

Eight Theses on Self-Determination: From Self-Determination of Peoples to Principles of Polity-Formation?

Zoran Oklopčič, SJD Candidate
University of Toronto

Introduction

This paper challenges the concept of self-determination through the elaboration of eight theses. It argues that self-determination is inoperative in new instances of polity-formation after the end of the Cold War (1). Then, it claims that, logically speaking, the principle may be redundant (2), and that it distorts the conceptual architecture of polity-formation (3), while at the same time possessing motivational, aspirational and inflammatory potential (4 and 5). Furthermore, the distorting lens of self-determination hides possible normative principles that might be invoked in the process of polity-formation (6), and its abandonment would shed light on the crucial role played by outside actors in polity-formation (7). Finally, the shaky edifice of self-determination impels us to reconsider its conceptual foundations, which, in turn, present themselves as ambiguous and contradictory (8).

1. Self-determination is *on demise*

After the end of the Cold War, influential, international and domestic, politico-legal actors, increasingly shied away from using the vocabulary of self-determination to justify the processes of polity-formation. The cases of the Yugoslav dissolution, Quebec's unsuccessful secession, and Kosovo's status negotiations, will illustrate that point.

In 1991, the Badinter Committee did not use the concept of self-determination to justify the independence of the component republics of the former Yugoslavia. When asked directly, Badinter declined to give a pronouncement on who had the right to self-determination, understood as a right to create an independent state. The creation of states, for Badinter, is not a matter of self-determination but that of a facticity, in conjunction with the principle of *uti possidetis*. Instead of using (external) self-determination in a positive fashion, Badinter used the idea of self-determination indirectly. Minority population that ended up "trapped" in the new states did not have the right to external self-determination. Instead, internal self-determination entitled them, Badinter said, to ask for a robust minority protection regime. As Caplan has rightly argued,

while the EC affirmed the principle of self-determination in its guidelines for recognition, the Commission did not invoke the principle in support of the republics' independence claims. ...*Badinter, in fact, invoked the principle of self-determination not to support but to restrict the emergence of new states in the region.*¹

In 1992, the Quebec National Assembly commissioned a report asking five reputed international lawyers (Five Experts) to give their opinion on the international legality of unilateral secession of Quebec. The Five Experts to a significant extent relied on

¹ Richard Caplan, *Europe and the Recognition of New States in Yugoslavia* (Cambridge: Cambridge University Press 2005), at 69.

Badinter. To a degree, the Five Expert Opinion mirrors the conclusions of the Badinter Committee. Like the Badinter Committee, the Five Experts did not overtly justify the potential secession of Quebec in terms of the right of the people to self-determination. Unlike the Badinter Committee, the Five Experts have *explicitly* stated that the independence of Quebec cannot be grounded in the right to self-determination of peoples. The Five Experts reiterated that the principle of self-determination has a “limited relevance” to the creation of a political community. According to the Five Experts, Quebec enjoys *internal* self-determination. The internal self-determination is understood merely as a right to participation in the expression of the will of a wider political community, and the recognition of its identity - within the Canadian federation. “External” self-determination in the form of secession is only reserved for the oppressed peoples, or the ones who do not have access to the meaningful representation and participation in the organs of the wider state. Equally, drawing on Badinter Opinion no.2, the Five Experts concluded that ethnic or linguistic minorities do not enjoy any specific territorial rights, nor the right to establish an independent state.

In 1998, the Supreme Court of Canada in the Secession Reference also declined to find self-determination applicable to the case of the secession of Quebec. The Court observed that the invocation of the right to self-determination of peoples in international documents is coupled with the obligation of respect for the territorial integrity of the states.² In other words, the “international law principle of self-determination has evolved within a framework of respect for the territorial integrity of existing states.”³ Given that, the right of secession defined as the right of achieving independent statehood does not exist except in certain, strictly delineated circumstances.⁴ Instead, the right of self-determination is “normally fulfilled through *internal* self-determination - a people's pursuit of its political, economic, social and cultural development within the framework of an existing state”.⁵ More importantly, instead of the principle of self-determination, the Court spelled out four constitutional principles - federalism, democracy, constitutionalism and protection of minorities whose interplay sets the frame for the future negotiations over the status of Quebec. While the possible secession of Quebec must be effectuated within the Canadian constitutional order, that order “cannot remain indifferent to the clear expression of a *clear* majority of Quebecers that they no longer wish to remain in Canada”⁶. The Court declined to engage the question of what constitutes ‘the people’ for the sake of secession, and instead pointed out that all aspects of polity-formation, including the boundaries of a future independent Quebec, may be on the table.⁷

² For example, the “U.N. General Assembly's *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations*, GA Res. 50/6, 9 November 1995, also emphasizes the right to self-determination by providing that the U.N.'s member states will: “Continue to reaffirm the right of self-determination of all peoples... This shall not be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States”, [1998] 2 S.C.R. 217, para. 120, see Ved P. Nanda, *Self-Determination And Secession Under International Law*, Denver Journal of International Law and Policy Summer/Fall 2001, at 309 – 311.

³ [1998] 2 S.C.R. 217, para 127

⁴ D. Murswiek, *The Issue of a Right of Secession – Reconsidered*, in C. Tomuschat, (ed.), *Modern Law of Self-Determination*, at 25 (1993).

⁵ Crawford said that Supreme Court of Canada's treatment of s-d should be authoritative; “The Right of Self-determination in International Law: its Development and Future”, in P. Alston (ed.) *Peoples' Rights*, (Oxford and New York: Oxford University Press 2001) at 58; for the criticism see Toope, supra note 100, at 524

⁶ (2) *Question 1 Reference re Secession of Quebec*, [1998] 2 S.C.R. 217

⁷ “Nobody seriously suggests that our national existence, seamless in so many aspects, could be effortlessly separated along what are now the provincial boundaries of Quebec.” Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 96.

Finally, in the case of Kosovo, the UN, as well as the informal political factors, such as the Contact Group, declined to frame the question of the future status of Kosovo using the vocabulary of self-determination. For example, the constitutive document for the Kosovo “protectorate”, the Security Council Resolution 1244, anticipates the determination of the future status of Kosovo. While it talks about “self-administration” and “self-government” the Resolution is careful to omit the reference to the principle of self-determination, either as justifying the protectorate, or anticipating future status of Kosovo.

In addition, in December of 2005, the Contact Group spelled out additional principles for the settlement of the question of status. First, the status of Kosovo should “be fully compatible with international standards of human rights, democracy and international law and contribute to regional security”. Second, the status of Kosovo should “contribute to realizing the European perspective for Kosovo”. Third, the overall settlement should “ensure multiethnicity”, and “provide effective constitutional guarantees and appropriate mechanisms to ensure the implementation of human rights”. Fourth, the settlement should ensure “participation of all Kosovo communities in government”. The effective system of local self-government will be established which should “facilitate the coexistence of different communities”. Fifth, the solution should include “specific safeguards for the protection of the cultural and religious heritage in Kosovo, [which] should include provisions specifying the status of the Serbian Orthodox Church’s institutions and sites and other patrimony in Kosovo. The sixth principle restates three fundamental principles proclaimed in April: “Kosovo [will] not return to the pre-March 1999 situation ... [and]. [t]here will be no partition of Kosovo and no union of Kosovo with any country or part of any country.” The rationale for that is that Kosovo’s status should “strengthen regional security and stability”. The same rationale stands behind seventh principle which states that the settlement will “also ensure that Kosovo does not pose a military or security threat to its neighbours”. The eighth principle requires safeguarding “multiethnic character of the police and the judiciary”. Principle nine states that the settlement should ensure sustainable development so that Kosovo can “cooperate effectively with international organizations and international financial institutions” Finally, Kosovo will require “continue to need an international civilian and military presence” in order to supervise the compliance with the settlement, as well to “ensure security and, in particular, protection for minorities”⁸

To summarize, the principles of the Contact Group, an *informal* gathering of the United States, United Kingdom, Russia, Germany, France and Italy have effectively determined:

- (1) the scope of the political unit, that is, its *demos* (“there shall be no partition of Kosovo”);
- (2) the range of options for the legal connection among that political unit and other units;
- (3) certain fundamental features of the internal structure of Kosovo, (decentralization);
- (4) the constitutional interpretation of the equality provisions (“ensuring multiethnicity”); and
- (5) the functions of Kosovo (should contribute to strengthening “regional security and stability”, “cooperate effectively” with international institutions).

⁸ [principles are leaked to the press by the members of contact group, they were not officially published; however, both Serbian and Albanian sources operate with the same version of them which implies the credibility of the text]

It is true that the political actors involved in the secessionist struggles invoked self-determination as a governing principle. However, while Tudjman, Milosevic, Parizeau and Rugova invoked self-determination, the ones in the position of legal (the Canadian Supreme Court), symbolic (Badinter, Five Experts), or factual authority (the Contact Group) made an effort to prevent the concept from doing any real work. Instead “facticity”, “uti possidetis”, “four principles of Canadian constitutional order”, “stability”, “multiethnicity”, or simply a definitional fiat are used to justify the creation of new states.

2. Self-determination is redundant(?)

Even when it is used to justify the formation of new independent states, the invocation of the self-determination of people is redundant. How is it different to say “the people of Kosovo have the right to decide its political future” from “Kosovo has the right to decide its political future”? The fact that we often hear those claims used interchangeably should impel us to ask what would we lose if we opted for the latter variant? The intuition here is that if there is a rhetorical value added by the former claim, that value is associated with justifying the idea of self-determination in the first place. This claim will become clearer as I elaborate on other theses.

3. Self-determination is distorting

When the concept of self-determination is debated in the contemporary literature, the character of the people is often put in question. Is “the people” in “self-determination of peoples” a *demos* – a body of citizens; or is it an *ethnos* – a group of individuals united in their belief in common descent and sharing an often radical political aspiration?

Both views are misleading, and a shift in perspective will help clarify my point. Instead of self-determination, let us for a moment imagine a wider, generic term: the *polity-formation*. Analytically, polity-formation can be broken down into four moments: triggering polity-formation, boundary-drawing, status-determination, and internal-organization. The talk about (external) self-determination of a *demos* is a talk *only* about status-determination of a pre-existing territory. Self-determination of a *demos* is not about creating a polity *de novo*, it is only about status *upgrade*. Kosovo, if it becomes independent, will only change its status from a “province” to that of an “independent state”. The meaning of the *demos*-based self-determination is only that there should be a majority vote about the pre-determined status possibilities: choice between the status quo, and an independent state.

The *demos*-based account of self-determination, however, hides two things. First - as Jennings and Fitzmaurice have noted a long time ago – self-determination hides the existence of the *outside*. That ‘outside’ determines what ought to count as a legitimate trigger for the polity-formation. It also determines what boundaries, for the purposes of a majority vote, are to be considered as legitimate. Second, the *demos*-based account of self-determination hides the possibility that there may be values, broadly associated with democracy, that can be used as arguments in polity-formation, also at the first two, and not only on the third level of polity-formation.

In contrast to this version of self-determination, ethnic self-determination does give a tentative answer to the first and second moment of polity-formation. The creation of the polity should be triggered if there is a demand on behalf of the national group to do so. The boundary of the future state should be such that the majority of the national group ends up within a single unit, and that in such a unit that group forms a majority. However, that account of self-determination ends up in a serious tension. The group asking for self-determination, “X-ians”, will not be the group receiving it – “the people of X.” Sovereignty, in most constitutions, is not vested in the ethnic nation but rather in the “citizenry”, the *demos* of a constituted state. That tension can be concealed, more or less effectively, by saying one thing in the preamble (for example, that the state expresses the will of an *ethnos*), and another in the body of the constitution (that the sovereignty belongs to the *demos*).⁹ That rhetoric is not part of this paper. Rather, in the rest of the presentation paper, I will sketch the rhetorical potential of the *demos*-based self-determination.

4. Self-determination is motivational and aspirational

During its 90-year political career as a major principle of polity-formation, self-determination has been called “ridiculous”¹⁰, “evil”¹¹, and, more recently “hopelessly confused and anachronistic”¹², “lex obscura.”¹³ Irrespective of the chronic academic irritation with the concept, the idea of self-determination persisted. That persistence, however, cannot be explained by the difficulties that accompany all conceptual innovations.

Self-determination persisted because it offers a set of motivational and aspirational promises, stemming from republican political theory. Republicanism offers motivational benefits to individuals who buy into the idea of “the people”. As a member of the people, the individual can understand the practice of governing, not as a “torment of heteronomy” (Kelsen), but rather as a self-legislating, self-directing activity. In the context of the decision on the political status, one can say that majority voting is a *means of detecting* the will of the people. By implication, the minority is not invited to see themselves as losers, but rather as *fellow input-givers*, feeding the great machine of “the people” with their votes. By the same token, the invocation of “the people” can be said to have a civilizing and aspirational quality. Some political theorists have claimed that the invocation of self-determination is hypocritical because the administrative unit’s majorities only wish to conceal their national hegemony, and increase the scope of their nation’s territorial control. But the flipside of the hypocrisy charge is that “the people” demands the majority to respect the ideals of inclusiveness, equality and non-discrimination between the citizens. As such, it can have a palliative effect on vicious nationalist politics.

5. Self-determination is inflaming

⁹ Cf. James Summers, *Peoples and International Law: How Nationalism and Self-Determination Shape a Contemporary Law of Nations* (Leiden and Boston: Martinus Nijhoff Publishers, 2007) at 51, for an example of an ethnicist language in Croatian and Macedonian constitutions.

¹⁰ Ivor Jennings, *Approach to Self-Government* (Cambridge: Cambridge University Press, 1956) at 56

¹¹ Amitai Etzioni, “The Evils of Self-Determination” (1992) *Foreign Policy*, at 21.

¹² Gerry Simpson, “The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age” (1996) 32 *Stanford Journal of International Law*, at 257.

¹³ J. Crawford, ‘Right of Self-Determination in International Law: Its Development and Future’ in P. Alston (ed) *Peoples’ Rights* (Oxford and New York: Oxford University Press 2001) 7 at 10

However, the losers in the decisions on status are not easily consoled by the republican story. Equally, they are not impressed by the aspirational quality of the invocation of ‘the people’, and are willing to offer same set of benefits within different boundaries, where they would be a majority, not minority. Insisting that they had a vote in determining an outcome about the status, while they did not have a say in shaping the boundaries, can only be inflaming. Chaim Gans is therefore right when he says that “[i]f the substance of the proposition is offensive to certain people, allowing the same people to participate in the vote is tantamount to humiliating them twice.”¹⁴

6. Self-determination is hiding the possible principles of polity-formation

Apart from being inflaming, self-determination draws our attention further away from the ideals that can be invoked at the first two levels of polity-formation: the triggering of polity-formation, and its boundary-drawing. In the good deal of contemporary discourse, polity-creation is considered to be justifiably triggered by either serious oppression, discrimination, or the statal breakdown. The mere expression of a radical political desire is irrelevant. In words of an early canonical pronouncement on the subject, the Committee of Rapporteurs in the case of the Aaland Islands stated that the withdrawal from a larger state because of the “wish or ...good pleasure” would equal anarchy in international life, and conceptual incompatibility with the very idea of the state.¹⁵

However, from the claim that the radical desire should not imply the *immediate* statal breakdown, does not follow that such a desire should not be perceived as worth of triggering the process of a new polity-formation. The latter position was endorsed recently by the Supreme Court of Canada in the *Secession Reference*. According to the Court, “the continued existence and operation of the Canadian constitutional order *could not be indifferent* to a clear expression of a clear majority of Quebecers that they no longer *wish* to remain in Canada”¹⁶. The expression of that wish is not only legitimate, but the failure of Canadian constitutional actors to negotiate towards the satisfaction of that wish would put the strain on the legitimacy of the Canadian constitutional order.¹⁷ Rapporteurs imagined a radical desire as a tantrum that, if acknowledged, would strike an immediate death blow to a state’s legitimacy. The Canadian Supreme Court, however, imagined it as a perfectly legitimate aspiration that does not immediately destroy the legitimacy of the state but rather corrodes the claim to rule on behalf of a constitutional order which remains unresponsive to the radical demands.

At the level of boundary-drawing, the invocation of the self-determination hides the aspiration to unanimity, or more modestly, improvement of allegiance to the state through the re-drawing of new boundaries. The invocation of “the people of” simultaneously hides and includes the aspiration to maximize allegiance in a given territory.¹⁸ A little mental experiment will help explain this. We need to ask if there is any

¹⁴ Chaim Gans, “National Self-Determination: A Sub-and Inter-State Conception” (2000) 13:2 *Canadian Journal of Law and Jurisprudence*, at 141.

¹⁵ The Aaland Island Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs (1921) League Doc. B7.21/68/106, 27 *supra* note 6, at 28.

¹⁶ (2) *Question 1* Reference re Secession of Quebec, [1998] 2 S.C.R. 217

¹⁷ Therefore I think that Jan Klabbers is right when he understands self-determination as “the right to be taken seriously”. Jan Klabbers, *The Right to be Taken Seriously: Self-Determination in International Law* (2006) 28:1 *Human Rights Quarterly* 186-206, at 205-6.

¹⁸ Demos-based self-determination has a *potential* to contribute to maximizing allegiance over the whole territory. One way of justifying demos-based self-determination in Yugoslav case, for example, is to claim

other way to understand the requirement of a majority in a referendum on self-determination, apart from taking it as a *sign of the will* of a corporate agent, 'the people'. If we accept this shift in the perspective, we will understand the requirement of the "majority of the people" as the opaque *compromise between the prudential requirements of viability, stability and functionality of the unit in the independent realm*, on the one hand, and *unanimity - the consent of all*, on the other. Instead of fine-tuning the "amount" of allegiance to the particular community, so as to increase it towards the ideal of unanimity, the majority required already presupposes (as a rule of the thumb), that there the consent is maximized given the real world prudential requirements. In other words, majority in a referendum should be seen as fulfillment of a legal requirement crafted as a balance between prudential considerations, and the implicit ideal of unanimity.¹⁹

7. Self-determination is obfuscating the outside(rs) direct involvement in the process of polity-formation

The demos-based self-determination relies on the principle of *uti possidetis*. One of the justifications of the principle of *uti-possidetis* that is used to construct the idea of "the people" is that it can thwart the involvement of the outside powers in the process of consolidation of a polity. Its purpose, to put it differently, is to prevent the strategy of 'divide and conquer' by preventing the outside from meddling into the affairs of the nascent state. But as the example of former Yugoslavia shows, outside involvement is inescapable. By choosing to endorse the administrative boundaries, the EU intervened on the most fundamental level, by endorsing a particular set of consociates and not some other. That decision may, or may not have been self-serving. One can legitimately argue that the reason for the EU recognition of the Yugoslav component republics was to internationalise and therefore help end the conflict. On the other hand, in the case of Kosovo, the endorsement of Kosovo's independence in its provincial boundaries may be less disinterested. For example, according to the chairman of the US Senate Foreign Relations committee, independent Kosovo would serve American interests by acting as a showcase for a well-intentioned American foreign policy towards the Muslim population in Europe.²⁰

However, the demise of the vocabulary of self-determination should not be lamented. Self-determination has always had a Janus-face, and was always implicated in hegemonic imperial struggles. James Tully has, for example, recently argued that subaltern actors are governed by informal imperial rule "through supporting, channelling and constraining their self-determination and democratic freedoms."²¹

that it *did* increase the *overall* allegiance, now owed to respective republics, in comparison to the former Yugoslavia as a whole. An argument could be made that SFRY was supported only by a plurality of Serbs (cca 8,5 million out of 22 million people), while under the new constellation, only the splinter Serbian, Croat and Muslim minorities were dissatisfied with their new political status.

¹⁹ In the case of Kosovo, the language of the US and UK officials betrays the aspiration to unanimity. Commenting on the American position in the Kosovo talks, James Dobbins, former senior adviser to President Bill Clinton for the Balkans, has claimed that "United States and its allies have already committed to an outcome that takes account of the wishes of a *vast* majority of Kosovo's population" Equally, John Sawers, the Political Director of the British Foreign Office has stated that "[t]he outcome of the future status will need to be acceptable to the *great* majority of people in Kosovo ... and we know that the majority of people in Kosovo aspire to independence" It appears that the vastness and the greatness of the majority is an important and valuable thing.

²⁰ Joseph Biden, "Opponents of new Kosovo must be stopped", *Financial Times*, January 3rd 2007

²¹ James Tully, "On Law, democracy and Imperialism" in *Political Theory and Politics*, (Aldershot: Ashgate, 2007), [forthcoming]

According to Tully, “self-determination ... through international law promoted today [is] not [an] alternative[] to imperialism but rather the means through which imperialism operates today against the wishes of the majority of population of the post colonial world.”²²

The demise of (external) self-determination coincides with the ascent of the new analytical lens of ‘state-building’. However, state-building, often used in tandem with the invocations of popular sovereignty and internal self-determination, is also being debunked as “[an] attempt[] by Western states to deny the power which they wield and to evade accountability for its exercise.”²³ The exercise of political power of these ‘Empires in denial’ need not be necessarily sinister. The self-interest of Western states is ambiguous. Its bottom line is “the desire to avoid any investigation of their interests, of their powers.”²⁴

In addition, removing the lens of self-determination will not only help us appreciate attempts of the great powers to hide the exercise of their political power. Equally important, it will show that their endorsement of particular boundaries also *rhetorically* empowers the particular side in the conflict. By drawing boundaries in a certain way, the outside powers enable the contingent majority within those boundaries to posture as good, inclusive *civic* nationalists, while reducing the minority within them to the position of bad, ethnic nationalists. By shedding light on the role of the role of the ‘outside’ in endorsing the particular constellation of boundaries, the labels ‘civic’ and ‘ethnic’ become present themselves as contingent rhetorical resources and not as predicates of good civic and bad ethnic nationalism.

8. Self-determination is built on the shaky conceptual ground

The demise of the rhetorical edifice of self-determination should impel us to reconsider the coherence of its conceptual basis. Initial theoretical articulations of self-determination highlighted three related, if distinct concepts: popular sovereignty, consent of the governed, and the principle of nationality.

According to Sarah Wambaugh, for example, the idea of self-determination is based, and is inseparable from the doctrine of popular sovereignty.²⁵ Wambaugh, herself one of the most notable experts on the subject in the interwar period, claimed that the “philosophers of the French Revolution” considered the acquisition of territory through conquest a concept inimical to the divine rights of kings. The doctrine of popular sovereignty, on the other hand, required that the change of sovereignty not be executed without an appeal to the will of inhabitants. Thus, reconciling French foreign political ambitions, with the normative basis of the existence of the French state led to the doctrine of “no annexation without consultation”, a political precursor of the right to self-determination.²⁶

²² Ibid.

²³ David Chandler, *Empire in Denial: The Politics of State-Building* (Pluto Press, 2006) at 1.

²⁴ Ibid, 45.

²⁵ Sarah Wambaugh, *A Monograph on Plebiscites*, (Washington, Carnegie Endowment for International Peace, 1920), at 2.

²⁶ Ibid.; also see Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995), at 11.

While Wambaugh treated consent of the governed as the principle governing the reconstruction of the state's boundaries only, Robert Redslob considered it to be governing the process of the creation of the state itself. He claimed that the first element of the principle of self-determination is the Enlightenment's demand that the state is valid only when it is formed by the free will of an aggregate of individuals. Following Hobbes and Rousseau, he claimed that the "state is only legitimate if its subjects consented to it."²⁷ The state is the work of the people who disposes with itself ["L'Etat est l'oeuvre du peuple disposant de lui-meme."]²⁸ In addition to the principle of consent, Redslob claimed that the conceptual development of the principle of nationalities (his name for self-determination) is marked by an objective historical process of dissolution of the medieval empires and which transformed the object of loyalty to a "nation" understood, arguably, in the cultural and ethnicist terms. In sum, the rationalist idea of individual consent, married to an objective phenomenon of the attachment to the nation, gave rise to the principle of self-determination.

At this point, I will address only the first two concepts: consent of the governed and popular sovereignty, in part, because they are the conceptual basis that sets off the demand for self-determination, even in its ethnicist incarnation.²⁹

If we understand self-determination as the principle that speaks to some, or all four moments of polity-formation *within* an already established political context we will encounter problems both with the idea of consent of the governed, as well as with popular sovereignty. While self-determination was understood to be regulative of territorial *changes*, the principle of consent operates in the vacuum. The stylized picture of polity-formation, both for Hobbes and Rousseau is unanimous consent that creates a polity – Commonwealth (Hobbes), or the People (Rousseau). There is no mention of the territory in Hobbes's account of unanimous covenanting. In Rousseau's account, the "lands of private persons, when they are united and contiguous become public territory."³⁰

However, the presence of dissenters creates the problem both for Hobbes and Rousseau. Hobbes for example insists that

because the major part hath by consenting voices declared a sovereign, he that dissented must now consent with the rest; that is, be contented to avow all the actions he shall do, or

²⁷ Robert Redslob, *Le Principe des Nationalites*, (Paris: Librairie du Recueil Sirey, 1930), at 5.

²⁸ *Ibid*, at 5.

²⁹ The full treatment of the conceptual problems with the idea of self-determination would need to include the debate about the demands of ethno-cultural justice. In the Fourteen Points, Wilson did not mention self-determination, but rather spoke of "the principle of justice to all peoples and nationalities, and their right to live on equal terms of liberty and safety". What would that justice demand in the process of polity-formation did not become the object of the systematic scholarly interest until early 1990s and works of Will Kymlicka, Allen Buchanan, Margaret Moore and others. While those authors often couch their arguments in the language of self-determination, I believe that ideas of justice can, and do conflict with the ideals of respecting political preferences of the inhabitants. John Rawls famously argued that "[d]esires and wants, however intense, are not by themselves reasons in matters of justice. The fact that we have a compelling desire does not argue for the propriety of its satisfaction any more than the strength of a conviction argues for its truth." If we agree with that proposition, and if we also agree with Kymlicka, who said that "adopting multinational federalism creates a *genuine form of equal treatment*" we might be impelled to ask: Why would Quebecois desires for secession even be admissible given that they go over and above the ideal of ethno-cultural justice, that is, multinational federation?

³⁰ "Book I, Ch.9", Jean-Jacques Rousseau, *The Social Contract* transl. by Maurice Cranston (London: Penguin Books, 1968) at 67.

else justly be destroyed by the rest. If he does not follow through, then [he] must ... be left in the condition of war he was in before.³¹

This passage suggests that there is a referent geographical area in which the covenanting occurs. The “major part” that consented to the establishment of a commonwealth can only be the “major part” of some predetermined area.³² Equally, Rousseau’s writings share the same Hobbesian ambiguity. “When the State is instituted”, Rousseau writes, “residence constitutes consent; to dwell within its territory is to submit to the Sovereign.”³³ But from initial Rousseau’s account the territory of such a state would be pockmarked, and not contiguous. It seems that for Rousseau, as Steven Johnston observes, “pursuit of unanimity is a luxury a would-be state cannot afford.”³⁴

The consent of the governed is the principle that is operative on the way out of the state of nature. Popular sovereignty is its product which makes sense only in the political context. While the People arises out of state of nature by unanimous covenanting. One of the important consequences of instituting a sovereign people is that

it cannot committ itself, even in treaties with foreign powers, to anything that would derogate from the original act of association; it could not, for example, alienate a part of itself, or to submit to another sovereign.³⁵

Once created as a sovereign polity, “the people” ought to remain in that state forever. If modern states are based on the principle of popular sovereignty, that would mean that popular sovereignty today cannot tell us anything about justifying territorial changes, or the emergence of the new polities. What is more, in contemplating criteria which would make a political community endure over time, Rousseau entertains the possibility of territorial re-construction of the political community – this time obviously outside of the state of nature, according to reasons for “expansion”, and reasons for “contraction”³⁶. For Rousseau, “[t]here are limits to the size [a state] can have if it is to be neither too large to be well-governed nor too small to maintain itself.”³⁷ However, that advice is not directed towards those concerned, the inhabitants, but rather towards the “skilled statesman.” The task of a “skilled statesman” is to “hit ... the mean” between contraction and expansion that is most favourable to the preservation of the State.³⁸ In doing so, his political actions are guided by prudence, rather than “abstract reason”.³⁹

³¹ Thomas Hobbes, *Leviathan* (ed.) J.C.A. Gaskin (Oxford and New York: Oxford University Press, 1996) at 123.

³² Thomas Hobbes, *Leviathan* (ed.) J.C.A. Gaskin (Oxford and New York: Oxford University Press, 1996) at 123. The conflict between unanimous covenanting and the majoritarian account was not lost on Hobbes’ contemporaries. Robert Filmer, for example, has noted that “it is not a plurality, but a totality of voices which makes an assembly be one will.” The act of instituting a sovereign by way of plurality is not “a proper speech.” R. Filmer, “Observations on Mr Hobbes’s *Leviathan*: Or, His Artificial Man – A Commonwealth” in G.A.J. Rogers (ed.) *Leviathan: Contemporary Responses to the Political Theory of Thomas Hobbes* at 7.

³³ *Supra* note 29. at 153.

³⁴ Steven Johnston, *Encountering tragedy: Rousseau and the project of democratic order* (Cornell University Press, 1999), at 35.

³⁵ *Supra* note 30. at 63.

³⁶ *Ibid*, at 92.

³⁷ *Ibid*, at 90.

³⁸ The reference to the “statesman” who is hitting the mean is not available in Cranston’s translation. See Jean-Jacques Rousseau, *The Social Contract and Discourses* (transl. and intr.) G. D. H. Cole (London: J.M. Dent Ltd, 1973) at 221.

³⁹ Allan Bloom, “Rousseau’s Critique of Liberal Constitutionalism”, in C. Orwin and N. Tarcov (eds.) *The Legacy of Rousseau* (Chicago: University of Chicago Press:1992), at 161.

At this point, let us go back to the four moments of polity-formation. At the level of triggering polity-formation – the ‘consent of the governed’ suggests that the polity should be created according to the wishes of the interested parties. However, that covenanting happens in the state of nature, and not within the political context. There is no one around to care what happens, and there are no negative political externalities to be imposed on those who do not join in creating a new polity. At the level of boundary-drawing, there is a silence and/or tension. Hobbes is not concerned with the territorial question, while Rousseau vacillates between (aspiration) to unanimity and the unarticulated version of *uti possidetis* principle – an already pre-existing territorial referent. Outside of the state of nature, Rousseau’s suggestions about boundary drawing continue to vacillate: between the demand that there aren’t any boundary alterations (popular sovereignty), and the prudential optimization of the size of the state. In sum, foundational accounts of polity-formation present a distorting picture (state of nature), and send conflicting normative signals (a-contextual unanimity and pre-determined boundaries) that continue to resonate in contemporary debates about self-determination.

Conclusion: Noticing the demise of self-determination as spoiling the game of international legal knowledge?

At this point I would like to pre-empt two possible critiques to the argument I have presented above. The first critique is contextual. It asks how one can lump together disparate cases of polity-formation, such as former Yugoslav republics, Quebec, and then again, the former Yugoslav province of Kosovo. The protracted break-up of Yugoslavia (including Kosovo) has been addressed in the international arena, while the secession of Quebec has been addressed in the domestic forum. However, the difference between the ‘inside’ and the ‘outside’ is becoming increasingly tentative. For example, the leading separatist party in Quebec, Parti Québécois denied the jurisdiction of the Canadian Supreme Court concerning unilateral secession of Quebec. For the PQ, the issue of secession was clearly a political question that does not fall within the ambit of the Canadian constitutional order. On the other hand, the pronouncements of the ‘domestic’ forum, the Supreme Court of Canada on the right to self-determination, have earned an international reputation, and are considered by many to be an authoritative account of law of self-determination.⁴⁰ Equally, the Badinter Committee – itself composed of constitutional lawyers - has woven its opinions using constitutional and international legal arguments.

The second possible critique is conceptual. If we notice the demise in the rhetoric of self-determination and reveal a critical potential behind it, are we approaching the game of international legal discourse in bad faith? Shouldn’t we ignore the demise of self-determination and instead opt for constructing those cases – Yugoslavia, Quebec, Kosovo - as part and parcel of some evolutionary trajectory? For example, one might be impelled to conclude that from these references it might be inferred - by means of *if-it-walks-and-talks-like-a-duck-then-it’s-a-duck* type of the argument - that self-determination of peoples is regulative of the final status of Kosovo. Christian Tomuschat has, for example, argued that the *spirit* of self-determination permeates the “entire texture” of the Resolution 1244. “Autonomy for a given human community”, writes

⁴⁰ See for example, James Crawford, “The Right of Self-determination in International Law: its Development and Future” in P. Alston (ed.) *Peoples’ Rights*, (Oxford and New York: Oxford University Press 2001) at 58.

Tomuschat, “cannot be invented by the Security Council without any backing in general international law”.⁴¹

However, in the case of Kosovo, the construction of an independent state is justified using a web of tropes; some moral, some prudential, and none of them legal. The vocabulary of prudential balancing involved in discourse of the great Western powers reveals the contingency and uniqueness of the proposed political settlement. If that is the case, where can such a language find the rhetorical resources for eliciting the strong obedience to the proposed solution?

To the contrary, the broken vocabulary of self-determination is a part of a general vocabulary of law. Risking over-simplification, we can understand the vocabulary of law not as a tool for constructing new realities, but rather as a vehicle for discovering dormant, yet authoritative meanings. As such, it is by its nature a project of eliciting strong obedience, and not only a grudging acceptance. The choice between the two vocabularies is, however, itself a prudential one.

That prudential choice obviously implies a trade-off. Forsaking self-determination will, on the one hand, further focus our attention on the outside actors who decisively affect the creation of the new polities. In addition, abandoning self-determination, may, paradoxically, empower trapped minorities and give them new rhetorical tools with which to fight the stigma of ethnonationalism.

On the other hand, the rejection of theorizing polity-formation in terms of popular *will-detection*, and instead seeing it as a process of contingent, *radical desire-management*, must have adverse consequences after the polity is fully constituted. If creating a polity is not a matter of a corporate will of the people, how can the continuation of political life, in consolidated circumstances, be seen as an exercise of that will? In other words, abandoning self-determination in international law would need to be followed by theoretical work on crafting new post-republican normative lenses for the *everyday* political life. Whether that work will be done will depend not only on individual theoretical sensibilities, but also on the larger geopolitical moves that affect our contemporary perception of polity-formation.

⁴¹ Christian Tomuschat, “Secession and Self-Determination” in M.G. Kohen (ed.) *Secession: International Law Perspectives* (Cambridge: Cambridge University Press 2006), 23-45, at 34. *Cf.* Helen Quane, “A Right to Self-Determination for the Kosovo Albanians?” (2000) 13 *Leiden Journal of International Law* 219-227. for an argument against Kosovo Albanian self-determination.