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Secession and Self Determination; A Philosophical Reflection on the Concept of Sovereignty

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ABSTRACT

This paper seeks to address the question of "to what extent is the right of a nation to seek self determination within a sovereign state without violating the international principle of the territorial integrity of the country". It conceives sovereignty in accordance with Leon Duguit (1859-1928) definition of sovereignty as the, "commanding power of the state; it is the will of the nation organized in the state; it is a right to give unconditional orders to all individuals in the territory of the state." It is on the premise of this definition that this paper takes a critical reflection on the principles of self determination as enshrined within the International Laws vis-à-vis the concept of a sovereign state as an independent entity with absolute authority over its territory. The paper posits that despite the several charters of the United Nations concerning the right of individuals to self determination, the idea is still operational at the level of theories as its tenets are yet to be fully defined and implemented thus making it an ambiguous principle. The paper however distinguished between the concept of secession and self determination outlining their point of convergence and dissimilarities.

Keywords: Secession, Self determination, Philosophical Reflection, Sovereignty.

INTRODUCTION

The foundation of modern democracy is based on the concept of sovereignty especially popular sovereignty. 'The idea of sovereignty is integrally bound up with the most fundamental concept of modern politics such as freedom and democracy'. The basic principle of democracy is that the ultimate authority resides in the mass and this is what popular sovereignty too stresses upon. Bryce considers it as "... the basis and watchword of democracy." Sovereignty is an essential characteristic of a state. The state is made of four basic components namely 'population', 'territory', 'government' and 'sovereignty'. Sovereignty forms an essential mark of statehood and it is an indispensable component of the state. J.W. Garner defines the state as: " ... a community of persons more or less

numerous, permanently occupying a definite portion of a territory, independent or nearly so of external control and possessing an organized government to which the great body of inhabitants render habitual obedience"[1]. Sovereignty, an important part of the state, may exist in a single person or in a group which prevents the state from disintegration and helps to keep all parts of the state together through obedience or use of power. Sovereignty as a term has its origin in the Latin word *'Superanus'* meaning supreme.

The word itself implies that the state enjoys supreme power over its citizens and has authority to enforce obedience to its laws and regulations. This is a sovereign power of a state which provides it the power to do things according to its wishes or as Jellinek defines it: "... that characteristic of the state in virtue of which it cannot be legally bound except by its own will or limited by any other power than itself."

Sovereignty and the sovereign have been variously defined by many scholars and political thinkers [2], defines a sovereign in the following words: By the sovereign is meant that individual or assembly who, by the terms of the contract on which the commonwealth rests, is authorized to will in the stead of every party to the contract, for the end of a peaceful life (75). According to [3] defines sovereignty in following words, sovereignty is the supreme power of the state over citizens and subjects, unrestrained by law. [4] considers sovereignty to be, "... the supreme, irresistible, absolute, uncontrolled authority in which the *jura summi imperii* reside".

On the other hand, the right to self-determination is the right of a people to determine its own destiny. In particular, the principle allows a people to choose its own political status and to determine its own form of economic, cultural and social development. Exercise of this right can result in a variety of different outcomes ranging from political independence through to full integration within a state. The importance lies in the right of choice, so that the outcome of a people's choice

should not affect the existence of the right to make a choice. In practice, however, the possible outcome of an exercise of self-determination will often determine the attitude of governments towards the actual claim by a people or nation. Thus, while claims to cultural autonomy may be more readily recognized by states, claims to independence are more likely to be rejected by them. Nevertheless, the right to self-determination is recognized in international law as a right of process (not of outcome) belonging to peoples and not to states or governments. It is a fundamental right enshrined in the Charter of the United Nations, the International Covenants of Human Rights (common Article 1) and the Covenant of the Unrepresented Nations and Peoples Organization. These instruments state that "all peoples have a right to self-determination" and that "by virtue of that right they are free to determine their political status and to pursue their economic, social and cultural development."

Despite this seemingly clear definition, there is little agreement on the content, applicability and implementation of the right to self-determination. Political debates at the United Nations and elsewhere, legal discussions and the practice of states reflect deep divisions of views. This range from the notion, on the one hand, that the right to self-determination is a right of recognized states to act without external intervention; to the notion, on the other hand, that each ethnic, linguistic or religious group has the right to secede from the state of which it forms a part. The prevailing view since World War II has been that only colonial peoples and territories (meaning exclusively those colonized by European powers in other continents) had the right to self-determination. Today, self-determination has been successfully claimed by nations and peoples in the former Soviet Union, the former Yugoslavia, Eritrea, and Slovakia. None of these are cases of de-colonization in the classical sense, but the international community has not yet

come to grips with the need to re-examine the concept and content of self-determination.

PHILOSOPHICAL CLARIFICATION OF THE CONCEPT OF SOVEREIGNTY

Political philosophy, as we know concerns itself with community, public life, social organizations and the like. It addresses issues such as the rights of the individual in relationship to the power of the state and society, the nature and legitimacy of political authority, of democracy and so on. The 'clarification' of concept forms an important work of social and political philosophy. [5] in 'Political Philosophy' considers that 'clarification' of a term involves three basic steps namely 'analysis', 'synthesis' and 'improvement'. Sovereignty as observed is the legal authority which is supreme by nature or may be defined as supreme authority within a territory.

Following the first step of clarification, each of the terms associated with the concept of sovereignty needs to be 'analyzed'. First, the holder of sovereignty possesses 'authority'. Authority as defined by [6] is, "... the right to command and correlatively the right to be obeyed [7]." The term 'Authority' comprises of 'power' to command and the word right connotes 'legitimacy'. Power gives competence to rule against the will of the people but when it gets augmented with legitimacy people accept and follow the laws spontaneously considering it in the welfare of the society.

Thus, people obey will of the authority but when sometimes they ignore or challenge it they are liable to punishment implying that when legitimacy fails, power controls the situation. A holder of sovereignty derives authority for some mutually acknowledged source of legitimacy like natural law, a divine mandate, hereditary law, constitution etc. The term 'legal' associated with sovereignty means a sovereign has the authority to makes laws and everyone

without exception needs to follow it. Sovereignty being 'supreme' implies that it is supreme not only to the other agencies or associations in the state but also to the custom, the norms of the society and even to the natural and divine law.

Sovereignty includes various important principles or laws which are essential for its legitimate power exercise over people. In the sphere of sovereignty when one owes his duty to the state, the state in turn is expected to provide complete protection to his life and property. Thus, in sovereignty there exists a logical relationship between duty and right. 'Improvement', which comes as the final step implies that a concept needs to be given a definition that would help to arrive at its complete and clear meaning. Sovereignty refers to supreme power of the sovereign but this power is not employed without use of rationality and it gives due regards to custom, social values etc. All these factors gives sovereignty its legitimacy, otherwise it would perish in due course of time. Thus, sovereignty though by nature is absolute and unlimited but it is by no means an arbitrary power or is coercive by nature. Sovereignty has two basic aspects 'external' and 'internal'. Internally speaking it means that state has supreme power over the people within its domain and externally it implies complete freedom from foreign rule. Thus, in a state, sovereign power is indispensable so as to free it from both the internal and external control. The concept of sovereignty as it developed includes a number of general features and also a series of distinctions. All of this helps to arrive at the correct meaning of sovereignty. The first of this is the distinction between 'legal' and 'political' sovereignty. While legal sovereignty implies to the supreme law-making authority of a state, the political sovereignty means the will of the people. These terms are though superficially different but they are closely related to each other that is, though the legal sovereign has its unlimited power it cannot ignore the will of the ruled people.

But at the same time, it is only possible in indirect democracy that the will of people and formation of law go together otherwise this connection between legal and political sovereignty indicates only the type of law which the public opinion demands.

Another distinction is made between 'De jure' and 'De facto' sovereignty. A De jure sovereign is given supreme power by the law. He rules and people obey him, although he may be less in physical strength. On the other hand, De facto sovereign is one whom the law of country does not recognize as a sovereign but he enjoys supreme power either by virtue of his physical strength or moral force. Thus, he may be a military dictator, a spiritual priest, traditional ruler etc. It is often seen that in due course of time a De facto sovereign obtains legal status and ultimately becomes De jure sovereign. This can be illustrated with the example of Bolshevik regime in Russia which from a De facto became a De jure regime [8]. Apart from the distinctions the attributes of sovereignty too help to arrive at its proper concept. Sovereignty has 'absoluteness' as one of its major characteristic. This means that the supreme power of the state is absolute without any limit and laws can be done or undone by it as it pleases. The sovereignty of a state exist as long as the state survives that is the supreme authority of a state does not cease with the dismissal or death of a particular man who bears it. Many Political philosophers and Scholars have discussed the concept of sovereignty. Which includes but not limited to;

Thomas Hobbes

Thomas Hobbes (1588-1679)[9] justifies absolute sovereignty. The English civil war of 1642 was highly condemned by him as he considered it the cause of social disintegration. The civil war made him realize that order and peace were indispensably needed for a state to exist and state absolutism was essential for social solidarity. Hobbes points out that in both the case of civil wars and state of nature there can be:

> No place for industry; because the fruit thereof is uncertain: and consequently no Culture of the Earth; no Navigation ... no commodious Building ... no account of Time; no Arts; no letters; no Society; and which is worst of all, continual fear, and danger of violent death; and life of man, solitary, poore, nasty, brutish and short. [9]

Hobbes considers sovereignty as an essential need to escape this state of nature which he describes as 'solitary, poor, nasty, brutish and short' and one which leads to war of all against all. To escape this insecurity Hobbes recommends absolute sovereignty which according to him many may consider dangerous but its positive aspects overshadows the negative ones. Hobbes states:

> And though of so unlimited a Power, man may fancy many evil consequences yet the consequences of the want of it, which is perpetual war of every man against his neighbour, are much worse.

Hobbes begins his philosophy with the analysis of human psychology. He considers 'selfish motive' to be the reason for every human action. Man to avoid the insecure state of nature enters into a contract and sets up a civil society. Here the citizens surrender their power and liberty to a person or group of people whom they authorize to govern them. This authorized person becomes the sovereign and the rest are his subjects. Hobbes, here gives a new orientation to a social contract theory. The anti-monarchial

writers of sixteenth century used 'social contact theory' to oppose absolute monarchy and Hobbes using the same theory does the reverse. According to him

a contract exists amongst the ruled rather than between the ruler and the ruled. He says, "A superior or sovereign exists only by virtue of the pact, not prior to it."

A sovereign can never be unjust since injustice signifies violation of contract and a sovereign is not bound by the covenant. Hobbes attaches different attributes to a sovereign and justifies each of them in detail. Sovereignty, for Hobbes, should be unlimited, irrevocable, inalienable and indivisible. To offer a rational explanation for unlimited sovereignty, Hobbes points out that by nature man is provided the right of self defense but in spite of it he faces continuous danger to his life during civil wars and in a state of nature. To avoid this condition, we enter into the political state and authorize the sovereign of our security and protection. As the ultimate aim of sovereign power is to establish peace, justice and maintain security, to impose restrictions on a sovereign becomes completely irrational.

John Locke

John Locke's (1632-1704) [10] concept of sovereignty is popular in nature. He gave his theory of political philosophy in his famous book 'Civil Government'. He was against the divine rights of the king and rejected absolute sovereignty as propounded by Hobbes. The contract idea is central to his political philosophy. Man, in his view, is a social animal and therefore, can't live alone. He writes:

> God, having made man such a creature that, in his own judgment, it was not good for him to be alone, put him under strong obligations of necessity, convenience and inclination, to drive him into society, as well as fitted him with understanding and language to continue and enjoy it. Man being social in nature comes into a contract and willingly submits his rights to the community so that his liberty, right to live and property will be received by him from the society.

The Lockean sovereign is not absolute but rather limited both by natural rights and

by the purpose for which the state has come into existence. In his theory, he concludes that people are the real sovereign and therefore they cannot alienate their power to the state. The state has come into existence through a contract between the people in a community and therefore it has a human origin and not a divine one. The ruler, accordingly, becomes a mere agent of the people and the people being the real sovereign can impose limitations on him. Law, for Locke, is the will of the people. Now since the ruler has gained his position on certain position of good behaviour the people have full right to revolt against an inefficient ruler.

From the forgoing, it is pertinent to note that philosophers have not agreed on the concept of sovereignty as many other philosophical issues but the common feature lies in the fact that the territorial integrity of a country must be maintained at all times be it in the monistic sovereignty of Hobbes or the popular sovereignty of Locke.

EVALUATION OF SECESSION AND SELF DETERMINATION IN A SOVEREIGN STATE

"Recognizing the unilateral declaration of [11] independence from Serbia legitimizes [...] the act of unilateral secession by a provincial or other non-state actor. It transforms the right to self-determination into an avowed right to independence" [12]. This assertion by Serbia's Minister of Foreign Affairs addresses the core of the problem represented by Kosovo's declaration of independence from Serbia. It reflects the issue whether, under certain circumstances, a sub-state entity can achieve statehood by means of unilateral secession without the consent of the encompassing state [13]. While international legal instruments and state practice remain ambiguous regarding the question whether, in exceptional instances, minority groups should be entitled to a right to unilaterally secede, in scholarly literature accounts arguing for such a right have been put forward, the most known of which is Allen Buchanan's [13],Remedial Right Only Theory. these theories understand

secession as a right to resistance and defence against injustices committed against a group by the encompassing state [13]: 217-221; [3]: 5-6; [4]: 41. Advocates of „remedial right" theories consider a right to secede as "analogous to the right to revolution as understood in the mainstream of liberal political theory: as a remedy of last resort for persistent and grave injustices" [13], 2003: 217). Thus, according to "remedial right" theories, secession is conceived as a right similar to Locke's theory of revolution, suggesting that if a government breaches the terms under which a people has given authority to it, then "by this breach of trust they forfeit the power the people had put into their hands" [8]. This gives the people a "right to resume their original liberty, and by the establishment of a new legislative to provide for their own safety and security, which is the end for which they are in society" [6].

However, the principle of self-determination of peoples has become firmly entrenched in international law and international legal instruments [5]. Articles 1 and 55 of the United Nations Charter call for respect of the "principles of equal rights and self-determination of peoples" (United Nations, 2012a) [4], while Article 1.1 of the , [6] and of the „United Nations Covenant on Economic, Social and Cultural Rights" (1994) provide that "all peoples have the right to self-determination" [4]; [5]. Equally, the 1970 „United Nations General Assembly Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States" (hereinafter 'Friendly Relations Declaration') gives great consideration to the notion of self-determination of peoples. It postulates that "[3]very state has the duty to promote, through joint and separate action, realisation of the principle of equal rights and self-determination of peoples" [6]. Yet despite its frequent mention in international instruments, the practical implications of the concept of self-determination for national and ethnic minorities remain ambiguous, since the international covenants referring to the principle give no explanation as to its

precise meaning and whether it implies a right to secession [7]: ; [3]:[4]. [2],thus suggests that state practice might be the best source for an analysis of the scope of self-determination in international law. Generally, international practice has established the right to self-determination to be achieved principally through so called 'internal self-determination', by means of autonomy arrangements enabling a minority to attain a certain degree of political, social, cultural etc. independence within the framework of an existing state. To what extent the notion of self-determination implies a right to 'external self-determination', and thus enables minorities to secede in order to become independent or associate with a new state, however, remains controversial. Generally it is held in international legal literature that the right to self-determination does not imply a right to secede, except in cases of decolonialisation. Former colonies are considered to have a legitimate claim to break away from the imperial power and to establish an independent state [5]: [6].

However, contemporary international law does not authorise secession of minorities living within the borders of another state. Concerning minorities' striving for independence outside the colonial context the principle of self-determination is generally considered not to imply a right to unilateral secession [5]; [4]. However, there are a number of scholars who argue for an established right to secession in international law. By approaching the issue of secession from a moral point of view, different theories, arguing either for or against an established right to secession, have been put forward. In an attempt to identify morally legitimate reasons for secession, these theories aim at clearly separating justifiable from unjustified claims to secession [9]. Three main strands of theory have been developed, addressing the conditions under which unilateral secession might be legitimate: “choice” theories, “remedial right” theories, and “national self-determination” or “ascriptive“ theories [8]; [2]. Generally, these conceptualisations of a right to secession

have been classified into two categories being, firstly, primary right theories based on individual rights, which comprise “remedial right” and “choice” theories and, secondly, accounts based on collective rights, namely those of nations, which are expressed in “national self-determination” theories of secession. Thus, “choice” theories offer a voluntaristic justification for secession by maintaining that any group of individuals, located on a defined territory, has the right to secede and form a new state if this is the expressed desire of the majority of the entity‟s members [4]: [8]. Different conditions are defined by varying accounts of this theory for establishing an entity‟s right to independence [2]. While the most permissive „choice‟ theories solely attach the will of the majority as the requirement for secession, most versions of this theory identify certain additional criteria which have to be fulfilled for secession to be justifiable. As, for instance, [6] suggests, an entity must afford the necessary resources to successfully build a new state and guarantee the protection of minority rights within the newly created state. Focusing on a different notion, “national self-determination” theories draw their conditions for secession from „national self-determination‟ theory, suggesting that independence is justified by the importance of national identity [5]. Contrary to “choice” theories, these accounts identify as the main criterion for justified secession not the will of the majority, but that the entity wishing to secede can be classified as a nation [4].

CONCLUSION

The main interrelation between the principle of self-determination of peoples and the principle of territorial integrity is that a claim to external self-determination covers a claim to territory. The question of secession is the most closely related to the principle of territorial integrity. Secession is a territorial change, which occurs when part of an independent state or non-self-governing territory separates

itself for becoming a new independent state. The principle of self-determination is usually invoked in connection to unilateral secession that is the secession undertaken without the consent of the existing state and without constitutional sanction. Since all land area is claimed by some state and use of force is prohibited, according to P. Treanor, "secession is the only real method of new state formation, and a prohibition of secession is equivalent to a veto on new states". But the possibility to merge also should not be forgotten.

Although the principle of territorial integrity is applied in the relations between states and, by contrast, the principle of self–determination is the right of peoples, the international community (states) while interpreting and applying the principle of self-determination is bound to the principle of territorial integrity. The principle of territorial integrity was straightforwardly connected to the principle of self-determination in the UN General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples (1960); the Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States (1970); the Helsinki Final Act adopted by the Conference on Security and Cooperation in Europe (1975) and the Vienna Declaration and Programme of Action (1993). However, it must be admitted that resolutions and declarations are not generally binding on states. First, resolutions are not enumerated as a formal source of law in the Statute of the International Court of Justice. Second, under the UN Charter the General Assembly does not have the legal power to make law or to adopt binding decisions except for organizational matters. But many commentators regard resolutions adopted by the UN General Assembly as evidence of customary international law, especially when a resolution was adopted unanimously. Then the declaration purports to express the *opinio juris communis (*sense of legal obligation*)*, not a recommendation, and if it relates to

state practice (*usus*), that norm qualifies as a customary law.

But according to A. Cassese, "strictly speaking, these resolutions are neither *opinio juris nor usus*" in themselves. Although the *travaux preparatoires (*Preparatory works*)* of the UN Charter do not clarify whether external self-determination is a part of self-determination of peoples, the consistent state practice in conformity with the UN resolutions formed the international customary rules on the external self-determination of colonial peoples and peoples under foreign military occupation. The United Nations Millennium Declaration upholds the right to self-determination of peoples under colonial domination and foreign occupation. As the principle of self-determination usually appears together with the principle of territorial integrity in the texts of international law, the latter is viewed as limiting the scope for the interpretation and application of self-determination.

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