THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW

Proposal for a Critical Interdisciplinary Legal, Historical, and Developmental Study

August 2023

PREAMBLE

Role of the principle of self-determination in the international legal universe

What is it doing?

What should it be doing?

Clarificatory part-normative, part-empirical study

A holistic theory of self-determination that gives rise to a properly particularised and justiciable norm in international law

Implementation/enforcement is beyond the study's scope

But, arguably, implementation should flow from a properly organised legal theory and norm of self-determination

PRIMARY QUESTION

Clarify a historically-grounded, normatively sound, and morally effective legal principle of self-determination in international law.

WHY?

The more broadly defined self-determination is, the less distinguishable it is from other politically and morally desirable goods like justice, human rights, and democracy, and the less it can be used as a concept that refers to the morality of law as distinguishable from other normative concepts. The question then becomes: how can it be distinguished from other adjacent rights and freedoms such that it has its own normative core?

SECONDARY QUESTION

- What, if anything, does development (sustainable and/or economic) have to do with self-determination?
  - Are there political economy considerations?
  - Should developmental considerations be part of the legal calculus for the international legal principle of self-determination?
  - Does this inform self-determination's normativity in any way?
    - If so, how can the law-development nexus help isolate the legal normativity of self-determination so that it may meet the demands placed on it?

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PART A

A THREE-PRONGED STUDY

LAW | HISTORY | DEVELOPMENT

I. HISTORICITY (I)

Historicise self-determination's intellectual, legal, and political aspects.

Where does self-determination come from?

Roots?

Genealogy?

What does a historically-grounded conceptualisation of self-determination entail?

Should it be limited by its origins?

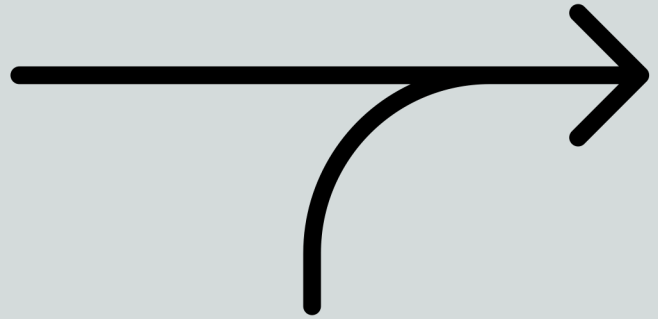
Or, should it strive from a place of historical authenticity to be the best version of itself?

I. HISTORICITY (II)

Before international law recognised the principle of self-determination, most struggles of independence were domestic affairs viewed as civil wars.

Self-determination has been historically invoked:

By nations in a Wilsonian sense to claim a place in a post-war world;	By post-colonial modern nations forging their own destinies following decolonisation; and	By those who are casualties and victims of self-determining sovereignties that got there first.



II. LEGAL NORMATIVITY (I)

- Does the principle of self-determination have a stand-alone normative worth as distinguishable from other adjacent freedoms, rights, and principles?
- If it does not, this leads to theoretical hollowing of self-determination's emancipatory potential. Of course, this emancipatory potential must be circumscribed (not unlimited) because infinite self-determinations are impracticable.
- Notable critique of normative approach: Brad R Roth

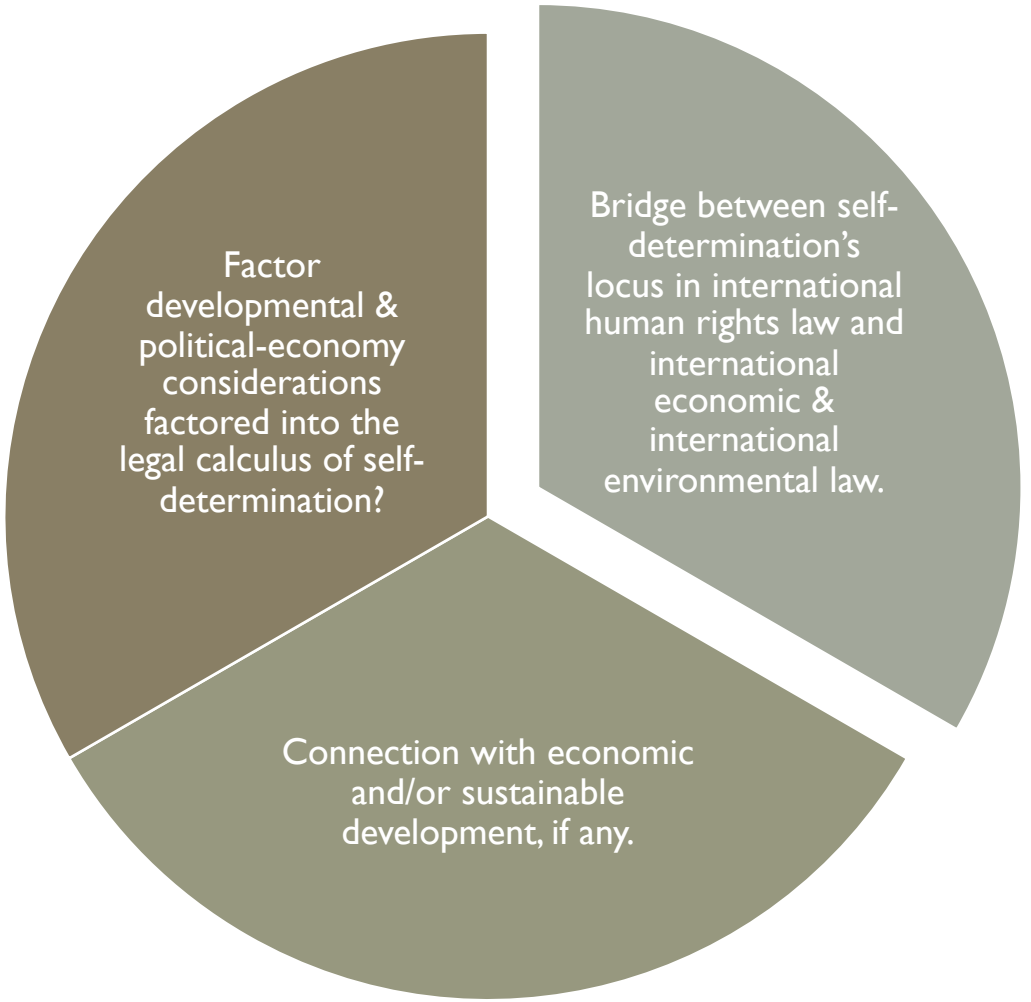
II. LEGAL NORMATIVITY (II)

Legal theory must put normativity in conversation with empirical constraints, balance the two, and give rise to the optimal norm.

Theory should make way for a norm that should enable discovery & realisation of the 'ought' in each particular self-determining case, rather than the 'ought' being determined by some ontological fixity/rigidity.

What is self-determination's *raison d'être* in its epistemic universe (in international law theory, democratic theory, and moral theory)? Then, bring out the contours of a legal norm from there.

III. DEVELOPMENTAL CONSIDERATIONS (I)



III. DEVELOPMENTAL CONSIDERATIONS (II)

Classic international law definition of self-determination in Article 1(1) of the International Covenant on Civil and Political Rights:

*All **peoples** have the right of self-determination. By virtue of that right they freely determine their **political status** and freely pursue their **economic, social and cultural development**.*

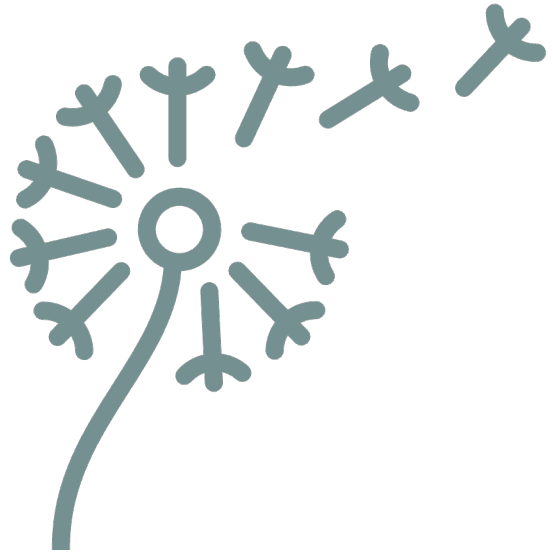
Emph. added

III. DEVELOPMENTAL CONSIDERATIONS (III)

Article 1(2) of the International Covenant on Civil and Political Rights:

All peoples may, for their own ends, freely dispose of their ***natural wealth and resources*** *without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law.* ***In no case may a people be deprived of its own means of subsistence****.*

Emph. added



III. DEVELOPMENTAL CONSIDERATIONS (IV)

The part of this definition that receives the most academic attention is 'peoples.'

Shift the focus from 'peoples' to 'development' for a few reasons:

'peoples' piece of the self-determination puzzle is conceptually circular as all 'peoples' are imagined constructs.

If so, how can self-determination flow from the 'peoples'?

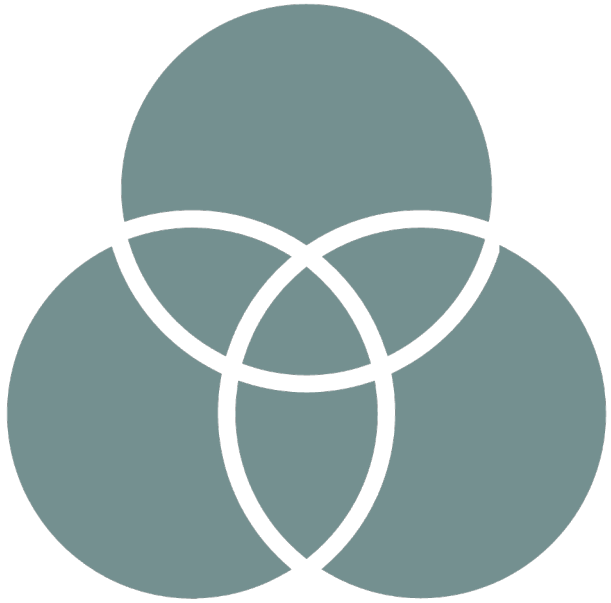
III. DEVELOPMENTAL CONSIDERATIONS (V)

WHAT CAN WE DO ABOUT "PEOPLES'" CIRCULARITY?

Option 1: Shift the weight to the political status, or economic, social, and cultural parts of the positive legal definition

- Critique: a status-centered approach to the production of norms is opposed to a view of globalised transnational law and global legal objects.

Option 2: Base it less on status-centered classificatory ontologies (linguistic, ethnic, religious, cultural, etc) and more so on a deontological relationality between majority & minority communities?



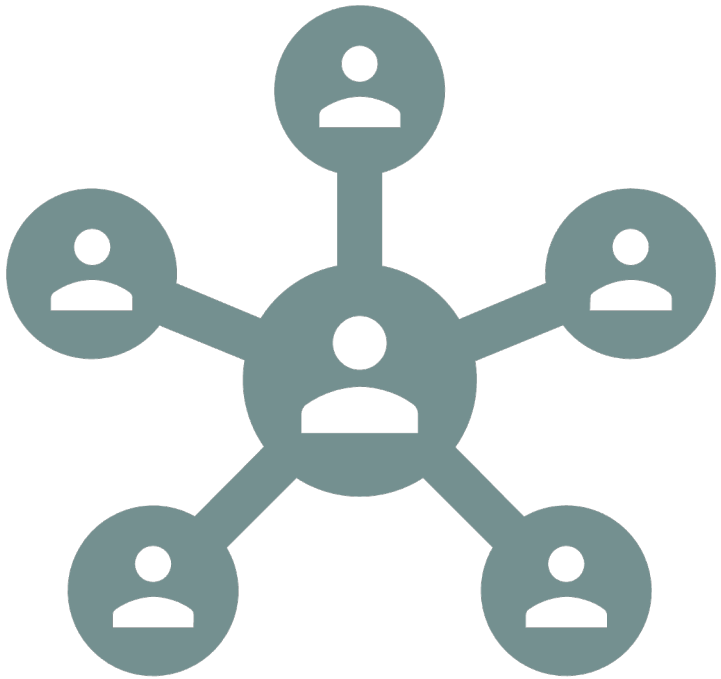
III. DEVELOPMENTAL CONSIDERATIONS (VI)

WHY A DEVELOPMENTAL PERSPECTIVE ON A LEGAL RIGHT?

Dignity on the basis of the merits of a legal case for self-determination is vital, but so are gainful prospects of real-world stability for a self-determining entity.

PART B

THE NUTS & BOLTS



I. RELATIONALITY (I)

The relationship the 'peoples' in question seek with another?

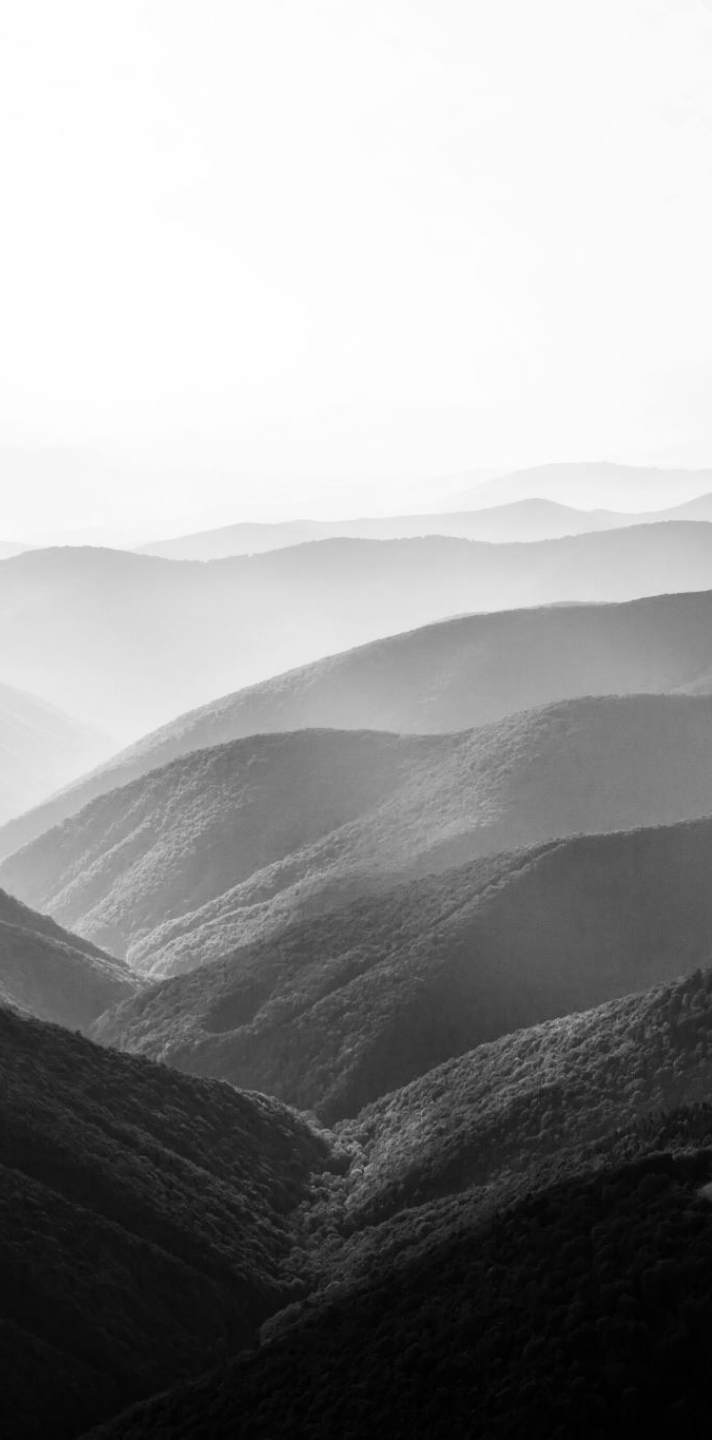
Will this shift the focus to another part of the self-determination definition: development?

Benefit of the developmental approach: does not look exclusively at either political or cultural or ethnic or territorial or linguistic, but accommodates intersectionality of all these factors.

I. RELATIONALITY (II)

Potential considerations under a relational test of self-determination:

- Do a collective self-determining people face an injustice/inequity?
- Do the people contemplate the effect of their chosen self-determination (secession or recognition) on other stakeholders:
  - The majority in a nation-state;
  - Other contiguous/incipient minorities; and/or
  - The international community



II. SECESSION & TERRITORIALITY (I)

- A restrictive view looks at territorial disputes & secession
- A more expansive vantage-point: reconstruct the notion of self-determination such that it is not wedded to territory. WHY?
- Because secession is not always self-determination: separationist regimes historically segregated:
  - Colonisers-and-colonised;
  - Black-and-white;
  - Rich-and-poor etc.

II. SECESSION & TERRITORIALITY (II)

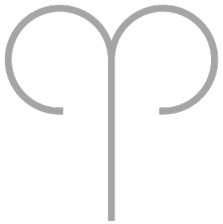
SEGREGATION & SECESSION CAN BE SILOES THAT MAINTAIN OVER-ARCHING POWER STRUCTURES & **RELATIONS**

THAT SAID, IMPORTANT TO IDENTIFY HOW EMPIRICAL & REAL-WORLD CONSTRAINTS OF TERRITORIALITY (AND EVEN LAND LAW FROM AN ECONOMIC AND ENVIRONMENTAL PERSPECTIVE) PLAY INTO SUCH A THEORETICAL VANTAGE-POINT.

III. SIGNIFICANCE FOR INTERNATIONAL LAW: OF GLOBALITY & LOCALITY (I)

- Localise within self-determination international law's macro-problem – toothless and it inhabits a high theoretical plane divorced from local lived experience.
- 2 critiques of international law
  - Micro-history's criticism of international law's planetary scale; and
  - International developmental concerns that it perpetuates inequities.
- An interdisciplinary critique may help bring about intradisciplinary sophistication needed for the principle of self-determination to meet its mandate.

III. SIGNIFICANCE FOR INTERNATIONAL LAW: OF GLOBALITY & LOCALITY (II)



In re-structuring the theoretical discourse, connect the local phenomenon and internationalism's normative/moral cosmopolitan core

International law should be committed to:

High principle (hence part-normative),

While recognizing that each self-determination is unique (hence part-empirical)

III. SIGNIFICANCE FOR INTERNATIONAL LAW: OF GLOBALITY & LOCALITY (III)

In tackling self-determination's theoretical poverty, we may grapple with international law's identity crisis at any given point.

International law is institutionally thinner than national law (because there is no clearly demarcated binding judiciary, no executive, no congress/parliament, and therefore no traditional separation of powers…)

In light of this institutional thinness and inadequacy of judicial reasoning in self-determination cases, international law must be rigorously theorised and brutally empirically honest, all at once.

IV. METHODOLOGICAL SIGNIFICANCE

Something in-between:		
Normative & positive;	Deductive & inductive; and	Old windbags & little know-it-alls.

This liminal space is where self-determining identities are being forged.

This is the space in which jurists can observe the totality of movement in power relations, rather than a mere ontological totality of object (race, religion, ethnicity, etc).

V. THEMES (I)

- Aspirational potential of Self-determination – *jus cogens* principle of international law with vague and obscure contours: Antonio Cassese, Marcelo G. Kohen, and Frédéric Mégret
- Inadequacy of judicial reasoning: Robert Howse and Ruti Teitel on ICJ reasoning
- Historical critiques of International Law: Valentina Vadi
- Developmental critique of International Law

V. THEMES (II)

- Political Right: Avner De-Shalit
- Cultural Right: Kai Nielsen on the case of Quebec
- Territorial Right: Lea Brilmayer
- Democratic Theory: internal versus external self-determination
- Relationality: Iris Marion Young, Craig Scott
- The Law-Development nexus: Dominic McGoldrick, Larissa Behrendt, and Joseph Kalt

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THE END

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