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THE CONCEPT AND DIRECTION OF THE RIGHT OF NATIONS TO SELF-DETERMINATION

The article is devoted to the development of the law to self-determination, international and domestic legal basis of its establishment. Its history and modern trends are distinguished in approach to the concept of self-determination. Interaction to the law of self-determination with other principles of international law is investigated. Implementation criteria of this law are differentiated. The implementation of its directions is given areas to the local self-government body and proposals and recommendations for legislation are given in this area. It is concluded that self-determination as a right has a basis as international law, applies to nations living under colonial dependence, self-determination for minorities is related to the type of the political regime and the right for self-determination has a collective legal content which is guarantee for individual rights.

Key words: self-determination, international law, international instruments, national legislation, political decisions, UN, Council of Europe, OSCE, ethnic minorities, regions, national interests, ethnic groups, ethnic minorities, sovereignty, human rights, indigenous peoples

Self-determination, which is more purposeful way of people's being organized, emerges as a result of nation's will for government. First adopted laws also linked the self-determination concept with the people's will. For example, the first French Constitution as of 1791 says that the goal of every state is "to ensure natural and integral rights of people" and "the source of sovereignty is the people's will". Recent increase in the number of "non-recognized" entities has increased the number of claims for the law of self-determination in the field of international law. "Self-determination of destiny" or "self-determination" concepts have emerged as a result of freedom fights by different groups. The law of self-determination, which reflects freedom fights of different peoples, has been gradually incorporated into national legislations and international contracts.

US Declaration of Independence develops this idea even further by embracing this idea legally. Self-determination (for colonial emancipation) establishes international and (democratic government) domestic directions. As an example to democratic government, at the end of I World War, on May of 1916, the US President V. Wilson has specifically emphasized the right of peoples to elect political government based on the provisions of Constitution. Therefore, two ideas are suggested: "domestic self-determination" or "non-political self-determination". According to "self-determination" principle, any nation is free to select the desired form of sovereignty. Self-determination in USA has emerged as a result of anti-British governance and later the US Declaration of Independence refers to the self-determination as a right granted by God as a democratic way of government.

Self-determination right has evolved historically. Since 90s of XVIII century, peoples' sovereignty idea has been interpreted as a right of people, inhabiting certain territories, to decide under which state government they want to live. The right of self-determination shall be understood within the framework of national and political context. The idea of significance of uniting the territories that share the same language under the same country and using linguistics to determine the state borders, has started to expand, and national freedom fight has been combined with national sovereignty and peoples' right for self-determination.

"Self-determination" term was used for the first time in Berlin Congress in 1878. In general, XX century and its middle years are referred to as period of self-determination and colonial emancipation. There were only few colonies (except for Russia and Iran) left at the beginning of XXI century. Therefore it is important to look at appropriate right within the transformative aspect. In other words, secession defines not the context, but rather the direction of democratic government.

Self-determination is interesting in terms of history. Self-determination idea is translated into the principles in the United Nations (UN) documents. UN documents provide a new content and conditions to the self-determination. UN Charter and Resolution dated December 14, 1960 by General Assembly 1514 (XV) treats the self-determination as a tool for colonial emancipation. Moreover it defines the criteria to prevent cases of abuse of this right.

When drafting the UN Charter, the I Commission of San-Francisco Conference of 1945, analyzes the importance of “equality of rights of nations” and “self-determination” principles reflected in Item 2, Article I and comes to the conclusion that these Articles fall under the same Norm, which is the manifestation of free and complete will of people. In order to develop the Charter, UN includes the self-determination principles to other documents. Every UN member country shall respect this right and support it, in accordance with the UN Charter. The Article 2 of Resolution number 1514, dated December 14, 1969, says that every nation has a right for self-determination and this right enables them to determine their political status and pursue their economic, social and cultural development.

In order to legitimize this idea (principle), UN General Assembly has adopted the Resolution number 1803 (XVII), dated 14 December 1962 on “Permanent sovereignty over natural resources” and the Resolution number 2105 (XX), dated 20 December 1965 on “Implementation of the Declaration on granting of Independence to Colonial Countries and Peoples”

Since self-determination is the process of transition to independent political will and establishment of sovereign state, this principle brings up the issue of minority nations. The main problem was the classification of the minority nations. Since, any group can be referred to as a nation during experience. Minority group cannot succeed either because of the failure to realize its independence or lack of grounds to become “independent”. The group that demands this right, most probably, shall achieve it. They have to go through the historical development process in order to achieve the self-determination rights. In international law, it looks like a problem of recognition occurred after establishment of the state.

Issues to self-determination, in international law, are associated firstly with the thinkers like H. Grotius, de Vattel, J.J. Rousseau. Even though a long time has passed since then, there is no unanimous position on this issue. There is certain difference in the thoughts of philosophers, political scientists and lawyers about the right for self-determination, the subject of this right, its basics and legal nature. It worth mentioning that uncertainty of concept, contradiction of collected experience, administrative and political approaches cause differences in opinion.

Differences of opinions among philosophers and political scientists create different ideas about self-determination among international lawyers. One group of scientists (for example, B. Tuzmuhamedov, H. Grotius, G. Espiell¹ etc) think that, self-determination is an imperative (jus cogens) norm of international law, others (for example, J. Crawford², A. Cassese³, R. Emerson⁴, M. Shaw⁵, etc) claim that, self-determination can be recognized by following certain conditions and other legal standards.

Another common idea is that the self-determination has negative aspects in international arena, and is related to political and ethical principles including separatism trends. Existence of such position is related to the uncertainty of scope of the relevant law. Many lawyers (R. Emerson⁶, A. İdovn⁷, J. Verzili, N. Glazer, C. Elden⁸, A. Etzioni, B. Hendrix⁹) suggest that, the scope and framework of this right (principle) is uncertain. Especially, in the case of separatism and ethnic conflicts (for example, Armenian community in the Republic of Azerbaijan, Russian minority in Moldova – course author), claiming this principle groundlessly and granting self-determination right to minorities have resulted in negative thoughts about this right, because of breakup of territories. UN expert on minorities A. Eide notes that international documents call for self-determination idea in uncertain way. Therefore, it is misinterpreted with regard to uncertainty of self-determination and security of the countries.

When self-determination is manifested in the foreign form, it creates new and uncertain problems for international security. In this sense, any group who wants to use self-determination principle, shall respect

¹ Espiell, G. *The Right to Self-Determination. Implementation of United Nations Resolutions*. See, UN Doc. E/CN.4/Sup.2/405/Rev.1/1980/, para.90

² Crawford, J. (2009). *The Creation of States in International Law*. Oxford. apud McLellan T.G. in Kosovo, Abkhazia and the Consequences of state recognition. C.S.L.R, vol. 5. Cambridge, 56.

³ Cassese, A. (1999). *Self-determination of people: A legal reappraisal*. Cambridge University Press, 69.

⁴ Emerson, R. (1971). Self-Determination. *American Journal of International Law*, 65/3:464, 224.

⁵ Shaw, M. (2000). Re: Order in Council P.C. 1996-1997 of 30 September 1996. *Self-Determination in International Law: Quebec and Lessons Learned*, 136.

⁶ Emerson, R. (2004). Self-Determination. *American Journal of International Law*. 65/3:464, 224-238.

⁷ Idowu, A.A. (2008). Revisiting the Right to Self-Determination in Modern International Law: Implications for African States. *European Journal of Social Sciences*, vol. 6, no. 4.

⁸ Elden, S. Contingent Sovereignty, Territorial Integrity and the Sanctity of Borders. *SAIS Review*. XXVI (1), 11-24.

⁹ Hendrix, B.A. (2001). International law as a moral theory of state territory? *Geopolitics*, no. 6(2), 141-162.

sovereignty of the country. Resolution number 2625 of the UN General Assembly states that, sovereignty of the state prevails over breakup and separation of nation or country.

International law ties self-determination right and equality of nations' rights. In this regard, when self-determination is realized, the rights of other nations, peoples and groups shall be respected. Vienne Declaration about Human Rights as of 25 June, 1993 and Action Program recognized the right for self-determination and after declaring that UN Resolution is rightful, mention that it shall not be interpreted as an action aimed at violation of territorial integrity¹. 1970 Declaration of Principle suggests that nothing in the Declaration shall be construed as allowing or sanctioning breakup and partial or complete violation of the territorial integrity and political unity of the government, which represents the whole nation and does not discriminate because of ethnicity, color of skin and religion, as well as respects the right for self-determination and equality of rights.

Article 6 of the Resolution 1514 describes this issue more seriously. The Article says, any effort aimed at violation of national unity or territorial integrity of the country contradicts to the objectives and principles of the United Nations Charter. Territorial integrity is included to the name "self-determination". If you pay attention, the name of the principle starts with the "Equality of rights of nations". Preamble of the Vienne Convention as of 1969 on the Law of Treaties says that member states agree on the followings taking into consideration *equality of the rights* in international law and self-determination, *sovereign equality* and independence of all states, not interference in domestic affairs of the state, forced threat or prevention of its realization, and respecting human rights and main freedoms included in UN Charter.

In spite of all this, most international lawyers recognize self-determination rights of the nations, this right can be realized only by nations living under colonial dependence or occupation².

A. Eide, the director of the Norwegian Human Rights Institute, member of the UN sub-committee on protection of minorities and prevention of discrimination, says that self-determination has been adopted firstly in terms of colonial occupation³. Then A. Eide mentions that the right for self-determination can apply to the nations who live in occupied territories, after ratification of the UN Charter.

Certain level of exploitation shall exist in order to realize this right. Freedom movement of the group in this approach is determined not by internal qualities of the group, but rather by vagarious human rights of the aggressors.

The right for self-determination historically has applied to the people who were in the process of transformation to a nation under colonial dependence, presently is used as a guarantee system of human rights in democratic government form.

Taking into consideration democratic administration experience of European countries, Antonio Cassese comes to the certain conclusions with regard to self-determination and suggests that application of this right shall be limited to address the current problems in Europe and other regions⁴.

D. Cameron mentions that newly created national states presently lose their trust in self-determination rights. Since, this principle creates secession problem, break-up threats to the states, therefore self-determination is a direct threat to sovereignty, territorial integrity and population of the states⁵. Secession is considered legal in those situations, when the state makes self-determination impossible by not creating democratic government, practicing systematic discrimination, thus massively violating human rights and not leaving any other chance for changing current situation.

Keeping in mind above-mentioned practice, a new form of realization of this right in international documents is interpreted together with efficient protection of human rights. Final document adopted by the OSCE in Paris on November 21, 1990 describes the right for self-determination in accordance with the UN Charter and its principles, including territorial integrity principle⁶. During implementation of the right for

¹ Rousseau, Ch. (1991). *La succession d'Etats em le droit internationale public*. Paris: Pedone, 225.

² Castellino, J. (2000). *International law and Self-determination: The Interplay of the Politics of Territorial Possession with Formulations of Post-Colonial National Identity*. The Hague: Martinus Nijhoff Publishers.

³ Possible ways and means for a peaceful and constructive solution of the problems related to minorities. // The second report on the work done, presented by Mr. A. Eide, UN doc. E/CN.4/Sib.2/1992/37 // Quoted from Черниченко, С.В. (1996). Принцип самоопределения народов (современная интерпретация). *Московский журнал международного права*, 4, 15.

⁴ Cassese, A. (1999). *Self-determination of people: A legal reappraisal*. Cambridge University Press, 115.

⁵ Cameron, D. (2006). Globalization And Self-Determination: Is The Nation-State Under Siege? *Rout ledge the Modern World Economy*, 119-120.

⁶ *Парижская хартия для новой Европы 1990*. <http://www.osce.org/documents/mcs/1990/11/4045_ru.pdf>.

self-determination included in final document, this right has been identified with breakup right, therefore self-determination shall be adopted together with territorial integrity.

Modern international law does not recognize break-up “right” justifying foreign aspect of self-determination. It rightfully mentions that, self-determination right of the nations has been incorporated in many international legal documents, but break-up right is not even recognized as a right. It requires determining clear distinction between break-up and self-determination of nations¹.

International law doctrine says that, break-up self-determination shall be based on reasonability, rather than on coercion. There are over 3000 nations and ethnic group in the world². In such situation, it is very scary even to think about the consequences of recognition of the break-up right to international peace and security³.

During realization of self-determination right, current international law requirements shall be observed; rights of other nations shall be respected. I. Brownlie suggests that, violation of well-known norms of international laws, i.e. jus cogens norms, *makes it impossible for international community to recognize self-determination right of the nations after its implementation*. I. Brownlie describes this idea by “jus ex injuria non oritur” principle and underlines that, no right can be implemented by violating other right⁴.

UN General Secretary notes in his “Peace Program” that “claims by every ethnic, religious and other groups for establishment of independent state is impossible with respect to ensuring peace and security and economic development”.

The demand for break-up by ethnic group and national minorities may disrupt domestic welfare of the state and cause conflicts among ethnic communities, therefore self-determination is not accepted as it is described. Keeping in mind complexity of this problem, the Report by Human and Peoples’ Rights Center under Paduan University submitted to the second Helsinki Civil Assembly in Bratislava in 1992, calls for determination of directions of self-determination, including domestic and foreign directions of this right.

International documents do not determine clearly foreign and domestic directions of this right, but identify boundaries of self-determination. According to UN Charter, 1970 Declaration on international law principles of friendly relationship and cooperation, says that self-determination is:

- creation of sovereign or independent state,
- free amalgamation of one state with other independent state, or
- government method or form chosen by the people by selecting freely political status.

It is noted that, the right for self-determination applies to colonies and the territory of the colony or other none self-governed territory has a different status than the territory of the state governing it according to the Charter. As the Charter suggests, this territory with different status remains until the nations of the colony or none self-governed territory implements the right for self-determination in accordance with the Charter, especially its objectives and principles.

Indirectly foreign and political forms of self-determination and internal aspect within the existing state come to mind. Hence, foreign right for self-determination can be exercised by the nations living in colonial dependence, i.e. by a group of people of independent country, who cannot participate equally together with other people in self-determination and state management. UN experience recalls domestic self-determination as colonial emancipation. However, 1975 Helsinki Final document applies this right to whole nation and interprets domestic self-determination not only within the colonial dependence, but also within the respect to human rights context. Helsinki Final document draws a special attention to the territorial integrity principle during foreign self-determination. Further document of the OSCE prohibits mutual recognition of borders of the state and changing the borders by using force. According to the foreign self-determination aspect in international law, nations have only a free right to determine their political status. Domestic aspect of self-determination is carried out within the boundaries of the state, and stipulates only cultural, administrative and territorial autonomy⁵.

¹ Решетов, Ю.А. (1994). Право на самоопределение и отделение. *Московский журнал международного права*, 1, 3.

² Minahan, J. *Encyclopedia of the Stateless Nations Ethnic and National Groups around the World*. <<http://www.washprofile.org/?q=ru/node/7415>>.

³ Морозов, Ю., Лутовинов, В. Этносепаратизм как угроза национальной, региональной и глобальной безопасности. <<http://www.voskres.ru/army/publicist/chuma.htm>>.

⁴ Броунли, Я. (1977). *Международное право. В 2-х книгах. Кн. 1*. Москва: Прогресс, 137; Brownlie, I. (1998). *Principles of Public International law*. 5th edition. Oxford.

⁵ Hannum, H., Lillich, Richard B. (1980). *The Concept of Autonomy in International Law*, volume 4, No. 74, October.

Self-determination can be manifested in different directions. These directions of self-determination include: political, economic, social, cultural (humanitarian). Except for political and economic self-determination, in all other cases, self-determination appears in domestic aspect. In this case secession problem does not occur.

During political self-determination, establishment of independent state means expression of the nation's will by creating independent country¹.

Economic self-determination is expressing the will to realize free, sovereign economic activities over the natural resources and ensure equal rights in economic field and mutually beneficial cooperation².

In social contexts self-determination means expression of the will to self-improve life conditions by the nation and rebuild the society in social aspect³.

Cultural self-determination implies the norms of expressing the will in different forms of culture, religion, science, and public life within the territory of the country, depending on historic, economic and social conditions⁴.

We think that the above mentioned basis of self-determination shall be implemented in certain priority. This time, political self-determination shall be at the end when other legal means are not sufficient and this right shall cover only the *nation* historically inhabiting the territory. In modern period, the international relations opt for domestic or cultural self-determination, i.e. establishment democratic institutions and group representation mechanism, which allow efficient participation of all members of the society and all the groups in management of the resources and distribution, rather than political self-determination. Colonial emancipation, which was primary goal of self-determination, requires reforming the meaning of self-determination. Therefore, international law scientists have started to search for other possible forms of implementation of this right⁵.

As literature states, this right presently sustains itself only by economic aspects. For example, every nation has a right to use its national resources completely or in any way desired⁶.

Self-determination right is considered "legal" only when unique ethnic group exists. The group implies united economically, but differed in other aspects from other members of the community. Then, constitutional guarantees on human rights of the state apply. Living in a territory in the case of breakup and further ability to live independently shall be acceptable.

Present legal norms, including international documents on human rights (1948 Declaration on Human Rights, 1966 International Pacts) and current experience on self-determination apply only in domestic direction and to nations living in colonial dependence.

In summary regarding self-determination we can say that:

- 1) the right has a basis as international law;
- 2) applies to nations living under colonial dependence;
- 3) self-determination for minorities is related to the type of the political regime;
- 4) the right for self-determination has a collective legal content which is guarantee for individual rights;
- 5) possess different characteristics reflected in political, economic, social, cultural, religious and other content.

¹ Hannum, H., Lillich, Richard B. (1980). *The Concept of Autonomy in International Law*, volume 4, No. 74, October; Simpson, G.J. (1996). The Diffusion of Sovereignty: Self-determination in the Post-colonial Age, in 32 Stanford Journal of International Law; Frowein, J.A. (1996). Self-determination as a Limit to Obligations under International Law, in *Modern Law of Self-determination*.

² Carty, A. (1992). *From the Right to Economic Self-Determination to the Right to Development: A Crisis in Legal Theory*, cited in *Law and Development* 265, Anthony Carty edition; Кузнецов, В.И. (1997). Октябрь и международное право. *Международная жизнь*, 11-12, 94.

³ Hannum, H. (1996). *Autonomy, Sovereignty and Self-Determination*. Philadelphia: University of Pennsylvania Press, 172; Bierstecker, T.J., Weber, C. (eds.) (1996). *State Sovereignty as Social Construct*. Cambridge, Cambridge University Press.

⁴ Knop, K. (2002). *Diversity and Self-Determination in International Law*. Cambridge, Cambridge University Press.

⁵ Castellino, J. (2000). *International Law and Self-Determination: The Interplay of the Politics of Territorial Possession with Formulations of Post Colonial 'National' Identity*. The Hague: Martinus Nijhoff Publishers.

⁶ Кузнецов, В.И. (1997). Октябрь и международное право. *Международная жизнь*, 11-12, 94.

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