Where Does India Stand on the Right to Self-determination?

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Demands for right to self-determination leading to secession cannot be prohibited and criminalised in India as the Supreme Court considers acquisition and cession of territory as a sovereign right outside the Constitution.

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Recent incidents at the Jawaharlal Nehru University attracted national and international attention when a few students were arrested and charged with sedition. One of the allegations was that these students organised a cultural event where certain slogans about India's disintegration and the right to self-determination of the Kashmiri people were raised. In relation to this incident, some students were charged under Section 124A of the Indian Penal Code for the crime of sedition. It is important to know whether the slogans chanted would amount to sedition or not, and this would be decided by the courts of law. However, the larger question is, what constitutes nation and nationalism, particularly in the context of the demand for the right to self-determination? At the international level, the understanding of the right to self-determination passed through several historical phases that enriched and determined its constituent elements. All along, it has been a contested concept and its relevance and application in a particular context has always been the outcome of political processes. Thus, its assertion as a claimable right is of legal significance. However, demands for its application remain in the political realm.

At the International Level

The emergence of the principle of self-determination is mainly attributed to the developments in the beginning of the 20th century, particularly in the European context. The principle's theorisation and articulation is mainly attributed to Lenin, Stalin and Woodrow Wilson, though with different political

connotations (Manela 2007). These articulations, however, did not attain any legal status immediately as a claimable right. The right to self-determination acquired its legal significance only after World War II when it was included in the United Nations (UN) Charter. Article 1(2) of the UN Charter provides that one of its purposes and principles is "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace." Similarly, Article 55 of the UN Charter contains provisions "[w]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples." These provisions, however, do not elucidate the normative component of the right.

Developments after World War II bring to light the understanding and expansion of human rights at the international level. Accordingly, the right to self-determination was contextualised in the human rights framework. A major initiative in this regard, after the UN Charter, was the UN General Assembly resolution of 1960, "Declaration on Granting Independence to Colonial Countries." This resolution proclaims the "necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations" (UNGA 1960). The Declaration, however, qualifies this assertion and goes on to state that "any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations." In continuation to this, another important development in relation to the right to self-determination is the Friendly Relations Declaration of 1970 adopted by the UN General Assembly which states,

> [b]y virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter. (UNGA 1970)

The principle of self-determination attained a concrete character in the form of a right when it was included in the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights adopted in 1966.[1] Article 1 of both the covenants states that "[a]ll 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." With the inclusion of this provision in both the covenants the principle of self-determination has been elevated to the level of a claimable right. This provision also broadly identifies the contours of this right, but does not confine its application to any particular context. Thus, the current status of the right to self-determination under international law has to be understood with reference to this provision in the covenants along with the UN Charter and other declarations.

India and Self-determination

Neither the Indian Constitution nor any statute expressly defines the right to self-determination or explains the position of India on the right to self-determination. In the absence of any specific reference to this right in the Constitution or in other statutes, it becomes imperative to evaluate India's position by examining its views expressed at the international fora. One of the most authoritative positions expressed by India on the right to self-determination is its declaration, which was made when it became a party to the two human rights covenants in 1979. India made a declaration to Article 1 of both the covenants. The declaration states that

> the Government of the Republic of India declares that the words 'the right of self-determination' appearing in [this article] apply only to the peoples under foreign domination and that these words do not apply to sovereign independent States or to a section of a people or nation ... which is the essence of national integrity. (UNGA 1966)

As international legal obligations are largely consent-based, India's acceptance of the human rights covenants including the right to self-determination should be read along with this declaration. The declaration limits the scope of the right to certain contexts only. It can be considered an authoritative statement of the Indian government irrespective of the change in the political parties and governments. It is also the legal position of the Government of India for both internal and external purposes as there is no other explanation found either in the Constitution or elsewhere. This position, thus, clarifies that the right to self-determination is confined to the specific context of foreign domination, like colonialism, and is clearly against its application to postcolonial and other situations. The consequence of this position is that this right cannot be extended to any situation in India as it can be argued that it is not a context of foreign or colonial domination, with India having attained independence from colonialism.

Countries like Bangladesh and Indonesia also took similar positions on Article 1 of both the human rights covenants. But, countries like France, Germany, the Netherlands, and Pakistan objected to India's declaration as limiting the scope of the right to self-determination (Hampson 2002). Hence, despite there being unanimity on the existence of this right under international law, there have been differences among states on its content and its applicability to specific situations.

Prior to this declaration too, India had voiced a similar view. When the Friendly Relations Declaration of 1970 was drafted, India stated that this right did not apply to sovereign and independent states or to integral parts of their territory, or to a section of people or nation.[2] It is a historical fact that the right to self-determination took on its character of a legally claimable right against the background of struggles against political and economic domination in the context of colonialism. The underlying elements of this right include collective political and economic independence from any external forces. Thus, the substantive element of the right to self-determination is not colonialism, per se, devoid of any form of domination. Self-determination is claimed because colonialism is a form of

political, economic, cultural, and social domination and subjugation.

Constitutional and Statutory Position

While remaining silent on the issue, India's constitutional and statutory position does not prohibit the possibility of claims for right to self-determination and secession of territories from India. Despite the absence of any specific reference to this right in the Constitution or in statutes, it cannot be argued that this right cannot be claimed. On the contrary, there is a clear possibility of claiming the right to self-determination, and the Supreme Court also ruled in favour of the possibility of cession of territory by India. A significant component of the right to self-determination is its external impact, that is, external self-determination in the form of secession from the existing territory to form a new entity or to merge with another existing entity. In India, any demand for the right to self-determination leading to secession needs to be evaluated in the existing constitutional and statutory scheme before determining whether such a demand would amount to any crime under the existing criminal laws.

The relevant provisions in the Constitution are related to the territory of India. Article 1 of the Constitution describes the territory of India. Article 1(3) provides that the territory of India shall comprise (i) the territory of the States; (ii) the Union territories specified in the first schedule; and (iii) such other territories as may be acquired. The geographical features of India are not confined to the existing territory alone, but include other territories that may be acquired in the future, in all probability parts of territory from other countries or the merger of another country or countries into the existing Indian territory. However, neither this provision nor any other provisions in the Constitution mention the cession in parts or in full of the existing territory. This aspect is profoundly relevant to understand and evaluate the demands for the right to self-determination in the form of secession.

Absence of the express provision in the Constitution for the cession of territory in part or in full cannot be considered as prohibition of cession. The Supreme Court was confronted with a situation of cession of parts of territory and its validity under the Constitution in the matter of *In Re: The Berubari Union and Exchange of Enclaves v Reference under Article 143(1) of the Constitution of India* (1960).

The issue before the Supreme Court involved the settlement of the dispute between India and Pakistan and the transfer and/or cession of territories between the two countries on the eastern border of India with Pakistan. India and Pakistan entered into an agreement known as the Nehru–Noon Agreement of 1958 detailing this process that involved the division of Berubari Union No 12, which would be divided by giving half the area to Pakistan, while the remaining are adjacent to India would continue to be with India. The agreement also involved the exchange of certain enclaves between India and Pakistan. Keeping in view the legal implications involved, the President of India, under Article 143(1), referred three questions to the Supreme Court for its opinion on the issue. The three questions were,

> [1] Is any legislative action necessary for the implementation of the Agreement relating to Berubari Union? [2] If so, is a law of Parliament relatable to Article 3 of the Constitution sufficient for the purpose or is an amendment of the Constitution in accordance with Article 368 of the Constitution necessary, in addition or in the alternative? [3] Is a law of Parliament relatable to Article 3 of the Constitution sufficient for implementation of the agreement relating to Exchange of Enclaves or is an amendment of the Constitution in accordance with Article 368 of the Constitution necessary for the purpose, in addition or in the alternative? (*In Re: The Berubari Union and Exchange of Enclaves v Reference under Article 143(1) of the Constitution of India* 1960)

The Supreme Court held that the agreement amounted to cession of a part of the territory of India to Pakistan and, thus, would involve the alternation of Article 1 and the relevant parts of the First Schedule to the Constitution. The Court in the Berubari case held that

> acting under Article 368 Parliament may make a law to give effect to, and implement, the Agreement in question covering the cession of a part of Berubari Union No 12 as well as some of the Cooch-Behar Enclaves which by exchange are given to Pakistan.

While dealing with the specific issue before it, the Court made certain important observations that are relevant for understanding the right to self-determination leading to the secession of parts of the territory. It was argued before the Court in the Berubari case that "even Parliament has no power to cede any part of the territory of India in favour of a foreign State either by ordinary legislation or even by the amendment of the Constitution." It was further argued that the Constitution has expressly provided under Article 1(3)(c), the power to acquire other territories, and there is no such provision for ceding any part of the territory. In response, the Court held that

> Article 1(3)(c) does not confer power or authority on India to acquire territories ...There can be no doubt that under international law two of the essential attributes of sovereignty are the power to acquire foreign territory as well as the power to cede national territory in favour of a foreign State. What Art 1(3)(c) purports to do is to make a formal provision for absorption and integration of any foreign territories which may be acquired by India by virtue of its inherent right to do so.

Thus, the Court held that "on a true construction of Article 1(3)(c) it is erroneous to assume that it confers specific powers to acquire foreign territories." Based on this, the Court held that

> if the power to acquire foreign territory which is an essential attribute of sovereignty is not expressly conferred by the Constitution there is no reason why the power to cede a part of the national territory, which is also an essential attribute of sovereignty, should have been provided for by the Constitution. Both of these essential attributes of sovereignty are outside the Constitution and can be exercised by India as a sovereign State.

The Court here expressed its noteworthy opinion that acquisition and cession of territories is beyond the Constitution and these aspects are in the realm of the sovereignty of a state. This view is particularly germane to the demands for the right to self-determination and secession of territories.[3] As ceding a part of the territory is outside the constitutional framework, it is not prohibited to demand the exercise of this sovereign right by the Indian state by a group of people under

the right to self-determination. Though the right to self-determination is narrowly accepted by the Indian state, it is not legally prohibited to demand its expansive application. And, it cannot be legally prohibited because it is only in the political realm that these matters are settled. What the Court considered as an essential attribute of sovereignty, and therefore outside the ambit of the Constitution, is in the practical sense a matter of political assertion and contestation. Thus, a secessionist demand in the name of the right to self-determination is very much within the legal limits as long as there is no prohibition on cession of territories by the Indian state.

Imagining India beyond Given Borders

The other important dimension of the issue is whether it is or it should be a crime under the law to demand the right to self-determination and secession. Against the backdrop of India's position on the right to self-determination at the international level and the possibility of cession of territory as a sovereign right, as held by the Supreme Court, it can be argued that it cannot be a crime to demand the right to self-determination leading to secession. When it is a sovereign right to cede a part of the territory, it cannot be a crime to demand that the Indian state cede a territory to a particular group of people living on Indian territory. It is for the Indian government to decide whether to yield to that demand or not, which largely depends on the political mobilisation and effective articulation.

The underlying view is that it is not illegal to make a political demand and engage in the mobilisation of people demanding for the right to self-determination. However, the conduct of the people involved in pursuing that political demand may be criminalised if they are engaged in any violent action that contravenes the existing laws. The mere demand for self-determination and political mobilisation for that purpose is not and cannot be a crime per se. Therefore, criminal law provisions that criminalise any claims for cession or secession of a part of the territory of India should be read along with the constitutional and sovereign position of India in terms of cession of a part of the territory. Statutes like the Unlawful Activities (Prevention) Act[4] that criminalise such claims should be restrictively interpreted to accommodate the sovereign right of India as held by the Supreme Court.

This can be explained with the example of the Rashtriya Swayamsevak Sangh's belief in pursuing the realisation of Akhand Bharat. The idea of Akhand Bharat goes beyond the existing borders of India (*Indian Express* 2015). This view is contrary to the geographical boundaries of India as defined by the Constitution. However, such political views can be seen as imagining India in a political and geographical sense that is different from what is understood as India today in a geographical sense, in the given constitutional framework. This view may be politically contested, but cannot be criminalised. Similarly, it is equally legal and legitimate to imagine India without certain parts of its existing territory. And, the same can be pursued politically. It should not be considered a crime under the law. Its acceptance and successful achievement or its failure is purely dependent on how it is politically articulated and pursued.

Conclusions

India understands the right to self-determination under international law as limited to situations of foreign domination and colonialism, and declines to extend it to postcolonial and other situations. Its constitutional and statutory frameworks are silent on the issue. Based on the related constitutional provisions, the Supreme Court held that acquisition and cession of territory are sovereign rights and are outside the Constitution. Based on this view, it can be concluded that the right to self-determination leading to secession cannot be prohibited as long as there exists a sovereign right of the state to cede its territory. Therefore, it cannot also be considered a crime to demand the right to self-determination leading to secession. It is the political process that determines the success or failure of such demands.

NOTES

1 The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights were adopted by the United Nations (UN) General Assembly on 16 December 1966; the former came into force on 3 January 1976 and the latter on 23 March 1976.

2 The Indian delegation expressed its view before the Special Committee for drafting of the Friendly Relations Declaration. It stated that "the right of self-determination did not apply to sovereign and independent states or to integral parts of their territory or to a section of a people or nation. Without such an understanding, the principle of self-determination would lead to fragmentation, disintegration and dismemberment of sovereign states and Members of the United Nations. The dangers in that context would be particularly acute in the case of states having multi-racial and multi-lingual populations" (General Assembly Official Records, 25th Session, Supplement No 18, Doc.A/8018, p 110; cited in V S Mani [1993: 251]).

3 Despite the differences of opinion on the binding nature of opinions expressed in the exercise jurisdiction under Article 143(1), the views expressed on the issue before it in the Berubari case were reaffirmed by the Supreme Court in *Union of India & Ors v Sukumar Sengupta & Ors* (1990).

4 Section 2(1)(o) of the amended Unlawful Activities (Prevention) Act of 1967 defines "unlawful activity" as any action taken by an individual or association through acts or words or signs "(i) which is intended, or supports any claim, to bring about, on any ground whatsoever, the cession of a part of the territory of India or the secession of a part of the territory of India from the Union, or which incites any individual or group of individuals to bring about such cession or secession; or (ii) which disclaims, questions, disrupts or is intended to disrupt the sovereignty and territorial integrity of India."

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