

## **The Right to Self-determination: The Collapse of the SFR of Yugoslavia and the Status of Kosovo**

In theory opinions differ about the right of a people to self-determination. Some writers argue that self-determination has become a part of international customary law while others hold that it has developed into a norm of international law. There are those who believe that it is a moral principle without legal obligation while yet others maintain that the right to national self-determination is a means of achieving decolonisation and as such is a purely political question without legal basis.

Such differences in interpretation of the principle of self-determination are sufficient proof of its complex nature from a theoretical point of view but the contradictions are even more acute in practice. This assertion is confirmed by an examination of how the phenomena of national self-determination has developed.

The idea of national self-determination originates in the liberal-democratic principles of the French Revolution. More exactly it arose from the principle of nationality which was developed particularly in the second half of the 19th century, according to which every nation has the right to its own state and to decide on its own fate. In that period the principle of national self-determination was of a national-constitutional and a pronounced anti-feudal nature which, particularly in the cases of Italy and Germany, superseded factionalism, and fostered unification into nation states.

The principle of national self-determination came to the forefront of public attention during and after the First World War and the creation of The League of Nations (Wilson's "14 Points" and Lenin's Declaration on the Rights of the Peoples of Russia). Self-determination at the time had a national-liberation, that is anti-imperialist character. Two European empires were destroyed: the Austro-Hungarian and the Turkish. An international system for the protection of minorities was established within the League of Nations, as an additional element to the principle of national self-determination. The introduction of the system of minority protection resulted from recognition of the reality that in some areas it was impossible to satisfy the principle "one people one country" on account of the hopelessly entwined ethnic mixture.

The principle of self-determination was included in the UN Charter in the list of the organization's general aims (article 1/2/) and in the decrees referring to the UN special tasks in the promotion of economic and social cooperation (article 55). With regard to the implementation of this principle - winning independence from colonial power, its main feature can be said to be anti-colonial. This feature has its root in the American declaration of independence in 1776, and it became fully affirmed when the USA rose to the position of a great power and the leader of "the free Western world". Decolonisation was, at the same time, an opportunity for the USA to weaken the already weakened allies from the Second World War and to definitely take over a leading position in the West. With the exception of one successful postcolonial case - the secession of Bangladesh, the function of principle of self-determination was, as we can see, decolonisation.

Besides being fully affirmed in practice, this principle was also officially proclaimed as a universal principle and was codified in international law. Besides the UN Charter self-determination is also included in the article 1 of both Pacts on human rights (1966), the Declaration on the Principles of International Law on Friendly Relations and Cooperation among countries (1970) and in the Helsinki act from 1975. The principle of self-determination, as a concept, was subdivided into internal and international components and extended to cover a country's territorial integrity and harmonization of its application with the relevant norms of international law.

From decolonisation until the great political changes in Eastern Europe towards the end of the eighties and the beginning of the nineties, the problem of self-determination had not been of any particular significance in international relations and international law. Then, in the spirit of self-determination the countries of Eastern Europe liberated themselves from their ideological-military-political block, and at the same time the "free" (unilateral, selective) interpretation of the principle brought almost all its weaknesses and shortcomings to the surface.

Throughout the development of the principle of national self-determination three essential elements have crystallized:

1. The right to self-determination means the right to the determination of political status, but also the right to the realization of political, economic, social and cultural development. Thereby, it should be stressed that the determination of political status does not mean only, not even

primarily, the right to secession, but instead another set of steps for political self-determination: confederation, federation, autonomy, local government, participation in government... Contrary to this, in the nineties of this century, as interpreted by the political actors in states where the right to national self-determination was invoked, it was reduced mainly to the right of secession. All other important features and elements of the principle were largely neglected or were left as an alternative variant, if secession proved impractical. This unilateral and simplified interpretation and the inappropriate identification with anti-colonialism runs contrary to the modern tendencies of regional integration and the softening of state borders.

2. The right to self-determination must not be realized to the detriment of the state's territorial integrity, that is, the change of borders. In so far as secession is seen to be an option as a form of self-determination, then it should follow mutual agreement and not be unilateral.
3. This principle should be interpreted in accordance to the relevant norms of international law, and in particular the UN's aims and principles.
4. The right to self-determination and the collapse of the SFR of Yugoslavia

As the example of former Yugoslavia shows, the right to self-determination is extremely simplified when reduced to the right to secession which, in turn, almost as a rule, is performed according to the principle of unilateral decision made on the basis of an "appropriate" plebiscite or referendum. In that situation, such plebiscites and referendums produced similar contra-plebiscites and contra-referendums among minorities creating a "Russian doll effect".

Hence, in the nationally varied Yugoslavia the right to self-determination, simplified in interpretation and unilateral in implementation, caused a chain reaction in secessionist ambitions. To stop this, it was tacitly agreed by the "international community" to confine the right to the federal units - Republics. It was obvious that the need to stop newly current national issues from causing similar reactions in other countries, primarily in the Soviet Union, was on everybody's mind.

Self-determination, interpreted as the right to secession, was exercised, de facto, in some of the former Yugoslav republics outside the institutions and legal framework - essentially, unilaterally, even by force, and not according to mutual agreement, as the constitution of the SFR of Yugoslavia and the relevant international documents decreed. Thereby, the protection of national and other minorities was completely neglected. There was only a verbal and formal commitment to respect the international standards and mechanisms, but in practice there was none of that.

Thus, in trying to satisfy the demands of the international community and gain international recognition, on the 4th of December 1991, Croatia adopted the Constitutional Law on Human Rights and Freedoms, as well the rights of national and ethnic communities and other minority groups in Croatia, which changed the Constitution previously adopted on the 22nd December 1990. Slovenia passed a new Constitution of the independent and sovereign state on the 23rd December, the same day when Germany, putting pressure on the other members of the European community, formally recognized Slovenia and Croatia, with the provision that the decision should become valid from the 15th January 1992. On that same day the countries of the European community recognized the sovereignty and independence of the two Yugoslav republics.

The principle of minority protection was treated differently by different political actors, but on the whole their attitude was one of contempt and rejection: in cases where former Yugoslav republics aimed at secession the nations of former Yugoslavia felt humiliated and degraded by their new position as minorities, whereas the majority nations saw minority rights as threatening and usurping.

Regarding the question of who is entitled to the right of self-determination from the standpoint of international law – nation or federal units – Badinter's commission offered an interpretation which in fact gave that right to federal units; this in turn encouraged the aspirations of members of all nationalities in the territory of former Yugoslavia to create their own territorial-political frameworks, which, in future, could form the basis of possible secession, since self-determination was understood as exclusively the right of secession. This gave rise to initiatives and political programs directed to the establishment of special statuses, autonomous regions, federal units or international protectorates.

### **Minorities and the right of self-determination**

Most authors who have dealt with the right of self-determination argue that minorities have no such right, particularly not in its most extreme form – secession. Secession is not allowed by international law, that is, the breaking up of a state cannot be legal. As early as 1920, the League of Nations Council denied the right of self-determination to national minorities in the case of the Aland islands.

According to the Pact decrees, minorities do not enjoy the right of self-determination even in cases where it would be justified by "their numbers and concentration of settlements in some parts of a state". The Declaration on Giving Independence to Old Colonies and Their Peoples (1960) stresses that "any attempt partially or totally to break up the national unity and territorial integrity of a state is incompatible with the aims and principles stated in the UN Charter". The Declaration on Friendly Relations Among States (1970) has the same tone, but at the same time it implies that states have governments which represent the whole of their population, regardless of race, religious convictions or the color of their skin.

Even those authors who are inclined to interpret the right of self-determination "more freely" point out that the right of self-determination (which does not necessarily lead to the right of secession) can only be in the hands of a government which represents all the people who live in its territory regardless of race, confession or the color of their skin.

Somewhere between these two understandings there is a standpoint that national minorities should also enjoy a certain degree of self-determination. These rights would not lead to secession, but rather to some forms of "internal self-determination" such as, for example: "fair opportunity for political autonomy and other forms of self realization", the right to participation in making decisions referring to questions of vital significance for the national community, the right to representation in all state bodies, or the right to maintain relations with the mother land. This in practice means that they should have the right to affect the determination of their political status and free realization of their economic, social and cultural development, bearing in mind the interests of the rest of the population.

There is no generally accepted definition of national minorities on an international level, however, on the basis of the most widely accepted definitions it is possible to derive some basic elements of the definition of national minorities: a community, which is only a part of a larger whole – people, that is, parts of population which are separated from their people by a state border and which constitute a special minority national community in the country of their domicile. In question are special parts of a population which differ from the majority population by their national characteristics – language, customs, culture or religion. It is often stressed, that such groups should constitute a significant segment of the population and exhibit the desire to maintain their national characteristics, that they are indigenous in a certain territory, and not newly arrived economic migrants.

One of the more acceptable attempts at the definition of a national minority is Caporoty's well known definition: "A group, smaller in number than the rest of the population of a state, in a non-governing position, whose members – otherwise citizens of the state – are marked by ethnic, religious or linguistic characteristics, different from the rest of the population, and who show, even tacitly, the feeling of solidarity aimed at the preservation of their culture, tradition, religion and language."

According to the Sub-commission on Prevention of Discrimination and Protection of Minorities of the Committee for Human Rights, a minority is understood to be "a group of citizens of a state, constituting a non-governing minority, with ethnic, religious or linguistic characteristics different from the majority population, whose members show solidarity as well as a collective will, even implicit, to maintain themselves as such and who aspire to real equality with the majority". As a speaker of the Subkommission on Prevention of Discrimination and Protection of Minorities, Asbjorn Eide also gave a definition of a minority: "A minority is a group of people who live in a sovereign state and who constitute less than a half of its total population, and whose members have common characteristics of ethnic, religious or linguistic nature which make them different from the rest of the population".

### **The principle of self-determination and the status of Kosovo**

The elements of these definitions confirm that the Albanians in Kosovo are a minority in Serbia, for they are: 1. Smaller in number than the rest of the population of the state (Albanians 17.1 % of the Serbian population, that is 16.5 % of the Yugoslav population), they differ from the rest of the population by language, religion and ethnic characteristics and they collectively try to maintain these differences; 2. They are separated from their people by a state border.

The standpoint that the Kosovo Albanians are not a minority, professed by official Tirana and adopted by the Albanian political elite in Kosovo and Metohija, is a direct result of the aspiration to strengthen the demand for self-determination which is identified with the right of secession. That demand is normally justified by the size and homogenousness of their settlement of a part of Serbian territory, which is, moreover, a separate (autonomous) administrative unit. Thus, it is forgotten that their autonomy is precisely the result of attempts to provide the Albanians in Serbia with equality in cultural, economic, and even political terms, and is not the result of a special historical development of the region under Albanian cultural and state-political influence.

The idea of a third federal unit is more and more frequently heard in diplomatic circles interested in finding a solution to the Kosovo problem, however that idea is rejected by the Serbian government as well as by the most significant opposition parties, because its acceptance would, in practice, mean "the acceptance of a gradual secession of Kosovo and Metohija". The programs of political groups among the Kosovo Albanians seen in the light of the precedent set when former Yugoslav republics were recognized as sovereign states, after their unilateral secession from the former common federation indicate that these fears are not ungrounded. As was the case in the former Yugoslavia where the constitutional decree (article 5, point 3, of the SFRY constitution) prohibiting unilateral secession failed to stop former republics from seceding without overall agreement, constitutional guarantees would not be able to prevent the future third federal unit from doing the same.

The leaders of Kosovo's Albanians deny that they are a minority and insist that comparisons of numbers be limited to a certain territory, seeking in this way to justify aspirations to secession under cover of the right to self-determination. At the same time they are busy in the world building themselves an image as "the victims of Serbian repression" which would again justify their insistence on self-determination up to secession. The construction of this image as "the victims of Serbian repression" is designed precisely to foster the idea that the repressed have the right to resistance, and in extreme cases, to secession. Naturally, the ruling regime in Serbia contributed a lot to the building of that image, since the escalation of the Kosovo crisis helps them to maintain their power.

Nevertheless, the strong secessionist ambitions among the Kosovo Albanians are not the consequence of present repression by the ruling regime and disrespect for basic human rights. Their real motive is indicated by two events which shook the former Yugoslavia. On two occasions strong state-creating aspirations expressed themselves in the former Yugoslavia: demonstrations on the 27th November 1968 and in March and April 1981. The question of Kosovo" was, at both times, presented openly as a state and national one, and the main demands were unification with Albania or somewhat more moderate, a "Kosovo – Republic". In both cases demonstrations broke out in decisive and critical periods for the former Yugoslavia: first at the time when initiatives were taken for the controversial federation of Yugoslavia towards the end of the 1960s, and then at the time of the post-Tito search for identity, when the Albanian question was used as an important element in the conflicts between federal units.

As a consequence of the demonstrations in 1968, the region of Kosovo and Metohija was changed into Kosovo, the political elite started their Albanization, changes were introduced into the system of education, Kosovo was granted the status of a Socialist autonomous province... The demonstrations in 1981 broke out despite the fact that the Province of Kosovo had been raised to an equal footing with the republics by the 1974 Constitution. The Autonomous province of Kosovo participated, just the same as the republics, in the formation and functioning of the highest federal bodies – from the Assembly of the SFRY, via the SFRY Presidency and the Federal Executive Committee, up to the Federal Court and the Constitutional Court of Yugoslavia. Via its delegations, the province took an equal part in passing federal laws and other decisions in the Committee of Republics and Provinces of the Federal Assembly. According to the 1974 Constitution, the provinces, just like republics, had the power of veto for any change in the federal constitution. The provinces passed their constitutions on their own, which did not have to be in accordance with either federal or republic constitutions, but only "not... contrary to them". They had their own presidency and supreme court. Their status, rights, duties and organization were regulated by the federal instead of the republic constitution... Serbia was denied the power to regulate the position of the autonomous provinces which were part of it, in accordance with the Serbian constitution. Consequently, from the point of jurisdiction, the Province of Kosovo was, in practice, at the same level as the republics, having the power to pass laws which need not have been in accordance with the laws of the republic of which it was a part.

The later break up of the SFRY, precisely along the republic borders, clarifies the background of the 1968 and the 1981 demonstrations and the aims of the then strategists: the creation of the republic would have been a step towards its secession.

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The numerical superiority of the Albanians in Kosovo and Metohija (82.6%) and the ethnic homogeneousness of these regions (the Albanians are a dominant ethnic group in 80.6% of the municipality territory of Kosovo and Metohija, that is they have an absolute majority in 25 out of 31 municipalities), as well as the political tension in the region make it impossible to consider the Kosovo Albanians an "ordinary" national minority or the "Kosovo problem" a problem of local significance only. The discussion of who is entitled to self-determination, whether it is only nations or national minorities as well, can lead to the entrenchment of attitudes and unilateral or extremist interpretations of the right to self-determination. In the existing context it is more suitable to discuss contents of self-

determination acceptable to both sides, duties of state and minority, as well as the role of the international community.

The solution to the "Kosovo problem" should imply primarily a compromise which would enable the Kosovo Albanians to realize the right to self-determination on the one hand, and on the other, would not entail a change of borders or threaten the vital state interests of Serbia and Yugoslavia. That would satisfy two important, and apparently contradictory principles demanded by the international community, and also both parties in the dispute. The core of the problem is that the Kosovo Albanians interpret the right to self-determination in a unilateral and simplified way which reduces it to the right of secession and, on the other hand, the Serbian government has made the Kosovo problem an instrument in their fight against their political opponents.

According to the international documents, the right to self-determination should not be realized to the detriment of a state's territorial integrity. The principle of self-determination should be interpreted in accordance with the relevant norms of international law, and particularly with the UN aims and principles. The UN charter and the relevant European documents encourage and support multi-racial, that is multi-ethnic or multi-national, secular, non-discriminatory pluralist states, grounded on the recognition of human rights and basic freedoms for all.

### **The role of "the international community"**

The influence of "the international community" could be constructive if it were exercised on the principle of agreement of both sides and with the necessary initiatives of good will from both sides. In practice, that would mean that the initiative of the Serbian side should be based on a generally acceptable solution and acts of good will, aimed primarily at relieving repression and avoiding the infringement of human rights and basic freedoms, and at allowing the relevant international institutions, primarily those within the OSCE (The Long-term Mission, High Commissioner for National Minorities, The Office for Democratic Institutions and Human Rights) to give good services, expert advice, monitor elections etc.... The Kosovo Albanians would, in return, give up the project of an independent state and join the political life in Serbia and Yugoslavia.

Until now the leaders of the Kosovo Albanians and both the Serbian and Yugoslav government have often been invoking "the international norms" and "Helsinki principles", but, these norms and principles have often been interpreted selectively and restrictively. Each side has stressed only that what favors its own position, and has ignored that which is contrary to their particular political aims or practice. Thus, for example, as has already been said, the right to self determination, invoked by the leaders of the Kosovo Albanians, does not necessarily mean the right to an independent state or territorial autonomy. Likewise, for Yugoslavia to be entitled to invoke the Helsinki principles, it, first of all, has to entirely comply with the Helsinki norms and uphold the OSCE standards.

The essence is that the Helsinki principles ought to be respected in their entirety, and not selectively, which means, as a coherent package of rights and duties. The Helsinki principles have been developed, particularly since 1989, in the spirit of encouraging the development of democratic, civil states founded on universal human rights, and not nationalist states in which rights are conditioned by ethnic origin. This is the path to be taken towards the solution of "the Kosovo problem".

It is in the interest of both sides, and also in the interest of stability in the region, that the problem be solved in agreement, and not unilaterally. The concept of regionalization or functional autonomy could be a way to finding a compromise solution in accordance with modern trends of softening borders and the promotion of universal aims such as: democracy, human rights, economic and political stability in the region, common and comprehensive security...

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The OSCE has made governmental responsibility to its own population one of the international standards; in other words, state sovereignty has become internationalized when human rights are at issue. The care for human rights has limited the sovereignty of the OSCE member states and made it possible that the interest of the organization, a group of its member states or even individual states is no longer seen as interfering in a state's internal affairs. However, at the same time the internationalization of sovereignty makes the need for a national state as a protector of human rights relative, which is the point the Kosovo Albanians insist on.

A state's sovereignty is also made relative from the aspect of security. The Kosovo Albanians insistence on secession against the Serbian accord not only threatens the region's stability and security, but is also contrary to the Helsinki principles and duties, as well as the principles on which the projected security for the 21st century is based. The cooperative safety is based on democracy, the

respect of human rights, basic freedoms and the rule of law, market economy and social justice (point 3, of the Declaration). These are precisely the principles on which "the Kosovo problem" ought to be solved in a generally acceptable concept of state regionalization, or the establishment of a wide autonomy, which need not necessarily be territorial, for, as the example of former Yugoslavia showed, when a minority issue is connected to a territorial one that inevitably leads into a conflict.

Democratic consolidation in Serbia could not have been realized in the conditions of a legitimacy crisis, created because of, among other things, out-voting the minorities (national, political, religious, cultural, linguistic...) on a constitutional level. If there is no basic consensus within a political community and if the majority principle is understood as an absolute principle, then we have majorization at work, that is, out-voting minorities in the spheres vital to them, which, in turn, threatens the minorities basic interests and formal democracy is transformed into a "tyranny of the majority".

In Serbia the "written democracy" was reached without the basic consensus of the main political actors and representatives of all social segments, although the agreement is the key political values is the basis of legitimate political government in a democracy, and it precisely democracy which is placed as a clear aim by all. In order to change this, the framework of the written democracy needs to be improved accordingly and filled with democratic contents, that is to be made legitimate by the additional participation of the opposition and minorities in the constitutional and practical-political sphere.

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