

ISSN: 2582-6433



INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed 6th Edition

VOLUME 2 ISSUE 7

www.ijlra.com

DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Managing Editor of IJLRA. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of IJLRA.

Though every effort has been made to ensure that the information in Volume 2 Issue 7 is accurate and appropriately cited/referenced, neither the Editorial Board nor IJLRA shall be held liable or responsible in any manner whatsoever for any consequences for any action taken by anyone on the basis of information in the Journal.

Copyright © International Journal for Legal Research & Analysis

IJLRA

EDITORIAL TEAM

EDITORS

Megha Middha



Megha Middha, Assistant Professor of Law in Mody University of Science and Technology, Lakshargarh, Sikar

Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshargarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society.

Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can bring a change to the society

Dr. Samrat Datta

Dr. Samrat Datta Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Samrat Datta is currently associated with Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Datta has completed his graduation i.e., B.A.LL.B. from Law College Dehradun, Hemvati Nandan Bahuguna Garhwal University, Srinagar, Uttarakhand. He is an alumnus of KIIT University, Bhubaneswar where he pursued his post-graduation (LL.M.) in Criminal Law and subsequently completed his Ph.D. in Police Law and Information Technology from the Pacific Academy of Higher Education and Research University, Udaipur in 2020. His area of interest and research is Criminal and Police Law. Dr. Datta has a teaching experience of 7 years in various law schools across North India and has held administrative positions like Academic Coordinator, Centre Superintendent for Examinations, Deputy Controller of Examinations, Member of the Proctorial Board



Dr. Namita Jain

Head & Associate Professor



School of Law, JECRC University, Jaipur Ph.D. (Commercial Law) LL.M., UGC -NET Post Graduation Diploma in Taxation law and Practice, Bachelor of Commerce.

Teaching Experience: 12 years, AWARDS AND RECOGNITION of Dr. Namita Jain are - ICF Global Excellence Award 2020 in the category of educationalist by I Can Foundation, India. India Women Empowerment Award in the category of "Emerging Excellence in Academics by Prime Time & Utkrisht Bharat Foundation, New Delhi.(2020). Conferred in FL Book of Top 21 Record Holders in the category of education by Fashion Lifestyle Magazine, New Delhi. (2020). Certificate of Appreciation for organizing and managing the Professional Development Training Program on IPR in Collaboration with Trade Innovations Services, Jaipur on March 14th, 2019

Mrs.S.Kalpna

Assistant professor of Law

Mrs.S.Kalpna, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi. Formerly Assistant professor of Law, Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr.Ambedkar Law College, Pudupakkam. Published one book. Published 8Articles in various reputed Law Journals. Conducted 1Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration. 10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.



Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC - NET examination and has been awarded ICSSR - Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

ABOUT US

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 is an Online Journal is Monthly, Peer Review, Academic Journal, Published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essay in the field of Law & Multidisciplinary issue. Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench. INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

CONFLICT BETWEEN STATE SOVEREIGNTY AND SELF-DETERMINATION

AUTHORED BY - JAHNAVI DAGA

Independence has always had the potential to destabilising. The Government of Sri Lanka attempted to preserve the state sovereignty and territorial integrity against the rebellious Tamil who demanded to give effect to their right to self-determination and establish a self-governing territory within Sri Lanka. This tussle resulted in the loss of lives of over 65,000 people since 1984. In response to Bosnia's declaration of independence from Yugoslavia, about 250,000 civilians of Bosnia were killed and over one million people were uprooted in a campaign of genocide which was carried out by Serbia. The war of secession in Sudan, nearly killed two million people¹. This tension between the fundamental UN principles of state sovereignty and self-determination have caused violence, terrorism, violation of human rights principles and mass destruction. These sovereignty-based conflicts are extremely difficult to resolve as statistics show that since 1965 only ten sovereignty-based conflicts have been resolved by mutual agreement and only five of these conflicts have been settled by granting independence to the substate entity². In international law, the doctrine of self-determination provide autonomy to the individuals, whereas the doctrine of state sovereignty provide autonomy to the state. These rights create a conflict among the autonomy of the state and the people within it. Though these principles are so fundamental to international law, they can never exist together within the same borders. While seeking to resolve such conflicts the existing legal principles and norms of the UN are theoretical and often not relevant to the situation in practicality which creates a huge gap. This paper aims to analyse the tension between the principles of self-determination and state sovereignty in the UN aiming to understand how this may have led to ambiguities in the UN policies. It will also suggest some solutions to bridge this gap by approaching it with the concept of earned sovereignty. This paper is divided into six parts. The origins and the interpretations of the self-determination and the sovereignty principles have to be discussed in order to understand the tension that exists among these principles in Part I and Part II respectively. Part III of the paper discusses the

¹ Paul R. Williams & Francesca Jannotti Pecci, 'Earned Sovereignty: Bridging the Gap between Sovereignty and Self-Determination' (2004) 40 *Stan J Int'l L* 347

² *ibid.*

tension between these principles. Part IV of the paper discusses traditional approaches to solve this tension among the theories. Part V of the paper proposes a novel approach to tackle this tension between the theories. Lastly, Part VI concludes the article.

I. Sovereignty

The concept of sovereignty is divided into two components which is internal and external sovereignty which was introduced by Michael Keating. This distinction is important to be comprehend the applicability of sovereignty especially when it is against the claims of self-determination. The privilege of states to maintain full authority within its borders is known as internal sovereignty (Keating, 2001:14) while external sovereignty means that “a state has no superiority in the international arena” (Keating, 201:12-13)³. The relationship between the people of the state and the government of the state is related to the concept of self-determination. The people of the state have the right to determine their governing body and are provided with the representation needed in the state. As this right is only internally applicable it does not have any international objections against it. The definition of external sovereignty gives rise to the right of individuals in the state to secede from their current state to formulate a new state or untie with a state that already exists. The principles of territorial integrity and non-intervention are also associated with the concept of sovereignty. No state has the right to intervene in the matters of another state unless there is massive suffering by the people. The concept of territorial integrity which is related to sovereignty is mentioned in Article 2(4)⁴ of the UN Charter which states that all Members shall refrain from threatening or using force against the territorial integrity or political independence of any state, or in any other manner⁵ which is inconsistent with the purpose of United Nations in their international dealings. It implies that a state has the right to remain with the same territorial boundary and an act such as secession will jeopardise the oneness and territory of the state. Through the principle of territorial integrity, the UN is indirectly rejecting the idea of unilateral secession. In the earlier nineteenth century, the link between sovereignty and territorial integrity began to solidify with the emergence of the principle of *uti*

³ Syanthy Christianity, ‘Tensions between Sovereignty and Self-Determination Principles in the UN: UN’s Ambiguity in relation to the West Papua Self-Determination Claims’ (2020), <https://www.diva-portal.org/smash/get/diva2:1472851/FULLTEXT02> accessed 13 April 2020

⁴ UN Charter, Article 2(4)

⁵ Territorial Integrity | The Princeton Encyclopedia of Self, <https://pesd.princeton.edu/node/686> accessed on 13 April 2022

possidetis juris among the Latin American states⁶. This doctrine states that the “the territorial boundaries of post-colonial states cannot alter the boundaries of the colonial territories that they replaced⁷”. As per this doctrine it can be inferred that colonies have the right to become independent only when they are within the confines of their pre-existing colonial boundaries⁸. However, the concept of external sovereignty creates a possibility of secession, and the territorial integrity of a state is threatened. Therefore, it can be seen that the UN places more importance on the sovereignty of the state rather than the rights of the individuals since the concept of territorial integrity has been defined more clearly.

II. Self-Determination

The theory of democracy gave rise to the principle of self-determination. In the Cold war, it was the democratic side which prevailed. It had an impact on the idea that self-determination should be expressed in a democratic form so as to choose the government which best represents the people. Hence, the democratic theory of self-determination came into existence. Statehood is often associated with the concept of self-determination. Peter Malanczuk defines self-determination as “the right of a peoples living in a territory to determine the political and legal status of that territory—for example, by setting up a state of their own or choosing to become part of another state”. There was a transformation in the understanding of self-determination with reference to the UN due to the decolonization process after the Second World. In Article 1(2)⁹ of the UN charter the concept of the right to self-determination was officially included. The principle of self-determination was now concerned with decolonization and laid down groundwork for the same in the 1960’s. Now, in the contemporary world, there exists two aspects of self-determination which are internal and external. The right of people to govern themselves without outside influence is known as internal self-determination. The right of the peoples to select their own political position and be independent of alien domination which also includes the development of their independent state is known as external self-determination. However, the only possibility of external self-determination is not limited to independence. After the right to self-determination was recognised in 1960s in international law it

⁶ MacFarlane, Neil, and Natalie Sabanadze. ‘Sovereignty and Self-Determination: Where Are We?’ (2013) International Journal 68, no. 4 609,627 < <http://www.jstor.org/stable/24709362>> accessed 13 April 2022

⁷ Christianity (n 3)

⁸ *ibid.*

⁹ UN Charter (1945), Article 1(2).

was regarded as a right of all the colonial territories to become independent or choose any other status the peoples freely choose. The indigenous or ethnic groups did not have an opportunity to separate themselves and become independent of the “peoples” of the territory as a whole. In the modern world, human rights norms are the main basis on which the right of groups to govern themselves is based on particularly the rights of ethnic and indigenous people. As of yet, no right to secession has been recognised under international law however it is quite possible that in the future a right to secession will be recognised as an exceptional measure. This right is extremely important for the minority group of people who have been facing gross injustice and violations of human rights and repeatedly denied the right to participate in the government of the state or if such a group has been denied participation in the government.

III. Tension between state sovereignty and self-determination

As mentioned above, the UN has accepted the principle of self-determination since the establishment of the UN Charter. One of the main purposes of the UN institution which is mentioned in the opening paragraph Article 1 Section 2¹⁰ of the UN Charter is “to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.” Subsequently, the UN has also set out the principles of territorial integrity and sovereignty in its Charter¹¹ under Article 2(4) which states that its members are not permitted to threaten or use force against any state’s territorial integrity or political independence. The preamble of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, the UN reaffirmed its position following the Charter and stipulated that:¹²

“the basic importance of sovereign equality and stressing that the purpose of the United Nations can be implemented only if the States enjoy sovereignty equality and comply fully with the requirements of this principle in their international relations” (UN, 1970).

¹⁰ UN Charter (1945), Article 1 Section 2.

¹¹ UN Charter (1945), Article 2(4).

¹² Syanthy Christianity, ‘Tensions between Sovereignty and Self-Determination Principles in the UN: UN’s Ambiguity in relation to the West Papua Self-Determination Claims’ (2020), <https://www.diva-portal.org/smash/get/diva2:1472851/FULLTEXT02> accessed 13 April 2020.

Therefore, it can be concluded by these statements that UN accepts both the sovereignty principle and the self-determination principle of the Charter. These two doctrines are considered to be the foundational principles of the UN.

The purpose of Resolution 1514 was to make the process of decolonization and the application of self-determination principles easier. The sovereignty principle with reference to the territorial principle is applicable by the UN on the adoption of the *uti possidetis* doctrine mentioned in Paragraph 6 of the Resolution 1514¹³. The doctrine of *uti possidetis* states that it “is a principle of [customary international law](#) that serves to preserve the boundaries of colonies emerging as States”¹⁴. It can be inferred from this application of the doctrine with respect to the principle of sovereignty that the UN still prefers the sovereignty of the state to prevail over the principle of self-determination. Therefore, it is understood that the UN will not accept any unilateral secession in the name of self-determination right. There has been a differentiation which has been mentioned in the doctrine of *uti possidetis* between “unilateral secession” and the “nationalist” movement. If the nationalist movement is permitted to self-determination under the UN Charter and Resolution 1514, the UN will reject the second which is unilateral succession. The tensions have heightened by the inclusion of the “non-self-governing territory” according to the Resolution 1514. The Special Committee on Decolonization which is established by the UN or “C-24” for short classifies the non-self-governing territories. The territories which have not yet attained a full measure of self-government are called the “non-self-governing territories” under Chapter XI of the UN Charter. In 1946, the General Assembly has listed these territories with the issuance of Resolution 66(1). Therefore, when a self-determination claim is made in a territory which is not classified as a non-self-governing territory, there are tensions between sovereignty and self-determination principles in the UN.

The Declaration on Principles of International Law concerning Friendly Relations and Resolution 1541 also give rise to the tensions between self-determination and sovereignty principles. An effort to increase the scope of self-determination beyond the understanding of decolonisation has been made by the Declaration by giving options to the people as the implementation of their right to self-determination, however the territorial integrity of the state is still taken into consideration. Nothing

¹³ UN Resolution 1514, Paragraph 6.

¹⁴ *uti possidetis*, Legal Information Institute (1986).

shall be understood as the acceptance of the UN towards the act of unilateral succession. The options of self-determination right to be considered have not been mentioned in Resolution 1514. No clarification in the Resolution has been provided for the for the phrase “emergence as a sovereign independent state” which creates tension between self-determination and sovereignty principles. These tensions create confusion in the UN when it refers to the practical implications of the Declaration.

IV. Solving Sovereignty Based Conflicts: Traditional Approach

The traditional approach to resolving sovereignty related conflicts is classified into two parts, the “sovereignty first” approach which deals with the principles of territorial integrity and sovereignty or the “self-determination” first approach which is based upon protection of human rights and self-determination¹⁵.

The states who wish to protect their territorial integrity or third-party states who fear that the international stability may be undermined by the creation of too many new states which may act as a precedent for the secessionist movements within their states may approach the “sovereignty first” approach. Under this approach the basis of international relations is sovereignty and is considered the reason for political existence. The mediators who take the “sovereignty first” based approach accommodate aggressor regimes.

The secessionist movements usually rely upon the “self-determination first” approach and are received by states who do not have a significant minority population. The principle that the right to exercise self-government must be given to dependant peoples is the basis for this approach which has evolved with respect to decolonisation. All self-identified groups with a coherent identity and connection to a defined territory are entitled to democratically determine their political destiny and to be free of systematic persecution under this approach¹⁶. An autonomous province is created under the territory of the parent state through which self-determination is achieved.

Both these approaches have failed to provide satisfactory options for structuring peaceful resolutions

¹⁵ Paul R. Williams & Francesca Jannotti Pecci, 'Earned Sovereignty: Bridging the Gap between Sovereignty and Self-Determination' (2004) 40 Stan J Int'l L 347

¹⁶ Declaration of Principles of International Law Concerning Friendly Relations 1970

in order to solve sovereignty-based conflicts. These options often result in increased violence and political tension and hence are not efficient.

V. Earned Sovereignty: A new approach

Earned sovereignty is an emerging conflict resolution approach which is intended to provide a mechanism for resolving sovereignty-related disputes by allowing for the controlled transfer of sovereign authority and functions from a state to a substate entity. In some cases, the substate entity may gain sufficient sovereign authority and functions to seek international recognition while in others it may gain only limited authority to operate within a stable system of heightened autonomy¹⁷.

This approach of Earned Sovereignty aims to promote an equitable and acceptable power sharing arrangement which will promote peaceful coexistence among a substate entity and a state. This approach is not focused on promoting self-determination claims. This is a non-violent approach to resolving conflicts by restoring security and encouraging the development of democracy in war-torn areas.

Earned sovereignty has evolved as a conflict resolution strategy that is inherently flexible and can be implemented over a variety of time periods. This resolution strategy has three main elements which are shared sovereignty, determination of a final status and institution building¹⁸. Three optional elements may be included in the process: phased sovereignty, conditional sovereignty, and constrained sovereignty.¹⁹ These optional elements are included in this approach in order to cater to the specific situations of conflict that arise and according to the particular needs of the parties.

¹⁷ Paul R. Williams & Francesca Jannotti Pecci, 'Earned Sovereignty: Bridging the Gap between Sovereignty and Self-Determination' (2004) 40 Stan J Int'l L 347

¹⁸ Paul R. Williams & Francesca Jannotti Pecci, 'Earned Sovereignty: Bridging the Gap between Sovereignty and Self-Determination' (2004) 40 Stan J Int'l L 347

¹⁹ *ibid.*

VI. Conclusion

This article talks about the origin of the principle of self-determination and State sovereignty. Then it identifies the tensions that still exist among these two fundamental principles of the UN. Then the two traditional approaches to resolve sovereignty-based conflicts namely the “sovereignty first” approach and “self-determination first” approach is examined. On examining these approaches, it is observed that none of them were providing peaceful solutions. Therefore, a need for a new approach to resolve sovereignty-based disputes is required which is known as Earned sovereignty. This approach is found to be the most peaceful means to resolve such conflicts. Hence, the UN must include such a type of conflict resolution which promotes the development of the democracy.

