right to self-determination is also construed as a right to the comprehensive determination of a people's own *external* status which may include the right to a single territory of that people. This might even include the right of a people to dissociate itself from an existing state, in other words the right to secession. As regards the implementation of this external aspect of the right to – or principle of – self-determination, the reunification of Germany in 1990 must be seen as one of the major "manifestations" thereof.

WHO CAN CLAIM THE RIGHT TO SELF-DETERMINATION?

In the German doctrine of international and constitutional law, three groups of holders of the right of self-determination can be identified: peoples including national minorities provided that they constitute peoples in the sense of international law, peoples under colonial or other foreign domination as well as the population of a sovereign state. However, the question as the exact definition of the holders of this right is controversial, as a matter of terminology as well as of substance.

It is beyond any doubt – and also supported by the wording of Articles 1 of both the 1966 UN Human Rights Covenants - that the main beneficiaries of the right to self-determination are "people" and "nation". However, the criteria for determining these notions are not clearly specified by international law. At least as concerns German doctrine and state practice – see in particular the above-mentioned formal declaration of the German government of protest against the reservation of the Indian Government to the UN Human Rights Covenants - it can be excluded that the right to self-determination should be considered as an exclusive right of peoples under colonial or other foreign domination.

On the other hand, if only linguistic, ethnic or cultural criteria were to be applied in order to define the beneficiary of the right to self-determination, the drawing of the line to define the bearer of this right in the framework of the German-language area in Europe would lead to unacceptable results: Thus, there can be no doubt that as concerns the population of Austria and of the German-speaking cantons of Switzerland do not form part of the German people; this clearly shows that also historical criteria have to be applied.

In the political context of Germany, the question as to the continued existence of only one, single German people was – as shown above - of considerable importance: During the period in which the government of the Federal Republic of Germany claimed to be the only legitimate representative of the German people (*Alleinvertretungsanspruch*), one argument supporting this policy of a single German people was derived from the view that the government of the German Democratic Republic lacked sufficient democratic legitimation. The second argument was based on an interpretation of the *Grundgesetz* which was said to be based on the continued existence of the German *Reich* in the borders of 1937. The critics of this approach stated, however, that a petrification of the beneficiary of this right by linking it to a particular date neglected the essentially historic character of the right to self-determination. Thus, as a result of the above-

mentioned *Ostpolitik*, a pragmatic *modus vivendi* was agreed between the governments of the two German states which allowed for the establishment of improved bilateral relations without having to decide this question: This approach is best reflected in the wording of the Preamble to the 1972 Basic Treaty concluded between the Federal Republic of Germany and the German Democratic Republic (*Grundvertrag*) according to which this treaty was concluded "notwithstanding the different concepts of the Federal Republic of Germany and of the German Democratic Republic concerning fundamental questions, among those the national question."

Moreover, in a judgement handed down on 21 October 1987, the *Bundesverfassungsgericht* explicitly relied on the right to self-determination as an argument to support its conclusion that every acquisition of the citizenship of the German Democratic Republic had, for the legal order of the Federal Republic of Germany, the legal effects of the acquisition of German nationality in the sense of the *Grundgesetz*. This result which, according to the *Bundesverfassungsgericht*, was mandatory under the *Grundgesetz*, was – in the court's view - also compatible with international law: The then existing quadripartite status of Germany as a whole and Berlin prevented a unilateral secession of the German Democratic Republic from Germany from being legally effective; moreover, as long as the division of Germany was not based upon a free expression of the internationally protected right to self-determination held by the German people, the Federal Republic of Germany was entitled, under international law, to maintain the concept of a uniform German nationality.

Concerning national minorities as one of the beneficiaries of the right to self-determination it has to be mentioned that, at present, there is no legal definition of the notion of a "national minority" neither in the German legal order, nor in the international law instruments binding upon Germany; this was particularly spelled out in the Explanatory Report to the 1995 Council of Europe Framework Convention for the Protection of National Minorities which constitutes, at least in the European context, the most important international instrument in the field of protection of national minorities. In its Comments on the Opinion of the Advisory Committee on the implementation of this Framework Convention of July 2002, the German government stressed the absence of such a definition. Thus, Germany considers national minorities to be groups of the population who meet the following five criteria: Their members are German nationals; they differ from the majority population insofar as they have their own language, culture and history, in other words, they have their own identity; they wish to maintain this identity; they are traditionally resident in Germany and they live in the traditional settlement areas. For the purposes of the application of the Framework Convention, the Danes, Frisians, Sorbs, and Sinti and Roma are considered to fulfil this criteria.

It is, however, essential to note that, according to the predominant view not only in German doctrine, not all groups constituting a national minority are holders of the right to self-determination: This is so because the holder of this right under current international law is a *people*, but not a *minority*. Therefore, international

minority rights law does not deal with nor includes a right to self-determination but consists of rules concerned with the protection and promotion of the rights of persons belonging to national minorities. It is, however, quite possible that a group of persons which, for purposes of international minority law, constitutes a national minority, is, at the same time, a people in the sense of the international law concept of the right to self-determination. Again, one is faced with the problem that there does not exist any universally accepted definition of the term *people* under international law – notwithstanding the many efforts undertaken by the United Nations. Most authors concur, however, in stating that a group of persons which constitute a national minority and is as such characterised by common objective criteria relating to culture, history, language, and religion, and subjective criteria such as the common wish to belong to a distinct group of persons and to preserve their distinct identity, must, in order to be considered as a people enjoying the right to self-determination, constitute the numerical majority in a geographically defined territory. So, some national minorities may, according to this opinion, indeed justifiably claim to constitute a people and, thus, to be the holder of the right to self-determination.

Applying these criteria in the German context, it is clear that none of the groups generally recognised as national minorities constitute *peoples* in the sense of the concept of the right to self-determination.

Under which circumstances can this right be claimed?

The answer to this question depends on who are the holders of this right, the particular historical situation and on the fact whether they are aiming at the implementation of their right to internal or external self-determination:

Starting with divided peoples or nations, the right to self-determination can be exercised by the whole population of the formerly unified state in order to offer the possibility of reunification; the question arises, however, whether the principle of formal democracy requires a decision by a majority of the whole of both parts together, or whether each part of a divided nation may decide its own political destiny. If the division of a nation has already resulted in the establishment of two sovereign and self-organised states, as was the case with Germany and still is as concerns Korea, each of them must be considered as having obtained its own "defensive" right of self-determination, so neither of them would be entitled to decide *en lieu* of the other. It should be noted that this condition was met in the context of German unification which was based upon a bilateral treaty concluded by the two German states and ratified by their freely elected parliaments.

On the other hand, this implies that – in the context of Germany - the claim for reunification could not be regarded as an interference in the internal affairs of the German Democratic Republic or the Allied Powers. The Federal Constitutional Court stated in this regard: "Other parts of Germany have, meanwhile, found their statehood in the German Democratic Republic. Being organised in this way, they can express their will for reunification with the Federal Republic of Germany only in a form which is admissible according to their own constitution." This position was of particular reference because the former Article 23 of the *Grundgesetz* which allowed for the accession of "other parts of Germany" to

the Federal Republic and to which it implicitly referred, did not state that the expression of self-determination was only admissible in the way provided for by the constitution of the German Democratic Republic.

As concerns, generally speaking, the circumstances of the implementation of the *internal* aspects of the right to self-determination by national minorities which constitute, at the same time, peoples in the sense of international law, it must be stressed that it is predominantly seen as encompassing, in particular, the right of such groups to the protection and promotion of their distinct identities. Therefore, as long as a government treats such a group in such a way as to respect its corresponding international legal obligations, current international law does not provide for a right to exercise self-determination "offensively", i.e. to strive for secession. This situation is considered to constitute the necessary balance between the right to every people to self-determination and the right of states to territorial integrity.

To the most relevant aspects of the right to the protection and promotion of a people's distinct identity belongs, along with, linguistic rights, the right to effective participation in the decision-making process on issues of particular relevance to the groups concerned. As concerns Germany and if one were to consider – hypothetically – the national minorities residing there as peoples in the sense of international law, one would have to conclude that the these aspects are guaranteed in Germany: The freedoms of assembly and of association are protected, and guaranteed to all German citizens, including the members of national minorities and ethnic groups, by its Articles 8 and 9. Also the effective participation of persons belonging to national minorities and ethnic groups in cultural, social and economic life and in public affairs is ensured by Germany's constitutional order as a free democratic state under the rule of law. In addition, there are legal protective provisions and practical promotion measures designed to realise such participation. Participation in the formation of the political will of the people is ensured by the right to freely establish political parties. This is laid down in Article 21 of the *Grundgesetz*. Thereunder, the state may neither impose restrictions on the number of political parties established nor make the establishment of political parties subject to prior authorisation. The members of national minorities and ethnic groups, like the majority population, have the unrestricted right to establish a political party. Also, as German citizens, they come under the scope of the legal provisions on the right to vote in elections, and the right to stand for election, to the German *Bundestag,* to the *Landtage* [Parliaments of the constituent states] and to local councils. As regards elections to the German *Bundestag* and to the *Landtage* of the *Länder* of Brandenburg and Schleswig-Holstein, political parties of national minorities are exempted from the five per cent threshold imposed under the Electoral Act.

On the other hand, the question as to the conditions under which peoples (including national minorities which constitute peoples in the international legal sense) may exercise their right to self-determination in an "offensive" way, i.e. to strive for secession, is still a most controversial issue. The predominant view in the German doctrine seems to be that such an action would be legally justified if

the people concerned were to be discriminated against by the government by means of acts consisting of widespread, persistent, and gross violations of the most fundamental human rights such as mass killings or genocidal measures as, e.g., *ethnic cleansing*. If, however, these – admittedly: rather extreme – criteria implying a right to secede are not fulfilled, then the people have "only" the right to internal self-determination which, according to a strong view in the German doctrine, should imply a minimum of internal autonomy within the boundaries of its state. On an abstract level, an optimum amount of autonomy is to be demanded, as much autonomy as possible without endangering the unity of a State.

What is the relationship between constitutional law and international law in respect to the right of self determination?

The question of the relationship between German constitutional law and the legal rules concerning the right of self-determination has to be addressed in light of the relation between constitutional and international law in general:

According to Article 25 of the *Grundgesetz*, the general rules of public international law are an integral part of federal law. They take precedence over statutes and directly create rights and duties for the inhabitants of the federal territory. The full content of this category of "general rules of international law" remains, however, unclear in the German doctrine: The majority of opinions tends to the view that universal international treaties as such do not belong to this category; it is held, however, that some of the provisions of such general treaties as, e.g., those on human rights have reached the status of customary law and would, therefore, fall into this group; however, there is no unanimous view in this respect.

This applies, in particular, to the question of the legal status, and in particular the contents, of the right to self-determination as enshrined in Article 1 of both International Covenants on Human Rights and as norm of customary law. A consensus can be observed only insofar as it is generally held that the process of the consolidation of international human rights law resulted in a general recognition that states are under basic obligation to protect the life and physical integrity of its citizens. If a state machinery turns itself into an apparatus of terror which persecutes specific groups of its population, these groups cannot be held to be under a legal obligation to remain loyally under the jurisdiction of that State.

As concerns the position of international law treaties in the domestic legal order of Germany, the pertinent provision is Article 59 of the *Grundgesetz*. According to this provision, international treaties that relate to a subject of federal legislation require the consent or participation, in the form of a federal statute, of the bodies competent in any specific case for such federal legislation. The doctrine interpretes this provision as encompassing treaties creating such rights and obligations for domestic subjects which could be – by means of domestic law - only in the form of a formal federal statute. This fact, i.e. passing of a federal statute, determines also the position of such treaty within the domestic legal order: It takes the rank of federal statute law which takes precedence over infrastatutory federal law, but also statutes of the *Lдnder* as a result a of the

supremacy of federal law and in order to reflect the principle of primacy of international law, it is, as a rule, to be applied as the more specific law overriding other federal laws.

Now, as concerns the question as to the direct applicability of Article 1(2) of the *UN Charter* – as a treaty duly ratified by and in force for Germany – as regards the principle of self-determination, there is, again, no unanimous opinion: On the one hand, the view has been presented that this provision should be interpreted as directly applicable law, a view supported by the fact that the statute of an international organisation should be subject primarily to objective interpretation, which does not need to strictly follow the subjective intent of the founders of the organisation, but rather respects subsequent developments and changing circumstances. As an additional argument for this position serves Article 2(4) of the *Charter* prohibiting the Member States from all activities which could impair its "purposes"; the legally binding nature of the purposes is presented as "undoubtedly clear", since they are expressly described as the object of the legal protection. On the other hand, there are also more cautious positions towards this reasoning and its results. Both positions concur, however, in stating that the reference to the right of self-determination in Article 1(2) of the *UN Charter* does not sufficiently clarify the contents and scope of that right. The mentioning of the self-determination principle in Article 55 of the *Charter* is interpreted as being of merely declaratory character.

What processes should be followed to realise such rights, within the framework of a state or, in an extreme case, through secession?

One of the preconditions of the implementation of the right to self-determination is some kind of expression of the popular will. If the majority of a group has no will to defend its characteristics, its distinct identity, this group is not considered to be qualified to be a holder of the right of self-determination, since without this will no such right exists. The existence of this will is a factual, rather than a legal question; as a most unequivocal expression of this will is considered a plebiscite.

As concerns Germany, it should be noted that the preamble of the *Grundgesetz* which – until 1990 - contained a clause according to which the entire German people was called upon to achieve in free self-determination the unity and freedom of Germany had been interpreted in 1973 by the *Bundesverfassungsgericht* as creating a legal obligation for all state organs to seek with "all their means" the reunification of Germany. However, the Court's decision opened a wide field for political discretion as to the choice of means deemed necessary for achieving this goal. Thus, the state organs of the Federal Republic were not allowed to waive the political objective of reunification. However, almost all kinds of political measures were admissible, for example the creation of a confederation of the two German states. Finally, under that decision, the Federal Government was not allowed to contribute to the creation of legal titles susceptible of preventing reunification, for instance by making reunification dependent on approval of third States.

At the end of 1989 and during the first months of 1990 it was not yet clear whether or how the unification of Germany could come about. Proposals concentrated on the possibility of a close co-operation of both states, potentially in a form of a confederation. Later on, it became clear that the German Democratic Republic would join the Federal Republic of Germany. The *Grundgesetz* seemed to offer two alternatives for the unification process: Article 146 provided for the adoption of a new constitution "by a free decision of the German people". The other alternative was offered by its Article 23 in the form of an accession; as already mentioned, the second option was eventually chosen.

Conclusion

The reunification of Germany in 1990 – in the eyes of many German authors a manifestation of the principle of self-determination, and by others seen „only" as the bringing to an end of an artificial separation of a nation – happened as a result of the end of the Cold War and in the period of an extensive application and implementation of this principle in other geographical areas of Europe: As examples, the dissolution of Czechoslovakia, the break-up of the Soviet Union and the dismemberment of the Socialist Republic of Yugoslavia can be mentioned.

Despite of the enormous significance of the principle of self-determination for the destiny of many new states, the precise meaning of the constitutional principle of self-determination, the preconditions of its implementation and the necessary steps leading to its implementation have – as yet - not been defined precisely in international law. This might not be so surprising if one considers that, notwithstanding the high significance of the right to self-determination for the recent history of Germany, neither its domestic legal order, nor the jurisprudence of the *Bundesverfassungsgericht*, nor the doctrine itself have achieved this goal. This might have several reasons: At first, it must not be forgotten that the implementation of the external aspect of this right almost always results in a collision with the principle of territorial integrity and sovereignty of a territorial State. Second, the practical relevance of the elaboration of precise legal rules seems to be less important than expected: Although even the right to secession was laid down in Article 72 of the Constitution of the Union of the Soviet Socialist Republics of 7 October 1977, as well as in Part One of the Preamble to the Constitution of Yugoslavia of 21 February 1974, this did not prevent the existence and even clash of opposing views about its precise contents and the means and ways of its implementation.

ПРАВО НА САМООПРЕДЕЛЕНИЕ
Проблема Германии

М. Хоффман
Доктор права (Прага)
Институт сравнительного публичного и

международного права Макса Планка
(Хайдельберг, Германия),
Преподаватель юридического факультета
Института Карла (Чарльза) (Республика Чехия)

Резюме

В данной работе исследуются вопросы, связанные с правом (принципом) самоопределения в контексте объединения Германии. Выделяются основные этапы развития проблематики о самоопределении, которые были в повестки дня современного германского государства. (Первый этап, начавшийся в 1949 году с возникновением ФРГ и окончившийся в 1969 году с началом «Восточной политики» канцлера Вили Брандта; второй этап, начавшийся в 1969 году и окончившийся воссоединением Германии в 1990 году; и наконец третий этап, начавшийся с момента объединения Германии и длящийся по сей день). В работе дается краткая характеристика данных этапов развития проблематики о праве на самоопределение.

Особое внимание в работе уделено вопросу о возражении ФРГ на оговорку, сделанную Индией 15 августа 1980 года при ратификации Международного пакта о гражданских и политических правах и Международного пакта об экономических, социальных и культурных правах 1966 года. В соответствии с вышеупомянутой оговоркой в отношении статьи 1 обеих пактов Индия объявляла, что осуществление права на самоопределение принадлежит лишь народам, находящимся под колониальным игом. Германское правительство отвергло оговорку Индии подчеркнув, что основанное на положениях Устава ООН право на самоопределение принадлежит всем народам.

Далее рассматриваются аспекты права на самоопределение, существующие в германской доктрине международного и конституционного права. Отмечается, что в широком смысле под принципом самоопределения понимается право народа свободно определять свой государственный и общественный строй а также основные направления своего экономического, социального и культурного развития. Проявлениями внешнего самоопределения могут рассматриваться, например, установление федеративного устройства или предоставление автономного статуса определенным образованиям. Наряду с вышесказанным отмечается, что право на самоопределение может включать, также право народа определять свой внешнеполитический статус, включая право обладания единой территорий, и следовательно право на отделение (сецессию). По словам автора одним из наилучших проявлений осуществления права на самоопределение явилось воссоединение Германии в 1990 году.

В работе довольно тщательно рассмотрены вопросы, связанные с определением обладателей (бенефициариев) права на самоопределение, отмечается, что германская доктрина выделяет три группы обладателей права на самоопределение; народы и нации в смысле международного права, народы находящиеся под колониальной или иной иностранной оккупацией, и

население суверенного государства. Одновременно отмечается, что определение вышеуказанных групп продолжает оставаться спорным.

Развивая данную проблематику автор отмечает, что для выявления конкретных обладателей права на самоопределение в каждом конкретном случае недостаточно применение только языковых, этнических или культурных критериев, исторические предпосылки и критерии также должны приниматься во внимание.

В работе делается попытка выявить те обстоятельства при наличии которых народы и нации, включая национальные меньшинства, которые одновременно являются нациями в смысле международного права, могут осуществлять право на самоопределение посредством отделения от государства.

Отмечается, что несмотря на то, что данный вопрос остается противоречивым, тем не менее согласно доминирующей в германской доктрине точки зрения отделение или борьба за отделение будут рассматриваться, как оправданные с юридической точки зрения, если определенный народ или нация подвергаются дискриминации со стороны правительства, посредством актов состоящих из широкомасштабных, непрерывных, серьезных нарушений наиболее основополагающих прав человека, коими являются массовые убийства или геноцидные меры, такие как, например этнические чистки.

В заключении отмечается, что объединение Германии в 1990 году многими немецкими авторами рассматривалось именно как проявление принципа самоопределения, хотя некоторые авторы рассматривали объединение лишь как прекращение искусственного разделения Германии, которое являлось результатом окончания холодной войны.

Prof. dr. Ivan Kristan
University of Ljubljana

The Right to Self-Determination
The case of Yugoslavia

I. Origin of the Right to Self-determination

The Right of Self-Determination in the history of modern statehood can be followed through historical documents and political actions since thirteen British Colonies in 1776 have separated from Great Britain and declared their independence.

The Declaration of Independence (The Unanimous Declaration of the Thirteen United States of America) was in modern history of statehood first formal document on the constitutional level proclaiming strict demand to the separation.

Introductory paragraph of the Declaration reads: »When, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the cause which impel them to the separation.«

After having listed the sufferance under the King of Great Britain and the injustices caused by him the authors of the Declaration have in its last paragraph declared full independence:

»We, therefore, the representatives of the United States of America, in General Congress, assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the name, and by the authority of the good people of these colonies, solemnly publish and declare, that these united colonies are, and right ought to be free and independent states...«

II. Collective and individual right

Self-determination as a political principle has a double nature: on the one side it is an individual right (freedom) and on other side it is also a right (freedom) of people (of a nation) to decide on its own destiny. From this point of view it is important the mutual connectedness of the individual Self-determination (the right of an individual) and the collective Self-determination (the right of a nation, of the community).

The Right to Self-determination became due UN activity a collective right of a nation and a right of individual.

When Thuerer says the American independence being a prototype of the right of self-determination in the meaning of secession (separation), he adds that the secession was not founded by anti-colonial or national reasons but for the protection of an individual.

The Right to Self-determination as a collective right of the nation is gaining - probably under the influence of the discussions about the universal character of this right - a new characteristic from the standpoint of the mutual correlation of the right of self-determination and other fundamental rights: they consider the Right to Self-determination being a precondition for the realization of all fundamental rights.

III. Democracy and Self-determination

The Democracy and the Self-determination are close linked-up. Self-determination without Democracy couldn't exist, because Self-determination is nothing but an eminent democratic act, nothing but realisation of a democratic essence.

The idea "consent of the governed" is of principal importance. This idea became a principle for the territorial changes between the states: at each territorial change there should be assured a participation in decision-making of the involved people (nation) or entities. This democratic principle found its expression in both the American declaration (1776) and French Declaration (1789).

Kaspar Lang put the democracy as a leading idea of the philosophy of federalism: democracy needs federalism; federalism needs democracy.

IV. The International conception of the Right to Self-determination

International conception of the Right to Self-determination founds its place first in the UN Charter. Later it was elaborated in several documents of the UN, particular:

- The Declaration on abolishing the colonialism from 1960,
- Both International Covenants on human Rights from 1966,
- The Declaration of seven principles of international law from 1970.

The Right of Self-determination was first dedicated to the abolishment of colonialism.

The Right to Self-determination was first dedicated to the abolishment of colonialism. This is to see in the Statement, that the Right to Self-determination is representing moral, political and legal foundation of anticolonialism. But the Declaration from 1960 is important for further development to Self-determination in two sense: first, because it indicates the linkage between the Self-determination and the Human Rights, and second, because it gives a clear definition of the Right to self-determination.

The Declaration on the Granting of Independence to Colonial Countries and Peoples states, that the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental rights. Through this assertion of the anticolonial declaration the Self-determination got a new dimension: besides the political and legal aspect it got an inherent humanitarian element of fundamental Human rights. For all modes of anticolonial actions this is a very important step foreword.

From another side the anticolonial declaration gives a definition of the Right of Self-determination: "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

The linkage between the Right of Self-determination and the fundamental Human rights - for the first time clear expressed in the anticolonial declaration - got its confirmation in both International Covenants on human rights (Covenant on economic, social and cultural rights; Covenant on civil and political rights) from 1966.

Three important points gives the Article I of the International Covenant of civil and political rights (identical is the wording of Article I of the Covenant of economic, social and cultural rights):

- First, it gives the general definition of the right of Self-determination,
- Second, it gives specific definition of economic Self-determination,

- Third, it postulates the obligations and duties of the State parties, concerning the right of self-determination.

Most comprehensively the self-determination is elaborated in the Declaration of seven principles of international law from 1970.

Among seven principles, solemnly proclaimed by the UN General Assembly, for this paper "The principle of equal rights and self-determination of people" is important. At least two parts of this seventh principle should be cited:

- "By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the UN, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every state has the duty to respect this right in accordance with the provisions of the Charter.
- The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right to self-determination by that people".

These two quotations clearly show the whole contents of the right to self-determination in general sense and besides that in the second quotation there is given a definition of political self-determination.

For international conception of Right to self-determination it is of decisive importance the fact that the General Assembly solemnly declared, that the principles of the UN Charter, which are embodied in this Declaration "constitute basic principles of international law"**.**

V. Internal and external Self-determination, the right to secession

Self-determination has its internal and external dimension.

Internal Self-determination signifies the enforcement of nations will considering its political status and its political, social and cultural development inside the existing state.

External dimension of Self-determination means accomplishment of the political status outside of the existing state. So the external self-determination means the right to secede.

Both dimensions of Self-determination are important, but it is obvious that the right to secede as a mode of external self-determination is essential, immanent part of the Right to Self-determination. Without the Right to secession there can be no Right to Self-determination, because it cannot exist without its immanent component part.

Secession is an emergency exit, it is a mode of self-help of a nation if its Right to Self-determination is being denied or if cannot realize all possible degrees and modes Of internal Self-determination.

Original sense of the Right of Self-determination that corresponds to American Declaration of independence 1776 is actually the Right to secession. It is being said that the American Declaration of independence is a prototype of Self-determination in the meaning of secession.

Similar consequence follows from international law, before all from the Declaration of seven principles of international law 1970: establishment of an sovereign state is impossible without the right to secede.

VI. The Theory of consumption of the right to Self-determination.

In connection with denying the Right to secession it should be mentioned the Theory of consumption of the right to Self-determination.

Two Serbian Academicians – Radovan Lukić and Jovan Djordjević – made clear statement advocating this theory in connection with Slovenian constitution. They both stated that Yugoslav nations had the right of Self-determination with the right to secession before formation of the Yugoslav state, but entering in Yugoslavia they have consumed this right.

Theory of consumption is not acceptable neither from theoretical nor from empirical point of view, namely how Yugoslav federation was built and how the first Yugoslav constitution was adopted.

From theoretical point of view this theory is not acceptable because the Right of Self-determination, if it can be used only once, it ceased to be a general right or a principle. No fundamental right exists to be used only once.

The Theory of consumption of the Right to Self-determination with the right to secession is contrary to the trends in understanding the Right of Self-determination in the context of the fundamental human rights, mentioned above.

Looking from standpoint of the American Declaration independence the Right of self-determination is not a right to be used only once, because whenever "a long train of abuses and usurpations" appears there is the right to alter the system of government or to secede.

In international law the theory o consumption is neither accepted. There are clear standpoints that the Right to Self-determination is a permanent, inalienable and repeatable right: actually this is a repeatable act.

Yugoslav federation was built up explicitly on the basis of the Right of Self-determination including the Right to secession. The historical events and facts about demanding and realizing the Right of Self-determination from the pre-war Kingdom of Yugoslavia (established 1918), through national liberation struggle (1941-1945) to the Constitution SFRJ 1974 are notorious.

In connection with Theory of consumption it is important that the Constitutional court of Yugoslavia also refused this theory. Namely the Constitutional Court in January 1990 refused proposal of the judge reporter for the assessment the tenth constitutional amendment to the Slovenian constitution (adopted among other amendments 1989), which stipulated the Right to Self-determination of Slovenian people, being contrary to the Constitution of Yugoslavia (SFRJ).

VII. Hesitation in acknowledgement the Self-determination.

There was after the fall of Berlin Wall and (expected) collapse of the Soviet Union (SSSR) towards the Self-determination in the case of Baltic states and in the case of the Socialist federative republic of Yugoslavia (SFRJ) a simultaneous attitude of the international community, before all of the United States: they have - if not quite denying the Self-determination - strong hesitated to accept it.

Western European governments and United States exercised pressure to preserve unity of Yugoslavia. Their pragmatic reason was that they didn't know, what consequences the break up of Yugoslavia could have for the balance of power and for peace in Europe, they didn't know if this example could cause the break up of Soviet Union a. s. o.

This attitude of western countries was wrong. It would be wiser to support a peaceful reform of Yugoslavia on the basis of the Right of Self-determination then to permit (or even to support?) use the violence or encourage the national intolerance to preserve the unity of Yugoslavia. It is possible to put a question if another attitude of western countries and of USA would prevent the horrible war in Yugoslavia, ending with Dayton peace, signed in December 1995.

Douglas Seay, American policy analyst, gave his observation of this western attitude to Yugoslavia crisis: "The Bush Administration and most West European governments oppose the break-up of Yugoslavia out of a fear of instability. This attitude probably is a relic of the Cold War era, when it was assumed, correctly, that a disintegrating Yugoslavia would be a tempting target for Moscow. Today, however, Yugoslavia's integrity is of little strategic importance to the West. Even if stability of Yugoslavia were in Western interests, it would not be achieved by the West backing the present regimes coercive attempts to hold the country together. Stability only can be established by the self-determination of Yugoslavia's constituent republics, be it through complete independence or a renewed federation of democratic republics."

Significant was the hesitation to acknowledge the Self-determination in the case of Baltic states, because there was principally different situation in the Baltic states (Lithuania, Latvia and Estonia) and in the SFRJ.

In Baltic republics the issue was not Self-determination but reestablishment of independence being lost on the basis of non-aggression treaty between Nazi Germany and Soviet Union (SSSR) 1939, which set the stage for Stalin's annexation of the Baltic states the following year.

When after falling the Berlin-Wall the Baltic states in 1990 reclaimed their freedom from the collapsing Soviet Union and when they declared anew their independence, leading western countries were hesitating a pretty time before they formally acknowledged the reestablishment of independent Baltic states being abolished fifty years ago.

When Soviet State Council, presided by Mikhail Gorbachov, on 6 September 1991 acknowledged the independence of Lithuania, Latvia and Estonia the way for realization of the Right of self-determination was opened.

VIII. What was the reason of the collapse of Yugoslav federation (SFRJ)?

The central issue was different attitude to the concept of federation being enforced in the SFRJ Constitution of 1974. It is to say, that in this constitution was federal principle in favour of independent status of federal units (republics) reached the highest level since the first constitution of 1946. Serbia was not satisfied with this conception and advocated strong centre, actually this was a concept of unitarian federation. So Serbia succeeded with its initiative that the

federal Constitution from 1974 was changed 1988. In Slovenia was to found critical opinion about this change - it was treated as a degradation of the sovereignty of Slovenia.

Dissatisfaction with federal constitutional amendments from 1988 caused in Slovenia an activity against the centralisation on federal level. This attitude found its expression 1989 in the group of amendments to the Slovenian Constitution from 1974, trying to preserve a relative independent status in the federation. These Slovenian amendments caused very strong negative reaction in Belgrade. In the centre of the critics was before all the amendment No. X. on the Right of Self-determination of the Slovenian people (nation).

To the Slovenian assembly there was one day before its session addressed a firm demand from the federal authorities and of Central committee of the Party (it was the strongest political pressure against Slovenia until then) not to adopt the proposed constitutional amendments: Slovenian assembly didn't follow this demand and adopted all proposed amendments.

So the crisis of Yugoslav federation began to ripen. There were still some efforts to reconcile the opposite views on conception of federation but no one of them succeeded. By Slovenia and Croatia there was elaborated a concept of reorganization of the federation into a confederation. Serbia decisively rejected this proposal.

IX. Secession or dissolution?

So in several republics (federal units) were made steps to reach their independency.

The Republic of Slovenia organized on 23 December 1990 a plebiscite (referendum): in favour of independent Republic of Slovenia voted 88,5% of all registered voters.

This was the basis for further activities. One of these was the proposal for consenting disunion of SFRJ, adopted by Slovenian Assembly on 20 February 1991 in a form of Resolution. Unfortunately this proposal was without expected effect. In that time Milošević as powerful leader of Serbia was not ready to accept peaceful dissolution of Yugoslavia. He planned to use even armed force to preserve Yugoslavia made after his conception.

Final decisions about the independency and constituting their independent states were adopted in all republics in 1991 and 1992 (Slovenia on 25 June 1991; Croatia on 25 June 1991; Macedonia in September 1991; Bosnia and Herzegovina on 14 October 1991; Serbia and Montenegro on 27 April 1992, establishing the Federative Republic of Yugoslavia).

In the process of break off of Yugoslavia (SFRJ) Serbia tried to enforce its standpoint that four federal units (republics) - Slovenia, Croatia, Macedonia and Bosnia and Herzegovina – seceded from the SFRJ. The aim of this assertion of Serbia was to reach the acknowledgement of his theory that the SFRJ exists further despite missing four of previous six component republics, now being composed only of republics Serbia and Montenegro. Through that formula Serbia with Montenegro wanted to reach the status of automatic succession after SFRJ.

The Arbitration Committee (Badinter Commission) rejected this assertion of Serbia and stated that in the case of SFRJ there is no secession but dissolution. The process of dissolution of SFRJ began on 29 November 1991 and it was completed on 4 July 1992. All new independent states arisen from SFRJ have equal status of state successor after the SFRJ. This new states (Bosnia and Herzegovina, Croatia, Macedonia, Slovenia, Federal republic of Yugoslavia) settled main problems of succession in Agreement of succession, signed in Vienna in June 2001.

ПРАВО НА САМООПРЕДЕЛЕНИЕ

Пример Югославии

И. Кристан

Профессор Университета Любляны

Резюме

В докладе проф. Ивана Кристана на примере Югославии исследуются вопросы, связанные с правом на самоопределение. Автор прослеживает развитие института самоопределения, начиная с провозглашения независимости тринадцатью британскими колониями в Америке и считая Декларацию о независимости Соединенных Штатов Америки первым документом, который на конституционном уровне закрепил право на отделение.

По словам автора, «согласие управляемых», т.е. согласие заинтересованных народов, наций, населяющих определенную территорию, имеет принципиальное значение для осуществления территориальных изменений и, следовательно, для осуществления права на самоопределение. В работе исследованы различные аспекты (внутренний и внешний) права на самоопределение. Отмечается, что внутреннее самоопределение выражается в том, что борющиеся нации и народы рассматривают свой политический статус, а также политическое, социальное и культурное развитие в рамках существующего государства, в то время как внешнее самоопределение предусматривает установление политического статуса вне рамок существующего государства, следовательно, внешнее самоопределение подразумевает право на отделение (сецессию). Право на отделение (сецессия) является составной частью права на самоопределение, без которого невозможно представить существование последнего. Право на самоопределение в смысле Американской декларации о независимости 1776 года означает именно право на отделение (сецессию).

Далее автор подвергает критике теорию «исчерпания (лишения) права на самоопределение» и, в частности, позицию сербских юристов Радована Лукича и Йована Джорджевича, которые отстаивали точку зрения, согласно которой югославские республики обладали правом на самоопределение,

которым они воспользовались, создав Югославию, после чего, соответственно, лишились его, отмечая, что если правом на самоопределение можно воспользоваться лишь один раз, то оно перестает являться общим принципом или нормой права. В доктрине международного права данная теория никогда не признавалась. О непризнанности последней свидетельствует и приведенное автором решение Конституционного Суда СФРЮ 1990 года, в котором Суд отверг предложение судьи-докладчика признать десятую поправку Конституции Словении, констатирующую право словенского народа на самоопределение, как не соответствующее Югославской Конституции.

В заключение автор совершает краткий экскурс в историю распада Югославии, подвергая особому исследованию вопросы правопреемства. В работе, в частности, рассматриваются попытки СРЮ (Сербии и Черногории) на первом этапе распада Югославии представлять себя единственным правопреемником СФРЮ и выступать от ее имени. Однако Арбитражный комитет (Комиссия Бадинтера) отверг данное требование СРЮ, установив, что в случае Югославии имело место не отделение, а расчленение, и, соответственно, все образованные после распада Югославии государства имеют одинаковый статус государств-правопреемников СФРЮ.

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I. Origin of the Right to Self-determination

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«We, therefore, the representatives of the United States of America, in General Congress, assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the name, and by the authority of the good people of these colonies, solemnly publish and declare, that these united colonies are, and right ought to be free and independent states...»

II. Collective and individual right

Self-determination as a political principle has a double nature: on the one side it is an individual right (freedom) and on other side it is also a right (freedom) of people (of a nation) to decide on its own destiny. From this point of view it is important the mutual connectedness of the individual Self-determination (the right of an individual) and the collective Self-determination (the right of a nation, of the community).

The Right to Self-determination became due UN activity a collective right of a nation and a right of individual.

When Thuerer says the American independence being a prototype of the right of self-determination in the meaning of secession (separation), he adds that the secession was not founded by anti-colonial or national reasons but for the protection of an individual.

The Right to Self-determination as a collective right of the nation is gaining - probably under the influence of the discussions about the universal character of this right - a new characteristic from the standpoint of the mutual correlation of the right of self-determination and other fundamental rights: they consider the Right to Self-determination being a precondition for the realization of all fundamental rights.

III. Democracy and Self-determination

The Democracy and the Self-determination are close linked-up. Self-determination without Democracy couldn't exist, because Self-determination is nothing but an eminent democratic act, nothing but realisation of a democratic essence.

The idea "consent of the governed" is of principal importance. This idea became a principle for the territorial changes between the states: at each territorial change there should be assured a participation in decision-making of the involved people (nation) or entities. This democratic principle found its expression in both the American declaration (1776) and French Declaration (1789).

Kaspar Lang put the democracy as a leading idea of the philosophy of federalism: democracy needs federalism; federalism needs democracy.

IV. The International conception of the Right to Self-determination

International conception of the Right to Self-determination founds its place first in the UN Charter. Later it was elaborated in several documents of the UN, particular:

- The Declaration on abolishing the colonialism from 1960,
- Both International Covenants on human Rights from 1966,
- The Declaration of seven principles of international law from 1970.

The Right of Self-determination was first dedicated to the abolishment of colonialism.

The Right to Self-determination was first dedicated to the abolishment of colonialism. This is to see in the Statement, that the Right to Self-determination is representing moral, political and legal foundation of anticolonialism. But the Declaration from 1960 is important for further development to Self-determination in two sense: first, because it indicates the linkage between the Self-determination and the Human Rights, and second, because it gives a clear definition of the Right to self-determination.

The Declaration on the Granting of Independence to Colonial Countries and Peoples states, that the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental rights. Through this assertion of the anticolonial declaration the Self-determination got a new dimension: besides the political and legal aspect it got an inherent humanitarian element of fundamental Human rights. For all modes of anticolonial actions this is a very important step foreword.

From another side the anticolonial declaration gives a definition of the Right of Self-determination: "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

The linkage between the Right of Self-determination and the fundamental Human rights - for the first time clear expressed in the anticolonial declaration - got its confirmation in both International Covenants on human rights (Covenant on economic, social and cultural rights; Covenant on civil and political rights) from 1966.

Three important points gives the Article I of the International Covenant of civil and political rights (identical is the wording of Article I of the Covenant of economic, social and cultural rights):

- First, it gives the general definition of the right of Self-determination,
- Second, it gives specific definition of economic Self-determination,
- Third, it postulates the obligations and duties of the State parties, concerning the right of self-determination.

Most comprehensively the self-determination is elaborated in the Declaration of seven principles of international law from 1970.

Among seven principles, solemnly proclaimed by the UN General Assembly, for this paper "The principle of equal rights and self-determination of people" is important. At least two parts of this seventh principle should be cited:

- "By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the UN, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every state has the duty to respect this right in accordance with the provisions of the Charter.
- The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right to self-determination by that people".

These two quotations clearly show the whole contents of the right to self-determination in general sense and besides that in the second quotation there is given a definition of political self-determination.

For international conception of Right to self-determination it is of decisive importance the fact that the General Assembly solemnly declared, that the principles of the UN Charter, which are embodied in this Declaration "constitute basic principles of international law"**.**

V. Internal and external Self-determination, the right to secession

Self-determination has its internal and external dimension.

Internal Self-determination signifies the enforcement of nations will considering its political status and its political, social and cultural development inside the existing state.

External dimension of Self-determination means accomplishment of the political status outside of the existing state. So the external self-determination means the right to secede.

Both dimensions of Self-determination are important, but it is obvious that the right to secede as a mode of external self-determination is essential, immanent part of the Right to Self-determination. Without the Right to secession there can be no Right to Self-determination, because it cannot exist without its immanent component part.

Secession is an emergency exit, it is a mode of self-help of a nation if its Right to Self-determination is being denied or if cannot realize all possible degrees and modes Of internal Self-determination.

Original sense of the Right of Self-determination that corresponds to American Declaration of independence 1776 is actually the Right to secession. It is being said that the American Declaration of independence is a prototype of Self-determination in the meaning of secession.

Similar consequence follows from international law, before all from the Declaration of seven principles of international law 1970: establishment of an sovereign state is impossible without the right to secede.

VI. The Theory of consumption of the right to Self-determination.

In connection with denying the Right to secession it should be mentioned the Theory of consumption of the right to Self-determination.

Two Serbian Academicians – Radovan Lukić and Jovan Djordjević – made clear statement advocating this theory in connection with Slovenian constitution. They both stated that Yugoslav nations had the right of Self-determination with the right to secession before formation of the Yugoslav state, but entering in Yugoslavia they have consumed this right.

Theory of consumption is not acceptable neither from theoretical nor from empirical point of view, namely how Yugoslav federation was built and how the first Yugoslav constitution was adopted.

From theoretical point of view this theory is not acceptable because the Right of Self-determination, if it can be used only once, it ceased to be a general right or a principle. No fundamental right exists to be used only once.

The Theory of consumption of the Right to Self-determination with the right to secession is contrary to the trends in understanding the Right of Self-determination in the context of the fundamental human rights, mentioned above.

Looking from standpoint of the American Declaration independence the Right of self-determination is not a right to be used only once, because whenever "a long train of abuses and usurpations" appears there is the right to alter the system of government or to secede.

In international law the theory o consumption is neither accepted. There are clear standpoints that the Right to Self-determination is a permanent, inalienable and repeatable right: actually this is a repeatable act.

Yugoslav federation was built up explicitly on the basis of the Right of Self-determination including the Right to secession. The historical events and facts about demanding and realizing the Right of Self-determination from the pre-war Kingdom of Yugoslavia (established 1918), through national liberation struggle (1941-1945) to the Constitution SFRJ 1974 are notorious.

In connection with Theory of consumption it is important that the Constitutional court of Yugoslavia also refused this theory. Namely the Constitutional Court in January 1990 refused proposal of the judge reporter for the assessment the tenth constitutional amendment to the Slovenian constitution (adopted among other amendments 1989), which stipulated the Right to Self-determination of Slovenian people, being contrary to the Constitution of Yugoslavia (SFRJ).

VII. Hesitation in acknowledgement the Self-determination.

There was after the fall of Berlin Wall and (expected) collapse of the Soviet Union (SSSR) towards the Self-determination in the case of Baltic states and in the case of the Socialist federative republic of Yugoslavia (SFRJ) a simultaneous attitude of the international community, before all of the United States: they have - if not quite denying the Self-determination - strong hesitated to accept it.

Western European governments and United States exercised pressure to preserve unity of Yugoslavia. Their pragmatic reason was that they didn’t know, what consequences the break up of Yugoslavia could have for the balance of power and for peace in Europe, they didn't know if this example could cause the break up of Soviet Union a. s. o.

This attitude of western countries was wrong. It would be wiser to support a peaceful reform of Yugoslavia on the basis of the Right of Self-determination then to permit (or even to support?) use the violence or encourage the national intolerance to preserve the unity of Yugoslavia. It is possible to put a question if another attitude of western countries and of USA would prevent the horrible war in Yugoslavia, ending with Dayton peace, signed in December 1995.

Douglas Seay, American policy analyst, gave his observation of this western attitude to Yugoslavia crisis: "The Bush Administration and most West European governments oppose the break-up of Yugoslavia out of a fear of instability. This attitude probably is a relic of the Cold War era, when it was assumed, correctly, that a disintegrating Yugoslavia would be a tempting target for Moscow. Today, however, Yugoslavia’s integrity is of little strategic importance to the West. Even if

stability of Yugoslavia were in Western interests, it would not be achieved by the West backing the present regimes coercive attempts to hold the country together. Stability only can be established by the self-determination of Yugoslavia's constituent republics, be it through complete independence or a renewed federation of democratic republics."

Significant was the hesitation to acknowledge the Self-determination in the case of Baltic states, because there was principally different situation in the Baltic states (Lithuania, Latvia and Estonia) and in the SFRJ.

In Baltic republics the issue was not Self-determination but reestablishment of independence being lost on the basis of non-aggression treaty between Nazi Germany and Soviet Union (SSSR) 1939, which set the stage for Stalin's annexation of the Baltic states the following year.

When after falling the Berlin-Wall the Baltic states in 1990 reclaimed their freedom from the collapsing Soviet Union and when they declared anew their independence, leading western countries were hesitating a pretty time before they formally acknowledged the reestablishment of independent Baltic states being abolished fifty years ago.

When Soviet State Council, presided by Mikhail Gorbachov, on 6 September 1991 acknowledged the independence of Lithuania, Latvia and Estonia the way for realization of the Right of self-determination was opened.

VIII. What was the reason of the collapse of Yugoslav federation (SFRJ)?

The central issue was different attitude to the concept of federation being enforced in the SFRJ Constitution of 1974. It is to say, that in this constitution was federal principle in favour of independent status of federal units (republics) reached the highest level since the first constitution of 1946. Serbia was not satisfied with this conception and advocated strong centre, actually this was a concept of unitarian federation. So Serbia succeeded with its initiative that the federal Constitution from 1974 was changed 1988. In Slovenia was to found critical opinion about this change - it was treated as a degradation of the sovereignty of Slovenia.

Dissatisfaction with federal constitutional amendments from 1988 caused in Slovenia an activity against the centralisation on federal level. This attitude found its expression 1989 in the group of amendments to the Slovenian Constitution from 1974, trying to preserve a relative independent status in the federation. These Slovenian amendments caused very strong negative reaction in Belgrade. In the centre of the critics was before all the amendment No. X. on the Right of Self-determination of the Slovenian people (nation).

To the Slovenian assembly there was one day before its session addressed a firm demand from the federal authorities and of Central committee of the Party (it was the strongest political pressure against Slovenia until then) not to adopt the proposed constitutional amendments: Slovenian assembly didn't follow this demand and adopted all proposed amendments.

So the crisis of Yugoslav federation began to ripen. There were still some efforts to reconcile the opposite views on conception of federation but no one of

them succeeded. By Slovenia and Croatia there was elaborated a concept of reorganization of the federation into a confederation. Serbia decisively rejected this proposal.

IX. Secession or dissolution?

So in several republics (federal units) were made steps to reach their independency.

The Republic of Slovenia organized on 23 December 1990 a plebiscite (referendum): in favour of independent Republic of Slovenia voted 88,5% of all registered voters.

This was the basis for further activities. One of these was the proposal for consenting disunion of SFRJ, adopted by Slovenian Assembly on 20 February 1991 in a form of Resolution. Unfortunately this proposal was without expected effect. In that time Milošević as powerful leader of Serbia was not ready to accept peaceful dissolution of Yugoslavia. He planned to use even armed force to preserve Yugoslavia made after his conception.

Final decisions about the independency and constituting their independent states were adopted in all republics in 1991 and 1992 (Slovenia on 25 June 1991; Croatia on 25 June 1991; Macedonia in September 1991; Bosnia and Herzegovina on 14 October 1991; Serbia and Montenegro on 27 April 1992, establishing the Federative Republic of Yugoslavia).

In the process of break off of Yugoslavia (SFRJ) Serbia tried to enforce its standpoint that four federal units (republics) - Slovenia, Croatia, Macedonia and Bosnia and Herzegovina – seceded from the SFRJ. The aim of this assertion of Serbia was to reach the acknowledgement of his theory that the SFRJ exists further despite missing four of previous six component republics, now being composed only of republics Serbia and Montenegro. Through that formula Serbia with Montenegro wanted to reach the status of automatic succession after SFRJ.

The Arbitration Committee (Badinter Commission) rejected this assertion of Serbia and stated that in the case of SFRJ there is no secession but dissolution. The process of dissolution of SFRJ began on 29 November 1991 and it was completed on 4 July 1992. All new independent states arisen from SFRJ have equal status of state successor after the SFRJ. This new states (Bosnia and Herzegovina, Croatia, Macedonia, Slovenia, Federal republic of Yugoslavia) settled main problems of succession in Agreement of succession, signed in Vienna in June 2001.