

The Criteria for Self-determination and Recognition as a Sovereign State: Case of Kosovo

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Abstract:

Self-determination is a controversial issue in international public relations as well as in international law. The rise of groups of people in different geographical locations of the world, seeking alienation and recognition as an independent sovereign state, cannot, therefore, continue to be ignored. The protection of the inviolable right of state sovereignty as provided for under the preamble of the United Nations Charter cannot be shoved under the carpet. It is now a public debate on whether state sovereignty has to be protected at all costs, including ignoring pressure from proponents of self-determination. What then are the characteristics or criteria that qualifies a group to be entitled to secession? The aim of this article is to look at the brief history of self-determination and assess the criteria considered for the declaration of sovereignty. The case of Kosovo will be regarded as extensively. The author seeks to fill the gap in the existing literature on whether recognition automatically confers upon meeting the laid down requirements or political decisions also hold water. The methodology used is theoretical. It is clear from the results that the subject of graduation from self-determination to state sovereignty is an issue, not so much of legality but political recognition by the international community. This research will positively contribute to the debate surrounding self-determination and sovereignty. It will at least demystify the fog surrounding this highly contested principle. The research will help in widening the criteria for state sovereignty to include political recognition. The author proposes more studies in the area of whether political recognition is legal when making international law decisions.

Keywords: Self-determination, Sovereign state, Kosovo

Introduction

Self-determination is a hotly disputed and controversial issue in public international law as well as public international relations, which has been evolving and developing in the course of the last 100 years (Drew et al., 2018). Self-determination is the right through which a group of people can freely determine their political status and pursue their social, cultural, and economic development. It is the grounds on which a nation determines its statehood and its government and one through which new countries have been able to emerge by secession (Freeman, 2018). As a result of self-determination right, over 100 states have been born since the end of World War II in 1945, a threefold increase in seven decades. In the modern world, happenings in Scotland, Catalonia, and Kenya during the August 2017 elections and other nationalism movements serve as a constant reminder that self-determination is a volatile issue in the international realm. 'Indeed, self-determination conflicts are among the most persistent and destructive forms of warfare' (Weller, 2009). As of 2011, there were 55 secessionist movements around the world and many more potential movements that have not yet mobilized a succinct pointer that we are still living in an age of secession (Griffins, 2018). Indeed, after close to six decades of transition from colonialism to constitutional democracy, it is considered that most countries are still under the yoke of governments they consider undesirable or oppressive. This has led to active movements requesting for cessation. Self-determination stems from the pertinent issue of national sovereignty, which according to Richard Butler (former Australia Chief of the United Nations) is the most complex and troublesome security issue of the present time (SBS News, 2018). Butler further adds that the second most troubling issue is the increasingly assertive demands for separatism and self-determination. The issue of the right to self-determination is, therefore, a debate that cannot escape scholarly contributions in an attempt to shed some light on it and the requirements for recognition. The question of whether Kosovo has a right to external self-determination and thereby hold international status and de jure independence is one that has elicited different contributions from various authors. No clear answers have been provided. The disputed status of Kosovo contributes to an uncertain political future, and the status quo offers a stalemate for the meaningful progression of any other cessation movements, whether genuine or otherwise. In light of the foregoing, the case of Kosovo is, therefore, an important case in the principle of self-determination studies.

Theoretical methodology

According to Hannum (2017), the principle of self-determination was unknown in the past since people existed in small groups that self-governed with legitimacy based on culture, religion, or empires and kingdoms without expectations for people to choose leaders. However, between the 18th and 19th centuries, political scholars and experts began to argue that groups of people with a shared culture, language, history, or ethnicity should be allowed to control their government instead of being subjected to foreign governance. Nationalism developed defined

by the congruence between political rule and the nation, but it remained a political goal and not a global legal provision as it was rejected by the covenant of the League of Nations. Nonetheless, it was recognized two decades later by the UN charter with calls for states to develop “free political institutions.” However, international law has maintained a conservative perspective that rejects the idea of groups of people within existing nations have a right to secession. Consequently, modern-day lawyers, IR theorists, and diplomats’ debates on self-determination issues revolve around the condition for which groups may acquire the self-determination right and whether the internal dimension of self-determination implies power devolution within an existing nation for distinct groups within that nation (Hannum, 2017)

Freeman (2019) provides that self-determination is a concept that needs rethinking. He expounds that by rethinking self-determination, it means that self-determination, as previously perceived, has a certain inadequacy that requires an adequate way of thinking. He states that self-determination is a necessary and important element of the human condition. It is a right of humanity that is both illusory and dangerous in its legal and philosophical imperative. Abulof (2015) builds on the inadequacy aspects by stating that self-determination as a justified principle of the international community has become a confusing compass with the confusion arising from the submersion of self-determination in state determination. Abulof explains that self-determination is comprised of a double helix of duality and mutuality, That is, people’s right to align with a group, their rights to determine their politics, and the rights of each being equal to that of another. However, practically state representatives have endeavored to make self-determination docile by controlling and containing the principles through yielding the public will to the interests of powerful nations and consequently impairing the moral imperative of self-determination (Abulof, 2015).

A brief history of the concept of self-determination

The right of a people to self-determination is considered a ‘cardinal principle, in the area of modern international law (commonly regarded as a *jus cogens* rule), binding, as such, on the United Nations as an authoritative interpretation of the Charter's norms’ (McWhinney 2007). The principle states that people, based on respect for the principle of equal rights and fair equality of opportunity, have the right to freely choose their sovereignty and international political status with no interference. The definition as per Diakonia (works with over 30 countries for the fulfillment of the right of all people to live a life in dignity) is as follows:

The right of all peoples to self-determination is one of the core principles of international law, and, by virtue of its *erga omnes* status, it is the responsibility of all states to ensure that this right is realized. The obstruction or violation of this principle, mainly through the use of force, constitutes a very serious violation of international law.

However, the modern-day self-determination concept is traced back to the Declaration of Independence of the United States of America on 4 July 1776. The Declaration recognized New Hampshire, Massachusetts Bay, Rhode Island, and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Maryland, Delaware, Virginia, North Carolina, South Carolina, and Georgia as sovereign states. The states had previously been under British rule. The

Declaration proclaimed that governments derived ‘their just powers from the consent of the governed’ and the people had a right to abolish it if the government was destructive at these end (Falklandstimeline.files.wordpress.com, 2018).

The French Revolution that lasted from the year 1778 to 1779 further propelled the concept of self-determination. The Revolution served to strengthen Napoleon’s dictatorship in the areas he conquered majorly in Western Europe (Livesey, 2001). In the 19th Century, the concept was further applied during World War 1 in the dismemberment of the Austro-Hungarian, Russian, and Ottoman Empires. The then President of the United States of America, Woodrow Wilson, championed for self-determination through Fourteen Points. The points were in the form of a statement of principles for peace that were used for peace negotiations to end World War I. However, the principle perceived to be more of a political rather than a legal concept.

During World War II, the concept of self-determination was boldly proclaimed in the Atlantic Charter. It defined the Allied goals in the post-war world, which included the right to self-determination. States in support of the Atlantic Charter signed the Declaration by United Nations on 1 January 1942, which became the basis for the modern United Nations. The provisions of the Atlantic Charter were also re-stated in the Moscow Declaration of 1943 and in other important instruments of the time, including the General Agreement on Tariffs and Trade.

The concept of self-determination was incorporated into the United Nations Charter in 1945. Article 1 of the Charter strengthens its purpose as developing friendly relations among nations on the principle of equal rights and self-determination. The Charter affirms that members of the United Nations, which have or assume responsibilities for the administration of territories, whose peoples have not yet attained a full measure of self-government recognize the principle. A trusteeship system is put in place under Article 76 to promote the development of the inhabitants of the trust territories towards self-government.

Evolution of the concept of self-determination

The concept has evolved over the years. The first significant contribution made by the UN in developing the concept of self-determination was the Declaration on the Granting of Independence to Colonial Countries and Peoples on 14 December 1960. The Declaration proved for the transfer of administrative powers without reservation, to the peoples in the trust and non-self-governing territories or all other territories, which had not yet attained independence (para 5).

In 1966, the adoption of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights further contributed towards the practice of the self-determination concept. They both have as Article 1 the right to self-determination.

The Declaration on Principles of International Law concerning Friendly Relations and cooperation among States in accordance with the Charter of the United Nations (Friendly Relations Declaration 1970) adopted by consensus on 24 October 1970, is the most authoritative and comprehensive formulation so far of the principle of self-determination (Falklandstimeline.files.wordpress.com, 2018). Principle 5 recognizes the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations.

Case of Kosovo



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The case of Kosovo provides a unique case of self-determination and secession of states mainly due to the intensive involvement of the international community, the rise of the Albanian armed insurgency, the justification for armed intervention by NATO against a sovereign state Serbia and the establishment of Kosovo under the UN protectorate elements of Kosovo's political path to independence (Bekaj, 2010). In the process of the conflict, interventions, and resolution towards Kosovo's independence, the values and provisions of self-determination, human rights, state sovereignty principles and laws and rules on non-interference in a nation's internal matters were referenced, applied and tested and even clashed severally with the ICC debates on the legitimacy of Kosovo's independence declared in 2008 typifying the clash of international law and community foundations for self-determination and intervention.

Serbia was one of the six republics within the former Socialist Federal Republic of Yugoslavia (SFRY) alongside two autonomous provinces: Kosovo and Vojvodina,. The constituent republics of SFRY began to dissolve following the end falling of the Soviet Union and its ruling over Eastern Europe. Primarily, The SFRY was in a lot of crisis at the end of 1980 on ethnic, territorial, religious, economic, nationalist, and political lines that raised conflict, caused wars and violence in the region in capacities that shocked the western states. As a result, the global society questioned the credibility of the individual states, and the leaders obliged with handling similar crises (Radelijic, 2010). Countries like Slovenia and Croatia were able to secession from the SFRY because they had been working towards breaking off from the SFRY for a while. For instance, Croatia and Slovenia had long started developing relations with Western Europe so that they would leverage the relations for support in their quest for secession (Radelijic, 2010). In 1991, Slovenia, Croatia, Macedonia, and Bosnia, declared independence. 1992, the Federal Republic Yugoslavia (FRY) succeeded the SFRY, and in 2003, the federation of Serbia-Montenegro succeeded the FRY.

However, Serbia retained the Federal Republic of Yugoslavia's name under the reign of genocidal Slobodan Milosevic and kept control of the neighboring

autonomous provinces. Therefore, Kosovo, as an autonomous state, remained under Serbia. After all, even Kosovo's autonomy was attained following a series of violent repressions by dominant groups in the province then towards Serbia. Autonomous regions did not bear the Yugoslav sovereignty, were subjects to the republics, and lacked a right to secession. Still, the autonomy was just the beginning of the birth of modern-day Kosovo. Kosovo had been identified as a province rather than a republic due to its population, which was 120,000 ethnic Serbs but wanted to rise to become a Republic (Gunaratne, 2013). The commencement of the conflict in Kosovo in the late 1990s was the result of prolonged oppression by Serbia and Albanian resistance since the beginning of the 20th Century. Kosovo's autonomy was illegally revoked in 1989, resulting in massive discrimination against Kosovo Albanians in public spheres. Albanians, who made up the ethnic composition of Kosovo, were massively removed from jobs in Serbia, and certainly high school and university stopped taking in Albanian students. Kosovo was thus in political apartheid in the 1990s (Bekaj, 2010). By 1997-1998, peaceful movements from Kosovo were becoming vocal against the discrimination in the systems and criticizing the passive resistance of the LDK provoking thoughts on more aggressive approaches. The Kosovo Liberation Army went into battle with Milosevic's Serbian Forces leading to a war of independence in 1998-1999 (Orosenberg, 2018). The intensification of the war gained the attention of the international community as citizens were massacred, and the threat to humanity was increasing. The UNSC then passed a resolution in mid-1990 that ended the war and created the NATO peacemaking force of Kosovo, returning some of the autonomy to Kosovo. The desire to become a republic, however, heightened after the war, and the UN, EU, and the US worked with them to advance a plan for independence.

In November 2005, the Secretary-General appointed Martti Ahtisaari Special Envoy for Kosovo, whose job was to mediate negotiations between the parties. In March 2007, the Comprehensive Proposal for the Kosovo Status Settlement (commonly referred to as the Ahtisaari Plan) was submitted for consideration (Kuvendikosoves.org, 2018). In the plan, Kosovo was to become independent after some period of international supervision. Serbia rejected the plan without giving it a second thought with the support of Russia.

In an effort to revive the mediation process, the European Union, Russia, and the United States oversaw negotiations between the Government of Serbia and the Kosovar Albanians, from August to December 2007. The parties were unable to reach an agreement.

In 2006, Montenegro declared independence, and Serbia declared itself the successor to Serbia-Montenegro later that year. Serbia, Russia, Romania, Moldova, and Cyprus, which were countries grappling with some secessionist issue, argued that Kosovo's secession and/or recognizing that secession would be a breach of international law (Belkovich, 2015).

The separation of Kosovo from Serbia culminated in the declaration of independence, unilaterally proclaimed by Kosovo on 17 February 2008. NATO intercepted police and military operations by Serbia. For the following nine years, the UN-administered Kosovo. Kosovo gained recognition as a sovereign state from March 2008 by the United States, the United Kingdom, the Republic of China (Taiwan), Germany, and others. As of February 2018, Kosovo's independence was recognized by 116 out of 193 UN member states, but three states withdrew their recognition. The rejection of Kosovo as independent states came from individual state experiences and the broader perception of the representation of the EU on a global platform. Slovakia's refusal lay in its sense

of loss of territory to Germany and Hungary in the late 1930s. Slovakia felt that Kosovo's case presents a threat to the idea of standard foreign policy within the Lisbon treaty that foresees a united strategy for Europe in foreign policy. On a political level, the unilateral declaration of Kosovo's independence is viewed as the precedence of the legalization of extremist groups which threaten the concept of a united Europe. Cyprus' refusal to acknowledge Kosovo has a state also arises from similar perceptions on the infringement of the declaration of territorial integrity (BBC, 2008). All the countries against the declaration of Kosovo as an independent state hold that it infringes on the international law of reaffirming protecting the integrity and sovereignty of territories. The argument is not as much against the right of the Kosovo Albanians to self-determination, but on the legal basis that territorial integrity as per international law and that provisional institutions have no power to declare state independence. More so, there are perceptions that Kosovo was cut off from Serbia as a result of NATO through an illegal military intervention, which represents the disregard for international law to recognize the territorial sovereignty of other states that are members to the UN.

While Kosovo's declaration of independence and its recognition by various states can be justified, it is not a clear case, but rather, 'Kosovo presents a quintessentially tough case, demonstrating the ways in which political interests of states affect how the international law is given effect' (Borgen, 2018). In Borgen words,

How and whether consideration will be given to it as a unique case in international law or a precedent for other secessionist movements may depend on how various states interpret the law and facts that gave rise to the declaration.

Kosovo's independence also led to increased tensions in a number of cases, e.g., in Bosnia-Herzegovina, where the Republic of Srpska vetoed recognizing Kosovo and threatened to declare independence themselves. Crimea was annexed by the Russian Federation.

Recognition of a new state

Article 1 of the 1993 Montevideo Convention on the Rights and duties of succinctly stipulates a four-prong criteria that must be satisfied in judging for the claimant statehood. The state as required under international law should have (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.

There are two schools of thought regarding recognition of a new state: constitutive and declaratory.

Constitutive

The constitutive school of thought that that a state can be seen as having become a state once it is recognized by other states. States are given discretion whether to recognize the state or not (Worster, 2018). The constitutive group is elementarily status creating. Kosovo has been recognized by more than half of the UN member countries. Does this qualify it to be regarded as a state on the international plane? Or is it a genuine state but only in the eyes of the states that have chosen to recognize it as such?

Declaratory

The second group of thought claims that states become states when they meet legal criteria for statehood according to international law (Pouwa, Leiden). Because scholars of the declaratory school focus on legal reasons, they do not consider political factors for the understanding of the recognition of states (Downer, 2013). This school of thought refers to the creation of a state through status confirming. A good example is that South Sudan was accorded state recognition after secession in post-colonial Africa.

There are other factors beyond the constitutive and declaratory school of thoughts. Some of these factors include recognition based on political consideration by outside states (Harrak Srifi, 2017) and non-recognition if the state is in violation of the right of self-determination or use of force unlawfully (Crawford 2007). The criteria for state recognition has not been applied consistently across all the cases like Somaliland. Somaliland was created as a result of colonial action on a territorial entity. More so, Somaliland is a homogenous region in terms of religion, ethnicity (mostly Isaaq) and language. Most of its population were also pastoralists in terms of economic practice. The commonalities of the region and the colonial aspect gave Somaliland a right to self-determination within international law and relations (Bereketab, 2012). Notably, when Somaliland had joined to form the greater Somali there was no vote into the matter or referendum and Somaliland has done it voluntarily thus it remained a separate entity (Kreuter, 2010). The Somaliland case is different from the Kosovo case especially in the aspects of territory as Kosovo was not by itself a territorial entity. Matt Bryden equates the case of Somaliland to 'the banana test'. He states that if something looks like a banana, smells like a banana and has similar characteristics of a banana, most likely it is one (2003). In his opinion, Somaliland has fulfilled the legal criteria for statehood, but its position is still grey in matters recognition. Political reasons and decision-making processes therefore are of substantial importance for understanding states' decisions to recognize new states. Kosovo on the other hand was never separate from Serbia and not a territorial entity. Most opponents of Kosovo's declaration to statehood argue that making Kosovo a state would mean having a nation (Kosovo) within another nation (Serbia) which infringes on the territorial provisions of statehood.

Furthermore, The European Community guideline on recognizing new states in Eastern Europe and in the former Soviet Union is quite informative as to the legal effects of recognition (16 December 1991). The guidelines bear a criteria laying down the conditions that had to be fulfilled before the community was prepared to recognize the new states. The document includes respect of the provisions of the UN Charter and non-recognition of entities created as a result of aggression. The document states that 'the commitment to these principles opens the way to recognition by the Community and its Member States and to the establishment of diplomatic relations'. Indeed, recognition of states is not a matter governed by law, but a question of policy (Lauterpacht 1947). Recognition can be withheld (or granted with conditions) even if the State fulfils the required statehood conditions under Article 1 of the Montevideo Convention. East Germany's, diplomatic recognition was withheld by West Germany and the Western Allies, but was recognized by its allies in Central and Eastern Europe.

Kosovo still remains under the control of the United Nations therefore cannot claim to be able to enter into foreign relations on its own accord. It remains a complicated entry notwithstanding the fact that over 100 states have recognized

its declaration of sovereignty. The recognition issue ceased to be an internal matter pertaining to the Kosovars but now is an issue before the international community. Even though Kosovo now operates distinctively from the operations of Serbia and the larger former Yugoslavia, only time will tell if it topples over to absolute statehood or whether the status quo will remain. How long then should a group of people who have declared self-determination wait on the cold benches before being graduated into statehood?

Conclusion

The main conclusion to be drawn is that the question of recognition of states has become less predictable and more a matter of political discretion because of recent practice. Kosovo's international status hangs loosely because of the indeterminacy of the precise conditions to be fulfilled for recognition. If Kosovo is recognized as independent, its long term positive effect would be to encourage people to exhaust all peaceful means before resorting to violence in their quest for self-determination. An international debate over whether a unilateral declaration of independence had set a precedent that could apply to other movements.

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