

Does “Self-Determination” Right Grant the Right for Unilateral Independence?

Deniz Baran

Abstract: At the present time, we are witnessing the rise of secessionist movements across the world whose political discourse is built on the basis of the right to self-determination. Echoes of this trend can also be seen in the Middle East and North Africa (MENA) region, with the best example being the independence referendum held by Kurdish Regional Government (KRG) in Iraq.

There is no doubt that the right to self-determination in the framework of international law exists, yet it is also possible to argue that the implementation of the right to self-determination was considered in the colonial context roughly a half-century ago in order to facilitate the legal independence of the colonized states and it is now highly arguable how the right to self-determination should be implemented. It seems that any use of the right to self-determination in a way paving the way for unilateral independence and secession attempts and thus harming the territorial integrity of existing states would not be approved of by the international community. From the perspective of realpolitik, passing over the constitutional framework which is binding for the different “peoples”; ethnic, religious etc. groups within existing states and paving the way for their arbitrary secession would again pose a great danger to the maintenance of the peace both at a national and a global level.

However, turning a blind eye to the serious grievances of different peoples within existing states and defining the implementation of the right to self-determination only in the colonial context would not be right or in compliance with political reality. Consequently, putting excessive emphasis on the division of the “inner-outer” self-determination and contemplating how the right to self-determination can be implemented on the basis of the internal self-determination appears to be the best option.

In the recent months, the international community has witnessed the rise of a global trend: daring attempts by secessionist or autonomous entities to gain their independence from the existing states which they are part of. While rising tensions in different parts of the world from Cameroon to Spain and Italy were seen, of course, it was not expected that this trend would bypass the MENA region. In the wake of the KRG in Iraq holding an independence referendum in September, the fear of similar attempts rose among the ruling regimes in many states in the region, and the concept of the right to self-determination was put firmly on the agenda in other parts of the world. However, what made the concept of the right to right to self-determination the trending topic on both a global and a regional scale was the recent escalation between the Spanish government and the regional government of Catalonia, because it was considered to be the most far-reaching attempt of all the secessionist movements.

While rising tensions in different parts of the world from Cameroon to Spain and Italy were seen, of course, it was not expected that this trend would bypass the MENA region.

The tension between the Spanish government and the regional government of Catalonia, which emerged due to the independence referendum held at the beginning of October by the unilateral initiative of the government of Catalonia, reached the peak after Catalonia unilaterally declared independence on Oct. 27. The central government responded to this declaration very quickly and dismissed the government and the parliament of Catalonia. Spanish Prime Minister Mariano Rajoy stated very clearly that the independence attempt was seeking an “impossible” goal.¹

The recent developments in Catalonia, as the best and the most daring example of the current global trend of separatist/independence movements, bring a crucial issue regarding both the today and future of the international law into question: Is it really possible to declare unilateral independence against an existing state on the basis of the “right to right to self-determination”?

Needless to say, the answer to this question has great importance for the future of the MENA region as well, considering there is great potential for such attempts in the region in the near future.

Is There any Binding General Norm About The Right to Self-Determination?

To be clear right from the beginning, the answer of this question can be given at the moment: The right to right to self-determination is a peremptory norm (jus cogens), as the International Law Commission put it clearly,² which means that no legislation contradictory to this right can be made. However, despite the fact that the right to self-determination is a peremptory norm and is mentioned in the United Nations Charter, and also despite the fact that the International Court of Justice (ICJ) has resorted to the principle of principle of self-determination in many cases such as East Timor, this does not mean that any independence movement can declare independence and form a new state on the sole basis of the right to self-determination. Even though it is arguable what the scope of the right to self-determination is, it is commonly accepted that it can justify unilateral independence declarations only when it is used against dominion or invader states. Hence, it can be said that the right to self-determination is not the kind of right which can unconditionally pave the way for the independence in the cases like Catalonia.



The historical roots of the concept of the “self-determination” date back centuries ago, yet this concept became popular in the 20th century and were used by a wide spectrum of politicians including U.S. President Woodrow Wilson and the founder of the Soviet Union, Vladimir Lenin. However, the first time it crossed beyond political rhetoric and turned into a legal term was 1945, when the UN Charter was accepted.³ In the Charter, the principle of self-determination was mentioned more than once, namely Chapter 1: Article 1(2) and Chapter 9: Article 55. Yet it also opened up a new discussion about the substance of the principle of self-determination: What kind of right was this principle engendering in the context of international law?

it can be said that the right to self-determination is not the kind of right which can unconditionally pave the way for the independence in the cases like Catalonia.

Indeed, when the aforementioned articles of the UN Charter mentioning the principle of self-determination are examined in a literal way, it can be seen that it was not mentioned as a main goal to be reached but as a tool to protect global peace and friendly relations between states. It can be concluded, therefore, that the principle of self-determination is a dependent element, which cannot be resorted to in every case. In a nutshell, from the perspective of the UN Charter, the principle of self-determination does not bring about a general and unequivocal binding norm in the framework of the international law.⁴ Since the UN Charter does not pave the way for any independence movement on the basis of the right to self-determination, the fact that all states are bound to the UN Charter does not matter in this regard.

There are two more important milestones that emerged in the development process of

the concept of the right to self-determination: UN Resolution 1514 (1960) and UN Resolution 2625 (1970).

UN Resolution 1514 (1960) was a cornerstone for nations which were resisting the control of colonial powers. It was also very important as it defined the right to self-determination much more clearly compared to the UN Charter. However, the subject of this resolution, whose title is “Declaration on the Granting of Independence to Colonial Countries and Peoples”, is only colonized countries and peoples. Therefore, this resolution has nothing do with the contemporary cases such as Catalonia or KRG.

UN Resolution 2625 (1970), which was accepted in the UN General Assembly in the honor of the 25th anniversary of the establishment of the UN and titled “Declaration On Principles Of International Law Concerning Friendly Relations And Cooperation Among States In Accordance With The Charter Of The United Nations”,⁵ was also an important milestone that gave a more profound definition of the right to self-determination. In this declaration, it was emphasized that the peoples had the right to determine their political status freely, without facing any external intervention and to provide for their own economic, social and cultural development. It was also emphasized that states shall respect these rights of the peoples and prevent from any action which would deprive these peoples from their right to freedom and independence. However, this obligation of the states was mentioned in relation to the goals of “advancing friendly

However, the subject of this resolution, whose title is “Declaration on the Granting of Independence to Colonial Countries and Peoples”, is only colonized countries and peoples. Therefore, this resolution has nothing do with the contemporary cases such as Catalonia or KRG.



relations and cooperation among states” and “ending colonialism immediately”.

Although it seems, at first glance, that the scope of the right to self-determination is broad in the UN Resolution 2625 (1970), a paragraph following the aforementioned parts of the Declaration adds the remarkable restrictions that:

“Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color.”⁶

This paragraph of the declaration caused serious debates about the framework of the concept of the right to self-determination. Some argued that UN Resolution 2625 (1970) was not an exception to the “colonial state-centric” substance of UN Resolution 1514 (1960), while others argued that the expression of “a government representing the whole people belonging to the territory without distinction” had added a new dimension to the concept and, on the basis of the right to self-determination, it would be legal and legitimate to declare independence from the states of which governments do not represent the whole people within an existing state without discrimination.⁷ However, the decisions of the ICJ, which postdate UN Resolution 2625 (1970), in many cases from Moldova to Ukraine, and the general understanding of the right to self-determination by the international community prove that the latter interpretation was not carried into action and the general approach has not changed significantly from before the aforementioned UN resolutions (as we can see in the case

of the Aaland Islands’ independence from Finland in 1920).

Only once, as a recent example, has the ICJ adopted a different attitude: in the case of Kosovo when Kosovo declared unilateral independence, yet this was just an advisory opinion by the ICJ, and therefore does not constitute any binding norm. Also, there has been some serious criticism of this advisory opinion of the ICJ, saying its legal argumentation was not adequate. In this advisory opinion, the unilateral independence declaration of Kosovo was compared with some other unilateral independence precedents in 18th, 19th and 20th centuries and it was mentioned that some of those attempts were successful. Therefore, according to the advisory opinion, delegitimizing all unilateral independence attempts categorically was impossible. In many cases such as Northern Cyprus or Southern Rhodesia, the unilateral independence attempts had not been seen as legal by the ICJ for other reasons such as using violence or committing “serious” violations of international law. On the other hand, in its argument, the advisory opinion did not touch on the right to self-determination in detail at all. For many legal experts, the advisory opinion of the ICJ on Kosovo was not only a striking exception to the general attitude of the ICJ and also produced “bad law” due to the shortcomings in its legal argumentation.⁸

Only once, as a recent example, has the ICJ adopted a different attitude: in the case of Kosovo when Kosovo declared unilateral independence, yet this was just an advisory opinion by the ICJ, and therefore does not constitute any binding norm.

In conclusion, according to the contemporary general understanding of international law and the current state-system, the roots of which lay in the Westphalian perspective, the



right to self-determination does not grant an absolute right to gain independence for any nation/people. Yet, it is not always necessarily illegal,⁹ as it is possible to reach compromises in the framework of the constitutional law. However, the cases of Catalonia or KRG are apparently not among them.

In conclusion, according to the contemporary general understanding of international law and the current state-system, the roots of which lay in the Westphalian perspective, the right to self-determination does not grant an absolute right to gain independence for any nation/people.

Is it Possible to Turn a Blind Eye to The Right to Self-Determination?

As we explained in the previous section, there is no binding general norm about the right to self-determination in the framework of the international law. Nevertheless, the absence of such a norm does not mean that we can turn a blind eye to the existence or necessity of the right to self-determination. In other words, if the right to self-determination is considered only as a concept belongs to the colonial era, it would not be in conformity with the contemporary political reality. Likewise, the right to self-determination should not be considered as a tool for only separatist movements, by contrary to that, it can contribute to the unity of the existing states if it is used for promoting political, economic and cultural rights of the minorities or different ethnic, religious etc. groups within the existing states. It means that the right to self-determination can be considered as a motive to strengthen the concept of the constitutional citizenship instead of relying on identity politics. It is surely beyond doubt that the improvement of such a conception of citizenship is greatly need for the stability of the states in the MENA region.

In fact, some recent approaches interpret and advocate the right to self-determination in the framework of "granting autonomy" to those people who would be able to reach a certain level of intensity and unity within the population which they are a part of and who have some distinct demands outside the framework of independence. While such approaches promote the "federalist" perception,¹⁰ on the other hand, they aim to obstruct the dissolution of the states on the basis of the right to self-determination.

In fact, according to the aforementioned recent approaches, there is a division between "inner and outer" self-determination.¹¹ Such a division seeks the implementation of a kind of "autonomization" in the context of the constitutional law without harming the territorial integrity of the existing states, while recognizing the right for the colonized states in a colonial framework to declare independence. Thus, the right to self-determination gains an "inward-oriented" form. One of the best examples of this approach is the reference of the Supreme Court of Canada re: the secession of Quebec,¹² which acknowledges the possibility of implementing the right to self-determination within the framework of an existing state, while laying emphasis on the protection of the territorial integrity of Canada.

Of course, there are also some recent examples of the use of the right to self-determination to gain independence from an existing state such as Czechoslovakia and Sudan. However, the common point in such cases is the existence of the consent of the existing state or a compromise between the two sides.

Of course, there are also some recent examples of the use of the right to self-determination to gain independence from an existing state such as Czechoslovakia and Sudan. However, the common point in such



cases is the existence of the consent of the existing state or a compromise between the two sides. Considering, for example, the case of Catalonia, apparently neither the consent of the Spanish government to Catalan secession nor a tendency to compromise exists. The Second Article of the Spanish Constitution of 1978 clearly asserts the “indissoluble unity of the Spanish nation” and “the common and indivisible homeland of all Spaniards”.¹³

Considering that Catalonia had a great amount of autonomy approved by the Spanish government and the Catalonians had not faced any systematic violation of its human rights or persecution in recent decades, it would be far-fetched to use the thesis of “remedial secession” in this case.

There is also one more interpretation of right to self-determination outside of the colonial context, which is the thesis of “remedial secession”¹⁴. Even though there is no general consensus on the thesis of remedial secession in the doctrine, there is some support for this. According to this thesis, peoples who face systematic discrimination and persecution, and whose access to the economic, political, social and cultural sphere is severely restricted by the state, can resort to secession on the condition that there is no other resort.¹⁵ Also, the legitimacy of secession from racist regimes such as the apartheid regime in South Africa could be advocated on this basis. Likewise, the unilateral independence declaration of Kosovo was advocated by some as such. Considering that Catalonia had a great amount of autonomy approved by the Spanish government and the Catalonians had not faced any systematic violation of its human rights or persecution in recent decades, it would be far-fetched to use the thesis of “remedial secession” in this case.

However, it would not be that easy to say same thing for most of the cases in the MENA

region such as the KRG. Given the Kurdish population (along with other peoples) has suffered a lot and been severely persecuted by the central government of Iraq in the past and is still suffering from the lack of effective governance and stability in the country, it is argued by some that the Kurds have right to resort to “remedial secession” under these circumstances. On the other hand, regardless of what happened in the past, there is another reality that the KRG has also retained great autonomy since the 2003 invasion of Iraq, which means they have been capable of promoting their existence and participation inside the system, even if partially.

In conclusion, the “failed state” problem is another concept directly related to the concept of the right to self-determination, because the existence of the failed states in the region, such as Iraq, paves the way for popular demands for the right to self-determination and getting rid of the collapsed/corrupted political sphere of the existing state. At this point, we need to define the concept of “failed states”. Failed states can be briefly defined as states which are not capable of fulfilling three core functions: namely security, welfare and legitimacy/the rule of law. In other words, failed states are either not able to effectively perform any of these functions.¹⁶

Conclusion

There is no doubt that there is the right to self-determination in the framework of the international law, yet it is also possible to argue that the utilization of the right to self-determination was carried out in the colonial context roughly a half-century ago in order to facilitate the legal independence of colonized states and that it is now highly arguable how to utilize the right to self-determination in the modern day. It seems that any use of the right to self-determination to pave the way for unilateral independence and secession attempts while harming the territorial



integrity of existing states would not be approved by the international community. Such an interpretation still constitutes a strict minority of adherents to the doctrine.

In addition, when the right to self-determination is assessed not only from the perspective of the international law but also from the perspective of realpolitik, passing over the constitutional framework, which is binding for different “peoples”—e.g. ethnic, religious groups, etc

In addition, when the right to self-determination is assessed not only from the perspective of the international law but also from the perspective of realpolitik, passing over the constitutional framework, which is binding for different “peoples”—e.g. ethnic, religious groups, etc. within existing states—and paving the way for arbitrary secession attempts would again pose a great danger for the maintenance of the peace, both at a local and a global level. Such a justification for separatist movements would also damage the efforts to reach compromises between different groups within existing states and result in the spread of the separatist trends across the world.

However, turning a blind eye to the serious grievances of the different peoples within the existing states and defining the utilization of the right to self-determination only in the colonial context would not be right or in compliance with the political reality. Consequently, putting excessive emphasis on the division of the “inner-outer” self-determination and contemplating how the right to self-determination can be implemented on the basis of inner self-determination seems to be the best option.



Endnotes

- 1- Aritz Parra, Ciaran Giles, "Catalan independence: Spanish prime minister Rajoy vows to restore 'rule of law' after Catalonia's parliament votes for secession", <http://www.independent.co.uk/news/world/europe/catalan-independence-spanish-prime-minister-mariano-rajoy-parliament-vote-region-spain-a8023306.html> ,27 October 2017 (Online: 30 October 2017)
- 2- Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf, p.85
- 3- UN Charter, <https://www.ombudsman.gov.tr/contents/files/6535501-Birlesmis-Milletler-Antlasmasi.pdf>
- 4- Fatma Tasdemir, Yeni Dünya Düzeninde Self-determinasyon, (Unpublished Master Thesis), Gazi University Social Sciences Institute, Ankara, 1999, p.4
- 5- For more details see: <http://www.un-documents.net/a25r2625.htm>
- 6- UN Resolution 2625 (1970), 69. paragraph
- 7- Deniz Akcay, "Selfderetminasyon: Bir İlkenin Önlenebilir Nötralizasyonu", Murat Sarıca Armağanı, İstanbul, 1988, p.30.
- 8- Milana Sterio, "Do Kurds Have the Right to Self-Determination and/or Secession?", <http://opiniojuris.org/2017/09/28/kurds-right-self-determination-andor-secession/>, 28 September 2017 (Online: 30 October 2017)
- 9- Chris Borgen, "Can Crimea Secede by Referendum?", <http://opiniojuris.org/2014/03/06/can-crimea-secede-referendum/>, 6 March 2014 (Online: 30 October 2017)
- 10- A.e Borgen
- 11- A.e Sterio
- 12- For the reference of the Supreme Court of Canada, 25506, 20 August 1998, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1643/index.do>
- 13-The Spanish Constitution of 1978, <http://www.congreso.es/portal/page/portal/>

Congreso/Congreso/Hist_Normas/Norm/const_esp_texto_ingles_o.pdf

14- Ieva Vezbergaite, "Remedial Secession As an Exercise of the Right to Self-Determination of People", Budapest, 2011, www.etd.ceu.hu/2012/vezbergaite_ieva.pdf

15- Ibrahim Kaya, Uluslararası Hukuk Temel Ders Kitabı, 6. Print, October 2015, Ankara, p.213

16- Ulrich Schneckener, Fragile Statehood, Armed Non-State

Actors and Security Governance, p.34



ABOUT THE AUTHOR

Deniz was born in 1992. He is currently a research and teaching assistant at International Law Research Center (UHAM) which is affiliated to Fatih Sultan Mehmet University and a research fellow at Al Sharq Forum. His research field is non-state actors and the elements of state. He is also lawyer. He graduated from Cagaloglu Anatolian High School and Istanbul University with a degree in law. He is currently pursuing his Master's degree in public international law. During his university years, he took part in numerous international projects and events in different countries as the chair of the Foreign Affairs Commission of the Istanbul Metropolitan Municipality Youth Assembly in 2012. He was the director of the first Turk & Arab Youth Congress in 2012. He took part in the Y20 Summit Turkey in 2015 as a moderator, then in 2016 he was a delegate to the Y20 Summit China in 2016. He is still the deputy chair Youth Commission of Diplomacy and Collaboration (YCDC), the organization running the Y20 affairs of Turkey. With a keen interest in press and media, he has taken up writing articles for various media outlets.

ABOUT ALSHARQ FORUM

The Sharq Forum is an independent international network whose mission is to undertake impartial research and develop long-term strategies to ensure the political development, social justice and economic prosperity of the people of Al-Sharq. The Forum does this through promoting the ideals of democratic participation, an informed citizenry, multi-stakeholder dialogue, social justice, and public-spirited research.

Address: Istanbul Vizyon Park A1 Plaza Floor:6

No:68 Postal Code: 34197

Bahçelievler/ Istanbul / Turkey

Telephone: +902126031815

Fax: +902126031665

Email: info@sharqforum.org

sharqforum.org



الشرق
منتدى

ALSHARQ FORUM

