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Self-determination in the contemporary world

Samostanowienie narodów we współczesnym świecie

HISTORY OF THE RIGHT OF SELF-DETERMINATION

For over two hundred years the right of nations to self-determination has existed in the theory and practice of international relations, legitimizing aspirations for independence and liberation struggles. Self-determination has become one of the most crucial executive forces in contemporary international relations. In a political sense it has had revolutionary implications, yet at the same time it has been a criterion for progress. In a legal sense it has reflected the oscillation between positive and natural law, between voluntarism and objectivity, between a static and dynamic vision of an international order. Thus self-determination has been Janus-faced¹ since the very beginning.

The origins of the idea of self-determination are present in the American Declaration of Independence of 1776 and the revolutionary proclamations of France in the years 1789–1795. They mainly referred to the responsibility of the government before the people, but also to the “transfer of a territory” according to the wishes of the people occupying it.² The idea of self-determination went from France to neighboring Italy where it was advocated by Giuseppe Mazzini who used to refer to it to motivate Italy’s aspirations for

¹ A. Cassese, *Self-Determination of Peoples. A Legal Reappraisal*, Cambridge 1995, p. 5.

² In the 18th century no rights of self-determination were taken into account in reference to enslaved Black people who served white Americans.

unification. He was supported in those efforts by Italian politician and lawyer Pasquale Stanislao Mancini who propagated the principle of “nationality”.³

The principle of self-determination was introduced into common international practice as a consequence of World War I and the Bolshevik Revolution. In the political and formal legal arenas a particularly important contribution was made by American president Woodrow Wilson (in the so-called Fourteen Points announced on January 8, 1918) but also by the Bolsheviks (Rights Declaration of Russia’s Nations, November 15, 1917). For Wilson, self-determination of nations became the key to permanent peace in Europe⁴, whereas for Lenin it was a means to carry out his plan to achieve global socialism.⁵ This principle became a conventional norm as a result of agreements entered into by Russia with Turkey, Persia, Afghanistan and Mongolia in the years 1921–1922, yet it lost much of its importance when the USSR was formed in 1922.

The period after World War I was extremely important for understanding the ideological and political meaning of the principle of self-determination. As a consequence of World War II, self-determination acquired the form of a binding legal standard. The United Nations Charter in Article I cl.2 acknowledged development of friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples as one of the Organization’s objectives. This principle is also referred to in Art. 55 that begins Chapter IX of the Charter entitled: “International Economic and Social Cooperation”. Thus, self-determination gained a normative dimension as the background for developing friendly relations among nations: once in the context of the UNn’s goals, and then in the context of resolutions regarding international economic and social cooperation.⁶ The implementation of this

³ R. Redslob, *Le principe des nationalités*, Paris 1930, pp. 1–38; R. Bierzanek, J. Jakubowski, J. Symonides, *Prawo międzynarodowe i stosunki międzynarodowe (International Law and International Relations)*, Warszawa 1980, p. 143.

⁴ A. Whelan, *Wilsonian Self-Determination and the Versailles Settlement*, “International and Comparative Law Quarterly” 1994, part I, pp. 99–115. Some people thought that the promotion of the principle of self-determination was a result of American idealism and egoistic interests. According to Winston Churchill that idea was “neither original nor new” since it was the borrowing of Fichte’s phrase “Selbst Bestimmung”, quoted in: R.W. Burchfield (ed.), *A Supplement to the Oxford English Dictionary*, Oxford 1986, vol. IV, p. 37.

⁵ Lenin developed his ideas on the principle of self-determination in the years 1915–1916 while working on the book *Imperialism, the Highest Stage of Capitalism*. To be more precise, prior to Lenin, the principle of self-determination used to be reflected in the programs of Social Democratic parties belonging to the Second International. In 1913 a short study on this topic, often ignored in scientific analyses was also written by Joseph Stalin. Cf. A. J. Mayer, *Wilson vs. Lenin. Political Origins of the New Diplomacy 1917–1918*, Cleveland 1964.

⁶ L. Dembiński, *Samostanowienie w prawie i praktyce ONZ (Self-Determination in UN Law and Practice)*, Warszawa 1969.

principle, although often difficult, managed to find its fullest expression on December 14, 1960 when the Declaration on the Granting of Independence to Colonial Countries and Peoples took effect. The UN Declaration on Principles of International Law of October 24, 1970 outlines the principle of self-determination in the form that has been binding since that time. Pursuant to it, "...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". And then, "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 of self-determination by that people".⁷

The historical significance of the right of self-determination was always important because it transformed the old way of thinking about international relations based solely on relations among political elites that protected the sovereign interests of empires and ignored the interests of societies. Self-determination applied to peoples and nations meant that sovereign powers could no longer determine the course of their lives, for example, by ceding or annexing their territories and ignoring the interests of the concerned parties. Nations gained the right to speak up about their domestic affairs and relations with others. They could also defend themselves against outside pressures and foreign subordination. Consequently, legitimacy of dynastic rule, various forms of absolutism and secret agreements between rulers were considerably undermined. Self-determination introduced a new criterion for legitimacy of authorities within countries participating in international relations: respect for national interests and aspirations.

The right of self-determination meant a break with an overly rigid concept of territorial dominance. This concept entailed full respect for power that every international entity exercised over a certain territory and people, no matter how this dominance was achieved (whether by conquest, heritage, or exchange) and how a given sovereign treated its subjects. By supporting the idea of developing international relations based on the free expression of expectations by interest groups, self-determination struck a deadly blow at multinational colonial empires. The principle of self-determination shook the colonial system and in this way contributed to undermining the imperial order

⁷ Declaration on principles of international law concerning friendly relations and cooperation among states in accordance with the Charter of the United Nations of October 24, 1970, in: S. Bieleń (ed.), *Prawo w stosunkach międzynarodowych. Wybór dokumentów* (*Law in International Relations. Documents*), Warszawa 1996, p. 62–63.

in international relations. It destroyed the current *status quo* and thus activated processes of power redistribution in international relations that resulted in the fall of empires such as the German, Ottoman, Austro-Hungarian and Russian⁸ at the beginning of the 20th century.

After World War II self-determination assumed the character of an anticolonial demand that legitimized the independence aspirations of peoples remaining under imperial domination.⁹ Acknowledgement of the right of self-determination led to national liberation movements gaining limited legal and international recognition. Yet, it remained important to define the goals of their struggle – liberation from colonial dependence and foreign occupation, or abolition of regimes based on racial discrimination. Also, of great significance was the conviction of national liberation movements that they had won the support of those whom they represented.

Although under the influence of the USSR and other communist countries an ideological character was ascribed to self-determination after World War II, and Western colonial empires were attacked with this principle, in the 1960s the roles were reversed. The West launched a counteroffensive, demanding that self-determination should be universal and should not be limited to colonial territories alone. Moreover, the West stressed the domestic aspect of self-determination as a condition for legitimizing national governments in all parts of the world. Thus, self-determination gained the meaning of a democratic principle that legitimized political regimes. It became obvious, yet not common, that citizens of various countries had an unquestionable right to elect their own governments. Eventually, self-determination became the background for national minorities to claim autonomy and self-government within sovereign countries.

Crucial international events and processes at the end of the 20th century, related to the fall of the Soviet bloc and democratization in Central and Eastern Europe as well as Latin America gave self-determination a universal dimension. And, they have led to the gradual crystallization of the standard whereby domestic self-determination is seen to be the underpinning of a new democratic international order. However, since the end of the Cold War new challenges have arisen. In the past self-determination was an expression of progress whereas since the 1990s it has begun to interact with the phenomena of ethnic

⁸ It was not unreasonable that American secretary of state Robert Lansing compared the principle of self-determination to a dynamite in 1919. Idem, *The Peace Negotiations – A Personal Narrative*, New York 1921, p. 96, quoted in: A. Cassese, *op. cit.*, p. 316.

⁹ L. Antonowicz, *Likwidacja kolonializmu ze stanowiska prawa międzynarodowego (Elimination of Colonialism from the International Law Position)*, Warszawa 1964.

intolerance, xenophobia and destructive tribe-oriented tendencies. “Golem turned against his creator”.¹⁰

THE NATURE OF THE RIGHT OF SELF-DETERMINATION

The principle of self-determination has developed significantly from a moral and political demand to a standard in common international law. In the beginning it meant that some peoples had the right of resistance, self-help or even revolution. However, third countries generally maintained that claims to self-determination remained within the domestic jurisdiction of the states concerned.¹¹ Based on this, it was believed after World War II that colonial territories that did not have self-government and had “separate and different” status than that of metropolitan territories could win their right to independence.¹² The winning of independence by colonial territories actually had nothing to do with the right of secession. From the legal viewpoint, independence was granted by a country that had exercised control over a territory so far. The difference between secession and granting independence to a subordinated territory was based on the difference between breaking and continuing an appropriate legal order.¹³ International law acknowledged the rights of colonial peoples to independence but simultaneously stressed that the very people concerned could give up on statehood status in exchange for “an association or union with an independent country or any other form freely determined by a people”. But the right of independence is the *sine qua non* for other solutions for achieving self-determination.¹⁴

The right of independence does not refer to those groups of people who do not constitute a people in the sense of the right of self-determination, i.e. if a group of people is so small that their independence would violate the principle of efficiency which determines the formation and existence of a state, or if a defined territory is undisputedly an integral part of an existing state. Undoubtedly, these two legal principles should be reflected in studies of contemporary cases of independence aspirations of non-colonial origin.

¹⁰ *Ibid.*, p. 4.

¹¹ M. Pomerance, *Self-Determination in Law and Practice. The New Doctrine in the United Nations*, The Hague–Boston–London 1982, p. 7.

¹² J. Tyranowski, *Integralność terytorialna, nienaruszalność granic i samostanowienie w prawie międzynarodowym (Territorial Integrity, Inviolability of Borders and Self-Determination in International Law)*, Warszawa–Poznań 1990, pp. 197–201.

¹³ D.P. O’Connell, *State Succession in Municipal Law and International Law*, vol. II – *International Relations*, Cambridge 1967, p. 88.

¹⁴ J. Tyranowski, *op. cit.*, p. 207.

It was highly significant that the right of self-determination was included in the first Articles of both International Covenants on Human Rights of 1966. Thus, it is possible to refer this standard to natural collective rights. It is impossible to talk about any human rights and ignore the emancipation and self-constitution of nations even if they are often acquired through wars or armed struggle.¹⁵

The right of self-determination as it is defined in the 1975 Declaration of Principles of the Final Act of the CSCE (the Helsinki Declaration) contributed to the progressive universality of its content. In Europe, as well as in North America, colonialism had practically ceased to exist by that time (apart from the problem of Gibraltar). There were no regimes of racial discrimination and apart from Turkish troops on some Cypriot land there were no occupied territories whatsoever. Therefore attention was increasingly focused on the domestic dimension of self-determination. Broadly understood it could definitely refer to both German states and Northern Ireland, Quebec, and American Indians in the U.S. or Canada. In this domestic meaning, it mainly referred to peoples, including – and this was the intention of Western countries – nations living under authoritarian systems.

Thus it has become clear that self-determination has two basic dimensions – domestic and international, and one cannot be tackled without the other. Domestic self-determination means that a people inhabiting a territory of a given country have the right to change a political, economic or social system, without any pressure or intervention from the outside, from a separate country or a group of countries.¹⁶ This means that the principle of self-determination decisively objects to any attempts (domestic or international) to impose a permanent *status quo*.

By 1989, when the Eastern bloc fell, that sort of understanding had not been favored by communist countries which maintained that sovereignty was a formal reflection of exercising the right of self-determination.¹⁷ Meanwhile, in the proceedings of the CSCE important linkages between self-determination

¹⁵ M. Sellers (ed.), *The New Order, Sovereignty, Human Rights and the Self-Determination of Peoples*, Oxford 1996.

¹⁶ Domestic self-determination is not yet granted once and for all. It cannot be obtained in the course of a single act of revolution or elections. It is a continuous process that envisions the right to elect governments and create political systems. It is conditioned by access to political and civil rights that can be guaranteed only by democratic systems. In non-democratic systems the right of self-determination is constrained by governing elites ascribing themselves the right to decide alone about the fate of a society. In fact these systems are of an oligarchic character as they are deprived of ideological legitimization of power, i.e. social consent and approval.

¹⁷ The dogma of national sovereignty has been a strong obstacle for decades to full acceptance of self-determination as a standard in international law.

and human rights were acknowledged. Self-determination began to mean simply more respect for human rights.¹⁸ In this interpretation, it proved to be “dynamite” that later blew up the Communist system from the inside.

The Helsinki Declaration assumed that all peoples have the right of self-determination, whether or not they lived in sovereign and independent countries. After all, only sovereign and independent countries existed on the territory of the CSCE in the mid-1970's. Moreover, this principle was given a continuous character, i.e. it could be cited even if a people on some territory had already achieved some form of self-government and some international status.¹⁹ Yet, it did not mean that national, ethnic or language minorities were granted the right to self-determination. Neither was the right to secession recognized.²⁰ The principle of respect for territorial integrity was a considerable counterweight in this matter. On the one hand, it proclaimed that any territorial changes could not be made by the central government of a state if they violated the will of the population of that state. On the other hand, only governments of sovereign states – signatories of the Final Act – were powerful enough to carry out territorial changes such as joining, splitting or taking other peaceful steps for the benefit of existing political entities, provided these changes were fully accepted by the concerned people. The principle understood in that way was cited both during the process of German reunification and during the split-up of Czechoslovakia. Although in both cases, in the heated political atmosphere there was not enough time to win public approval through a plebiscite or referendum. The innovative character of the principle of self-determination in the Helsinki Declaration lay in its anti-authoritarian and democratic message. It was reminiscent of Woodrow Wilson's notion of self-determination which linked this principle to democracy.

An innovative interpretation of the principle of self-determination based on the above experiences was applied by the countries of the European

¹⁸ In the Paris Charter of New Europe of November 21, 1990, the principle of self-determination was directly related to the development of a pluralistic democratic society, human rights and the rule of law. The statement that “democratic government is based on the wish of the people expressed regularly in free and just elections” contributed to specifying the meaning of domestic self-determination through the outlining of criteria that allow nations to carry out genuinely free elections. Simultaneously, it dealt with the necessity to protect national minorities within sovereign states without violating their territorial integrity. *Paris Charter of New Europe*, Warsaw 1991, p. 8–9.

¹⁹ See more: A. Cassese, *The Helsinki Declaration and Self-Determination*, [in:] T. Buergenthal (ed.), *Human Rights, International Law and the Helsinki Accord*, New York 1977, pp. 95–103.

²⁰ On the basis of the non-existence of the right of secession it is impossible to table the motion about banning secession in international law. A successful secession is simply a fact that leads to the formation of a new country, it is the fact that is acknowledged by international law that ascribes to it certain legal consequences. J. Tyranowski, *op. cit.*, p. 294.

Community after the fall of the Communist bloc. They confirmed the appropriateness of the “political principle” of self-determination in the Declaration of December 16, 1991 on recognizing new countries in Eastern Europe and the USSR, and in this way they simultaneously stressed that it was necessary for them to respect “legal norms, democracy and human rights”, as well as establish “guarantees for the rights of national and ethnic minorities in compliance with resolutions in CSCE documents”. The Community declared that it would refrain from recognizing political entities that might be the product of aggression.

Attaching considerable importance to recognizing republics formed after the breakup of Yugoslavia provided democratic principles were respected, the countries of the then “Twelve” decisively confirmed the existence of strong linkages between domestic and international self-determination. The relationship between those two aspects had been only reflected as a formal provision until then, for example in the International Covenant on Civil and Political Rights of 1966. Also, for the first time, self-determination was unequivocally connected with the protection of minorities. This means that domestic self-determination cannot be seen as completed if minority rights are not fully protected. Equally, there is no consent for international self-determination if domestic self-determination does not fully exist.

Thus the traditional meaning of the principle of self-determination has undergone reevaluation. The time of colonial empires definitely belongs to the past now. Even the Soviet empire has fallen apart.²¹ Its uniqueness rested in the fact that it did not have any overseas colonies and the main instrument of the metropolitan power was based on a uniform military structure, economic centralization and institutionalization of single-party hegemony.

The issue of amending the principle of self-determination has also appeared in the context of integration processes in Europe. In these processes self-determination is concerned less with assertions of individual nationhood than with the formation by European nations of independent and free political,

²¹ The origins of new states after the fall of the USSR were not based on international or constitutional law. This phenomena took place first of all as a consequence of political facts. Self-determination was only the background of political rhetoric legitimizing the secession of subsequent entities from central structures. Apart from the Baltic republics within the former USSR that demanded the restoration of their independence, other Soviet republics had no right to self-determination but only the right to secession, based on Art. 72 of the Union Constitution of 1977. In 1990 it was amended by a provision about referendums, qualified however by a number of complex conditions. This right was never applied given the speed of the collapse of Soviet statehood. Some republics, e.g. Georgia, Turkmenistan, Ukraine and Uzbekistan, sought their own confirmation for the right to secession and independence by organizing referenda as legitimizing forms within the general right of self-determination.

economic and military communities. In contemporary conditions European nations are not afraid of giving up part of their own sovereignty and decision-making autonomy, while continuing to maintain a widely understood identity.²²

Thus self-determination in contemporary international relations is an extremely complex concept, if not vague. On the one hand, it is often cited in relation to the struggle of peoples for independence; on the other hand, it is associated with aspirations of national minorities towards independence. This very phenomenon points to considerable vagueness in the process of defining legal subjects of the right of self-determination. After all it has been one of the most difficult theoretical and practical issues in the whole question of self-determination since the very beginning.²³

The right of self-determination means, on the one hand, the ability to achieve independent statehood, and on the other hand, the freedom of a nation to determine its own fate, whether within its own national state, federation, multi-ethnic state or other systemic structure. This right is thus a gradient that begins from the primary level, when a social group called a nation is developing its own statehood from scratch, and then comes to the level when it gradually cedes a portion of its sovereignty or decision-making autonomy for the benefit of non-state or interstate institutions.²⁴ Thus the two meanings not only reflect different concepts but in specific historical circumstances may be in conflict.²⁵

Historical nations that developed a relatively long time ago understand self-determination differently from young nations that were shaped by long-lasting subordination and humiliation. Thus, for example, independence for the Ukrainians is such a new gift that they treat it as something very valuable, evoking occasionally the impression of dangerous nationalistic euphoria.

²² J. Kułakowski, *Unia Europejska a suwerenność państw członkowskich (The European Union and Sovereignty of Membership Countries)*, "Biuletyn OCIPE", no. 1, January 10, 1997.

²³ The principle of self-determination was applied to colonial territories within political and administrative borders established as a result of old divisions or later changes that were made by colonial powers. This meant that regardless of how arbitrarily territorial divisions for colonial rule were made, the existing subordinated territories were and are entities of self-determination and their integrity had to be respected at the moment of de-colonization. J. Tyranowski, *op. cit.*, pp. 202 et seq.

²⁴ This is an outcome of a very peculiar phenomenon. At the beginning of the 21st century, apart from a sense of belonging to their own motherland and nation, people need a strong sense of belonging to their surroundings, being part of a larger group beyond national and continental structures.

²⁵ After all it is not certain that if terrorist organizations came to power in new political entities, for example if ETA ruled an independent Basque state, the conditions in the new country would be appreciated by most of its citizens who accept the current status and laws within the Kingdom of Spain.

Whereas for the Belorussians, deprived of national identity awareness, self-determination means quite often an unnecessary separation from Russia and prosperity which can be guaranteed solely by a Russian-Belarusian Union. The above examples reflect the important interdependence between the right of self-determination and the maturity of national awareness.

Another aspect of the complex meaning of the right of self-determination is related to an obvious or apparent contradiction between regulations in international law and the principles of inviolability of borders, territorial integrity and non-intervention. After all, the latter principles reflect an inclination toward maintaining the *status quo* whereas the right of self-determination brings about territorial changes. Thus if the principle of territorial integrity and all principles related to this are static elements, the principle of self-determination is a dynamic element in international relations. According to Jerzy Tyranowski, only extreme interpretations of static and dynamic principles may lead to a conclusion that there is a contradiction between them impossible to overcome. Apparent collisions between these principles may occur in the following situations: if a limitless right of secession is acknowledged; if the principle of territorial integrity is used as grounds to ban secession; if territorial claims against another country are motivated by the right to self-determination of that country's inhabitants; if the right to self-determination of a people in a certain part of a country is opposed by calls to maintain the territorial integrity of the country.²⁶

THE RIGHT OF SELF-DETERMINATION VS. THE USE OF FORCE IN INTERNATIONAL RELATIONS

The right of self-determination modifies significantly the legal prohibition against the use of force or the threat of using force.²⁷ The principle of banning the use of force in the Declaration of 1970 says that "every country is obliged to refrain from any compulsory action that deprives peoples [...] of their right to self-determination and freedom as well as independence".²⁸ In the past several decades various resolutions of the UN General Assembly and Security Council have confirmed in practice the meaning of that opinion, namely, the exercise of the right of self-determination may require the use of force.

²⁶ See more: J. Tyranowski, *op. cit.*, pp. 181–183.

²⁷ A. Cassese, *Self-Determination of Peoples...*, pp. 193–194.

²⁸ Declaration of International Legal Regulations related to friendly relations and cooperation among nations in compliance with the UN Charter, [in:] S. Bieleń (ed.), *Prawo w stosunkach międzynarodowych...*, p. 60.

International law prohibits the use of force against the right of self-determination in three cases: de-colonization, occupation and racial discrimination. This means that the right of self-determination allows oppressed peoples to use force if they find themselves in these three situations. This is not forbidden either by the UN Charter or other legal and international acts. Art. 2.4 of the UN Charter forbids the use of force by countries but not by liberation movements that aim to gain self-determination of the people they represent in a certain territory.

In the 1950s and 1960s countries liberated from colonial rule, with the support of the existing Communist countries, propagated the idea of using force by liberation movements under Art. 51 of UN Charter as a form of individual or collective self-defense against military aggression, more precisely – colonial dominance. This political view was, however, rejected by most UN member states as it justified the use of any collective form of self-defense against any colonial empire in the form of state coalitions and not national liberation movements alone.

In practice the opinion prevailed that despite there being no specific legal grounds for legitimizing the use of force by liberation movements, this did not preclude the use of force or the threat to use it if the use of force was a response to an empire that used force against dependent, occupied or racially discriminated peoples and rejected the right of those peoples to self-determination. There were however cases when other (third) countries claimed their rights to a given territory subject to colonial control, and wanted to restore their rights to sovereignty there. India's military intervention in Goa (1960) and Argentina's intervention in the Falklands (1982) reflect the situation very well. The international community's reaction to those events showed that it considered them to be violations of Art. 2.4 of the UN Charter.

There is no legal right to organize any form of collective self-defense involving the use of force against a country that opposes the right of self-determination; likewise, there is no law that allows countries to use force to help national liberation movements that struggle to exercise the right of self-determination. The latter phenomenon is reflected in the international community's reaction to the actions of India in 1971 that supported Bangladesh's self-determination through the use of force.²⁹

Consequently, third countries are required to limit their actions to providing economic and political assistance as well as logistic support for liberation movements, which in practice does not exclude shipping them weapons and ammunition. The primacy of peace and international security under the UN Charter precludes the right of third countries to become actively involved in

²⁹ A. Cassese, *Self-Determination of Peoples...*, p. 199.

supporting the exercise of self-determination through the use of force. At the same, those third countries must refrain from providing support for any state that uses force to oppose the right of a given people to self-determination.

Therefore, the relationship between self-determination and peace in the contemporary world is based on fundamental innovations that have taken place in international law. Firstly, a general ban has been developed prohibiting states from using force on their own territory against racial or ethnic groups who are denied equal participation in government; secondly, a general ban has been formulated against exerting institutionalized pressure aimed at denying the right of self-determination to colonial peoples, oppressed peoples or racial groups; thirdly, legal authorization has evolved allowing liberation movements to use military force against oppressors – countries that have denied the right of self-determination through the use of force; fourthly, a prohibition has been formulated banning third parties from providing military help for oppressor states. In this way the right of self-determination either extends the ban on the use of force by states in international relations or reduces its scope with respect to entities aiming for self-determination.³⁰

The right of self-determination was the main factor which led to the creation of a new category of military conflict – national liberation wars. In the course of defining them there were two opposing tendencies. Newly liberated countries and Communist countries tried to convince the United Nations that uniform standards of war should apply to these wars but Western countries opposed this arguing that national liberation wars were domestic conflicts and as such should be subject to the law on civil wars. Otherwise some domestic conflicts would be treated differently than others. Moreover, such differentiation, based on ideologies would inevitably lead to the revival of the long-forgotten concept of just wars (*bellum justum*), popular in the Middle Ages.³¹ Regardless of all those reservations, the attitude of developing and Communist countries became dominant. At the Geneva conference in 1974, liberation wars were recognized as military conflicts with an international character.

Currently, liberation wars are subject to the Protocol Additional to the Geneva Conventions of 1949 relating to the Protection of Victims of International Armed Conflicts (Protocol I, 1977). Since then, wars in the name of self-determination against colonial or occupational authorities or racist regimes have taken on the character of interstate wars. Liberation wars became subsumed by the law related to interstate wars. The most critical stand against

³⁰ *Ibid.*, p. 200, 325.

³¹ In relation to national liberation wars it would be appropriate to define them as “wars justified in some circumstances”.

such political and legal qualifications was taken, for understandable reasons, by Israel and South Africa.

THE RIGHT OF SELF-DETERMINATION AND DISINTEGRATING TENDENCIES

In a hierarchical world in which power is extremely unequally distributed among various countries and only a few powers decide on the most crucial international issues, while the remaining countries are only “spectators”, if not to say “pawns” on a chessboard, self-reliance has become a fiction. Therefore, it is anachronistic to think about developing some mythical form of democracy in international relations that would actually confirm the absence of egalitarianism in this sphere. Its predominating value and principle would be an unconstrained freedom to exercise the right of peoples to self-determination. If it is used consistently the whole political map of the contemporary world would undergo radical decomposition. Then, it would be possible to imagine China, Australia, Mexico, Canada or even the United States splitting into many independent national entities. The establishment of the North Italian Padania, the Basque region, Catalonia, Brittany, Flanders, Wallonia, Scotland or Wales as independent countries would not surprise anybody. Likewise, the breakup of Russia, which is inhabited by several dozens of peoples dissimilar to Russians would be accepted without objection.³² Shrinking Russia down to a Great Moscow Duchy could then be considered a totally normal thing.³³

The war in former Yugoslavia, Russian intervention in Chechnya and Turkish intervention in Kurdistan have sparked discussions on the aspirations of nations that are deprived of independence and their rights to territorial sovereignty.³⁴ The independence claims of the Palestinians, Tibetans, Kash-

³² Attention is often paid to the case of Chechnya which is particularly interesting in a legal sense. Namely, at the time Chechnya proclaimed its Declaration of Sovereignty in 1991, the USSR still existed and its constitution was obliging. It gave republics the right to leave the Federation, a right which in fact was used by all Union republics except Russia. The Constitution of the Russian Federation of 1993, even if it guarantees the territorial inviolability of Russia, should have retroactive power. Moreover, Chechnya proves that exercising the right of self-determination is still possible only through armed struggle. J. Russell, *Chechnya-Russia's 'War on Terror'*, London 2007.

³³ H.-J. Spanger, *Russia: Failed Transition or Failed State?*, http://www.ippu.purdue.edu/failed_states/1999/papers/Spanger.html (10.06.2005).

³⁴ So far, aspirations towards unconstrained self-determination of some territorial entities have been expressed in the support for the so-called Europe of regions. See: S. Parzymies, *Unia Europejska a Europa Środkowa. Polityczne aspekty współpracy (The European Union and Central Europe. Political Aspects of Cooperation)*, Warszawa 1997, pp. 116–137.

miris, Puerto Ricans, and Zulus apparently do not raise any doubts.³⁵ How should the independence aspirations of ethnic groups living in melting pots be treated? Which group then has the right to self-determination at the expense of another? Fears that national minorities will wish to fully exercise rights of self-determination, i.e. carry out secession, result in their being denied even partial rights, such as cultural or linguistic autonomy. This is the way the Romanians treat the Hungarians in Transylvania or the Turks treat the Kurds. This approach has led to numerous conflicts or even civil wars, but the fundamental reason for them has not been eliminated yet. The fall of Yugoslavia has proved the complexity and drama of the situation of the Serbs in Croatia, the Croats in Serbia and the Albanians in Kosovo.³⁶

Many governments support independence movements but only a few of them are fully aware of their responsibility to help maintain a stable international order.³⁷ And, only a few are interested in Russia being weakened further through the splitting up of its territory and formation of hybrid state forms prone to atavistic conflicts based on the principle of “everyone against everyone”. Likewise, anyone familiar with the complexities of the Middle Eastern political scene realizes very well that the formation of an independent Kurdistan would complicate rather than mitigate the situation in the region and would create new axes of conflict. The road to an independent Palestine is long and complex. It depends not only on Israel’s position but also on neighboring Arab countries. Also little can be done *hic et nunc* in relation to free Tibet or Xinjiang.³⁸

Escalation of independence claims could lead to an increase in tensions on a global scale in view of weapons of mass destruction, the increase in terrorism, and organized crime. And, all this would require the intervention of powers responsible for maintaining international order. It is absolutely

³⁵ Many of those cases are of a non-colonial character and therefore they are controversial and difficult to define. In the case of the Palestinian territories we are currently dealing with the occupation of territory by another country. Still another non-colonial case is Quebec where a linguistic minority demands the right to self-determination on the basis of either international or constitutional law. This case is particularly vital in evaluating broader phenomena that refer to decentralizing tendencies on the part of national minorities.

³⁶ M. Waldenberg, *Rozbicie Jugosławii (Fragmentation of Yugoslavia)*, Warszawa 2005; A. Balcer, M. Kaczmarek, W. Stanisławski, *Kosovo before the final decision. Regulating Kosovo’s international status – historical & political conditions and prospects for future developments*, “Prace OSW/CES Studies”, Warsaw 2008, no. 27.

³⁷ It is interesting to notice that in accordance with Art. 55 of the UN Charter, respect for the principles of equal rights and self-determination of peoples is an indispensable condition for friendly and peaceful relations among nations that may develop only in stable conditions.

³⁸ J. Jura, *Tybet musiał eksplodować (Tibet had to explode)*, “Gazeta Wyborcza” April 3, 2008.

certain that the constantly growing number of independent political entities is not conducive to global security and development.³⁹

Therefore, are the costs of creating new states not too high in view of the desired results? Especially if there is no moral imperative requiring that the right of self-determination be exercised unconditionally.⁴⁰ Also, there is no unequivocal legal interpretation⁴¹ in this respect. Besides, how is it possible to find a balance between the right to self-reliance and self-determination and the rejection of blind national separatism?

The breakdown of multinational entities at the beginning of the 1990s led to crucial inquiries about the boundaries of independence aspirations. An abstract right to self-determination collides with an objective situation in which the process of mixing races, nationalities and nations simply prevents its application. A good case in point is Africa where only four weak countries – Swaziland, Lesotho, Botswana and Somalia – are ethnically homogeneous.⁴² In the 1990s, in the name of this very right, horrible crimes have been committed in Europe resembling the bloody slaughter of the Middle Ages. This sort of “return to tribal existence” – in the words of well-known sociologist and philosopher Ralph Dahrendorf⁴³ – has become a destructive and regrettable process.⁴⁴

Current separatist aspirations are perhaps a reaction to the deep integration processes that have been taking place for several decades on the European continent. The famous Italian-style “leaguism”⁴⁵ is a spectacular

³⁹ G. Gottlieb, *Nation Against State. A New Approach to Ethnic Conflicts and the Decline of Sovereignty*, New York 1993, pp. 26–27.

⁴⁰ Citing some sort of morality in international relations is simply a form of hypocrisy. After all, hardly anyone obeys any moral rules in this arena, and military interventions have become a common way for states to impose their own interests.

⁴¹ See more in: M. H. Halperin, D. J. Scheffer, P. L. Small, *Self-Determination in the New World Order*, Washington, D.C., 1992.

⁴² A. Guelke, *International Legitimacy, Self-Determination and Northern Ireland*, “Review of International Studies” 1985, no. 1, p. 41.

⁴³ R. Dahrendorf, *Rozważania nad rewolucją w Europie (Considerations over the Revolution in Europe)*, Warszawa 1991, pp. 126–128; idem, *Europa regionów (Europe of Regions)*, “Polityka”, October 5, 1991.

⁴⁴ What Dahrendorf expressed at the beginning of 1990s was noted already by Eleanor Roosevelt in 1952 who predicted that self-determination taken to extremes would lead to the absurd and “...evoke total chaos and threaten the physical existence of many countries”. *The Universal Validity of Man’s Right to Self-Determination*, “Department of State Bulletin” 1952, Dec. 8, vol. 27, p. 919. Many years later Elmer Plischke echoed her views warning that dangerous nationalism would make self-determination “a Frankenstein of unlimited proliferation and fragmentation”. *Self-Determination: Reflections on a Legacy*, “World Affairs” 1977, no. 1, p. 52.

⁴⁵ On May 25, 1997 in the northern regions of Italy a referendum was held, organized by the Northern League. Secession was approved, but only a decided minority of Northern Italian

demonstration of the “new tribalism” in social and cultural life, defined as “world tribalism”.⁴⁶ Decentralist movements express a sort of crisis or “wearing off” of current forms of democracy. Civil democracy is being progressively replaced by a tendency towards “ethnic democracy”. According to French sociologist Michel Maffesoli, traditional politics based on class and political parties is being replaced by a post-modern “culture of sentiment” that refers to the emotions, experiences, and ideas of small communities, and rejects all political institutions shaped within the two last centuries⁴⁷. Perhaps this sort of understanding will be useful in explaining the Silesian phenomenon which became well-known after the Association of People with Silesian Nationality (Związek Ludności Narodowości Śląskiej) was registered in 1997 by the Local Court in Katowice, Poland.⁴⁸

In the light of negative separatist tendencies, despite support for pluralism, the international community is not interested in multiplying new countries, incapable of a self-reliant and stable existence. It seems that the time for formation of new countries is coming to an end although there are still a lot of visionaries who warn against the increasing number of nations participating in international relations – they could reach 500–600 in the future. After all the number of ethnic groups is more than three thousand.⁴⁹

A territorial approach to ethnic conflicts would lead to the breakup of complex countries with unpredictable consequences. And, the fragmentation of the international scene would then dangerously result in an increased number of events and processes that would be difficult to control, especially in view of their impulsive character. Consequently, the world would face the danger of growing anarchy that could be opposed only by large empires.

The urge to achieve self-determination and sovereignty at any price is an anachronism that clashes with increasing international interdependence, integration and internationalization in various areas of economic and social life. It also leads to disequilibrium in the relatively balanced geopolitical

voters took part, which does not in any way mean that the problem of *leaguism* has disappeared from the Italian political scene. A lot points to the fact that this will lead to reforms of the state in a federal spirit.

⁴⁶ In the political discourse of the 1990s this term was introduced by Joseph S. Nye, Jr. in the USA. See: T. M. Franck, *Post-Modern Tribalism and the Right of Secession*, [in:] C. Brölmann, R. Lefeber, M. Zieck (eds.), *Peoples and Minorities in International Law*, Dordrecht, Boston and London 1993, p. 3–21.

⁴⁷ M. Maffesoli, *Eloge de la raison sensible*, Paris 1996.

⁴⁸ On 24 September 1997 the Appeals Court in Katowice recognized the appeal of the Katowice Voivod as justified and decided to dismiss the motion for registering the Association of People with Silesian Nationality.

⁴⁹ A. Maryański, *Narodowości świata (World Nationalities)*, Warszawa 1994.

division that exists currently, a rapid increase of disproportion between a small number of great powers realistically responsible for maintaining peace and international order, and a huge number of weaker participants being a steady source of destabilization and tensions.

BOUNDARIES OF THE RIGHT OF SELF-DETERMINATION AND ATTEMPTS
TO RECONCILE CONTRADICTORY TENDENCIES IN INTERNATIONAL
RELATIONS

Self-determination is declared to be a proper and just tendency in international relations, however when it comes to real motivations of countries it often depends on their political and economic interests. The moderate attitude of Western countries toward declarations of independence made by the Baltic Republics in 1990 proves how easily anxiety about maintaining a “global balance” and territorial integrity of a giant empire can overshadow legitimate calls for self-determination. Thus, in extreme cases it is only a pretext for hiding real political motivations. It is an attractive value as long as it is not aimed at your own country. For many peoples striving for self-reliance, self-determination is the key that unlocks the door to the club of independent political entities, whereas existing states reserve to themselves the right to decide on the exercise of self-determination by those peoples so as to block any undesirable changes. In conditions of tremendous internal heterogeneity it is difficult to expect that great actors, being those who create rules of the international order, would give their unconditional consent to the undermining of their own order, stability and unity. Moreover, it is not a surprise that these actors include countries that benefited from the principle of self-determination themselves but currently object to its broader interpretation.⁵⁰

Broadly understood, resistance to self-determination also results from the fact that a considerable number of currently existing states still exercise authoritarian power, and hardly respect the aspirations or expectations of their people. It would be naive to expect that undemocratic regimes would

⁵⁰ Kosovo’s declaration of independence is controversial. As the unceasing conflict threatened to destabilize the region, Serbia rejected Western peace plans and Belgrade was employing ruthless methods to regain control (such as ethnic cleansing and massacres), NATO decided to attack Serbia, and a UN protectorate was established in Kosovo. As a result, Kosovo has *de facto* been independent of Serbia since 1999. On 17 February 2008 Kosovo’s parliament unanimously endorsed a declaration of independence from Serbia. If the West recognizes Kosovo’s independence, Russia says there is no basis for changing a 1999 resolution which handed Kosovo to the UN. A number of countries fear that it is a precedent, affecting other contested territories in Europe and in different parts of the world.

fully acknowledge the principle of people's freedom of choice with regard to who governs them, and in this way weaken their own position.

We can therefore conclude that the boundaries of the right of self-determination are defined firstly by the interest of individual countries and the international system as a whole whose vital values are based on stability and integrity.

Secondly, the right of self-determination is a result of the weakness of the common international law. It does not have a history of being effectively implemented. It only allows liberation movements to use force if any country violates this right. However, there is no solidarity among countries when it comes to supporting the exercise this right on the domestic level. So far no state has submitted a complaint before the UN Human Rights Committee regarding a violation of Art. 1. of the International Covenant on Civil and Political Rights.

Thirdly, for these reasons alone it is difficult to agree with the opinion that the principle of self-determination has become an imperative standard (*ius cogens*) of international law.

Fourthly, the right of self-determination is constrained by other standards which are binding in relation to some areas. This refers to the *uti possidetis* principle⁵¹ for territories that used to be colonies or as in the case of Bosnia and Herzegovina, parts of a federal state.⁵² This means that people living within defined borders are refused the right of choice of the country they would like to belong to. In such cases – it may be stated – geopolitics is superior to international law.

Fifthly, boundaries of the right of self-determination are rooted in the principles of sovereignty and non-intervention in domestic affairs. The former says that there is no right of secession on the part of national, ethnic or minority groups. In fact, the right of self-determination refers only to two classes of people: those who are under colonial rule and those under occupation. However, it does not refer to ethnic or national groups that wish to determine their international status themselves. Nevertheless, the right of self-determination enters into the domain of sovereignty of the state because it obliges its authorities to grant rights of participation in public life to racial and ethnic groups living on its territory. Moreover, the latter principle, non-

⁵¹ *Uti possidetis, ita possidetis* (Lat.): let it be as you have had so far. In Roman law, a means of protecting property. In international law the basis for regulating territorial issues in some parts of the world (Latin America, Africa); also the basis for territorial regulations when entering into peace treaties; means a definite settlement of a given territorial issue, recognition of a legal title to a given territory. Cf. J. Tyranowski, pp. 107 et seq.

⁵² This last case refers to the outcome of the Arbitrage Committee of 1992, established by the Peace Conference for Yugoslavia. A. Cassese, *Self-Determination of Peoples...*, p. 332.

intervention in domestic affairs, has been modified in the sense that it entitles any country to raise issues of self-determination in bilateral and multilateral negotiations if any legitimate entity calls for this.⁵³

Taking into account the complexity of contemporary determinants of emancipating processes in the world, various experts in politics, law and diplomacy have called for the drafting of a special code of self-determination that would contribute to defining clear boundaries. Such a code is necessary in order to secure the fundamental values of the international order, i.e. peace and security, but also the individual rights and interests of all participants in the international community.⁵⁴

This code would force countries to be more careful about recognizing new political entities as they would have to meet specific requirements, such as:

- using up all possibilities for a peaceful settlement within the existing national communities, for example, on the basis of autonomy or federation⁵⁵,
- carrying out a “civilized divorce” based on a plebiscite with a large qualified majority in a given territory (achieving 100% support would be a purely theoretical result)⁵⁶,
- acceptance by new democratic governments of international standards in the area of human rights, including guarantees for ethnic or religious minorities,
- establishing an international regime of supervision, and if necessary, mechanisms of collective intervention to prevent or stop bloodshed and end discrimination against minorities; such interventions would be undertaken only if domestic conflicts threaten to unleash a massive tide of refugees and exiles crossing borders and disturbing the stability of neighbors.

The above determinants do not mean then that every secession, even if it is based on effective control by political and military authorities of a defined territory, deserves support from the viewpoint of contemporary requirements related to self-determination. Generally, secession is unacceptable from the viewpoint of international law if it is acknowledged that most states today are internally heterogeneous and are determined to maintain their territorial integrity.⁵⁷

⁵³ *Ibid.*, p. 335.

⁵⁴ R. McCorquodale, *Self-Determination: A Human Rights Approach*, “International and Comparative Law Quarterly” October 1994, vol. 43, part 4.

⁵⁵ Premature recognition of a new state would be tantamount to involvement in the domestic affairs of the old state.

⁵⁶ The dramatic fall of Yugoslavia is the best argument in support of this argument.

⁵⁷ D. Z. Cass, *Rethinking Self-Determination: A Critical Analysis of Current International Law Theories*, “Syracuse Journal of International Law and Commerce” 1992, vol. 18, p. 38-40.

Certainly, the question remains of who would be granted the right to implement the above set of principles in view of the weakness of current universal and regional institutions. Of some value are ideas to form narrower zones of geopolitical responsibility within regional integrative structures (EU, NATO). After all, countries are different in many attributes and exercise various functions depending on their geographical location. For this reason, teams of countries, respecting their current interests, could be formed which would undertake joint initiatives in specific geopolitical areas. In this way, the international division of tasks would mean that all efforts targeted at jointly approved goals would be distributed among various countries. In such multilateral strategies it would be possible to maintain the leadership or main responsibilities of major powers, while enabling simultaneous collective participation of other participants. These propositions definitely require democratic agreements. Otherwise they would be strongly reminiscent of the shameful patterns of bloc dependence and imperial zones of influence.

In contemporary international relations there are two apparently contradictory tendencies: on the one hand, renationalization and return to national sovereignty, and on the other, a greater openness towards non-national structures. The only way to reconcile those two tendencies is not the formation of some supranational superstate but intensification of cooperation among nation-states in resolving concrete problems. We are witnessing crises in all ideologies that used to ascribe to a country the role of a super-powerful guarantor of economic growth, modernization and social justice. The state no longer meets all the social expectations that are created by civilizational progress and internationalization of various spheres of social life. It seems that as integration in Europe proceeds traditional values as attributes of a nation-state, mainly sovereignty, lose their meaning.⁵⁸ They will be replaced by national identity.⁵⁹ Opponents of the Maastricht Treaty in the Danish and French referenda, were not afraid of the future shape of their country but of losing their national identity as a result of European integration.

Nations integrated within Western European structures see European identity in a political sense. At the same time, they stress national differences of a cultural nature and defend local traditions against the inflow of foreign behavior patterns and ways of thinking. In contrast, Central European nations

⁵⁸ J. Symonides, *Wpływ globalizacji na miejsce i rolę państwa w stosunkach międzynarodowych* (*The Position and Role of the State in International Relations under the Influence of Globalization*), [in:] E. Halizak, R. Kuźniar, J. Symonides (eds.), *Globalizacja a stosunki międzynarodowe* (*Globalization and International Relations*), Bydgoszcz-Warszawa 2004, pp. 130–152.

⁵⁹ F. Kratochwil, (eds), *The Return of Culture and Identity in International Relations Theory*, Boulder, CO, 1996; K. Gilarek. *Państwo narodowe a globalizacja* (*Nation-state and Globalization*), Toruń 2003.

consider themselves Europeans precisely because of their cultural heritage and historical ties, whereas in political life they diverge considerably from Western patterns.⁶⁰

Political scientists are increasingly calling for a change in the traditional approach to sovereignty of nation-states through spreading of its attributes also to nations that do not have separate statehood.⁶¹ Then the right of self-determination would lose its attractiveness since the attributes of sovereignty would be distributed in the juridical, functional and territorial senses. This would mean a peculiar disassembling of the sovereignty of countries that would result in a series of deep organizational, political and legal changes in the current laws of states. Traditional borders of states would be subject to a natural devaluation. Instead, other borders would be formed based on their functions related to goals carried out by national entities. Nations would naturally find a territorial point of reference different from a traditional “homeland” (*patrie, Heimat*); its borders would not necessarily correspond to state borders. Within its framework, the fundamental needs and interests of nations could be pursued without undermining the integrity of states.⁶² It sounds revolutionary in the light of current knowledge and experience, but it seems that such ideas deserve attention. They show that there is an evolutionary approach toward the right of self-determination; in the future self-determination need not lead to the proclaiming of independent states. It can simply mean that various nations will acquire political significance in the international arena without needing to institutionalize their territorial identity.⁶³ They will enter into various relations with currently existing countries. Perhaps the cross-border and regional cooperation practiced in various parts of Europe since 1970s is indicative of the direction of such future solutions.⁶⁴

The above understanding points to the possibility that the right of domestic self-determination will become prevalent, and national groups will be free to express their will within the existing state structures. In this way, the right of self-determination of nations would not be exercised automatically as it used to be in a bygone era of de-colonization and the fall of 20th-century empires.

⁶⁰ K. Zuba, *Polski eurosceptycyzm i eurorealizm (Polish Euroscepticism and Eurorealism)*, Opole 2006.

⁶¹ G. Gottlieb, *op. cit.*, p. 6 et seq.

⁶² Idem, *Nations without States*, “Foreign Affairs” 1994, no. 3, pp. 100–112.

⁶³ See more: Y. Dinstein (ed.), *Models of Autonomy*, New Brunswick and London 1981, pp. 23–28; 291–303; H. Hannum, *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights*, Philadelphia 1996, pp. 453–477; C. Tomuschat (ed.), *Modern Law of Self-Determination*, Dordrecht 1993.

⁶⁴ M. Perkowski, *Samostanowienie narodów w prawie międzynarodowym (Self-determination in International Law)*, Warszawa 2001, s. 79–80.

Basic words:

Right of self-determination, history, reassessment and an innovative interpretation, boundaries, a special code of self-determination.

Słowa kluczowe:

Prawo do samostanowienia, historia, przewartościowania, granice, kodeks samostanowienia.

STRESZCZENIE

Prawo do samostanowienia od dwóch stuleci jest jedną z najważniejszych sił sprawczych w stosunkach międzynarodowych. Przeszło ono znaczną ewolucję od postulatu moralnego i politycznego do normy powszechnego prawa międzynarodowego.

W wyniku II wojny światowej samostanowieniu nadano charakter wiążącej normy prawnej. W Karcie Narodów Zjednoczonych w art. 1 ust. 2 uznano za jeden z celów Organizacji rozwijanie przyjaznych stosunków między narodami, opartych na poszanowaniu zasady ich równouprawnienia i samostanowienia.

Samostanowienie wprowadziło nowe kryterium legitymizacji władzy w państwach uczestniczących w obrocie międzynarodowym. Było nim poszanowanie interesów i aspiracji narodowych. Uderzając w system kolonialny zasada samostanowienia przyczyniła się do podważenia imperialnego ładu w stosunkach międzynarodowych.

Samostanowienie ma dwa podstawowe wymiary - wewnętrzny i zewnętrzny i nie mogą one być traktowane w oderwaniu od siebie. Prawo do samostanowienia oznacza z jednej strony zdolność uzyskania własnej niepodległości państwowej, z drugiej zaś swobodę narodu dysponowania swoim losem, czy to w ramach własnego państwa narodowego, czy też federacji, państwa wieloetnicznego lub innych rozwiązań ustrojowych.