

**Self-Determination  
of Indigenous Peoples  
within the Human Rights Context:  
A Right to Autonomy?**

**Kristina Roepstorff**

**Global interactions** increasingly rely on law to govern them. Today, numerous rules dominate the interactions between states and non-state parties. International courts and dispute settlement mechanisms are in place to ensure compliance with commonly agreed norms.

**International Law**, however, is complex and often lacks universal acceptance. Worse, its influence is disproportionately strong on the poorest countries and countries in crisis. It is in situations of poverty and conflict where international law has the most impact - for better or worse. International legal structures can provide security, stability and access to economic support, but they can just as easily prevent timely and adequate assistance. Development and humanitarian actors must increasingly be aware of their potential as well as their pitfalls.

**Good Governance** is easily prescribed, but must become a mindset of all involved to make the system work. Less and least developed countries are often governed by constitutions that are complex and inaccessible for their citizens. Without acceptance by their subjects, they weaken and cease to safeguard the nation state against failure. Development assistance must provide more than just models and institutions to move these countries forward.

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## Abstract

The importance of the right of self-determination in international law must not be underestimated. But the enthusiasm with which self-determination was promoted in the past has changed into a cautious application of this right in the post-colonial period, as the claims of self-determination have often led to violent wars of secession and break-ups of states. Traditionally, self-determination was recognised as a right of peoples under colonial rule to gain independence. But the inclusion of the right of self-determination into international human rights law allows for a different approach to its interpretation. With the emerging rights of indigenous peoples under international human rights law based on the claims of self-determination, the debate on the interpretation of this right has received new impetus, especially in introducing the expressive right to autonomy as a means of exercising the right of self-determination into the legal discourse on international law. Thus, some clarifications of the concept of autonomy and the implications of an emerging right to autonomy in the context of the rights of indigenous peoples are necessary.

## **1. Introduction**

The main problem with the right of self-determination is its vague and ambiguous articulation in the relevant international legal instruments. As it leaves space for interpretation, the scope and application of the right have been subject to controversies.<sup>1</sup> Are indigenous groups entitled to the right of self-determination? And if that is the case, what is the appropriate interpretation of such a right? Does it imply a right to secession? Or is only a narrow interpretation favouring autonomy arrangements feasible? And does this correspond with the emergent right to democracy?

In order to answer these questions, I first want to outline the evolution of the principle of self-determination in international law from its first appearance as a principle to its articulation as a legal right in the decolonisation era and in international human rights law. This will be followed by a discussion of self-determination in the context of the emerging rights of indigenous peoples.

The right of self-determination is commonly divided into the external and the internal aspect of self-determination. I will therefore discuss this dichotomy and its meaning for the interpretation of the right of self-determination of indigenous peoples. A lot of the confusions and problems in the debate on self-determination can be resolved when not applying the internal/external dichotomy. I will therefore outline an alternative approach towards the conceptualisation of the right of self-determination.

As in the debate on the right of self-determination of indigenous people a right to autonomy has been the favoured interpretation, I will analyse the concept of autonomy and draw

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<sup>1</sup> For a detailed analysis of the problems of interpretation see Knop (2002). The author shows that not only the taxonomies, but also the underlying normative models from which self-determination is developed are based on inequality and exclusion. Interpretation has to be understood as an activity and the author wants to draw attention to the ethics of interpretation itself.

attention to the inherent tensions of this concept in the relation to human rights and democracy, as the right to autonomy is often equated with a right to democracy.

I will then outline the different ways autonomy can be implemented and its relevance as a tool for conflict resolution, before discussing it in the particular context of indigenous peoples' rights. Using the alternative terminology to the internal/external dichotomy, I will analyse the meaning of a right to autonomy for indigenous peoples.

I will argue that there are strong arguments for a right to autonomy under international law. This right must not be equated with a right to democracy, as this does not pay due regard to all the facets of the complex concept of autonomy. I will conclude that although it should be considered as a right of indigenous peoples, it should not be understood as replacing a right of self-determination, as it is only one way of exercising it. Reducing the right of self-determination to a right to autonomy is not in accordance with the idea of self-determination as a human right and neither is the denial of the right of secession *in absoluto*. I will argue, that an alternative approach towards the conceptualisation of self-determination on the one hand better describes the issues involved and on the other hand meets better the interest both of the states and the indigenous peoples themselves.

## **2. Self-Determination**

Self-determination developed in three differing but not necessarily exclusive contexts: morality, politics and law.

Within moral theories, the idea of self-determination is derived from a specific understanding of the human nature that can be traced through the history of liberal thinking at least since the Enlightenment: the person as capable of rational reasoning and the idea of the autonomy of the person. This autonomy of the person, as in the Kantian philosophy, is often regarded as the source for the human dignity and gives the person its inherent value.<sup>2</sup> The natural rights of all humans are then deduced from this absolute value of the person. Sure, this conception of natural rights has been challenged and today even liberal theories of human rights are not necessarily based on the assumption of human dignity. But the general perception of the person as autonomous and capable of rational choices remains the bases of the liberal idea of the right of self-determination.

Taking the liberal concept of self-determination further, it leads to the idea that the only legitimate government is that which has been authorised by the people themselves in their capacity as autonomous agents. This exercise of the constitutive power of the people is a manifestation of their political self-determination in the internal sense. Thus, the liberal concept of self-determination is linked to the idea of popular sovereignty and participation.<sup>3</sup> These ideas have influenced political theories and are reflected in the debate on self-

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<sup>2</sup> Kant (1998)

The concept of autonomy is elaborated in the moral philosophy of Kant. The person has the capacity of reason and this enables him to give himself his own laws. This capacity is the autonomy (of will) of the person. The autonomous person therefore has to be respected as an end in itself and this lends him his intrinsic value.

<sup>3</sup> Locke (1982); Kant (1998); Rawls (1999).

determination as the exercise of the constituent power of the people, popular sovereignty and democratic theories.

The development of self-determination in international law<sup>4</sup> is based on moral considerations on justice and political considerations resulting from political struggles.<sup>5</sup>

In recent years the scope of the right of self-determination has expanded due to changing state practice<sup>6</sup>, the acknowledgement of group rights and the claims of indigenous peoples. It has even been argued that the right of self-determination forms part of *jus cogens*.<sup>7</sup>

## **2.1. Evolution in International Law**

Historically, the right of self-determination emerged in international law during World War I in two competing ideological forms, reflecting the differing worldviews of the East and the West. In Western Europe the concept of self-determination derived from the Enlightenment ideas of popular sovereignty and representative government. In Central and Eastern Europe the concept of self-determination was primarily based on the phenomena of nationalism. As a result, the Western European concept was less linked to ethnic and cultural factors than the Central and Eastern European one.<sup>8</sup> Both concepts were represented by two important figures of that time: Lenin and Wilson.

The first and more radical form of self-determination was defined by Lenin, who understood self-determination as a precondition for peace in the world and his intention was to apply it to all non-European peoples under colonial rule. The second form of self-determination was

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<sup>4</sup> Hannum (1990).

<sup>5</sup> “[...] 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.”

Falk (2000), p. 111 and Falk (2000), p. 48, quoting Higgins.

<sup>6</sup> For an overview over developments in state practice in different countries see: Sanders (1993).

<sup>7</sup> Cassese (1995)

<sup>8</sup> Musgrave (1997), p. 2

articulated by Woodrow Wilson.<sup>9</sup> His intention was to apply the principle of self-determination unconditionally to European peoples but not necessarily to peoples under colonial rule. For some decades the Wilsonian restrictive<sup>10</sup> approach to self-determination was the prevailing one and it was only after World War II that the radical approach first promoted by Lenin became the popular understanding of self-determination<sup>11</sup>. By this 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: whereas the Soviet Union challenged the colonial order, the European powers wanted to maintain their colonies. As a consequence, the articulation of self-determination that was subsequently included in the Charter of the United Nations<sup>12</sup> constitutes a compromise between the two competing ideological conceptions.<sup>13</sup> The Charter, which states that one of the purposes of the United Nations is the development of friendly relations among nations based on the respect for the principle of equal rights and self-determination,<sup>14</sup> remains vague on the actual content of self-determination. In order to accommodate both ideological conceptions of self-determination, the language of the Charter is somehow ambiguous and, although self-administration of non self-governing territories is encouraged, no expressive right to independence is articulated. Instead, it is left to the administering power to decide in accordance with the specific circumstances the manner in which to govern the occupied territories.

But although self-determination was enshrined in the Charter of the United Nations, it was for a long time regarded as a mere political principle rather than a legal right.

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<sup>9</sup> As stated in the famous Fourteen Points from 1918.  
Falk (2000) p. 104 and Falk (1995), p. 39

<sup>10</sup> It was restrictive in its scope as it did not allow for self-determination of people under colonial rule.

<sup>11</sup> Cassese ( 1995), p. 14 and Falk (2000) p. 106

<sup>12</sup> The Charter of the United Nations was adopted in 1945 by the former League of Nations.

<sup>13</sup> Falk (2000), p. 106

<sup>14</sup> Charter of the United Nations, Article 1 (2)

## **2.2. The Right of Self-Determination**

The most important step forward for accepting self-determination as a legal right in international law<sup>15</sup> was in the context of Decolonisation when Declaration on the Granting of Independence to Colonial Peoples as General Assembly Resolution 1514 (XV) was adopted by the United Nations in 1960.<sup>16</sup> The Declaration states that all peoples have the right to self-determination and that by virtue of that right they shall freely determine their political status and freely pursue their economic, social and cultural development.<sup>17</sup> Yet the content of the right remained vague and ambiguous as it on the one side provided for a right of self-determination, but on the other hand limited that right in emphasising the principle of territorial integrity of states.

The right was subsequently included into the Declaration on Principles of International Law concerning Friendly Relations and Cooperations among States, which was adopted as General Assembly Resolution 2625 (XXV) in 1970<sup>18</sup>, which provides for a clarification of the obligations of states under the provisions of the Charter of the United Nations. According to the Declaration on Principles of International Law, the principle of equal rights and self-determination of peoples of the Charter of the United Nations embraces the right of all

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<sup>15</sup> The different levels in the evolution of the right of self-determination can be categorised in first-order self-determination, second-order self-determination and third-order self-determination. First-order self-determination refers to the struggle of a people against alien rule and seeks political independence within internationally agreed boundaries. Decolonisation is a case of first-order self-determination. Second-order self-determination also involves a move to independence for a distinct people, but within the boundaries of the state. This can provide for federal structures. Third-order self-determination refers either to a subunit of a state or to a member of a federalism. Self-determination of indigenous peoples may be regarded as a distinct category of fourth-order self-determination.

Falk (2000), p. 100

<sup>16</sup> Falk (2000); see also: Tomuschat (1993)

<sup>17</sup> Paragraph 2

<sup>18</sup> Hereinafter called the Declaration on Principles of International Law.

peoples to freely determine, without external interference, their political status and to pursue their economic, social and cultural development. It also imposes a duty on every state to respect this right.<sup>19</sup> The right of self-determination has to be interpreted in accordance with the other principles of international law set out in the Declaration on Principles of International Law.<sup>20</sup> Among these principles are the principle of the general interest of the international community to preserve international peace and security, the principle of territorial integrity of states and the principle of maintenance of colonial boundaries (*uti possidetis juris*).<sup>21</sup>

The principle of territorial integrity creates a limitation on the right of self-determination, as it does not allow “ [...] *any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States*”. This limitation does not apply in all situations though, as the Declaration refers only to those states “[...] *conducting themselves in compliance with the principle of equal rights and self-determination of peoples [...] and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.*”

The principle of *uti possidetis juris* creates limitations on the right of self-determination where independence from a colonial power or secession is sought. It preserves and validates the colonial boundaries of a state.<sup>22</sup> This principle thus applies in disputes about colonial boundaries and therefore only forms a restricted limitation on the right of self-determination.<sup>23</sup> In summary, international law provides for a right of secession in the context of decolonisation. Outside this context, unless a group has no other option than to secede in

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<sup>19</sup> Rosas, (1993), p. 226

<sup>20</sup> Seven principles of international law are set out in the Declaration on Principles of International Law: equal rights, self-determination of peoples, prohibition of the use of force, prohibition of intervention into the domestic jurisdiction of a state, duty to settle disputes by peaceful means, duty to cooperate with other states, sovereign equality of states, and the duty of states to fulfil their obligations in good faith. Further, it states that these principles are interrelated and each principle must be interpreted in the context of all the other principles.

<sup>21</sup> McCorquodale (1996), p. 19

<sup>22</sup> Although this principle evolved in a South American context, it was also applied in territorial disputes in other regions of the world.

<sup>23</sup> McCorquodale (1996), p. 21

order to protect themselves from gross human rights violations, self-determination must be exercised within the boundaries of the existing state.<sup>24</sup>

### **2.3. Self-Determination as a Human Right**

Although the idea of human rights has a long philosophical tradition, it was the human rights movement, which started as a reaction to the atrocities of the World War II that initiated their inclusion into positive international law.

As a result, the former League of Nations adopted the Universal Declaration of Human Rights. Thus, when discussing human rights, it must be born in mind that the human rights now forming part of international law evolved from a particular historical, political and ideological framework.<sup>25</sup>

Self-determination has been expressively acknowledged as a human right when it was included into the two international human rights covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which came into force in 1976 and constitute legally binding human rights treaties based on the Universal Declaration on Human Rights. The right of self-determination is stated in common Article 1 of the ICCPR and the ICESCR.<sup>26</sup> Common Article 1(3) of the ICCPR and the ICESCR then specifies the right in stating that the realisation and respecting of it shall be in conformity with the provisions of the Charter of the

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<sup>24</sup> Hannum (1990), p. 11

In cases of continuing and structural violations of the right of self-determination, the General Assembly has in the past even acknowledged the legitimacy of using force in the struggle for gaining independence from colonial rule. It also asks member states to provide moral and material support in order to help them to attain freedom and independence. This idea is also expressed in the African context.

<sup>25</sup> The idea of human rights is underpinned by a particular philosophical anthropology and derives from the conception of liberty, autonomy, equality and legal capacity of the individual (see 2.).

<sup>26</sup> The right of self-determination is also enshrined in the African Charter on Human and People's Rights of 1981 in Article 20, but no similar provision is enshrined in the European or American instruments. Smith (2003), p. 265

United Nations.<sup>27</sup> Yet, the content of the right of self-determination is not determined and leaves space for interpretation. As human rights have to be balanced with the particular and changing requirements of society, following general legal rules have been elaborated: first, human rights must be interpreted in the context of current standards; second, any limitations on the exercise of human rights are to protect either other rights or to protect the general interest of society; third, any limitations must be considered narrowly and in the context of specific circumstances; and finally, the victim of a human rights violation must bring the claim.<sup>28</sup>

In addition, the Human Rights Committee, a treaty body set up by the International Covenant on Civil and Political Rights, defined the right of self-determination as “*[...] an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that States set forth the right of self-determination in a provision of positive law in both Covenants and placed this provision as article 1 apart and before all of the other rights in the two Covenants.*”<sup>29</sup> Thus, A human rights approach to the right of self-determination is essential for any attempt to clarify the meaning and application of it.<sup>30</sup>

One problem faced with when employing a human rights approach is the emphasis on individual rights within international human rights law and the reluctance of acknowledging group rights.<sup>31</sup> In ascribing the right of self-determination to “all peoples”, the wording of common Article 1 of the two human rights treaties clearly identifies the right of self-determination as a group right.

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<sup>27</sup> Ghandhi (2002)

<sup>28</sup> McCorquodale (1996), p. 14

<sup>29</sup> Quoted by McCorquodale (1996) in reference to CCPR General Comments 12, para.1.

<sup>30</sup> McCorquodale (1996), p. 11

<sup>31</sup> The Human Rights Committee has denied to deal with claims of Article 1 violations brought before it, as Optional Protocol to the ICCPR only allows individuals to bring complaints to the committee. But it may address the right it under its reporting procedure.

McCorquodale (1996), p. 13

In more recent practice the committee has interpreted Article 1 in conjunction with other Articles, mainly Article 25, 26 and 27 of the ICCPR.

Schäfer (2004), p. 63

Thus, one of the questions in the application of the right of self-determination is who should be considered as “a peoples” and therefore as entitled to this right.

## **2.4. Self-Determination of Indigenous Peoples**

The historical evolution and development of the concept of human rights is derived from the liberal idea of the individual as being entitled to rights and freedoms against the state. Thus, international human rights law has mainly paid attention to the protection of individuals. Although the international community condemned the discrimination of religious minorities, no real protectoral system existed until recently and the emphasis was rather on tolerance than on rights.<sup>32</sup> However, the international community became aware that an individual-centred system alone was not sufficient for protecting the rights of individuals as members of a group or of the group as such. Consequently, group rights have been recognised in international human rights law.<sup>33</sup> These developments lead to the recognition of indigenous peoples as distinctive communities with collective rights.<sup>34</sup> The representatives of indigenous peoples themselves insist on their right of self-determination as their core right. One reason for indigenous peoples to claim a right of self-determination is that such an entitlement would officially state the dignity of their status as a people. But until now no binding international legal instrument expressively establishes such a right and even where the general right of self-determination is included, its scope remains vague and unclear.<sup>35</sup> Yet, there is an increasing acknowledgement of the claims of indigenous peoples by the United Nations and many states, but there is neither consensus on the definition of “peoples”<sup>36</sup> nor of

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<sup>32</sup> Hannikainen (1998), p. 79

<sup>33</sup> See Lerner (1990)

<sup>34</sup> For a discussion of group rights see Kymlicka (1995).

<sup>35</sup> Falk (2000), p. 121

<sup>36</sup> Thornberry, (1993), p. 124; Crawford (1991), p. 237; Hannum (1990), p. 88

Experts of the UNESCO have discussed following common characteristics, that amount to a description but not a definition of the term people as it is used in international relations: a common historical tradition, racial or ethnic

“indigenous.”<sup>37</sup> The suggestion of a less monolithic meaning of people takes into account the fact that most human groups live in pluralistic societies. The focus should be on the participation of the different groups and thus “*A less majoritarian, more differentiated, participatory and communitarian meaning of ‘people’ carries opportunities [...]. A mature concept of peoples respects and incorporates diversity and takes strength from it.*”

The main reason for the reluctance by which states applied the term “peoples” in the context of indigenous rights has been the fear that this would lead to a full recognition of their right of self-determination, including a right to secession. This is also reflected in the two Conventions on indigenous rights adopted by the International Labour Organisation: 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.<sup>38</sup>

With the elaboration of the United Nations Draft Declaration on the Rights of Indigenous Peoples by the Working Group on Indigenous Populations (WGIP)<sup>39</sup>, the right of their status

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identity, cultural homogeneity, a common language, sharing of religious and ideological values, territorial connection, and a common economic life.

<sup>37</sup> The same is actually the case with the definition of “indigenous” itself. Similar approaches as to the definition of minorities are not helpful, as they will lead to confusion and a blurred distinction between minorities and indigenous peoples. The most comprehensive proposal was made by the United Nations in study of 1983, which gives the following definition: “*Indigenous communities, peoples and nations are those having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their own cultural patterns, social institutions and legal systems [...] On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group).*”

See Hannum (1994), p. 15

<sup>38</sup> Thornberry, (1993), p. 128

<sup>39</sup> The WGIP is a subsidiary organ of the Commission on Human Rights and is composed of representatives of member states. In addition to the usual participation of NGOs with consultative status, the WGIP allows participation of indigenous organisation without consultative status, as is stated in CHR resolution 1995/32. The same resolution as well as ECOSOC resolution 1995/32 established the open-ended inter-sessional Working Group on the draft Declaration, which has to be considered and adopted by the General Assembly. (see UN website)

A summary of the issues the WGIP was faced with is to be found in: Barsh (1996)

as peoples and their consequential entitlement to the right of self-determination<sup>40</sup> becomes acknowledged at the international level. It is now widely accepted that indigenous populations belong to the category of peoples who are entitled to the right of self-determination. Yet, the fundamental questions of interpretation and the content of the right of self-determination under international (human rights) law remain. Does the right of self-determination mean the right of a people to be free from external interference and foreign domination (external self-determination)? Or does the right imply the right of a people to assert its will against its own government (internal self-determination)?

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<sup>40</sup> Article 3

### **3. The External and Internal Dichotomy**

In the formulation and application of the right of self-determination the United Nations itself does not distinguish between the internal and the external aspect of this right. This distinction evolved from political discussions and scholarly writings.<sup>41</sup>

The interpretation of the right of self-determination in its external aspect seems to fit better with the traditional inter-State system and the principle of sovereign equality. In contrast, the internal aspect of the right of self-determination challenges this traditional system.<sup>42</sup>

As a legal principle, the right of self-determination can be regarded as containing at least five elements: first, the right of a peoples of an existing state to determine freely their political status as well as pursue their economic, social and cultural development without external interference; second, the right of a people under foreign rule to free themselves; third, the right of a people to secede; fourth, the right of a people to determine their constitution including autonomous status, and finally, the right to govern by way of democracy.<sup>43</sup> Whereas the first three elements fall under the aspect of external self-determination, the remaining two elements constitute what is generally referred to as internal self-determination.<sup>44</sup>

#### **3.1. External Self-Determination**

The first element of the external aspect of self-determination is based on the principle of non-interference into the domestic affairs of states and thus is linked to the notion of state

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<sup>41</sup> Alfredsson (1993), p. 50

<sup>42</sup> Rosas (1993), p. 227

<sup>43</sup> Rosas, (1993), p. 230

<sup>44</sup> Cassese was one of the first to spell out internal self-determination.

It has been argued, that internal self-determination means the same as the first two elements referred to as external self-determination, as foreign interference constitutes a violation of the right of the population to be independent. As Rosas argues, the terminological confusion results from the fact that no clear distinction between internal and external self-determination can be drawn.

Rosas, (1993), p. 231

sovereignty.<sup>45</sup> It is in this context that the sensitive issue of humanitarian intervention is to be located.<sup>46</sup>

The law and practice of decolonisation deals with the second element of external self-determination. This has been discussed under the analysis of the emergence of the right of self-determination.<sup>47</sup>

The third, and most important element of the external right of self-determination in the context of the rights of indigenous peoples, involves the issue of secession. Secession has to be understood as a problem of the legitimacy of boundaries.<sup>48</sup> In this respect, the question whether secessionist claims are legitimate or not bases on the assumption of the political validity of the State and its boundaries. Secession can be regarded as the dissolution as well as the new constitution of political unity - usually both aspects are in play. In its normative dimension the problem of secession is a problem of the legitimate constitution of a political entity and of the legitimate foundation of political governance.

Two different lines of argument in favour of secession can be distinguished: first, that secession is a means against unjust government, and second, that secession is justified on the basis of a normative conception of political participation.<sup>49</sup> Thus, a discussion of secession includes three aspects: secession as reaction to colonisation or annexation, secession as statement of political self-determination, and finally, secession as means against unjust governance.<sup>50</sup>

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<sup>45</sup> Hannum (1990), p. 14

<sup>46</sup> I will not discuss this issue here, as it is a subject deserving a work on its own. And as it does not seem to be at the core of the debate on the right of indigenous peoples of self-determination this should not result in an inadequate picture of this right.

A good normative discussion is to be found in Beitz (1999), where the author argues that the principle of non-intervention is based on the misleading analogy of the autonomy of peoples and the autonomy of states and the consequential ideal of state autonomy.

<sup>47</sup> See 2.2.

<sup>48</sup> Chwaszcza (2002), p. 467

<sup>49</sup> Buchanan distinguishes between primary right type justification of secession (political self-determination) and remedial right type (as means against injustice).

Buchanan (1997)

<sup>50</sup> Chwaszcza (2002)

The claim for secession in the case of colonisation or annexation is the least problematic one, both from the perspective of international law as well as from a stance of liberal theory, as colonisation obviously denies and violates fundamental rights.<sup>51</sup> However, there is the practical problem of what to consider a case of colonisation or annexation. There the perception of the international community plays a major role.

The problem of secession also has an inter-state dimension as far as the question of the importance of recognition of the legitimacy of a state at the international level is concerned. From an inter-state perspective the normative criteria and consequences of the recognition or non-recognition of states are of fundamental importance. It seems that, at least to some extent that historically the acceptance of secession by the international community depended on the success of armed struggle against an oppressive government. For example, in accepting a successfully seceded region as a new member to the United Nations it gains the status at the international level as an own legitimate state.<sup>52</sup>

Although one aspect of external self-determination legitimates secession, international law on self-determination nowhere says that all peoples have the right to secede from existing state by virtue only of the right to self-determination.<sup>53</sup> At present, only two situations may establish a right to secede: colonisation and more recently in the case of gross human rights violations. In general it can be said, that the more representative a government is and the higher the degree to which the claim is destabilising, the less likely is the recognition of a right to secession by the international community.<sup>54</sup>

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<sup>51</sup> Chwaszcza (2002)

<sup>52</sup> Laiser (1991), p. 87, giving the example of Bangladesh, the former East Pakistan.

<sup>53</sup> Scott (1996), p. 818

<sup>54</sup> Kirgis (1994), p. 309, especially Figure 1.

### **3.2. Internal Self-Determination**

Traditionally, the internal aspect of self-determination has not been an issue in international law as sovereignty of states as the fundamental principle of the international order<sup>55</sup> did not allow for interference into the domestic affairs of a state. But with the human rights movement and the increase of acceptance and importance of human right norms, the principle of state sovereignty is weakened.<sup>56</sup> Thus, the internal aspect of self-determination has become increasingly important in the debate on self-determination.

The content of internal self-determination can be divided into two main categories: group autonomy and democratic government.<sup>57</sup> The first category corresponds with the fourth element of self-determination (the right of a people to determine their constitution including autonomous status), whereas the second category corresponds with the fifth element (right to govern by way of democracy). Thus, the internal aspect of self-determination draws to a greater extent upon natural law considerations than the external aspect does.<sup>58</sup>

With the inclusion of the right to autonomy into the Draft Declaration on the Rights of Indigenous Peoples in Article 31, the element of group autonomy is being acknowledged.<sup>59</sup> In accordance with the fifth element of self-determination, it has been argued that internal self-determination primarily addresses the right of a people to democracy within an existing state.<sup>60</sup> It is often assumed that the external aspect of self-determination constitutes the traditional meaning. But a look at the Wilsonian approach to self-determination, which was the dominant interpretation of self-determination for a long time, demonstrates that the internal aspect of self-determination at least played a role in the aftermath of World War I.

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<sup>55</sup> Hannum (1990), p. 14

<sup>56</sup> This development manifests itself also in the debate on humanitarian intervention.

<sup>57</sup> Alfredsson (1993), p. 50

<sup>58</sup> Rosas (1993), p. 250

<sup>59</sup> As I will discuss the concept of autonomy and its implementation in detail under 4., I will turn my attention to the democratic element of self-determination.

<sup>60</sup> Rosas, (1993), p. 232

Wilson had held that every person had the right to select its own form of government and to give their consent on a continuous basis. Thus, the Wilsonian approach to self-determination was guided by a democratic understanding of its meaning.<sup>61</sup>

Also in later statements on self-determination by the United Nations, the internal aspect was emphasised when underlining the importance of the free and genuine expression of the will of the peoples concerned.<sup>62</sup> This is also supported by the Universal Declaration of Human Rights, which does not expressively state a right of self-determination, but says in Article 21 that the authority of government is based on the will of the people, which shall be expressed through periodic and genuine elections.<sup>63</sup> Although the reference to the will of the people as the basis of authority of government was not included in the legally binding human rights covenants, the ICCPR and the ICESCR, the principle of participation is to be found in Article 25 of the ICCPR<sup>64</sup>. In addition, as human rights are traditionally understood as rights of citizens against the state, it can be argued that the internal aspect of self-determination is implied in common Article 1 of the ICCPR and the ICESCR.

Since the adoption of the two human right covenants democracy has made a breakthrough not only as a political, but also as a legal concept and has been incorporated into several regional documents.<sup>65</sup> Yet, it has not been enshrined into any document of the United Nations.

Before discussing the impact of this dichotomy on the right of self-determination of indigenous peoples, I first want to outline an alternative approach to the conceptualisation of self-determination.

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<sup>61</sup> Hannum (1990), p. 30

<sup>62</sup> Rosas, (1993), p. 234

The emphasis on the expression of the will of the peoples is referred to in General Assembly Resolution 742 (VIII), and in the advisory opinion of the International Court of Justice in the Western Sahara case for example. For a discussion of the Western Sahara Case see also: Musgrave (1997), p. 241.

<sup>63</sup> Ghandhi, (2002)

<sup>64</sup> Ghandhi, (2002)

<sup>65</sup> Salmon (1993), p. 270

Examples of Documents emphasising a right to democracy: Copenhagen Meeting of the Conference on Human Dimension by the CSCE (1990), Charter of Paris for a New Europe by the CSCE (1991), Resolution of representative democracy adopted by the Organization of American States (1991).

For a detailed analysis of the emerging right of democracy see Franck, “The Emerging Right to Democratic Governance”, in: *American Journal of International Law*, (1992)

### **3.4. Again: Self-determination of Indigenous Peoples**

At the United Nations much of the debate on the rights of indigenous peoples have centred on the right to self-determination in both its internal as well as its external aspect, and the relationship between such a right and autonomy. States have been reluctant to recognise the right of self-determination if it implies a right to secession<sup>66</sup> and bases on the emphasis of geopolitical stability and the avoidance of excessive fragmentation of the international order.<sup>67</sup> Apart from this pragmatic argument, the legal argument for not granting indigenous peoples the right of self-determination is its claimed colonial context. This argument can be challenged in at least two ways: first, the inclusion of the right of self-determination in the two human rights covenants clearly shows that the right, as a human right, can not be restricted to colonialism. Second, even if this was the case, it can be argued that indigenous peoples have been colonised<sup>68</sup> and hence are entitled to the right of self-determination to the same extend as the peoples already categorised as colonised. In validating the second argument, indigenous peoples must be regarded as entitled to external and not only internal self-determination. This fuels the fear of further fragmentation of the international order and therefore is not likely to be accepted by the international community, even if argued that representatives of indigenous peoples do not aim for independent statehood<sup>69</sup>, this is no assurance that this right will never be exercised.<sup>70</sup>

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<sup>66</sup> Hannum (1994), p. 9

<sup>67</sup> Falk (2000), p. 124

<sup>68</sup> Tully (2000), p. 37.

He distinguishes between internal and external colonisation. He regards to indigenous peoples as having been at least internally colonised.

<sup>69</sup> It can even be argued that the creation of a new nation-state is antithetical to the aims of indigenous peoples, who tend to look at the very concept of the nation-state with suspicion. What indigenous peoples actually aim for is freedom and not the creation of new centres of powers.

Daes (2002), p. 303

The concept of the nation-state is discussed in Connolly (2000) and the aspect of freedom is also emphasised by Tully (2000), p. 50.

<sup>70</sup> Falk (2000), p. 122

The problem thus does not lay in the actual claims but in the logic of the right of self-determination. When the right of self-determination of indigenous peoples is acknowledged, it is logically difficult to deny them a right to independent statehood. Yet, no government has promoted an external right of self-determination of indigenous peoples. The tendency is to acknowledge the needs and claims of indigenous peoples by accepting their right to internal self-determination in the form of autonomy.

Before discussing the concept of autonomy in detail, I want to have a look at an illustrative example of the complexities involved in the claim for self-determination in the context of the rights of indigenous peoples:

The Pellet Report, a legal analysis by international lawyers for the Committee of the Quebec National Assembly, tries to clarify the consequences of a possible secession of Quebec of Canada.<sup>71</sup> In doing so, the Pellet Report also discusses the question of the role of indigenous peoples in the process of secession and asks whether their claims involve a right of self-determination. In the case of applicability of the right of self-determination, there might be many arguments in favour of an external right of self-determination of indigenous peoples<sup>72</sup>, but does this necessarily imply the right to secede?

The problematic question the Pellet Commission was faced with, is a problem inherent to secessionist claims and can be expressed in the following way: in the case of diverse and multiply secessionist claims in the name of self-determination, what are the conditions for the legitimate creation of a new state?<sup>73</sup> What the Pellett report does acknowledge is the right of indigenous peoples to participation. As participation is best achieved through democratic structures, what the report seems to suggest is a right of indigenous peoples to democracy.<sup>74</sup>

Applying the internal / external dichotomy, one could argue that although the Pellett Report

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<sup>71</sup> Falk (2000), p. 117, and Falk (1995), p. 54

<sup>72</sup> Alfredsson, (1998), p. 133

<sup>73</sup> Falk (2000) p. 119

This question is articulated in the context of the findings of the Pellett Commission, but it seems to be at the heart of many, if not all, cases of secession.

<sup>74</sup> Falk (2000) p. 120

negates the external right of self-determination of indigenous peoples in Quebec it does emphasis and acknowledge the internal aspect of the right of self-determination. So what can be drawn from the problems faced by the Pellett Commission? The example of Quebec illustrated that tensions between competing claims of self-determination may arise.

### **3.4. An Alternative Approach**

So far I have used the categories of internal and external self-determination as these are the commonly used terms when discussing the right of self-determination. However, the suitability of these terms should not be taken for granted. Aspects of self-determination may also be defined by using different categories. So does James Anaya in his book *Indigenous Peoples in International Law* challenge the commonly used dichotomy and suggests a different approach to the right of self-determination, which I want to outline now. Anaya defines the essence of self-determination as a standard of governmental legitimacy within the modern human rights frame.<sup>75</sup> The problem with the principle of self-determination in international law is its linkage with the term “peoples”. According to Anaya, the limited conception of “peoples” ignores the multiple and overlapping spheres of community, authority and interdependency of reality. He states: “*Humanity effectively is reduced to units of organization defined by a perceptual grip of statehood categories; the human rights character of self-determination is thereby obscured as is the relevance of self-determination values in a world that is less and less state centred.*”<sup>76</sup>

In addition, the resistance towards acknowledging a right of self-determination in the non-colonial context results from a misconception that self-determination in its fullest sense implies a right to secession. In order to avoid the problems attached to the misconceptions - the linkage to the term “peoples” and the necessity of granting a right to independent

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<sup>75</sup> Anaya (1996), p. 81

<sup>76</sup> Anaya (1996), p. 78

statehood – he distinguishes between the substance of the norm of self-determination and the remedial prescriptions that may follow when the norm has been violated. Most importantly, the norm of self-determination as a human right must apply to all human beings and not only to those under colonial domination.

Whereas the substance of the norm defines the standard that every human being is entitled to, the remedial aspect of the norm of self-determination only applies to situations where substantive self-determination has been denied or violated. Remedial prescriptions vary in accordance to the specific circumstances and therefore not only one solution to this kind of claims is possible. But in order to understand what the remedial prescriptions of the norm may result in, an analysis of the substantive aspect of the norm is necessary. Substantive self-determination consists of two normative aspects. The first aspect is the constitutive meaning of self-determination, which requires that the governing institutional order be founded on the will of the people.<sup>77</sup> This aspect is also stressed in the two international human rights covenants in the provision that peoples should freely determine their political status by virtue of the right of self-determination. The second aspect of self-determination is the ongoing manifestation of it by way of providing for a governing institutional order under which one may live and develop freely. This aspect is reflected in the second part of the provision of the international human rights covenants when stating that peoples are to freely pursue their economic, social and cultural development.<sup>78</sup>

The best example of the remedial meaning of the right of self-determination is its application in the context of decolonisation. As colonialism violated both aspects of substantive self-determination, namely the constitutive and the ongoing aspect, the right of self-determination may apply in its remedial form and thus judging the constitutional processes retroactively. This, however, does not necessarily promote a reversion to the *status quo ante* but should be

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<sup>77</sup> Anaya (1996), p. 80

<sup>78</sup> Anaya (1996), p. 82, (in reference to common Article 1 (1) of the ICCPR and the ICESCR)  
The idea of an ongoing right of self-determination is now being more and more attached to the notion of democracy.

exercised within the particular circumstances of the given situation and adapted to the will of the peoples whose aspirations may have altered over time.<sup>79</sup> Secession, as a remedial prescription, may be an option only in limited cases where substantive self-determination cannot be exercised otherwise or where it is beneficial for all parties involved.<sup>80</sup>

In looking more specifically at the rights of indigenous peoples, Anaya argues that their right of self-determination consists of a remedial claim. Due to historical violations of self-determination of indigenous peoples, genocide and present day inequities against them, indigenous rights norms comprise a remedial regime, although some detailed elements of substantive self-determination of indigenous peoples are to be found as well. Thus, the Draft declaration states in the wording of common Article 1 of the ICCPR and the ICESCR that indigenous peoples by virtue of their right to self-determination freely determine their political status and freely pursue their economic, social and cultural development.<sup>81</sup> Following the previous analysis, both aspects of constitutive and ongoing self-determination in the substantive meaning of the norm are applied in the context of indigenous rights. As a remedial measure, the implementation of the right of self-determination of indigenous peoples has to be in accordance with their own aspirations. This may involve a change in the political order and therefore a change of the *status quo*. But it does not imply necessarily a right to secession, as most states fear. Rather self-determination in the context of indigenous peoples requires “belated state building”<sup>82</sup> through peaceful mechanisms such as negotiation, which guarantees their participation.<sup>83</sup> This often results in a form of autonomy arrangement.

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<sup>79</sup> Anaya (1996), p. 83.

Anaya in this context brings the example of the Western Sahara case, where the International Court of Justice stated that self-determination favours present-day aspirations of aggrieved peoples over historical institutions.

<sup>80</sup> Anaya (1996), p.85

<sup>81</sup> Anaya (1996), p. 86.

United Nations Draft Declaration on The Rights of Indigenous Peoples, Article 3

<sup>82</sup> Anaya (1996), p. 87

The author quotes Professor Erica.Irene Daes, “ Some Considerations on the Right of Indigenous Peoples to Self-Determination”, in: 3 *Transnational Law & Contemporary Problems*, 1, 9, 1993

<sup>83</sup> Anaya describes an illustrative case, where the Inter-American Commission of Human Rights suggested a belated state building as a remedy for the violations of the self-determination of indigenous peoples of the

#### **4. The Concept of Autonomy**

Autonomy is being increasingly promoted as a means of exercising the right of internal self-determination. As such it is often said to manifest a right to democracy. Thus, in granting indigenous peoples a right to autonomy, it can be argued, that they have a right to democracy. In order to understand the meaning of this statement properly, an analysis of the concept of autonomy is necessary. The relationship between autonomy and democracy is not as clear as often assumed and depending on the actual understanding of autonomy, a tension between competing principles can be traced. Therefore a clarification of the terminology is necessary, both in its normative as well as the practical implications.

From a pragmatic stance, there are various reasons and claimed advantages of autonomy<sup>84</sup>: for instance the maintenance of the territorial integrity of the state or the peaceful resolution of conflicts. Yet, at the international level autonomy is not yet acknowledged as a legal right. But with elaboration of the Draft Declaration on the Rights of Indigenous Peoples autonomy is being mentioned expressively in an international human rights instrument: Article 31 provides for a right to autonomy or self-government of indigenous peoples in matters relating to their internal and local affairs.<sup>85</sup> This raises the question of the substance of autonomy as a form of self-determination in the context of the rights of indigenous peoples.

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Atlantic Coast region of Nicaragua. By way of consulting and negotiating, all parties accepted an autonomy arrangement.

Anaya (1996), p. 88

<sup>84</sup> See Danspeckgruber who promotes self-government as a form of autonomy and the principles elaborated in The Liechtenstein Draft Convention on Self-Determination Through Self-Administration discussed by Watts. Danspeckgruber (1995).

<sup>85</sup> Heintze (1998)

#### 4.1. Autonomy, Democracy and Human Rights

The concept of autonomy has played a crucial role in Western political theory.<sup>86</sup>

Semantically, the term autonomy derives from the Greek *auto* (self) and *nomos* (rule) and thus literally stands for self-rule.<sup>87</sup> But what does this mean?

The notion of autonomy is based on at least two preconditions: the precondition of a developed self to which the actions can be ascribed to; this requires the second precondition of a consciousness of oneself as a being acting for reasons. As an autonomous person, the individual is perceived as being free from external constraints.<sup>88</sup>

In reference to individuals, four meanings of autonomy can be distinguished. First, it can describe the capacity to govern oneself; secondly, it can refer to the actual condition of self-government; thirdly, autonomy can be used to describe an ideal character from the conception; and finally, analogous to a political state, autonomy can mean the sovereignty to govern oneself. These different meanings of autonomy do correspond with different notions of independence: first, the capacity to support oneself; secondly, de facto self-sufficiency; thirdly, the ideal of self-sufficiency; and finally, de jure sovereignty and the right to self-determination.

To illustrate potential tensions between human rights and autonomy, I will discuss Habermas' theory of law.<sup>89</sup>

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<sup>86</sup> It has been dealt with by Niccolò Macchiavelli in his *Discourses*, Jean-Jacques Rousseau in his *Social Contract*, John Stuart Mill in his *On Liberty*, and Immanuel Kant in his various works, only to mention his *Critique of Practical Reason* and *Foundations of the Metaphysics of Morals*. Also in modern political theories the concept of autonomy finds attention among famous writers like Isaiah Berlin, John Rawls, and Robert Nozick, just to mention a few of them.

Wiberg (1998), p. 48

<sup>87</sup> Wiberg (1998), p. 47 and Hannikainen (1998), p. 79

<sup>88</sup> Wiberg (1998), p. 47

Wiberg seems to equate the freedom from external constraints with freedom of will. I want to emphasise that, following Schopenhauer in his essay on the freedom of will, this sort of freedom as freedom of actions rather than freedom of will. This is of importance, as the freedom of will is a subject of much controversy and it will neither help to ground the concept of autonomy as it is used in the context of indigenous peoples on such a controversial and therefore "insecure" foundation, nor is it necessary.

Schopenhauer (1986)

<sup>89</sup> Habermas (1992),

According to Habermas, there is a tension between the notions of private autonomy, on which aspirations of human rights are grounded, and public autonomy, from which the democratic principle is derived.<sup>90</sup> The idea of public autonomy or popular sovereignty is at the core of his theory<sup>91</sup> and human rights guarantee the conditions for communication in order to achieve a reasonable political constitution of the will of the people. A tension between private autonomy and human rights on the one hand, and public autonomy and popular sovereignty on the other hand exists insofar as popular sovereignty, and therefore the exercise of democracy, has to be compatible with the human rights of the individual.<sup>92</sup> Thus, in Habermas' theory, public and private autonomy refer to each other and they must be understood as supplementary.<sup>93</sup> Human rights do not limit popular sovereignty, but rather are a constitutive element of democracy. Further, Habermas recognises the intrinsic value of classical liberal rights, which are based on the private autonomy of the individual. In reference to Kant and Rousseau, Habermas argues that autonomy, which in a moral context constitutes one single principle, in a legal context implies both private and public autonomy.<sup>94</sup> But the tension between human rights and democracy as described by Habermas is only to be held on the premise that private and public autonomy are equivalent principles or *gleichursprünglich*.

In order to clarify the relationship between the democratic principle on the hand and human rights on the other hand, two basic strategies have been developed within political theory. Liberal theorists<sup>95</sup> advocate the primacy of human rights, whereas democratic-republican<sup>96</sup> approaches emphasise the primacy of popular sovereignty. In favouring the primacy of either human rights or democracy, the tension is being resolved.

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<sup>90</sup> Habermas (2001) and (1992)

<sup>91</sup> Habermas (1992), p. 112, see also Gosepath (1998), p. 214

<sup>92</sup> Gosepath (1998), p. 209

<sup>93</sup> Habermas (2001), p. 134

Habermas calls this relationship in German “Gleichursprünglichkeit”, which means that none of the two principles has precedent before the other.

<sup>94</sup> Habermas (2001), p. 150

<sup>95</sup> For a classical example see Locke (1982). A contemporary example is Rawls (1999).

<sup>96</sup> A classical example would be Rousseau (1968) and a contemporary one Habermas (1992).

In liberal theories human rights impose limitations on the will of the people (popular sovereignty) in order to prevent violations of the subjective rights of the individual. In contrast, democratic-republican theories argue for a primacy of the public and collective self-government of the citizens. Human rights are then validated through the process of public self-determination and thus are a constitutive element of democratic rights of participation and communication.<sup>97</sup>

Habermas claimed tension between private and public autonomy, or human rights and popular sovereignty, thus derives from his assumption of the equivalency of this two principles.

Following the liberal approach, this tension disappears when recognising the primacy of human rights over democracy. From a democratic-republican perspective this tension is being resolved in arguing the primacy of the democratic principle over human rights.

In the context of indigenous rights the importance of these normative considerations lays in the fact that, at least in the legal context, there exists a difference between private and public autonomy, which has to be kept in mind. To equate a right to autonomy with a right to democracy, the concept of autonomy is not captured in all its manifestations, but only as public autonomy and may be interpreted as lending primacy of popular sovereignty over human rights. Or, to put in a different wording: “*There are no inner constraints or filters that somehow automatically guarantee that only morally justified policies are enacted and implemented through the mechanisms of democratic means of majority rule. This is important to keep in mind especially for those well meaning persons who try to defend simultaneously both democracy and autonomy. These two concepts may easily contradict each other in many political contexts.*”<sup>98</sup> I also want to point out a further complication when talking about democracy in the context of indigenous peoples: does a right to democracy imply participation and representation of the group at the state level, or does it mean the democratic

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<sup>97</sup> Gosepath, (1998), p. 211

<sup>98</sup> Wiberg (1998), p.45

governance of the group *inter se* and thus refer to an individual right against the group?<sup>99</sup> This is not the place for answering this complex issues. My aim is to draw attention to these complications, which require further (normative) analysis.

After having discussed some normative problems of the relationship between autonomy and democracy, I will now look at different ways of implementing autonomy.

## **4.2. Forms of Autonomy**

Autonomy is a principle, which can manifest itself in various forms and thus a fixed and determinate definition of what amounts to autonomy is not possible. Yet, a common basis for the different models of autonomy in public international law is identifiable: the principle of subsidiarity. This principle embodies both negative obligations as well as positive duties. The negative obligations limit the power of superior community level in restraining it if a solution can be achieved at a lower community level.<sup>100</sup> However, the principle also imposes the positive duty to assist the lower community level when it is not able to achieve a solution on its own. The principle of subsidiarity thus advocates decentralisation and thus is at the basis of any autonomy arrangement.

The different forms in which autonomy can manifest itself can be distinguished in 1)territorial autonomy and 2)non-territorial autonomy arrangements such as cultural autonomy, personal autonomy and federal structures for example.

### **1) Territorial Autonomy**

Territorial autonomy is the least disputed and, in terms of application, the easiest form of autonomy. This form of autonomy can only be implemented where a group lives within a

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<sup>99</sup> This point is discussed in Palmisano (1997), p. 302

<sup>100</sup> Heintze, (1998), p. 12

This is a social and political principle for the organisation of the state and society according to the idea that there are elements between the state and the individual that allow the individual to preserve its identity.

geographically defined area constituting the majority there.<sup>101</sup> If a region is autonomous, this status applies to all people living in that region, not only the members of the majority.

Members of the group living outside the territory do not enjoy the autonomous status.

Problematic with this form of autonomy is the possibility of reversal of majorities: the former minority within the state becomes the majority within the autonomous region and gains power over other minority groups within it. The suppression of the new minorities may occur or in the extreme, the structure of the population may be changed through ethnic cleansing. In order to avoid this misuse of power, clear regulations must be agreed on before the region gains its autonomous status.<sup>102</sup>

## 2) Non-Territorial Autonomy

Not all minorities live within the same territory and thus the concept of territorial autonomy is not practicable. As alternatives to territorial autonomy, cultural, personal and functional autonomy arrangements can be a solution for claims by minorities not being territorially concentrated. Although these three different types of non-territorial autonomy can be identified, they cannot be distinguished in an absolute sense and be overlapping each other.<sup>103</sup>

*Cultural autonomy:*<sup>104</sup> can be defined as self-government of cultural affairs by the minority.

As such the autonomy is restricted to purely cultural affairs. From a normative, but also practical, perspective, the question of how to define culture must be raised. There is no consensus of what exactly culture is and which aspects of group identity should be considered as integral to their cultural identity. Usually, issues concerning language, education and religion are regarded as part of the cultural affairs of a minority. The objective of this form of

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<sup>101</sup> Heintze (1998), p. 18

<sup>102</sup> Heintze (1998), p. 19

Regulations should include issues such as the sources of funding, the mechanisms to be employed when a conflict between the state and the region arises, creation of representative bodies and compliance with human rights.

<sup>103</sup> I follow the distinction given by Heintze (1998), p. 21

<sup>104</sup> Eide (1998)

autonomy is the preservation and development of the culture of the group in question. One problem of cultural autonomy is the danger of isolation and alienation of the minority, which in its extreme may destruct the unity of the state if the minority is being separated from the majority culture. It is therefore important to guarantee participation of the minority in the state.<sup>105</sup>

*Personal Autonomy:* Public international law distinguishes between *jus soli* and *jus sanguinis*. This distinction corresponds the one between territorial and non-territorial approaches to nationality. Similar, the relationship between ethnicity and the state is being distinguished into the principle of territoriality and principle of personality. Personal autonomy is thus based on the principle of personality according to which the subjects of autonomy are members of ethnic groups. Under the idea of personal autonomy, collective rights are transferred to the individual. It applies where no separate areas of group settlement exist<sup>106</sup> and enable political participation of the individual as a member of a specific group.

*Functional Autonomy:* In functional autonomous arrangements, selected state functions are being transferred to the minority and they are granted rights to private minority group organisations.<sup>107</sup> Thus, this form of autonomy requires the private organisation of the minority. The state then transfers particular functions to the private corporations, which the minority has to form collectively and without state interference. The advantage of this form of autonomy is the possibility of easy and fast participation of minorities in the political and social life. On the other hand, it requires financial support and the lack of a status under public law is disadvantageous.<sup>108</sup>

*Federalism:* Another solution of accommodating different groups within the boundaries of a state is federalism. Autonomy can be understood as a kind of federal arrangement. The basic difference between a federal arrangement and autonomy is the separation of competences

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<sup>105</sup> Heintze (1998), p. 21

<sup>106</sup> Heintze (1998), p. 22

<sup>107</sup> Heintze (1998), p. 23

<sup>108</sup> Heintze (1998), p. 24

between the states governments. Federalism as a form of territorial group protection transfers legislative and executive powers to the federal states. Autonomy means fragmentation, whereas federalism establishes constituent states as part of the whole. A federal state needs to adapt to changing circumstances and requires therefore cooperation. It is a structure *sui generis* that has to be viewed in conjunction with geographical, economic, historical and other factors.<sup>109</sup> One variant of federalism is based on ethnicity and can be labelled as ethnic federalism. This type of federalism is often regarded as a solution for group conflicts based on ethnic identities. It combines political and ethnic structures of state territory. Another variant of federalism is poly-ethnic federalism in which neither the federal state nor the constituent states are ethnically homogenous. Due to the federal structure, political integration can be achieved, as the smaller units instead of larger ones have to cooperate. In addition, the minority of the one region usually constitutes the majority in another region and thus a balance is being maintained. The precondition of the functioning of a poly-ethnic federation is a high commitment to the preserve the unity of the state.<sup>110</sup> It is important to acknowledge that although federalism may be a good basis for autonomy-like arrangements, it does not guarantee the peaceful coexistence of the different ethnic groups and the persistence of the federal structure.<sup>111</sup>

*Political Autonomy:* The notion of autonomy is vague and is being used in different contexts giving it different meanings and contents.<sup>112</sup> In a political context the notion of autonomy usually describes the autonomy of agents. As such, autonomy is derived from the belief of the freedom of will and moral capacity of a person. But the freedom of autonomous agent does not have to be understood in an absolute sense – every agent is to some degree dependent on

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<sup>109</sup> Heintze (1998), p. 25

<sup>110</sup> Heintze (1998), p. 27

<sup>111</sup> Heintze (1998), p. 26

<sup>112</sup> The notion is used for example in political philosophy, medical ethics, as well as in international law. Wiberg (1998), p. 43

external forces and in rarely socially isolated.<sup>113</sup> This form of autonomy corresponds the notion of public autonomy in theory of Habermas discussed earlier. It manifests itself through democratic structures within the society.

#### **4.3. Autonomy as Conflict Resolution**

Experience has shown that majoritarian democracy<sup>114</sup> and the protection of individual human rights are not sufficient conditions for the peaceful settlement of disputes.<sup>115</sup> Disputes over sovereignty and self-determination require more flexible legal doctrines in order to resolve them.<sup>116</sup> Traditionally, autonomy did not have a strong status in international law as it is considered a matter of constitutional law and therefore is a matter of domestic affairs. Yet, autonomy always played a role in the solving of conflicts<sup>117</sup> as one claimed advantage of autonomy is its potential for conflict resolution.<sup>118</sup> Further, autonomy is often perceived as a means to avoid secessionist claims. Thus, within the context of peaceful conflict resolution, autonomy has been recommended by some states.<sup>119</sup> Autonomy does not interfere with the principle of the territorial integrity of the state, as the main aim of autonomy should be the transfer of rights to the minority or population and thus rendering secession superfluous. But it should be kept in mind that autonomy is only one part of conflict resolution and a combination with other measures appropriate to the specific circumstances of the conflict is necessary.<sup>120</sup> Sometimes, autonomy arrangements can even worsen the situation and cause new conflicts. Where the conflict is based on ethnic differences, autonomy could increase

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<sup>113</sup> Wiberg (1998), p. 44

<sup>114</sup> For a discussion of the impact of two different conceptions of democracy on minorities see Pettit (2000).

<sup>115</sup> Hannum (1994), p. 3

<sup>116</sup> Hannum (1994), p. 4

<sup>117</sup> Hannikainen, (1998), p. 88

<sup>118</sup> Heintze (1998), p. 11

For an illustrative example in China see: Pei (1995)

<sup>119</sup> Heintze (1998), p. 28

<sup>120</sup> Heintze (1998), p. 28

alienation between varies ethnic groups<sup>121</sup>. Thus, instead of learning to live together in harmony, autonomy can intensify the differences between disputing parties. Autonomy does not always meet the expectations of the group concerned and a subsequent claim for secession may arise. It is then often feared by states that in guaranteeing autonomy to a region this will only be the first step to statehood.<sup>122</sup> This is mainly because autonomy is such a flexible concept that it can mean a variety of things to different people and if the arrangements are not spelled out properly may cause misunderstandings. As long as there is a basic understanding of its essential features, it can be a useful tool for the resolution of conflict in a variety of circumstances.<sup>123</sup>

This vagueness of the concept of autonomy must not necessarily be considered as negative. It has been argued that this vagueness of the concept of autonomy may also help in the case of a stalemate, where none of the parties wants to lose the face but concessions are needed in order to make progress in a peace process.<sup>124</sup> Often the settlement is only possible because the details of the autonomy arrangement are not spelled out. It is for that reason, that the concept of autonomy is a popular solution for ending conflicts. This may be regarded as positive.<sup>125</sup> But I don't think that this is an appropriate understanding of how autonomy may help in resolving conflicts. Autonomy is not an empty formula, but does indicate a process of participation of the people involved. In order to solve the conflict on a long-term, the arrangement has to be agreed on in good faith and the more detailed it is spelled out, lesser further disputes will arise out of it.<sup>126</sup> This should be achieved through peaceful mechanisms for the settlement of disputes, which are recognised by the international community.<sup>127</sup>

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<sup>121</sup> See cultural autonomy.

<sup>122</sup> Hannum (1994), p. 7

<sup>123</sup> Wiberg (1998), p. 56

<sup>124</sup> Wiberg (1998), p. 57

<sup>125</sup> As Wiberg does suggest. p. 57

<sup>126</sup> For an evaluation of self-determination and interstate conflicts since 1990 see Appendix C in: Danspeckgruber (1995)

<sup>127</sup> Collier/Lowe (1999)

Peaceful mechanisms for the settlement of international disputes are for example negotiation, mediation, reconciliation, arbitration and the binding decisions by international courts.

In addition, one precondition for the success of an autonomy arrangement is the respect of human rights. Therefore, the protection of human rights should be regarded as the first aim of any autonomy.<sup>128</sup> This indicates the primacy of human rights over popular sovereignty.

#### **4.4. Indigenous Peoples and Autonomy**

The main advantage of a right to autonomy is that it does not challenge the unity of the state and existing state boundaries.<sup>129</sup>

Although autonomy is not an explicit right at the international level and not to be found in any international treaty, it may be regarded as a principle of international law and it has been claimed that a right to autonomy forms part of customary law. Even in soft law no explicit acceptance of a right of autonomy can be traced.<sup>130</sup> But until now it is disputable if such a right of customary law exists as forms of autonomy vary to such an extend from case to case that the specific content of this right remains doubtful and thus a customary rule can not be said to have evolved. Hence, it cannot be said that there is a right to autonomy under international law.<sup>131</sup> Yet, the expressive right to autonomy established by the Draft Declaration on the Rights of Indigenous Peoples can be regarded as a source for a new legal right.

The recent developments within the context of the discussion of the rights of indigenous peoples and more specific their right of self-determination, gave new impetus to the acceptance of autonomy as a principle of international law.

Article 31 of the draft Declaration on the Rights of Indigenous Peoples states that indigenous peoples have the right to autonomy or self-government in matters relating to their internal and

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<sup>128</sup> Heintze (1998), p. 28

<sup>129</sup> Heintze (1998), p. 20

<sup>130</sup> Heintze (1998), p. 13.

<sup>131</sup> Heintze (1998), p. 14

local affairs. This right to autonomy forms an integral part of self-determination of indigenous peoples.

The wording of Article 31 has been criticised as it could be read as excluding self-determination in its full sense as autonomy is only one way to exercise self-determination.<sup>132</sup>

This concern is also expressed in a working paper submitted by Miguel Alfonso Martinez, a member of the WGIP, at the 22<sup>nd</sup> session in July 2004.<sup>133</sup> As he emphasises, the right to autonomy is a specific form of indigenous peoples to exercise their right of self-determination.<sup>134</sup> In addition, Article 45 of the Draft Declaration and the Declaration on the Principles of International Law state that the interpretation of rights has to be in accordance with the Charter of the United Nations. Restricting the right of self-determination to a right of autonomy is not compatible with the Charter.<sup>135</sup> In any event, the right of self-determination is expressively stated in Article 3 of the Draft Declaration and the additional provision of a right to autonomy must not be interpreted as infringing this right.

And nor does the right to autonomy or the right of self-determination infringe other human rights granted under international human rights law. Autonomy does not mean that indigenous people can do whatever they want in accordance with their customs, as they are still bound by international legal norms, and depending on the special autonomous arrangements, by the law of the state. Especially in the administration of justice, the conformity with international human rights law has to be guaranteed. Thus, to use the Habermasian terminology, their public autonomy is bound by the private autonomy of the individual. This indicates a normative assumption of the primacy of human rights over the idea of popular sovereignty.

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<sup>132</sup> Tomuschat (1993), p. 13

<sup>133</sup> E/CN.4/sub.2/AC.4/2004/2, p. 7

<sup>134</sup> Autonomy, self-government and territorial integrity actually form subsidiary rights of the right of self-determination.

Daes (2002), p. 302

<sup>135</sup> E/CN.4/sub.2/AC.4/2004/2, p. 8

## 5. Conclusion

In the past it has often been assumed that the only way of exercising the right of self-determination is by way of secession or external self-determination. But there exist a variety of forms by which the right of self-determination can be exercised, and secession is only one of them. From a liberal perspective, a right to self-determination is never absolute but must always be in accordance with the same right of others.<sup>136</sup> A right to secession does not necessarily flow from a right of self-determination. Yet, in the case of gross human rights violations, secession might be the only way to exercise the right of self-determination and thus secession may be legitimate as a last resort.

Much of the reluctance to grant a right of self-determination to indigenous peoples is caused by the assumption that a full exercise of the right of self-determination would imply their right to secede. But self-determination does not necessitate a fixed outcome but rather prescribes the process leading to the outcome.<sup>137</sup>

From a logical perspective it is difficult to maintain a restrictive interpretation of the right of self-determination of indigenous peoples. The arguments against acknowledging the full right of self-determination are based on practical and political considerations. The dichotomy of internal/external self-determination may be invoked in order to restrict the right of self-determination of indigenous peoples to the internal aspect and thus exclude the right to secede.

But in using the terminology suggested by Anaya instead of the internal/external dichotomy two important and often neglected aspects of the right of self-determination become apparent: first, the idea of justice as an integral part of autonomy; and second, that secession is a remedial prescription and not a substantive right.<sup>138</sup> In the context of a right of self-

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<sup>136</sup> For example see: Kant, *Metaphysik der Sitten. Rechtslehre*.

<sup>137</sup> Nettheim (1988), p. 119

<sup>138</sup> Scott (1996), p.819

determination of indigenous peoples the remedial aspect of the right of self-determination reflects the notion of justice. Thus, the importance of self-determination lays in its acknowledgement of the injustices of the past by way of granting a right of self-determination as a means of rectification.<sup>139</sup> The strength in this approach lays in its constructive critique of the status quo without necessarily challenging existing state boundaries and therefore is more compatible with the interest of the states without denying the right of self-determination of indigenous peoples, as in the most cases, autonomy arrangements better remedy these injustices than secession or the reconstruction of the *status quo ante*.

The right to autonomy thus may be a good way of exercising self-determination, both in the interest of the state as well as in the interest of the indigenous peoples themselves. However, as the right of self-determination must not be equated with a right to secession, similarly the right to autonomy must not be equated with the right to democracy. Self-determination is a human right, and in the same way as the right to autonomy is one aspect of the human right of self-determination, the right to democracy is one aspect of both of them.

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<sup>139</sup> Falk (2000), p. 102

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