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Understanding Self-Determination as Non-Domination: Calling for a Shift from Government to Governance?

*"[...] The whole history of the right of self-determination is, for better and worse, the story of adaptation to the evolving struggles of peoples attempting to achieve effective control over their own destinies, especially in reaction to circumstances that are discriminatory and oppressive."*¹

Introduction

Since the Cold War the international community has witnessed an increasing number of intrastate violent conflicts against governments often resulting in the break-ups of nation states and, in cases, secessions. This emergence of a 'new pattern of conflict' in the 1990s primarily challenged the existing state authority and often resulted in separatist movements that threatened the territorial integrity of a state². In these instances, self-determination was, and is to this day, frequently invoked in disparate contexts and by various kinds of groups to support an equally diverse collection of purposes. The demand for self-determination of a group of people – religious, ethnic, cultural, linguistic – often collides with other fundamental principles of international law, such as the principle of state sovereignty and of the territorial integrity of the state. While acknowledged as a fundamental principle of international law and the international system, the very meaning of the right of self-determination remains unclear, due to its vague definition in international law that leaves it open to diverse interpretations and understandings. At the same time, the changing nature of contemporary conflicts together with the dynamism of the globalised international system makes a contemporary understanding of the right of self-determination all the more pressing³. This paper

¹ *Richard Falk*, *Revisiting the Right of Self-Determination*, in: id, *Human Rights Horizons. The Pursuit of Justice in a Globalizing World* (New York 2000) 111.

² *Hugh Miall, Oliver Ramsbotham and Tom Woodhouse*, *Contemporary Conflict Resolution* (Cambridge 2007) 59.

³ For a discussion of the role of Globalisation in self-determination conflicts see: *Frances*

therefore examines the very meaning of self-determination in international law and the ways in which self-determination can be exercised while at the same time acknowledging the legitimate claims and rights of all the different actors involved. To this end, the paper starts off by exploring the evolution of self-determination in international law to work out the prevailing understanding of the same. Arguing that the meaning of self-determination is commonly interpreted along the sovereignty paradigm, the paper proposes an alternative and relational interpretation of self-determination that allows for a more adequate understanding of competing claims and rights when self-determination conflicts arise. The paper subsequently discusses the implications of this alternative interpretation of self-determination for the ways in which self-determination may be exercised. Not only does this require the respect of the rights of others, but also the understanding of the locus of power within a given political entity. The paper therefore explores the extent to which the current debate on new forms of governance may be useful for imagining new forms of power-distribution that are in line with a relational understanding of self-determination. The paper concludes that an analytical shift from traditional forms of government to new ways of governance provides a viable tool for elaborating alternative and creative responses to self-determination conflicts.

The emergence of self-determination on the international scene

Self-determination first emerged on the international scene during World War I in two competing ideological forms, reflecting the differing worldviews of the East and the West. While the Central and Eastern European conception of self-determination was primarily based on the phenomenon of nationalism, the Western conception was derived from the enlightenment ideas of popular sovereignty and representative government and was less linked to ethnic and cultural factors than its Eastern counterpart⁴. For some decades, *Wilson's* approach to self-determination that reflected the Western conception of self-determination prevailed and it was only after World War II that the Eastern approach promoted by *Lenin* gained influence. By that time the split between the two ideological approaches to self-determination were represented by the Soviet Union on the one side and the European powers on the other side, evidenced in the Soviet Union challenge to

Stewart, Valpy FitzGerald and Rajesh Venugopal (eds.), *Globalization, Self-Determination and Violent Conflict* (New York 2006).

⁴ See for example *Richard Falk*, *Revisiting the Right of Self-Determination*, in: *ibid*, *Human Rights Horizons. The Pursuit of Justice in a Globalizing World* (New York 2000) 104; *Richard Falk*, *Self-Determination under International Law: The Coherence of Doctrine versus the Incoherence of Experience*, in: *Wolfgang Danspeckgruber* (ed.), *The Self-Determination of Peoples. Community, Nation, and State in an Interdependent World* (Boulder 2002) 39; *Thomas Musgrave*, *Self-Determination and National Minorities* (Oxford 1997) 2.

the colonial order whereas the European powers sought to maintain their colonies⁵. The articulation of self-determination that was subsequently included in the Charter of the United Nations (UN)⁶ has to be understood as a compromise between these two competing ideological conceptions⁷.

As a consequence, the Charter that emphasises the development of friendly relations among nations based on the respect for the principle of equal rights and self-determination as one of the purposes of the UN remains vague on the actual content of self-determination which was regarded as a mere political principle rather than a legal right⁸.

The most important step forward for acknowledging self-determination as a legal right in international law emerged in the context of decolonisation in which self-determination was associated with gaining independence from the colonial power. The *Declaration on the Granting of Independence to Colonial Peoples in General Assembly Resolution 1514 (XV)*, adopted by the UN in 1960⁹ provided for a right of self-determination while at the same time limiting that right by affirming the validity of the principle of the territorial integrity of states¹⁰. Similarly, the International Court of Justice in its Advisory Opinion in the *Namibia case* (1971) and the *Western Sahara case* (1975) interpret the right of self-determination as the right of former colonies to independence¹¹. Self-determination was thus predominantly linked to the idea of sovereignty in the form of independent statehood.

This tendency to interpret the right of self-determination in line with what can be called the sovereignty paradigm prevails to this day despite the existence of several instruments allowing for different possible outcomes of a self-determination process including: the *Declaration on Principles of International Law concerning Friendly Relations and Cooperations among States* that was adopted as General Assembly Resolution 2625 (XXV) in 1970 and the two major human rights covenants, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic Social and Cultural Rights* (1976)¹².

⁵ Antonio Cassese, *Self-determination of peoples: a legal reappraisal* (Cambridge 1995) 14.

⁶ The Charter of the United Nations was adopted in 1945 by the former League of Nations. Self-Determination is mentioned in Article 1(2) and Article 55.

⁷ Richard Falk, "Revisiting the Right of Self-Determination", in: *ibid*, *Human Rights Horizons. The Pursuit of Justice in a Globalizing World* (New York 2000) 106.

⁸ Charter of the United Nations, Article 1 (2).

⁹ Christian Tomuschat, *Modern Law of Self-Determination* (Dordrecht 1993).

¹⁰ Declaration on the Granting of Independence to Colonial Peoples (General Assembly Resolution 1514 [XV]), Paragraph 2.

¹¹ Legal Consequences for States of the Continued Presence of South Africa in Namibia, Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971; and Western Sahara (Advisory Opinion), *ICJ Reports* (1975).

¹² Declaration on Principles of International Law concerning Friendly Relations and Cooperations among States, GA Resolution 2625 (XXV), (1970): "[...] The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people." Cited in: *Allan*

The sovereignty paradigm: self-determination and political freedom as non-interference

There are several consequences of the common interpretation of self-determination derived from the sovereignty paradigm. This can be exemplified when looking at one of the essential questions in the application of the right of self-determination, that is who should be considered as 'a people' to whom this right is ascribed. The question becomes apparent in the discussion on the rights of indigenous people: While the representatives of indigenous peoples themselves insist on their right of self-determination as a people, states have hesitated to acknowledge such a right, the main reason being the fear that this would lead to a full recognition of their right of self-determination as a right to secession and independent statehood as established in the decolonisation era¹³. Thus, the two Conventions on indigenous rights adopted by the International Labour Organisation, the term 'people' is avoided altogether: the first Convention from 1957 uses the term populations and the second from 1989, although using the term peoples, makes clear in Article 1(3) that this usage must not be construed as having any implications in regard to its usual meaning under international law – namely the right of colonised people to attain independence. Moreover, the influence of this debate is reflected in the wording of the recently adopted *United Nations Declaration on the Rights of Indigenous Peoples* from September 2007. While acknowledging the right of their status as peoples and their consequential entitlement to the right of self-determination in article 3, the subsequent text limits the potential ways of exercising self-determination and introduces their right to autonomy or self-government in matters relating to their internal and local affairs and therewith not threatening the territorial integrity of the state¹⁴. Thus, it can be claimed that the declaration constitutes a restrictive interpretation of self-determination.

However, it can be argued that this formulation of indigenous peoples' right of self-determination is both restrictive and non-restrictive. It is restrictive in the sense that it seems to rule out secession or independent statehood as a way of realising self-determination. But it is non-restrictive in the sense that it acknowledges different ways of realising self-determination, offering a broader interpretation of self-determination. While a common interpretation of self-determination, derived from the sovereignty paradigm, limits the potential ways of realising self-determi-

Rosas, Internal Self-Determination, in: *Christian Tomuschat*, Modern Law of Self-Determination (Dordrecht 1993) 226; See also common article 1 of the ICCPR and the ICESCR, establishing the right of self-determination as a right of peoples to freely decide on their political status and pursue their economic, cultural and social development.

¹³ *Patrick Thornberry*, The Democratic or Internal Aspect of Self-Determination with some remarks on Federalism, in: *Christian Tomuschat*, Modern Law of Self-Determination (Dordrecht 1993) 128; *Richard Falk*, Revisiting the Right of Self-Determination, in: *ibid*, Human Rights Horizons. The Pursuit of Justice in a Globalizing World (New York 2000) 124.

¹⁴ Declaration on the Rights of Indigenous Peoples.

nation to secession or independent statehood, an alternative interpretation of self-determination, based on a relational understanding of the same, allows for a variety of outcomes from the self-determination process. This needs some more clarification, leading to the first key question of what the common interpretation of self-determination is, and whether it is appropriate for the understanding of and responding to self-determination conflicts.

Though it has been argued that self-determination does not necessitate a fixed outcome but that it rather prescribes the process leading to the outcome it remains, however, that the predominant understanding of self-determination is closely linked to the idea of state sovereignty. This paradigm and its consequences have been well described by *Iris Marion Young*:

“In this paradigm, a self-determining people dwell together in a relatively large territory in which only members of their group reside, and this homogenous territory is contiguous and bounded; the self-determining people exercises strong self-government rights over this territory. This autonomous region may not be sovereign, but rather may stand in formalised relation to a larger state. This paradigm of self-determination has guided many political events and international interventions [...] where groups with conflicting claims to exclusive sovereignty over a territory reside side by side within that territory, however, as in Northern Ireland or republics of the former Yugoslavia, adhering to this paradigm tends to produce injustice and perpetuate cycles of violence.”¹⁵

Iris Marion Young argues that this paradigm, together with its consequences for the interpretation of self-determination, is derived from the prevailing conceptualisation of self-determination as non-interference¹⁶. This interpretation, it is claimed, limits the meaning of self-determination and the ways in which it can be exercised. Most importantly, this predominant conception of self-determination ignores the relations of interdependence between self-determining peoples. Not only does it deny rights of interference by outsiders, but it also brings about the idea that self-determining entities have no obligations with respect to other entities. Self-determination on this account, then, postulates the leaving alone of the self-determining entity to conduct its affairs over its independent sphere. But:

“The peoples who have or claim self-determination are inevitably related to one another. They have numerous economic and social interactions where each affects the others, and each risks being adversely affected by actions of the others because of their relationship. Because agents and groups are often closely related in common contexts where their actions affect one another, and because they are often unequal in resources or power or both, some of the weaker units may be vulnerable to domination by more powerful units, not because they directly interfere,

¹⁵ *Iris Marion Young*, *Global Challenges. War, Self-Determination and Responsibility for Justice* (Cambridge 2007) 58.

¹⁶ *Iris Marion Young*, *Self-Determination as Non-Domination: Ideals Applied to Palestine/Israel*, in: *Ethnicities* (2005).

but because they determine conditions under which the weaker party is forced to act.”¹⁷

Thus, the idea that self-determination means to be totally independent from others is a ‘dangerous fiction’ and an inadequate picture of political and social realities. Rather, an adequate understanding of self-determination must promote the capacity to pursue own ends in the context of these relationships¹⁸. According to *Iris Marion Young*, it is the underlying and presupposed concept of freedom as non-interference that does not reflect the reality of interdependence of the social collectives. An alternative interpretation of self-determination can be derived from the idea of freedom as non-domination proposed by *Philip Pettit* and applied to self-determination conflicts by *Iris Marion Young*. And indeed – such a conception of self-determination seems more suitable to capture the reality in which self-determination conflicts occur.

The relational model: self-determination and political freedom as non-domination

The difference between the two understandings of self-determination is not so much grounded in the particular theoretical stream of republicanism, liberalism or communitarianism, but in the different perspectives on power-relations in society and its political arrangements. In fact, while *Pettit*’s conception of freedom as non-domination is republican, it is also compatible with the liberal idea of a neutral state that is impartial towards people’s cultural and communal affiliations. At the same time, the conception of freedom as non-domination is an inherently communitarian ideal, being both a social as well as a common good: It is a social good in the sense that it does not come about by virtue of the absence of other people, but rather by acknowledging social relations and the capacity of people to exercise domination over others; freedom as non-domination cannot be enjoyed by the mere absence of other people¹⁹. Non-domination is then a common good in particular from the perspective of vulnerability groups:

“The goal of freedom as non-domination gives a common cause to each of the salient vulnerability classes in contemporary society: to each of those groups who are rendered particularly vulnerable by virtue of gender or ethnicity or colour or sexual preference or whatever; to each of those groups who, in this sense, count as relatively oppressed [...] If we attach ourselves to the promotion of non-domi-

¹⁷ *Iris Marion Young*, *Global Challenges. War Self-Determination and Responsibility for Justice* (Cambridge 2007) 64.

¹⁸ *Iris Marion Young*, *Global Challenges. War Self-Determination and Responsibility for Justice* (Cambridge 2007) 47.

¹⁹ Communitarianism stresses the role of community in defining and shaping the individual. Communitarians generally criticise classical liberalism not recognising the value of community for individuals.

nation in any contemporary society, then one of the first things to recognise will be that the politics required for that enterprise cannot just be an atomistic project; it will have to be articulated at the level of group grievance and group assertion, as well as at levels involving individuals as such.”²⁰

According to *Pettit*’s conception of freedom as non-domination, persons are not free if other people have an arbitrary power of interference over them. This holds true even if that power is not being exercised – freedom requires the non-existence, not just the non-exercise, of such power. Non-domination, in this interpretation, means to enjoy the absence of interference by arbitrary powers and as such does not reject every form of interference²¹.

This raises the question of the criteria according to which power is to be considered arbitrary. There are at least two possible answers to this. The first is to define it as a process: Power is arbitrary to the extent that it is not externally constrained by effective rules, procedures, or goals that are common knowledge to all persons or groups concerned²². Alternatively, arbitrariness can be defined substantively: power is arbitrary when it fails to track the ‘welfare and world-view’ of those affected. This substantive definition allows for at least three further possible interpretations, depending on whether the welfare and world-view of those affected are interpreted as (a) their objectively-defined interests, (b) their subjective preferences, or (c) their shared ideas as expressed through suitably-structured deliberative and democratic procedures²³. While *Pettit* argues in favour of the latter, it is here argued that a combination of (a) and (c) is preferable, as participatory procedures in themselves may not guarantee non-domination. What is needed in addition is the assertion of fundamental rights that underpin the participatory procedures. Thus, the objectively defined interests are presented as human rights that deliver the framework for the structuring of the participatory procedures.

However construed, *Pettit* identifies three sufficient elements of a relationship of domination: (1) the capacity to interfere on (2) an arbitrary basis in (3) certain choices that the other is in a position to make. While the first refers to an actual capacity, the power to interfere, the second element of a domination relationship emphasises the arbitrary nature of the act. An act of interference is regarded arbitrary when the interests or opinions of the affected person or group or people are being disregarded. The third feature stresses the fact that an agent may dominate another in a certain domain of choice, sphere or aspect or period of life, without necessarily doing so in all²⁴. According to this definition, a non-arbitrary use of state power can therefore be described in the following way:

²⁰ *Philip Pettit*, *Republicanism. A Theory of Freedom and Governance* (Oxford 1997) 124.

²¹ *Philip Pettit*, *Republicanism. A Theory of Freedom and Governance* (Oxford 1997) 26.

²² *Frank Lovett*, *Domination: A Preliminary Analysis*, in: *The Monist* vol. 84 (2001) 98–112.

²³ *Henry Richardson*, *Democratic Autonomy: Public Reasoning About the Ends of Policy* (Oxford 2002) 37.

²⁴ *Philip Pettit*, *Republicanism. A Theory of Freedom and Governance* (Oxford 1997) 53–58.

"[...] that the power be exercised in a way that tracks, not the power-holder's welfare or world-view, but rather the welfare and the world-view of the public. The acts of interference of the state perpetrated by the state must be triggered by the shared interests of those affected under an interpretation of what those interests require that is shared, at least at the procedural level, by those affected."²⁵

And another important point to be raised: Whether or not a domination relationship was consensual or not does not change the nature of the relationship being one of domination and subjugation²⁶. What constitutes domination is not the exercise of arbitrary interference, but that one has the capacity for doing so, in not being equals²⁷. Thus, the differences between this form of freedom and the understanding of freedom as non-interference are based on the fact that one can be dominated by someone, without suffering interference (example of happy slave), but also can be interfered without being dominated (example of suitable laws)²⁸. So far so good – but how do these different conceptualisations of freedom impact on our understanding of self-determination in international law?

Proposing an alternative interpretation of self-determination

First, it is necessary to clarify how self-determination in international law is linked to questions of freedom. To this end, the notion of self-determination itself has to be looked at. As stated in international law, self-determination most generally refers to the freedom of peoples to determine their own political status and form of government through free expression of their will. Self-determination therefore refers to the ability of a group to participate in the determination of the specific political arrangements and institutions, conditions for their participation, as well as the policies to be implemented. The notion of self-determination is thus inherently linked to the idea of freedom: To determine one's own political status and the conditions for it is only possible when one enjoys a certain sphere of freedom. But what kind of freedom is it that allows for self-determination? Evidently, self-determination is concerned with freedom in respect of political matters, or political freedom²⁹.

²⁵ *Philip Pettit*, *Republicanism. A Theory of Freedom and Governance* (Oxford 1997) 56.

²⁶ Consent to interference is not a sufficient check against arbitrariness or domination and thus the following two ideas are problematic in the light of the idea of freedom as non-domination: unconstrained majoritarianism and the doctrine of free contract. *Philip Pettit*, *Republicanism. A Theory of Freedom and Governance* (Oxford 1997) 62.

²⁷ *Philip Pettit*, *Republicanism. A Theory of Freedom and Governance* (Oxford 1997) 63.

²⁸ *Philip Pettit*, *Republicanism. A Theory of Freedom and Governance* (Oxford 1997) 80.

²⁹ Political freedom is intertwined with economic, social and cultural freedom. It is important, however, to stress that the conception of freedom that is proposed here is to be applicable to self-determination in international law. The intention is not to define freedom in all its meanings.

In line with the earlier discussion, two interpretations of self-determination based on differing conceptions of political freedom can be distinguished: a sovereignty interpretation derived from the idea of political freedom as non-interference and a relational interpretation derived from the idea of non-domination³⁰.

The consequences of the first and dominant understanding of self-determination have already been discussed. Now let us examine an alternative understanding of self-determination as non-domination that has been proposed by *Iris Marion Young*.

According to the conception of freedom as non-domination, peoples can be free and therefore able to be self-determining only when they stand in non-dominating relations with others. And as self-determining entities stand in relations with others, they cannot ignore the claims of others when their actions affect those others:

“Insofar as their activities affect one another, peoples are in relationship and ought to negotiate the terms and effects of the relationship.”³¹

Following from that, *Iris Marion Young* emphasises four elements of self-determination in international law: first, the presumption of non-interference and the *prima facie* right of peoples to self-governance; second, self-determination as implying the right of affected others to make claims on the self-determining group and to negotiate the terms and effects of the relationship; third, self-determination of peoples requires recognised institutions and procedures through which peoples negotiate, settle conflicts as well as enforce agreements; fourth and finally, self-determination of peoples requires the participation of peoples in designing and implementing these institutions that are to minimise overall domination. As a result:

“Sovereign independence is neither a necessary nor a sufficient condition of self-determination understood as non-domination [...] self-governing peoples ought to recognise their connections with others, and make claims on others when the actions of those others affect them, just as the others have a legitimate right to make claims on them when their interdependent relations threaten to harm them.”³²

What is needed in light of the actual situation of conflicting peoples is a conception of self-determination that pays due regard to the fact that these groups often

³⁰ With sovereignty Young means having final authority within a territory, regulating all its activities. *Iris Marion Young*, *Global Challenges. War, Self-Determination and Responsibility for Justice* (Cambridge 2007) 45.

³¹ *Iris Marion Young*, *Global Challenges. War, Self-Determination and Responsibility for Justice* (Cambridge 2007) 51.

³² *Iris Marion Young* exemplifies the difference between a concept of self-determination as non-interference and a concept of self-determination as non-domination in reference to the conflict between the Goshutes (a Native Indian Tribe) and residents of the state of Utah. *Iris Marion Young*, *Global Challenges. War, Self-Determination and Responsibility for Justice* (Cambridge 2007) 53–57.

dwell together in territories³³. And indeed, contemporary post Cold War conflicts are predominantly intrastate conflicts where conflicting parties reside on the same territory³⁴. Against this background – and by rejecting the model of self-determination as non-interference and its emphasis of the sovereignty paradigm – the alternative understanding of self-determination as non-domination calls for imagining alternative ways of addressing of self-determination conflicts that do not necessarily involve independent sovereignty³⁵.

The meaning of self-determination in international law is thus understood to mean to be free from domination, hence from arbitrary interference. Understood in this way, self-determination conflicts are then essentially conflicts over relations of domination and therewith over the just distribution of power within a political entity. Understood in this way, self-determination as non-domination points towards the necessity of respecting self-determination as non-domination through the implementation of appropriate models of power-distribution and power-sharing in divided societies³⁶. Non-domination as a normative ideal to interpret self-determination does not, however, give direct guidelines for action³⁷. On the contrary: to ensure non-domination, power-relations and issues of domination must be regulated both by institutions in which all people concerned participate as well as by ongoing negotiations among them³⁸. Any response to claims for self-determination therefore must first and foremost address the fundamental issues of domination and power in a political entity, especially in the context of minority-majority relations.

Realising self-determination as non-domination

Frequently, demands for greater self-determination are caused by structural, cultural and political violence, which invariably encroach on the political freedom of affected groups, often presenting domination of one group's interest over the

³³ *Iris Marion Young*, *Global Challenges. War, Self-Determination and Responsibility for Justice* (Cambridge 2007) 59.

³⁴ *Hugh Miall, Oliver Ramsbotham and Tom Woodhouse*, *Contemporary Conflict Resolution* (Cambridge 2007) 61.

³⁵ In reference to the claims of indigenous peoples, Young holds that their claims are related to domination issues. An alternative understanding of self-determination establishes the right to their self-governance that should not be interfered with by others arbitrarily. The same applies in the case of Palestine and Israel. *Iris Marion Young*, *Global Challenges. War, Self-Determination and Responsibility for Justice* (Cambridge 2007) 59.

³⁶ For a discussion of models of power-sharing and their implications for divided societies see for example: *Ian O'Flynn, David Russell and Donald Horowitz*, *Power-Sharing: Institutional and Social Reform in Divided Societies* (London 2005).

³⁷ *Iris Marion Young*, *Global Challenges. War, Self-Determination and Responsibility for Justice* (Cambridge 2007) 70.

³⁸ *Iris Marion Young*, *Global Challenges. War, Self-Determination and Responsibility for Justice* (Cambridge 2007) 40.

interest of others. There are many options available to address the causes of such violence; however, it appears that the option of last resort, namely secession, is increasingly invoked by the oppressed group to the extent that the term self-determination and secession have become synonymous. This is not surprising as the conception of self-determination as non-interference supports an equation of self-determination with secession and independent statehood. But understanding self-determination as non-domination requires a more flexible and creative approach towards competing self-determination claims. According to this understanding, self-determination is never exercised in a vacuum and is not to be understood as an absolute right, but has to be balanced with other competing rights and principles of international law. Just as the freedom of one person ends where the freedom of another person begins, the right of self-determination is constrained by others' right for self-determination. As Kant famously stated:

“Freiheit (Unabhängigkeit von eines anderen nötiger Willkür) sofern sie mit jedes anderen Freiheit nach einem allgemeinen Gesetz zusammen bestehen kann, ist dieses einzige, ursprüngliche, jedem Menschen kraft seiner Menschheit zustehende Recht. – Die angeborene Gleichheit [...] mithin die Qualität des Menschen, sein eigener Herr (*sui iuris*) zu sein [...]”³⁹

In this light, secession may only be exercised under specific circumstances and depends on the concrete context in which the self-determination conflicts occur. This view is supported both legally as well as normatively. Normatively, one such attempt is proposed by *Allen Buchanan's* Remedial-Right-Only Theory that legitimates a unilateral right to secede only in severe cases of injustice and gross human rights violations⁴⁰. In international law, this stance has increasingly found support with the advance of human rights law and is observable in the debate on humanitarian interventions⁴¹.

From a more practical view it is also important to note that secession is a conflict management measure rather than a conflict resolution measure – in other words, it seeks basically to separate people rather than addressing the contradictions at the core of the conflict. In that case, secession is not a guarantee for a final settlement of the conflict and might even give rise to new conflicts by generating new majority-minority relations⁴².

This does not mean that secession or independent statehood is never a legitimate way to exercise self-determination. But by moving away from the sovereignty paradigm with its inherent claim for independent statehood, self-determination as non-domination examines the many different ways in which self-determination may be exercised, paying due regard to its relational character. In this light, secession is only one of many possible outcomes of the self-determination

³⁹ *Immanuel Kant*, *Die Metaphysik der Sitten*. Rechtslehre (Stuttgart 1990) 77.

⁴⁰ *Allen Buchanan*, *Justice, Legitimacy, and Self-Determination* (Oxford 2004).

⁴¹ See for instance: *J. L. Holzgrefe* and *Robert O. Keohane*, *Humanitarian Intervention. Ethical, Legal, and Political Dilemmas* (Cambridge 2003).

⁴² See *Jaroslav Tir*, *Keeping Peace after Secession: Territorial Conflicts Between Rump and Secessionist States*, in: *Journal of Conflict Resolution* (2005).

process⁴³. But what are the other ways in which self-determination as non-domination is being exercised?

Generally: all the ways helping to diminish domination and the power of arbitrary interference. Thus, while self-determination as non-interference focuses on sovereignty of entities, the conceptualisation of self-determination as non-domination allows for a more flexible approach and seeks a less hierarchical distribution of power⁴⁴. Thereby, not only consensual and unilateral secession, but also various forms of autonomy, federalism, consociation regimes, decentralisation and devolution, the principle of subsidiarity, local self-governance and participation of the different societal groups in political decision-making processes are possible ways for enhancing and exercising self-determination as non-domination⁴⁵. And indeed, these may be better ways of exercising self-determination than the alternative of secession, both in the interest of the state and of the people⁴⁶. It has been shown that autonomy can help in the solving of conflicts as one claimed advantage of autonomy is its potential for resolving self-determination conflicts as it allows for the accommodation of conflicting claims (enhanced self-governance versus territorial integrity)⁴⁷. Moreover, different forms of federalist or consociation structures may prevent self-determination conflicts and are potential solutions to self-determination conflicts, as they provide for the allocation of political power to subunits of the state⁴⁸. These possible ways do differ in many respects and have to be evaluated in the light of the actual self-determination conflict. For instance, both federalism and consociation reject majoritarian democracy to some extent, but they are not identical: while consociational democracy emphasises grand coalition and segmental autonomy, proportionality and minority veto, federalism gives primary weight to a guaranteed division of

⁴³ *Frederic Kirgis*, The Degrees of Self-Determination in the United Nations Era, in: *The American Journal of International Law* vol. 8, No. 2 (1994).

⁴⁴ *Iris Marion Young*, Global Challenges. War, Self-Determination and Responsibility for Justice (Cambridge 2007) 59.

⁴⁵ *Asbjørn Eide*, In Search of Constructive Alternatives to Secession, in: *Christian Tomuschat*, *Modern Law of Self-Determination* (Dordrecht 1993).

⁴⁶ *Otto Kimminch*, A 'Federal' Right of Self-Determination?, in: *Christian Tomuschat*, *Modern Law of Self-Determination* (Dordrecht 1993); *Patrick Thornberry*, The Democratic or Internal Aspect of Self-Determination with some remarks on Federalism, in: *Christian Tomuschat*, *Modern Law of Self-Determination* (Dordrecht 1993); For a discussion of the role of local self-governance see: *Marc Weller* and *Stephan Wolff*, *Autonomy, Self-Governance, Conflict Resolution. Innovative Approaches to Institutional Design in Divided Societies* (Abingdon 2005).

⁴⁷ *Hans-Joachim Heintze*, On the Legal Understanding of Autonomy, in: *Markku Suksi* (ed.), *Autonomy: Applications and Implications* (The Hague 1998) 11.

⁴⁸ On a theory of federalism see *Stanislaw Ebrlich*, Theoretical Reflections in Federations and Federalism, in: *International Political Science Review*, Vol. 5, no. 4 (1984). For a comparison of federalism and consociationalism: *Arend Lijphart*, Non-Majoritarian Democracy: A Comparison of Federal and Consociational Theories, in: *The Journal of Federalism* vol. 15 (1985); See also *Daniel Elazar*, Federalism and Consociational Regimes, in: *Publius* vol. 15, No. 2 (1985).

power between central and regional governments⁴⁹. There are difficulties with the different ways of exercising self-determination as well, for example, the question whether the concept of ethnic federalism is suitable for the resolution of self-determination conflicts based on ethnicity, or whether this stimulates conflicts⁵⁰. The same applies to the principles of decentralisation, devolution and subsidiarity.

In general and most importantly, self-determination has to be understood as a flexible, context-dependent right which does not necessitate a fixed outcome but rather prescribes the process leading to the outcome⁵¹. This process is not a one-off event but an ongoing process of negotiation and rearrangement of the relationships between the different societal collectives through democratic decision-making.

However, the regulation of these interdependent self-determining entities requires working joint governance and institutions and processes through which self-determination conflicts are to be resolved. And indeed, when dealing with self-determination claims, the international community has to deal with questions of governance within societies where self-determination conflicts arise⁵². This leads us to the current and fashionable debate on the concept of governance in contemporary political science. Linking the conceptualisation of self-determination as non-domination to the debate on new forms of governance points toward an analytical shift from government to governance – whereby governance refers to a less hierarchical form of governing that promotes decentralisation and local self-governance. The question then is how the current debate on governance may contribute to imagining new forms of power-distribution that are in line with self-determination as non-domination.

Self-determination and governance

As discussed earlier, the central question in regard to self-determination understood as non-domination is how to diminish domination and distribute power within the boundary of a given state – or across boundaries in the case of regionalisation and globalisation. Thereby, governance as a political concept constitutes a problem-solving mechanism useful to settle self-determination conflicts⁵³.

⁴⁹ Specifically discussing India: *Sunita Parikh and Barry Weingast*, A Comparative Theory of Federalism: India, in: *Virginia Law Review* vol. 83, No. 7 (1997).

⁵⁰ *Aalen Lovise*, Ethnic Federalism and Self-Determination for Nationalities in a Semi-Authoritarian State: the Case of Ethiopia, in: *International Journal on Minority and Group Rights* vol. 12 (2006).

⁵¹ *Garth Nettheim*, 'Peoples' and 'Populations': indigenous peoples and the rights of peoples, in: *James Crawford* (ed.), *Rights of Peoples* (Oxford 1988) 119.

⁵² *Hugh Miall, Oliver Ramsbotham and Tom Woodhouse*, *Contemporary Conflict Resolution* (Cambridge 2007) 113.

⁵³ *Nicolai Dose*, Governance im Geflecht von Problemen, Ebenen und Akteuren, in: *Julia*

In order to understand the role of governance in the context of self-determination, it is necessary to understand the concept of governance itself and how it relates to the notion of government. Though promoted widely recently, governance is an old term and was traditionally associated with government, referring to the exercise of power by political authorities⁵⁴. While not used very much for some time the interest in the concept of governance re-emerged in the 1980s as a reaction to a change in political practices and changes in society due to increasing globalisation, the rise of networks crossing the state-civil society divide and increasing fragmentation of the world system. These developments raise the question of how to regulate and govern a society in an increasingly complex world and in situations of competing self-determination claims⁵⁵.

Although used in a whole range of disciplines and being a widely used concept, no common definition of governance has yet been agreed on, and the concept is applied in many diverse contexts⁵⁶. Differences of definitions can be traced either in regard to the substantive content of governance or in regard to practice⁵⁷. One and maybe the most important similarity between the different definitions of governance is that they refer not only to state actors and institutions as the only relevant ones, but stress the role of networks in the pursuit of the common goals. Moreover, governance analysis focuses on the affect of the particular political framework within which citizens and officials act and politics occurs, and which shape the identities and institutions of civil society⁵⁸. Governance can therefore be generally defined as the setting, application and enforcement of 'rules of the game':

"Governance requires the design of institutions to meet the demands of collective decision-making in increasingly complex circumstances [...] As a baseline definition it can be taken that governance refers to the rules and forms that guide collective decision-making."⁵⁹

These rules need to be legitimate in order to be stable. The use of force or arbitrary power to uphold these rules may cause resistance through exit (secession) or violent action⁶⁰. According to this definition, governance is treated as both activity and process. It reflects upon human agency and at the same time refers to a

von Blumenthal, Stephan Bröckler (Hrsg.), *Von Government zu Governance. Analysen zum Regieren im modernen Staat* (Hamburg 2006) 23–47.

⁵⁴ Jon Pierre and Guy Peters, *Governance, Politics and the State* (Basingstoke 2000) 1.

⁵⁵ Anne Mette Kjaer, *Governance* (Boulder 2004) 6.

⁵⁶ Anne Mette Kjaer, *Governance* (Boulder 2004) 2.

⁵⁷ Goran Hyden, Julius Court and Kenneth Mease, *Making Sense of Governance. Empirical Evidence from 16 Developing Countries* (Boulder 2004) 12.

⁵⁸ Anne Mette Kjaer, *Governance* (Boulder 2004) 10.

⁵⁹ Gerry Stoker, *Designing Institutions for Governance in Complex Environments: Normative, Rational Choice and Cultural Institutional Theories Explored and Contrasted*, ESCR Fellowship Paper No. 1 (2004).

⁶⁰ Anne Mette Kjaer, *Governance* (Boulder 2004) 12.

process of setting parameters of policy development and implementation⁶¹. Thereby, the promotion of the concept of governance is based on the common assumption that the inclusion of civil society will enhance both the efficiency and the legitimacy of governance. Yet, concepts advocating civil society involvement are still contested on grounds of democratic accountability and democratic equity. It can be maintained nevertheless that governance, as it is used in the contemporary political debate, refers to processes and actors beyond the narrower realm of government, distinguishing it from the traditional concept of government and including civil-society actors. In contrast to the narrower concept of government, governance in this sense has the capacity to understand the whole range of institutions and relationships that are involved in the process of governing. In this respect, governance refers to at least three types of displacement of state power and control: first, upwards to the international level; second, downwards, towards the regional and communal level; and finally, outwards, to institutions operating under considerable discretion from the state⁶². Governance then refers to the body of different forms of collective regulation of issues of concern to a given political entity⁶³. Thereby, and in line with self-determination as non-domination, the regulation of the political entity is based on ideas of legitimacy and inclusion. Governance then requires a more effective participation of different societal groups and of minorities in political decision-making to prevent abuses of power⁶⁴. As such, it has the capacity to diminish domination of one group over the other and thus enhances self-determination as non-domination.

To sum up, in a very general sense governance refers to the manifold ways in which problems are solved within a certain political entity. As such, governance analysis looks at all the rules, procedures and practices affecting how powers are exercised within that particular political entity⁶⁵. The aim is to adopt new ways of governance that brings central authority closer to its citizens, make it more effective, and consolidate the legitimacy of its institutions. Because of the focus on the just distribution of power within a state, self-determination as non-domination has to be linked to debates on governance that explore the power of the central

⁶¹ Goran Hyden, *Julius Court and Kenneth Mease*, Making Sense of Governance. Empirical Evidence from 16 Developing Countries (Boulder 2004) 16.

⁶² Jon Pierre and Guy Peters, *Governance, Politics and the State* (Basingstoke 2000) 77.

⁶³ See: Renate Mayntz, Governance im modernen Staat, in: Arthur Benz (Hrsg.): *Governance – Regieren in komplexen Regelsystemen* (Wiesbaden 2004) 65–76; R. Rhodes, Understanding Governance. Policy Networks, Governance, Reflexivity and Accountability (Philadelphia 1997); Jan Kooiman (ed.), *Modern Governance. New Government-Society Interactions* (London 1993).

⁶⁴ The Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note, in: *International Journal on Minority and Group Rights*, Vol. 12 (2005); Dewi Fortuna Anwar, Pluralism and Good Governance, in: *International Journal on Minority and Group Rights* vol. 8 (2001).

⁶⁵ Julia von Blumenthal, Stephan Bröckler, Von Government zu Governance – Analysen zu einem schwierigen Verhältnis, in: dies. (Hrsg.), *Von Government zu Governance. Analysen zum Regieren im modernen Staat* (Hamburg 2006) 8.

government of a state, the powers given to subunits of the state and the nature of state-society relations more generally. The claim is that a shift in the perspective on state-society relationships and dependencies can be used for resolving self-determination conflicts⁶⁶.

Thus, defining new forms of governance goes hand in hand with new perspectives on the changing role of government in society and is fundamental to the concept of governance. Thereby, government and governance are not interdependent and mutually exclusive terms and the role that government plays in governance is a variable and not a constant. There are different models of governance – some that are more state-centric and some that are more society-centric. It seems more feasible to understand the role of government and of governance as a continuum than as a sharp dichotomy⁶⁷. However, to understand the distribution of power within the modern state and to analyse the problem-solving mechanisms applied in cases of self-determination conflicts, one has to shift the focus from a mere analysis of the traditional role of government to look for alternative ways of governance that allow for greater self-determination of the different societal collectives.

The shift from government to governance

A common way of describing the shift from government to governance is to differentiate between old or traditional roles of governance and new and more flexible forms of governance. While old governance refers to the traditional notion of steering by national governments from the top down, new governance refers to how the centre interacts with society and asks for more self-organising networks⁶⁸. According to the traditional view of government, the state – and with it central government – constitutes the main locus of power within the state. The new concept of governance, however, challenges this understanding of government and analyses the role of the state in modern society⁶⁹. What is at stake is not a promoted weakening of the state, but how it transforms and the new models of governance that emerge with it. For instance, the state has to cope with regionalisation, globalisation but also localisation which is driven by cultural, ethnic or territorial identities and not by mere economic motives⁷⁰. One strategy to respond to challenges to the traditional understanding of the state and its govern-

⁶⁶ *Anne Mette Kjaer*, *Governance* (Boulder 2004) 17.

⁶⁷ *Jon Pierre and Guy Peters*, *Governance, Politics and the State* (Basingstoke 2000) 29.

⁶⁸ *Anne Mette Kjaer*, *Governance* (Boulder 2004) 11.

⁶⁹ *Jon Pierre and Guy Peters*, *Governance, Politics and the State* (Basingstoke 2000) 82 and 114.

⁷⁰ This, for instance, allows for an understanding of self-determination across borders, facilitated by regionalisation, a weakening of the sovereignty concept, and networking across borders that makes the importance of independent statehood less and less important for groups claiming self-determination.

ment is by way of promoting new models of participation of the different actors (groups, associations, etc.) involved in the political decision-making process. Sub-national governments thus become a powerful institutional tool to promote regional and local interests.

Another way of enhancing participation of the different actors in the political process is to promote democratic governance structures, with the aim to return governance to the people:

"The assumption is that to govern appropriately a democratic political system must be capable of linking demands and wishes of the public directly to policies [...]. Further, the traditional governance view often argues that most representative institutions do not permit adequate debate and discussion but rather depend more on one side prevailing over the other with as little discussion as possible."⁷¹

While not agreeing on one specific form of democracy, governance theory criticises representative democracy on its own as inadequate and argue that it needs to be supplemented with other forms to achieve democratic accountability⁷². From a philosophical perspective two main governance alternatives to the existing (criticised) pattern of government can be differentiated: first, communitarianism with its idea that the more appropriate basis for governing is the community⁷³; and secondly, deliberative democracy with an emphasis on the reform of decision-making institutions. Within the latter, the lower level of government is understood as the most suitable locus to enhance deliberative democracy. This seems to be compatible with the communitarian alternative. Most fundamentally, the notion of deliberative democracy refers to a process of involving the public in making decisions through open debate and dialogue. Deliberative democracy stands in contrast both to representative as well as direct democracy. In the former case, the public is only involved in the process as voters that select the elites who will then make the decisions for them; in the latter case, the public makes the decision themselves, but without or only little collective deliberation or confrontation of the competing views on the issues⁷⁴. However, the idea of deliberative democracy is being criticised itself: the more heterogeneous the community is, the more difficult it becomes to find a social basis of communication allowing a meaningful dialogue⁷⁵.

⁷¹ *Jon Pierre and Guy Peters, Governance, Politics and the State (Basingstoke 2000) 137.*

⁷² *Anne Mette Kjaer, Governance (Boulder 2004) 14.*

⁷³ "Their implicit, and at times explicit, plan is to decentralise government as far as possible and to make smaller 'communities' responsible for more aspects of public policy. [...] Communitarianism proceeds well beyond the simple desire to devolve governing to smaller governments and communities as defined in a common-sense manner. It involves as much as anything else a shift away from individualism towards a more collective sense of governing. This involves rethinking the basis on which public policy is made: rather than individual utility maximization, policy is to be made on the basis of community values, presumably held by all participants." *Jon Pierre and Guy Peters, Governance, Politics and the State (Basingstoke 2000) 148.*

⁷⁴ *Jon Pierre and Guy Peters, Governance, Politics and the State (Basingstoke 2000) 150.*

⁷⁵ This presents a problem to the 'ideal speech theory' proposed by Habermas. *Jon Pierre and Guy Peters, Governance, Politics and the State (Basingstoke 2000) 153.*

This is likely the case in the context of self-determination conflicts. While it is not the aim of this paper to discuss in detail which understanding of the democratic process is to be the favoured one in the context of self-determination conflicts, it is important to stress that the concept of governance is not only relevant to democratic regimes but also to other regime types. Indeed, applying the concept of governance allows for a shift of focus from a pre-defined ideal of political institutions towards examining alternative ways in which the legitimacy of government is possible⁷⁶. In the same light, the enforcement of pre-defined *Good Governance* that has been mainly promoted by international financial and developmental institutions and that refer to an unsatisfactory functioning of government and the need for more efficient administration is contrary to the idea of self-determination as non-domination⁷⁷. Rather than being framed and negotiated through participatory processes through which the people concerned are able to express their free will, imposing any blueprint of governance runs against the very ideal of a self-determination process. However, democratic processes⁷⁸ as well as grass-roots participation in the negotiation process⁷⁹ are inevitable if self-determination as non-domination is taken seriously.

In summary, the shift from government to governance refers to the creation of more participatory governing, paying due regard to the fact that the state and society are linked together in the process of creating appropriate governance mechanisms⁸⁰. Changes in society have necessitated the shift of focus from old forms of government to new forms of governance, which can be understood as a strategy to link the contemporary state to contemporary society. Therefore, these new forms of governance are distinctly different from previous conceptualisations of the state and state-society relationships⁸¹. Though the state remains the main body in the pursuit of the collective interest, it is challenged to fit the society of the late twentieth and early twenty-first century⁸².

⁷⁶ Anne Mette Kjaer, *Governance* (Boulder 2004) 150.

⁷⁷ Francis Botchway, *Good Governance: The Old, The New, The Principle, and The Elements*, in: *Florida Journal of International Law* vol. 13 (2001) 160.

⁷⁸ Jorge Valadez, *Deliberative Democracy: Political Legitimacy and Self-Determination in Multicultural Societies* (Boulder 2001).

⁷⁹ Frederic Pearson, *Dimensions of Conflict Resolution in Ethnopolitical Disputes*, in: *Journal of Peace Research* vol. 38, No. 3 (2001).

⁸⁰ Jon Pierre and Guy Peters, *Governance, Politics and the State* (Basingstoke 2000) 49.

⁸¹ Arthur Benz, *Governance – Modebegriff oder nützliches Sozialwissenschaftliches Konzept?*, in: *ders.* (Hrsg.): *Governance – Regieren in komplexen Regelsystemen. Eine Einführung* (Wiesbaden 2004) 11–28.

⁸² Jon Pierre and Guy Peters, *Governance, Politics and the State* (Basingstoke 2000) 68.

Conclusion

In criticising the emphasis of the sovereignty paradigm of the traditional concept of self-determination in international law, this paper proposed an alternative interpretation based on a relational understanding of self-determination as non-domination. It further argued that self-determination as non-domination can be exercised and respected in manifold ways and that the different ways of exercising self-determination move away from the sovereignty paradigm. This led to the idea of a less hierarchical distribution of power by promoting a shift from government to governance and the participation of the different societal groups in the political decision-making processes. Thereby, the realisation of self-determination has to be balanced with other, competing, principles and rights of international law. This, however, does not rule out the option for independent statehood or secession.

There is not one final answer to how best accommodate self-determination claims and the specific solutions are context-dependent and subject to negotiation. Taking the right of self-determination as non-domination seriously, however, requires innovative forms of governance within modern societies. Thereby, the most essential characteristic of governance is its emphasis on citizen participation and the consequential acceptance of the legitimacy of governmental institutions in line with self-determination as non-domination.

New ways of governance allow for a more effective participation of different societal groups and of minorities in the political decision-making to prevent abuses of power⁸³. Governance, understood as a problem-solving mechanism, thereby allows for rearranging the *loci* of power in a given society in order to prevent domination and the use of arbitrary power. Furthermore, in order to understand the role of government and to respond to claims for self-determination as non-domination, governance-research may shed some light on better and innovative ways of including the different societal actors in the decision-making process and on new forms of institutions that add to self-determination as non-domination. Further research in this area of governance analysis may help to reveal the power distribution in a given political entity, particularly in the light of multi-level systems (such as federalism, regionalisation, or decentralisation) and weakening sovereignty.

Nonetheless, it is important to remember that the blueprint of how the political entity is to be organised must not be imposed. In the end, peoples have to freely determine their political status and frame their institutions. Only then they are self-determined.

⁸³ See: The Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note, in: *International Journal on Minority and Group Rights*, Vol. 12 (2005); see also *Dewi Fortuna Anwar*, Pluralism and Good Governance, in: *International Journal on Minority and Group Rights* vol. 8 (2001)

Summary

Obwohl Selbstbestimmung gemeinhin als ein fundamentales Prinzip des internationalen Rechts gilt und auch in verschiedenen Rechtsquellen eine entsprechende Anerkennung findet, sind sowohl die Bedeutung als auch die Umsetzung desselben bislang umstritten. Dies ist vor allem auf die Vagheit und die damit verbundene Interpretationsvielfalt des Selbstbestimmungsrechts zurückzuführen. Im folgenden wird zunächst eine Interpretation des Selbstbestimmungsrechts vorgestellt, welche in der wissenschaftlichen Literatur und rechtlichen Auslegung überwiegt. Basierend auf einem liberalen Verständnis politischer Freiheit als Nicht-Einmischung nimmt diese Interpretation auf die Idee staatlicher Souveränität (Souveränitätsparadigma) Bezug. Abgeleitet von einem alternativen Freiheitsbegriff wird hier ein alternatives Verständnis von Selbstbestimmung vorgeschlagen, welches den relationalen Gehalt von Selbstbestimmungskonflikten widerspiegelt. Ein solches alternatives Verständnis von Selbstbestimmung im internationalen Recht verlangt nicht nur die Berücksichtigung der konkurrierenden Rechte aller Beteiligten, sondern auch die Untersuchung der gegebenen *loci* von Machtkonzentration. Eine Verlagerung der Analyse von *Government* zu *Governance* könnte die Erarbeitung alternativer und kreativer Lösungsansätze für Selbstbestimmungskonflikte ermöglichen, welche dem relationalen Gehalt des Selbstbestimmungsrechts Rechnung tragen. Es wird die These vertreten, daß die Ergebnisse der aktuellen *Governance*-Forschung und -Debatte neue Wege zur Umsetzung von relationaler Selbstbestimmung aufzeigen können.

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