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# Old Problems and New States

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# **OLD PROBLEMS AND NEW STATES**

**QERIM QERIMI**

We come back again to that old, yet contemporary and fundamental, question in international relations: self-determination.

Conscious of highly context-specific sensitivities of various situations and driven by realities of our time, this article aims to introduce an alternative view to self-determination. It draws inspiration from the lack of a set of unified principles or their consistent and principled application in external arenas. Failure of the UN Security Council to adopt a plan of the UN secretary-general's special envoy on Kosovo's status, or otherwise reach an agreement on the status issue, is nothing but a failure of world community's institutions and principal actors of world public order to adequately and effectively articulate and apply their written and customary principles and rules to real world problems.

In the absence of international consensus within the UN system, on Feb. 17 -- in its ninth year under a UN-led international administration and after a series of unsuccessful internationally-mediated talks -- the Assembly of Kosovo declared Kosovo to be an independent and sovereign state.

An emergency session of the Security Council, requested by the Russian Federation on the same day, ended up without any agreement, as did an open meeting convened the day after at the request of the Russia and Serbia. While Russia and Serbia maintained the illegality of the declaration, most other nations favored the act of independence; with some remaining silent or taking no explicit public position, as was the case with the UN secretary-general.

## **RECOGNITION**

In spite of fierce opposition by Serbia and its traditional ally, Russia, the declaration of independence was met with swift recognition from the US government and the majority of EU member states. The arena of countries that recognized Kosovo's declaration of independence was soon expanded beyond the European and US theaters to include other geographic locations in Africa, Asia, Australia and Latin America. The number of recognitions exceeded the number of 20 UN member states within the month of February, while other countries pledged to follow the same path.

This same dynamic of individual recognitions, however, does not seem to apply in a foreseeable future to membership in several international organizations where either the "veto system" or the "policy of consensus" is applied in their decision-making processes.

As one's claim is materialized, this brings again into horizon, as a sequential effect, a multiplicity of other claims or at least some renewed hopes for possible materialization.

Notwithstanding the existence of some traditional criteria, in practice, the whole process of who deserves statehood, or under what specific circumstances, is blurred by the reluctance of nation-states to relinquish territorial integrity in favor of a more expansive use of collective self-determination (in its external sense).

The pressing question is thus where to draw the lines. The answer, this article posits, is a public order of human dignity that is defined as one which approximates the optimum access by all human beings to all values they desire most, and which are expressed empirically in terms of eight value categories: power, wealth, enlightenment, skill, well-being, affection, respect and rectitude.

## **SELF-DETERMINATION**

The right to self-determination, as conceived here, refers to a process of decision that requires the continuously expressed will of an entity's members through various forms, means or ways, including, *inter alia*, consultation, participation and inclusion in decision-making processes characterized by free, open, pluralistic and regular political processes, fair representation and equal distribution of power.

Alternatively, it requires some form of representation of interest that encompasses access by all human beings to all demanded human values.

Collective self-determination aims to accommodate diverse groups within the borders of an existing body politic, so that it allows individuals who may act either alone or in association with various functional groups, or on behalf of other participants or on their own, to freely and widely shape and share the values system.

However, if a self-perceived or externally viewed distinct group of people is denied access to these processes and values domestically, and once all means to repair and restore the public order of human dignity are exhausted, the group should then pursue the course of accommodating itself within a new body politic, where all democratic processes and desired values are guaranteed for all.

## **ALTERNATIVE APPROACH**

The approach outlined in this article is a human-centered and relies empirically on human needs and wants. Although territory is and will likely remain the central component of State sovereignty, the sovereign component can no more be detached from the needs and wants of its people -- which remain the sovereign's foundational and existential resource -- and especially not if sovereign power is used as a means to abuse the dignity and rights of "others" within its jurisdiction.

In any event, neither territorial nor ethnic approaches to self-determination have been applied consistently. Nor anyone of them seem to provide a universal-featuring approach that would best take into account various human considerations, while being able to

adequately and effectively “survive” current and future trends in decision-making processes, aiming to promote the largest net aggregate of the common global interest.

Against this background, and as an alternative to various existing theories, a realistic human-centered approach seems to provide such holistic solution.

This approach is oriented at an optimum order of human existence in dignity and freedom, i.e. maximum access by all to all the processes of shaping and sharing all values humans cherish most; a minimum order of human dignity would be characterized by the absence of unauthorized coercion and violence in society.

The article argues that persistent abuses or consistent failures to guarantee a public order of human dignity would give rise to a well-grounded international law claim to self-determination. A pattern of deliberate and widespread human rights abuses or systematic policies of oppression surely fall below an order necessary for a dignified human existence.

This approach could also take the form of, or be equated and transformed to (if one chooses so), a normative setting which would combine a legal-text model of interpretation as universally agreed and reflected in pertinent international legal instruments, as well as applied and interpreted by various judicial forums, and an element born out of past trends in decision-making processes concerning self-determination, or state practice.

## **ASSESSING MERITS**

Concerning the former criterion (self-determination from a perspective of international legal instruments), the article proposes an assessment of the merits of any self-determination claim through several principal bases, including the right to self-determination of people subject to colonial rule, and the oppressed peoples, which is the peoples subject to subjugation, domination and exploitation by “others”; to self-determination of people that were denied the right to internal self-determination; the right to self-determination of people who are excluded from public or social life, or those lacking a “minimum level of participation”; the right to self-determination of discriminated and non-represented peoples; and to self-determination of people subject to human rights violations.

As far as state practice is concerned, a set of consensual criteria upon which the modern secessionist claims are most likely to be supported can be established.

Such situations can so far be considered: illegal annexation of territories (i.e., the Baltic states, Eritrea), gross human rights violations (Bangladesh), the breakup of the state (the Soviet Union, former Yugoslavia), peaceful separation (Czechoslovakia), or with the agreement of the entire population (unification of Germany).

The overall configuration presented above is without prejudice as to the freely pursued democratic and peaceful processes, where political communities or entities themselves agree to pursue a certain course of action, leading up to new political arrangements that may include creation, modification or termination of the body politic.

To the extent possible, this should remain the preferred course of action when addressing self-determination claims. Genuine democratic processes in governance could considerably enhance the eventuation of more acceptable and adequate solutions.

## **WORLD ORDER**

From the perspective of a world public order based on and guided by the values of human dignity, the claim that recognizing Kosovo's independence would set a "dangerous precedent" is merely unfounded.

The act of declaration of independence by Kosovo and its subsequent recognition by a number of major world powers and other members of the world community could, in fact, well serve as a deterrent for all those who might use sovereignty as an excuse for discriminating or exterminating their own citizens.

It is a reminder, or indeed a contemporary precept, that in the modern world order, sovereignty is about best serving all without any distinction whatsoever within the sovereign's jurisdiction.

No other course of action would seem to best approximate a public order of human dignity and keep it away from the eventuation of dystopias.

Both as a people subjected to ethnic cleansing policies, and as a people that have been consistently and forcefully denied their right to self-determination -- which as the World Court held in East Timor and Wall cases, is today a right *erga omnes* and is generally accepted to be prohibited by the superior norm of *jus cogens* -- the people of Kosovo were entitled to the right to external self-determination.

Alternatively, access to basic values necessary for a dignified human existence has been persistently denied to the people of Kosovo, while the fundamental international instruments that guarantee the right to self-determination and other basic rights and freedoms contained therein have also been violated in a gross and systematic manner.

In addition, the world community has recognized as independent and sovereign states cases as similar -- in substance -- as Kosovo.

Moreover, a solution that intends to correct the past wrongdoings and that aims at maximizing the access by all to all the most cherished human values, both in individual and aggregate terms, and by doing so produces a viable and responsible body politic based on the express and genuine wish of those to be governed by such body politic, is

the solution that contributes most to the greater production and wider distribution of values of human dignity.