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SELF-DETERMINATION, THE RIGHT OF PEOPLES TO DECIDE AND THE OBLIGATION OF STATES TO NEGOTIATE

1 Introduction

The fundamental and collective right of self-determination of peoples continues to be the subject of great debate. Around the world, the right of self-determination has been and continues to be claimed by many independence and autonomist movements struggling to make their voices heard on the international stage. Although it is practically unthinkable to make an exhaustive list, such groups are active in: the Åland Islands (Finland); Ambazonia (Cameroon); Bougainville (Papua-New-Guinea); Brittany, New Caledonia and Polynesia (France); Casamance (Senegal); Catalonia, Galicia and the Basque Country (Spain); the Chagos Archipelago, Northern Ireland, Scotland and Wales (United Kingdom); Chuuk (Federated States of Micronesia); Flanders (Belgium); Greenland and the Faroe Islands (Denmark); Hong Kong and Tibet (China); Kabylia (Algeria); Kurdistan (Iraq, Iran, Syria, Turkey); Lombardia, Sardinia, South Tyrol and Venetia (Italy); Porto Rico (United States of America); Quebec (Canada); Szeklerland (Romania); and, Western Sahara (Morocco).¹

While no one can predict today what fate will befall these various movements, their sheer number alone testifies to the ever-renewed

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¹ For a detailed analysis of the claims of many of the aforementioned peoples, see Turp, Daniel - Sanjaume-Calvet, Marc (eds.): *The Emergence of a Democratic Right of Self-Determination in Europe*. Brussels: Centre Maurits Coppiters. 2017. [online], available from: http://uniset.ca/microstates2/Coppieters_5282_selfdetermination_final.pdf, accessed: 24. 11. 2020.; and Griffiths, Ryan: *The State of Secession in International Politics*. In: *E-International Relations*, published: 23. 09. 2016 [online], available from: <http://www.e-ir.info/2016/09/23/the-state-of-secession-in-international-politics>, accessed: 24. 11. 2020.

relevance of the principle of self-determination.² From the 20th to the 21st century, there has been a significant shift towards the right of self-determination, which comprises a right of decide (I), accompanied by an obligation of States to negotiate (II).

2 Self-determination and the right of peoples to decide

The right of peoples to self-determination has been acknowledged and enacted in international instruments as important as the *Charter of the United Nations* and the *United Nations Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*.³ According to these international instruments, the right of self-determination is universal in nature as it is granted to “all peoples”. Such an interpretation is confirmed by common article 1 of the *International Covenants on Human Rights*⁴ which affirms that “[a]ll people have the right of self-determination” and that “[b]y virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”. With regards to the determination of a political status, the *Declaration on Friendly Relations* states that “the establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence

² Such relevance is also illustrated by the theoretical debates surrounding the right of self-determination and especially the right of secessionist self-determination, notably through the philosophical and political essays of Buchanan, Allen: *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Québec*. New York: Basic Books, 1991.; Hannum, Hurst: *Autonomy, Sovereignty and Self-Determination - the Accommodation of Conflicting Rights*. Philadelphia: University of Pennsylvania Press. 1996; and Seymour, Michel (dir.) : *Repenser l'autodétermination interne*. Montréal: Les Éditions Thémis, 2016.

³ G.A. Res. 2625 (XXV), UN GAOR, 25th Sess., UN Doc. A/8082 (1970) [hereinafter *Declaration on Friendly Relations*].

⁴ See *International Covenant on Economic, Social and Cultural Rights*, (1976) 993 United Nations Treaty Series [UNTS] 3 and the *International Covenant on Civil and Political Rights*, (1999) 997 UNTS 171 [hereinafter *International Covenants*].

into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people”.

There have been attempts to give a restrictive interpretation to the right to self-determination and to limit the ambit of such right. For colonial peoples, all forms of political status could be achieved through the exercise of their right of self-determination, including the right to external self-determination- i.e., to become sovereign and independent States.⁵ Such right of external self-determination could also be available to those peoples who are comprised in sovereign and independent States that, to quote the safeguard clause of the *Declaration on Friendly Relations*, are not “possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour”. In this case of “remedial secession”,⁶ sovereign and independent States would not be seen as conducting themselves in compliance with the principle of equal rights and self-determination of peoples and any action which would dismember or impair, totally or in part, their territorial integrity or political unity would not be considered in violation of international law. With regards to free association or integration with an independent State or the emergence into any other political status freely determined by a people as modes of implementing the right of self-determination, and notably the right to autonomy within a State,⁷ such modes would be open to colonial as well as non-colonial peoples.

⁵ The Committee on Decolonization (Committee of 24) of the United Nations considers that 17 Non-Self-Governing territories are vested with the right of self-determination and can establish sovereign and independent States: American Samoa, Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands (Malvinas), French Polynesia, New Caledonia, Gibraltar, Guam, Montserrat, New Caledonia, Pitcairn, Saint Helena, Tokelau, Turks and Caicos Islands, United States Virgin Islands and Western Sahara: see <http://www.un.org/en/decolonization/nonselgoverterritories.shtml>, accessed: 24. 11. 2020.

⁶ On the concept of remedial secession, see: Vezbergaité, Ieva: *Remedial Secession as an Exercise of the Right of Self-Determination of Peoples*. Thesis, Budapest, Hungary. 2011;

⁷ See: Gilbert, Geoff: *Autonomy and Minority Groups: A Right in International Law*. In: *Cornell International Law Journal*, Vol. 35. 2002, 307-353.; and Ghai, Yash: *Introduction: Nature and Origins of Autonomy*. In: Ghai, Yash - Woodman, Sophia (eds.): *Practising self-government. A comparative Study of Autonomous Regions*. Cambridge: Cambridge University Press. 2013, 1-31.

Although some publicists who continue to support the idea that the right of self-determination - and notably the right to establish a sovereign and independent state - belongs only to colonial or oppressed peoples,⁸ in our opinion, the views expressed by the International Court of Justice have contributed to restoring the original scope of the right of self-determination, including the right to establish a sovereign and independent state enshrined in the *Charter of the United Nations* as interpreted by the *Declaration on Friendly Relations* and in the *International Covenants on Human Rights*, comprising both the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*, and which it must, in accordance with article 26 of the *Vienna Convention on the Law of Treaties*, perform in good faith.

International practice tends to show that attempts to contain this right to self-determination to the colonial sphere and to refuse non-colonial peoples the benefit of independence or autonomy has not been successful during the last part of the 20th century and the beginning of the 21st century. The international community witnessed the accession to independence of Eritrea or Eastern Timor, as well as of the republics of the former Soviet Union or Yugoslavia. It also saw the United Kingdom recognize the right of the inhabitants of Northern Ireland to determine their own future and to decide, if such was the will of the majority, that Northern Ireland should continue or to cease to be part of the United Kingdom.⁹ After the second independence referendum held in Québec in 1995 which and the acknowledgment of its the Supreme Court in *Reference re Secession of Quebec*¹⁰ “right of Quebec to pursue secession”, the Parliament of Canada also accepted that Québec could “cease to be part of Canada” in a *Clarity Act*¹¹ adopted in response to the *Quebec Secession Reference*.¹²

⁸ See Crawford, James: *The Creation of States in International Law*. Oxford: Oxford University Press, 2nd ed. 2006.; and Radan, Peter: *Secessionist Referenda in International and Domestic Law*. In: *Nationalism and Ethnic Politics*, Vol. 18. 2012, 8-21.

⁹ See the *Northern Ireland Peace Agreement*, 10 April 1998, art. 2 (Constitutional issues).

¹⁰ [1998] 2 Supreme Court Reports [S.C.R.] 217 [hereinafter *Québec Secession Reference*].

¹¹ Statutes of Canada (S.C.), 2000, c. 26.

¹² For a detailed analysis of the right to decide in a Québec context, see: Turp, Daniel:

Furthermore, the *United Nations Declaration on the Rights of Indigenous Peoples*¹³ affirmed in 2007 the right of such peoples to self-determination. With the support of several member States in the international community, Kosovo unilaterally declared its independence in 2008, and in an advisory opinion of 22 July 2010 the International Court of Justice determined that this declaration was not illegal.¹⁴ Southern Sudan also took its place in the community of nations, and the United Kingdom explicitly recognised the right of Scotland to organise a referendum and to become an independent state if such was the wish of its people.¹⁵

One can also note that the recognition a right to decide its political and constitutional future is recognized Belgium when we think of Flanders and Wallonia, in Denmark if we consider the peoples of Greenland and the Faroe Islands.

One we cannot however pass in silence the difficulty of the Palestinian people to fully achieve their right of self-determination,¹⁶ not to mention the peoples of Western Sahara¹⁷ or Kurdistan¹⁸, whose struggles for freedom face obstacles that have so far proven insurmountable. And what can we say of the obstinate refusal of the Spanish State to recognise the right of the Catalans to freely decide their future and the measures it has taken to curtail such right, including

The Right to Choose: Essays on Québec's Right of Self-Determination. Montréal: Éditions Thémis. 2001, 801-835.

¹³ A/RES/61/295, UN GAOR, 61st sess., U.N. Doc. A/61/49 (2007).

¹⁴ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010, 403.

¹⁵ See *Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland*, Edinburgh, 15 October 2012.

¹⁶ See Barnidge, Jr., Robert. P.: *Self-Determination, Statehood, and the Law of Negotiation: The Case of Palestine*. Oxford, Hart Publishing, 2016.

¹⁷ See Hunsinger, Maribeth: Self-determination in Western Sahara: A Case of Competing Sovereignities? In: *Berkeley Journal of International Law Blog*, 21. 02. 2017. [online], available from: www.berkeleytravaux.com, accessed: 25. 11. 2020.

¹⁸ See Watts, Nicole: Democracy and Self-Determination in the Kurdistan Region of Irak. In: Romano, David - Gurses, Mehmet (eds.): *Conflict, Democratization, and the Kurds in the Middle East*. New York: Palgrave Macmillan. 2014, 141-168.

the iniquitous sentences of the Spanish Constitutional Court in these matters?¹⁹

Despite the continuing obstacles to the full achievement of the right of self-determination, there have been several other instances where the right of self-determination has been invoked and recognized in recent years. Hence, self-determination referendums were held in the Bougainville region of Papua New Guinea,²⁰ as well as in New Caledonia in 2018 and 2020.²¹ In addition, an independence referendum should be held in the Chuuk State with the consent of the Federated States of Micronesia in 2022.²²

The major attribute of the right of self-determination is “the right of peoples to decide”. But it comes with an essential corollary, “the obligation for States to negotiate”.

¹⁹ On such measures, see the views expressed by the legitimate president of Catalonia Carles Puigdemont: Spain’s attempt to block Catalonia’s referendum is a violation of our basic rights. *The Guardian*, 21. 09. 2017 [online], available from: www.theguardian.com, accessed: 25. 11. 2020. On the attitude of the Spanish Constitutional Court, see Turp, Daniel: Catalonia’s “Right to Decide” under International, European, Spanish, Catalan and Comparative Law. In: *The Catalan Independence Referendum: An Assessment of the Process of Self-Determination*. Montréal: L’Institut de recherche sur l’autodétermination des peuples et les indépendances nationales (IRAI). 2017, 55-73.

²⁰ This referendum was organized held 23 November and 7 December 2019 in accordance with the *Bougainville Peace Agreement*. Given the choice between greater autonomy within Papua New Guinea and full independence, 98,31% of the votes were cast in favor of independence, see: Cave, Damien: Bougainville Votes for Independence From Papua New Guinea. *The New York Times*, 11. 12. 2019 [online], available from: www.nytimes.com; accessed: 25. 11. 2020.

²¹ The referendum on self-determination held in New Caledonia on Sunday 4 October 2020, in accordance with the *Nouméa Accord* of May 5, 1998, resulted in a short victory for the NO. To the question: “Do you want New Caledonia to accede to full sovereignty and become independent?”, 53.26% voted YES and 46.74% voted NO. The YES vote obtained 43.33% in the referendum of November 4, 2018. The *Nouméa Accord* allows for a third referendum to take place and such a referendum should occur in 2022: see Julien SARTRE et Ben DOHERTY, “New Caledonia rejects independence from France for second time- Secessionists say they will take their campaign to third referendum in 2022”, *The Guardian*, 4. 11. 2019 [online], available from: www.theguardian.com, accessed: 25. 11. 2020.

²² See: Chuuk independence referendum postponed until 2022. *Radio New Zealand*, 29. 02. 2020. [online], available from: www.rnz.co.nz, accessed: 25. 11. 2020.

3 Self-determination and the obligation of states to negotiate

In accordance with the right of self-determination guaranteed in Article 1 common to both *International Covenants on human rights*, peoples may “freely determine their political status and freely pursue their economic, social and cultural development.” In terms of political status, the *Declaration on Friendly Relations* stipulates that “[t]he 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 provisions confer to peoples a genuine “right to decide” and a collective right which is ultimately to be exercised by peoples. It should be remembered that the exercise of the right does not necessarily lead to national independence; it may take the form of association with another state or the acquisition of increased autonomy or fundamental individual and collective rights for the people within the State.

But it is also important to stress that the affirmation of the right of self-determination of peoples is accompanied in the same *International Covenants on Human Rights* by the imposition of an obligation on States. Hence, “the States Parties to the present Covenant shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.” This requirement has not been more closely defined by the *Declaration on Friendly Relations* or by other international instruments. It gives States a duty to negotiate with peoples who have chosen to exercise their right of self-determination and to enter into discussions about the political status that the peoples desire. Such an obligation to negotiate should be seen to derive from the duty to promote the realization of the right and to respect it.

Such an interpretation is supported by the views expressed by the Supreme Court of Canada in its 1998 *Reference re Secession of Quebec*. Referring to the “clear expression of self-determination of Quebec” and drawing on the principles of federalism and democracy, the Court

recognised that Quebec had “the right [...] to pursue secession” and that Canada had an obligation to negotiate. Two excerpts from the Court’s opinion deserve to be quoted:

88. The federalism principle, in conjunction with the democratic principle, dictates that the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire. [...] The clear repudiation by the people of Quebec of the existing constitutional order would confer legitimacy on demands for secession, and place an obligation on the other provinces and the federal government to acknowledge and respect that expression of democratic will by entering into negotiations and conducting them in accordance with the underlying constitutional principles already discussed.

92. However, we are equally unable to accept the [...] proposition, that a clear expression of self-determination by the people of Quebec would impose no obligations upon the other provinces or the federal government. The continued existence and operation of the Canadian constitutional order cannot remain indifferent to the clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. This would amount to the assertion that other constitutionally recognized principles necessarily trump the clearly expressed democratic will of the people of Quebec. Such a proposition fails to give sufficient weight to the underlying constitutional principles that must inform the amendment process, including the principles of democracy and federalism. The rights of other provinces and the federal government cannot deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects

the rights of others. Negotiations would be necessary to address the interests of the federal government, of Quebec and the other provinces, and other participants, as well as the rights of all Canadians both within and outside Quebec.

Although the opinion of the Supreme Court of Canada is based on the principles of the Canadian constitution, these principles should extend far beyond the borders of Canada and Québec. All the peoples who are seeking self-determination could remind the governments of the States in which they are comprised that their right to decide can also rest on the democratic principle, and that the exercise of such right has as a corollary, their own obligation to negotiate.

The democratic principle is entrenched in many constitutions and should be seen as the source of right to decide and the obligation to negotiate. It has provided the basis for some peoples who organised self-determination referendums and could afford a sound basis for other peoples to consult their population as well.

To summarize, it has been argued the right of self-determination is “the right of peoples to decide” and that it allows peoples to freely determine their political status, whether it be 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, including a status conferring various degrees of autonomy within an existing State.

What has been neglected within juristic opinion to date, is the that the right of self-determination comes with an essential corollary, i.e. “the obligation for States to negotiate”. This obligation was strongly affirmed in the Supreme Court of Canada’s *Reference re Secession of Québec* and can also be found in article 1 common to the same *International Covenants on Human Rights*,

The struggle to be a nation and for national self-determination is obviously, to quote the French philosopher Ernest Renan “a daily plebiscite” (“*un plébiscite de tous les jours*”).²³ When it comes to self-determination, it is important that peoples affirm such a right for themselves. It is also important that a movement claiming the right to self-determination defines means and ways to allow for a true manifestation of the will of the people. Elections and referendums are obviously such true manifestations and their use consistent with the democratic principle

Québec has chosen such paths in holding referendums in 1980 and 1995 and also in adopting in 2000, an *Act respecting the Exercise of the Fundamental Rights and Prerogatives of the Québec people and the Québec State*.²⁴ Articles 1 to 5 and 13 of this Act read as follows:

1. The right of the Québec people to self-determination is founded in fact and in law. The Québec people is the holder of rights that are universally recognized under the principle of equal rights and self-determination of peoples.
2. The Québec people has the inalienable right to freely decide the political regime and legal status of Québec.
3. The Québec people, acting through its own political institutions, shall determine alone the mode of exercise of its right to choose the political regime and legal status of Québec.
4. No condition or mode of exercise of that right, in particular the consultation of the Québec people by way of a referendum,

²³ Renan, Ernest: *Qu'est-ce qu'une Nation?* Paris: Imprimerie nationale. 1882.

²⁴ Compilation of Québec Laws and Regulations (CQLR), chapter E-20.2 [online: <http://legisquebec.gouv.qc.ca/en/ShowDoc/cs/E-20.2>]. As evidence that a nation is a daily plebiscite, there has been a constitutional challenge of this Act before a Québec court in which the Government of Canada has intervened. On this challenge, see Beauséjour, Anthony – Turp, Daniel: *Affaire Henderson sur la constitutionnalité de la Loi 99 – La relecture fédérale du Renvoi relatif à la sécession du Québec*. In: *Revue juridique Thémis de l'Université de Montréal (R.J.T.U.M.)* 53 2019, 367.

shall have effect unless determined in accordance with the first paragraph.

5. When the Québec people is consulted by way of a referendum under the Referendum Act (chapter C-64.1), the winning option is the option that obtains a majority of the valid votes cast, namely 50% of the valid votes cast plus one. [...]

13. No other parliament or government may reduce the powers, authority, sovereignty or legitimacy of the National Assembly, or impose constraint on the democratic will of the Québec people to determine its own future.

All peoples could affirm similarly their right to self-determination, including their right freely determine their political status. They could also call upon the States in which they are included to abide by their obligation to negotiate and their international commitment to promote the realization of the right of self-determination, as well as to respect the democratic principle.

In so doing peoples would remind us, as Woodrow Wilson stated more than 100 years ago, that

“there is a deeper thing involved than even equality of right among organized nations” and that indeed “[n]o peace can last, or ought to last, which does not recognize and accept the principle that governments derive all their just powers from the consent of the governed, and that no right anywhere exists to hand peoples about from sovereignty to sovereignty as if they were property”.²⁵

²⁵ See Address of the President of the United States to the Senate », 22 January 1917 [online: <http://www-personal.umd.umich.edu/~ppennock/doc-Wilsonpeace.htm>].

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