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# Right to Self-Determination in International Law: Naturalist-Positivist Tension

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## ABSTRACT

*The right to self-determination is a settled legal principle in International Law. Having been enshrined in the charter of The United Nations and The Universal Declaration of Human Rights, Self-determination enjoys wide international legal notoriety.*

*Despite extensive codification, the right has faced inconsistent recognition by member states. Since its inception, the claim has suffered from an identity crisis. It has been codified as a collective right, a right of "people" to govern themselves, something legal in nature gaining its validity from social contract. On the other hand, legal scholars have argued that the right to self-determination is individualistic, part of human nature, a right that does not gain its legitimacy from collective action but is something that is exercised collectively.*

*The topic has left naturalist and positivist legal jurists of international law in a never-ending match of ping-pong, where both schools of thought have convincing arguments for their cause. This paper aims to critically examine the arguments that have been put forth by both schools of thought on the subject matter of self-determination. The paper in its first part will try to trace the origins of the right to self-determination and review how consistent the naturalist and positivist understandings are of the right in relation to situations where the right has been classically exercised. The second part of this paper will explore the right to self-determination as a part of customary international law and determine if the arguments made by the two schools are consistent with the principles of interpretation that are well settled on matters of customary international law. The third and final part of this paper will have concluding arguments and observations that were a result of the author's engagement with the topic at hand.*

***Keywords**: Self Determination, International Law, Positivist, Naturalist, Kosovo.*

## I. INTRODUCTION -THE ORIGINS OF THE RIGHT TO SELF DETERMINATION

The right to self-determination developed in the backdrop of colonialism. Its origins are fairly political as opposed to the positivist assertions. In the *Aaland Islands* case, the issue that arose was of Swedish inhabitants of the island being subjected to Finnish sovereignty. The general

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rule of international law propounds that states have a sovereign domain over their nationals.[2] The court, however, came to the observation that the right to self-determination is a purely political concept having no legal validity. The permanent court relied on the principle of *uti possidetis juris* for legitimising Finnish sovereignty over the island.[3] The settled position in international law has shifted from the opinion arrived at in the case of *Alands.* Subsequent codification of the principle in various international instruments has actualised this political fiction into a legitimate claim of people.

A critical analysis of recent history points us to the fact that the right to self-determination was at the core of the American Independence struggle, as it called for a breakaway from colonial British rule and its heart had the desires of the American people to govern themselves. In the 1940's, the Indian freedom struggle at its heart had desires that were similar to the Americans. This results in the observation that, the right to self-determination emerged in an extremely specific context. People being subjected to rules and norms that were imposed upon them by a foreign occupying power with an expectation of absolute adherence by this foreign power went against the grain of rights of man actualised in the backdrop of revolutionary Europe[4]. One cannot rob the French of the credit they deserve for giving the world the idea of self-government but such Eurocentrism only mystifies the true history of European colonialism. The struggle for true self-government has only been truly actualised outside Europe.

These experiences can be seen in almost all former European colonies, where the states that succeeded the colonial powers at their heart had a zeal for the values of self-rule and independent government in their new constitutions. It can be said without any hesitation that self-determination is a shared experience of most ex-colonial states and a successful state practice exclusive to them.

The United Nations, under The Charter of The United Nations, has recognised the right of self-determination and has extended the right to non-self-governing territories. This codification resulted in the right to self-determination becoming an internationally recognised legal right of people. The International Court of Justice in their advisory opinions on the case of *Nambia*[5] concluded that development of international law with regards to non-self-governing territories as per the charter, self-determination as a right extends to all non-self-governing territories. The court further elaborated on this position in their advisory opinion in the case of *Western*

[2] ANDREW LINKLATER, *Citizenship and Sovereignty in the Post-Westphalian State*, 2 European Journal of International Relations 77 (1996) https://doi.org/10.1177/1354066196002001003.
[3] LNOJ Supp. No. 3, 1920, pp. 5–6 and Doc. B7/21/68/106[VII], pp. 22–3.
[4] Chimene I. Keitner, *National Self-Determination in Historical Perspective: The Legacy of the French Revolution for Today's Debates*, 2 International Studies Review 3 (2000) https://doi.org/10.1111/1521-9488.00213.
[5] ICJ Reports, 1971, p. 16; 49 ILR, p. 3

*Sahara* [6] where the issue was of territorial claims by Morocco and Mauritania over the newly independent territory of Western Sahara. The court was of the opinion that the ties the country had in the 1800s with the territory are irrelevant in the present post-colonial context and the right to self-determination would be enjoyed by them as it has been by other post-colonial states. The International Court of Justice took an even more liberal interpretation of the rule in the case of *East Timor (Portugal v. Australia)*[7] where the court argued that the right to self-determination has *Erga Omnes* characteristics, making it a general principle of customary international law. It can be summarised here that self-determination emerged as a principle dictating the basis on how political life should be constituted to subsequently become a legal right upon codification to be enjoyed by states now independent of colonial rule to being considered a rule having *Erga Omnes* characteristics.

Having established that self-determination as a right under international law does not exist in a fugue state, it will now be easier to trace the Naturalist and Positivist arguments.

### A. Naturalist Positivist Arguments

The initial development of the right to self-determination supports the naturalist cause. The fact that the right emerged in the backdrop of collective action gives the right an innate form. Naturalist arguments on self-determination lie on the foundation of the doctrine of resistance. The doctrine suggests that resistance to authority by certain groups or individuals in society is justified as laws that are immoral and not just laws. It can be argued that these arguments heavily rely on the maxim of "*ex injuria jus non oritur"* which means illegal acts cannot create law. For naturalists the situation where "people" are not governing themselves and are subjected to laws that are not their own is an immoral and unjust situation and any law and norm that arises out form the same is no law. The positivists on the other hand heavily rely upon the principle of *"ex facto jus oritur"* which in its essence means that law is based on facts. The positivists legitimise their arguments for the principle upon its subsequent codification and the restrictive hierarchy that the international courts have established for how the right can be exercised. The positivist understanding that self-determination as a right comes from a sphere of positive morality and undermines the naturalist cause.

The issues that arise from a naturalistic understanding of self-determination is that if the said right is innate and a natural right, then all individuals have a right to exercise it and it no longer remains exclusive to people who have shared the same colonial experience. This understanding leads to a problematic situation for nation-states as it attacks their territorial sovereignty. This

[6] M. N. Shaw, 'The Western Sahara Case', 49 BYIL, p. 119.
[7] ICJ Reports, 1995, pp. 90, 102; 105 ILR, p. 226.

will be discussed in further detail in the coming sections when we discuss the case of Kosovo with respect to the principle of *"uti possidetis juris".* The naturalist and positivist discourse on the subject matter is not only limited to self-determination. The outcome of said discourse would have overreaching effects on the overall understanding of human rights, the concept of state and the extent of state sovereignty.

## II. THE RIGHT TO SELF-DETERMINATION IN CUSTOMARY INTERNATIONAL LAW

The International Court of Justice in the case of *East Timor(Australia v. Portugal)* concluded that the right to self-determination has "*Erga Omnes"* characteristics. From a blanket reading of this statement and rule it can be argued that the court has expanded the nature of the right to self-determination. "*Erga Omnes"* have a universal application and in essence cannot be restricted to post-colonial states. This universal applicability of peremptory norms, with the inclusion of the right to self-determination as *Erga Omnes* can be seen as an attack on state sovereignty. This section aims to understand the implications that arise from a positivist and naturalist understanding of the right to self-determination as a principle of customary international law and subsequent interpretations.

The positivist regard of International law as a part of positive morality results in a situation of dismissal of international law. The positivist argument that law is the command of a sovereign disqualifies international law as a law because it has emerged from state practice and custom. It can be conferred from the above that, for positivists the right to self-determination is a part of positive morality and no law. It can be further argued that it is a defiance of the command of the sovereign as self-determination is antithetical to the idea of state sovereignty and integrity. Self-determination, external or internal is a direct violation of the command of the sovereign as it questions the very genesis of the state, the sovereign and the facts on which the law is based. A derivative legal argument can be made here. One can argue that the principle of *"ex facto jus oritur"* supports the positivist cause. The principle is based on the idea that law is based on fact, and self-determination as argued by naturalists being based on a sense of morality cannot be constituted as law in this case a right. This understanding of politics and international law misses the essence of self-determination.[8] The attack on the grey areas of international law by positivists and the lack of any real solution weaken their case. The Naturalist position doesn't suffer from the problem of rejection of international law, rather comes up with a problem of its own. First is the assertion that the right to self-determination is a natural right, of individuals. This assumption is against the classical understanding of the

[8] Ediberto Roman, Reconstructing Self-Determination: The Role of Critical Theory in the Positivist International Law Paradigm, 53 U. Miami L. Rev. 943 (1999)

right, where it is a collective right of people and cannot be exercised individually. The idea of self-determination has a close nexus with the idea of the state. Self-determination is the very essence of statehood, the two cannot be seen as mutually exclusive ideas. The existence of a sovereign and its subsequent legitimacy comes from people, these people have collectively come about to a contract that they want to put reasonable restrictions on their liberty in exchange for security. This exercise is self-determination. It lacks the absolute command of a sovereign and is something that is exercised collectively and would be impossible for an individual to achieve. This consistent practice among all nation-states gives rise to what would constitute state practice in the international law regime which then can be regarded as custom or a general principle of international law.

From the above, it can be summarized that both schools of law struggle with a consistent understanding of the principle of self-determination. This results in a permanent stalemate. The customary nature of the norm is undisputed in the author's regard.

### A. Rules of Interpretation of International customary law concerning right to self-determination

Having analysed the arguments made by the naturalists and the positivists, it can be ascertained that both lack a sense of clarity and fail to answer the core issues at hand. What the positivists fail to understand is the implication the right has on the command of the sovereign and state sovereignty, a mere rejection of the right does little to their case. This section will explore how the customary application of the right by the International Court of Justice and its consistency with settled rules on the interpretation and application of custom influence the positivist-naturalist debate.

### B. Kosovo

There is a close nexus between statehood and self-determination. Kosovo enjoyed autonomous status within the Yugoslav federation. This was also reflected in their constitution and it gave the province of Kosovo a de-facto right of self-government. This can be regarded as internal self-determination as understood by political theorists. In 1989, this de facto right was stripped away from the then-province of Kosovo. In 1990, the ethnic Albanian leaders declared their independence from Serbia. Subsequent developments have been made in the case, but the most important issue here is the legitimacy of the right of self-determination of the ethnic Albanians. Working on the precedents set in the case of *East Timor* (supra), the right to self-determination is a general principle of international law. If applied in the strictest sense, the statehood of Kosovo is a legitimate cry for self-determination but this presumed isolation is rarely the ideal

case. Arguments can be made that support the right to self-determination of Kosovo on the lines that, the region enjoyed considerable autonomy within the former Yugoslav Republic and upon the subsequent disintegration the people had the right to form a new state as it satisfies the principles of *uti possidetis juris*, the principle in its essence preserves the boundaries of the states that emerged from former colonies. This argument can be further supported by the fact that Kosovo has enjoyed considerable autonomy since it was made a part of Serbia via the means of conquest and Serbian rule over Kosovo constitutes foreign rule, consistent with the rule that was advocated in *opino juris* on the *Western Sahara case* (supra) where the court rejected Moroccan claims. Having made these arguments, let's analyse how consistent they are with the customary application of international law.

The International Court of Justice in the *North Sea Continental Shelf* case argued that custom constitutes a settled practice and must be carried out in a way that is rendered obligatory by the existence of a rule requiring it. [9] It was further elaborated in the case of *United States of America v. Nicaragua* that the existence of a rule of customary international law requires settled practice with *opinio juris* [10] The arguments made above are consistent with the rules that have emerged on the subject matter.

The positivist and naturalist positions on Kosovo could render the whole exercise of self-determination redundant. The aim of a right, legal, natural or customary is to provide some benefit to the individual or individuals claiming it. The outright rejection of the right as positive morality limits the rights of the individual, in a state where there is no absolute sovereign and the existence of a social contract makes it difficult for the positivists to provide any remedy to the people of Kosovo. The naturalist understanding on the other hand is in the same vicinity of the target but misses to hit it. The inherent understanding of the right to self-determination as an innate right gives rise to the problem of factionalism and becomes a threat to the territorial integrity of a nation-state. The discourse suffers from a dilemma where one side fails to recognise the problem in contention and turns a blind eye to it and the other has an extremely perverted understanding of the same.

## III. CONCLUSION

The arguments made above have made it abundantly clear that the positivist and realist debate fails to hit the hammer on the nail. The purpose of any theory is to solve a particular problem. Most theories of legal jurisprudence more or less achieve this. The positivist or the naturalist

[9] North Sea Continental Shelf cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) (Judgment) [1969] ICJ Rep 3

[10] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA) (Merits) [1986] ICJ Rep 14.

approach in the instant case fails to provide a coherent solution to the problem at hand. International Law as an institution, with respect to modern nation-states enjoys considerable legitimacy which goes beyond the concept of positive morality. Most modern nation-states come into inception via the means of popular struggles seeking the rule of law via the means of a self-given constitution while rejecting classical symbols of sovereignty.

International Institutions came into existence when sovereign states agreed to some settled principles on how states must behave with each other. Most modern states fail the positivist test of an absolute sovereign, and so do these international institutions. The assumptions based on the doctrine of resistance by the natural school of law also do not provide the naturalists with a conclusive understanding of self-determination as a right under international law. The right to constitute political life as one wants is deeply linked with the right to freedom of speech, the right of assembly and liberty, these are not absolute rights and come with reasonable restrictions, hence the right to self-determination cannot be absolute.

It can thus be concluded that the positivist-naturalist argument is in an enteral flux, limited by their hermeneutic assumptions[11]. These disagreements are however not "hard disagreements" as both approaches aim to give a working understanding of rights and how they function within the rule of law and can be reconciled to this extent.

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[11] Paul B. Armstrong, *The Conflict of Interpretations and the Limits of Pluralism*, 98 PMLA 341 (1983), https://www.jstor.org/stable/462275 (last visited Nov 26, 2022). See also Arie Rosen, *Statutory Interpretation and the Many Virtues of Legislation*, 37 Oxford Journal of Legal Studies 134 (2017), https://www.jstor.org/stable/26363248.