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Michael Freeman
University of Essex, UK

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The Right to Self-Determination: Philosophical and Legal Perspectives

Michael Freeman

University of Essex, UK

Why do we need to rethink self-determination? In this article I argue that self-determination is a necessary feature of the human condition and a human right but that it is in part illusory and is potentially dangerous. We need to rethink self-determination because our collective thinking has been very confused, and bad thinking about self-determination costs many lives.

The idea of “rethinking self-determination” implies the following: (1) once we were thinking about self-determination; (2) there was something inadequate about the way we were thinking about self-determination; (3) we should seek a more adequate way of thinking about self-determination. To rethink self-determination more adequately, we need to be clear about how we have thought about self-determination in the past, why we now think this past thinking was inadequate, and what we want to achieve by rethinking self-determination. What is the problem, or what are the problems, that rethinking self-determination is intended to help solve?

To answer this question, I propose four theses: (1) self-determination is a fundamental and necessary feature of the human condition; (2) it is a human right; (3) it is in part illusory; and (4) it is potentially dangerous.

The most familiar, and the primary legal, definition of self-determination is that of the common article 1 of the 1966 International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. It reads as follows:

All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.¹

This article was inserted in these two human rights covenants on the insistence of the newly independent, postcolonial members of the United Nations. It was initially resisted by the Western imperialist governments, who accepted it only when the worldwide process of decolonization was almost complete, and this provision was consequently largely redundant.

Eric Weitz has criticized the international legal definition for being historically and conceptually too narrow in that it is limited to the right to national self-determination in the context of anticolonial liberation. He locates the origin of the idea of self-determination in the philosophy of Immanuel Kant, where it is a strictly individualist idea. Human individuals, according to Kant, determine themselves through their interaction with their environment. In doing so they act autonomously, that is, they make choices, including moral choices, with the aid of their reason. They have a strict duty to make these choices in accordance with moral law. Moral self-determination, Kant argues, makes us truly human and gives us our dignity. As moral agents, we have the duty to respect the dignity and autonomy, that is, the right to self-determination, of all other individuals.

Weitz argues that this individualist conception of self-determination began to change in the work of Johann Gottlieb Fichte. Fichte was initially a follower of the liberal, individualist

Michael Freeman is an emeritus professor in the Department of Government, University of Essex, United Kingdom. This article is a revised version of a presentation at “Re-thinking Self-determination,” a conference organized by the International Communities Organization at Chatham House, London, February 18, 2019.

philosophy of Kant, but, under the influence of Napoleon's conquests of Germany, he emphasized the importance of the rights of nations. Although Fichte's intense German nationalism is often seen as a forerunner of Nazism, Fichte sought to reconcile individual rights with the rights of nations. He argued that individual rights could be protected only in a self-determining nation. Here we already see the seeds of the UN conception of the right to national self-determination as closely associated with individual human rights.

In the nineteenth century, individual self-determination was transformed into three main forms of collective self-determination. The first was that of liberal nationalism, represented, for example, by John Stuart Mill. Liberals held that individual rights could be protected only in a national community. Individuals, it was said, could be free only in community with others with whom they shared a common culture. Individual self-determination and collective, national self-determination were therefore inseparable. This was a universal truth; thus, the right to individual freedom and the right to national self-determination were universal human rights. The second turn to collective self-determination was that of authoritarian nationalism, the extreme form of which was fascism. The third was socialism, especially Marxism. Although self-determination in Marxism took the form of the emancipatory self-determination of the working class, Karl Marx and Friedrich Engels supported several national liberation struggles, such as that of the Irish against the English, the Poles against the Russians, and the Italians against the Hapsburg Empire. In 1896 the Socialist International included in its program an article on self-determination for all peoples. Meanwhile, movements for national liberation from Western imperial rule were stirring around the world.

In the early twentieth century, Vladimir Lenin advocated a form of Marxist national self-determination, while President Woodrow Wilson of the United States countered with a liberal-democratic form of national self-determination based on the historical experience of his country. Wilson's secretary of state, Robert Lansing, was skeptical. "[T]he right to self-determination," he wrote, "is bound to be the basis of impossible demands . . . and create trouble in many lands. . . . The phrase is simply loaded with dynamite. It will raise hopes which can never be realized. It will, I fear, cost thousands of lives. . . . What a calamity that the phrase was ever uttered! What misery it will cause!"² Some seventy years later, the dynamite exploded as Czechoslovakia split into two and Yugoslavia collapsed into civil war.

The verbal convergence between the Marxist-Leninist and the liberal-democratic, Wilsonian conceptions of self-determination enabled the United Nations to include the principle (not the right) of the self-determination of peoples in article 1 of the UN Charter. But when the United Nations adopted its Universal Declaration of Human Rights in 1948, it did not include the right to self-determination. The Western imperialist powers did not want to encourage anticolonial movements, and the United States did not want to encourage human rights and self-determination claims by African Americans. The worldwide anticolonial movement after the Second World War eventually succeeded in including the right of peoples to self-determination in the two UN human rights covenants of 1966. Individual human rights and the right of peoples to self-determination appeared to have been reconciled in international law. The enacted text, however, concealed three unsolved problems: Robert Lansing's dynamite lay unattended in the cellar of international law. The first problem was that the covenants did not define *peoples*, the entities that had been awarded the right to self-determination, and there was no definition elsewhere in international law. The Nigerians had the right to self-determination but did the Catalans? The Palestinians had the right but did the Tibetans or the Kurds? The second problem was that the United Nations had accorded an important right to peoples but had also affirmed the sovereignty and territorial integrity of states. It seemed to assume that "peoples" were either the citizens of established states or the peoples of colonies who had the right to establish an independent state. It failed to address the

problems raised by diverse peoples in multinational states. The third problem was that the declarations assumed compatibility between individual human rights and the right of peoples to self-determination. This assumption was implausible: empirically, national self-determination was often accompanied by serious violation of individual human rights. These unsolved problems meant that the right to self-determination was potentially dangerous.³

Weitz's narrative of the journey made by the idea of self-determination from individualism to collectivism is illuminating but it suffers from a defect for which he criticizes international law: it is historically and conceptually too narrow. It is limited to the modern era of liberalism and nationalism. The idea of self-determination, however, is deeper and more ancient than that. Human infants cannot survive without the help of human adults. Human adults cannot achieve much without the help of other adults. To have access to reliable help from other adults, humans must live in communities of rights, obligations, and mutual trust. Such communities are as ancient as history: they provide cooperation for the common welfare, conflict resolution and the maintenance of internal order, and defense against external enemies. Collective self-determination is therefore ancient; it was not, contrary to what Weitz suggests, an invention of the nineteenth century. In ancient times expanding empires frequently met resistance from would-be self-determining peoples. Less certain is whether the idea of individual rights is ancient or modern. In Sophocles' play *Antigone*, for example, the protagonist defies the orders of her king and buries her rebellious brother. We might think that she is claiming an individual right to freedom of religion, but she affirms her duty to follow the higher law of her community.

Weitz's story of the transformation of the idea of self-determination from individualism to collectivism also underestimates the place of collective self-determination in the two great eighteenth-century declarations of rights, the American Declaration of Independence of 1776 and the French revolutionary Declaration of the Rights of Man and of the Citizen of 1789. The American declaration begins with a reference to the necessity of "one people to dissolve the political bands which have connected them with another" and goes on to declare: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness—that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed." Article 2 of the French declaration proclaims that "the final end of every political institution is the preservation of the natural and imprescriptible rights of man," while article 3 says that the "basis of all sovereignty lies, essentially, in the nation." Emma Mackinnon has emphasized the presence of the right to national self-determination in these classic, eighteenth-century declarations often revered as pioneers of the idea of individual human rights.⁴ In this context it is worth noting another important declaration of rights. On September 2, 1945, Ho Chi Minh, leader of the League for the Independence of Vietnam, commonly known as the Viet Minh, proclaimed the independent Democratic Republic of Vietnam in Hanoi. His speech began with the following words:

All men are created equal. They are endowed by their Creator with certain inalienable rights, among them are life, liberty, and the pursuit of happiness. This immortal statement was made in the Declaration of Independence of the United States of America in 1776. . . . The Declaration of the French Revolution . . . on the Rights of Man and the Citizen also states: "All men are born free and with equal rights and must always remain free and have equal rights."⁵

Both international law and Weitz's narrative of the history of the idea of self-determination raise questions about the relation between individual rights and the rights of nations. They do not address the rights of vulnerable groups such as women, children,

refugees, disabled persons, indigenous peoples, ethnic and racial minorities, asylum-seekers and stateless persons, and the poor and “left-behind” communities. Orthodox human rights theory maintains that the complete fulfilment of individual human rights would be sufficient to protect the rights of members of these groups. Others argue that experience shows that, in the absence of collective rights, the individual rights of members of vulnerable groups will in practice be insecure. Liberal democracies privilege the preferences and interests of majorities provided that the human rights of minorities are protected. Majoritarian democracy, however, may not protect the legitimate interests of what are sometimes called “permanent minorities,” that is, those groups that are never likely to form a majority. This problem has led some to call for minority rights of various kinds (including forms of self-determination) to protect minorities against what has been called “majority tyranny.”

Will Kymlicka has argued that human rights may be insufficient to protect the fundamental interests of vulnerable minorities. He invites us to suppose members of the white, anglophone majority in Canada exercising their human right to freedom of movement, settling in the traditional homeland of an indigenous group, and then exercising their human right to participate in local government to override the economic and cultural interests of the local indigenous population. Kymlicka argues that this injustice might be carried out *without any human rights violations*: if the white anglophones became a majority, they could carry out policies against the interest of the indigenous minority without violating their human rights.⁶

There are therefore problems with the subjects of self-determination. Who has this right—individuals, nations, peoples, minorities, communities, other groups? There are also problems with the objects of the right: To what do the holders of the right to self-determination have a right? International lawyers distinguish “external” from “internal” self-determination. A people (or, more precisely, a state) exercises external self-determination when it acts independently of external powers, whether they be other states or transnational economic actors. The drafters of the right of peoples to self-determination in the two 1966 UN covenants probably had in mind such external self-determination. Internal self-determination is democracy.⁷ This is the meaning of self-determination we have in mind when we think of self-governing communities, whether these communities be local, national, or supra-national (such as the European Union). The international community has, in practice, been ambivalent about both forms of self-determination. It has been reluctant to allow self-determination to minority nationalities and does not require its member states to be democracies.

An interpretation of the right of peoples to self-determination as the right to democracy encounters some problems of democracy. Although the Universal Declaration of Human Rights does not explicitly recognize a “right to democracy,” it does state, in article 21, that the “will of the people shall be the basis of the authority of government.” In these populist times we have heard quite a lot about “the will of the people” supposed to be threatened by various elite conspiracies. Albert Weale has shown that “the will of the people” is what he calls a “modern myth.”⁸ In real democracies “the will of the people” is rendered problematic by intense minorities who have more at stake in certain public policies than indifferent majorities; by shifting majorities; and by the absence of majorities on certain issues. The “will of the people” has been much invoked in connection with the UK referendum on remaining in or leaving the European Union. In this context, “the will of the people” usually refers to the supposed wills (plural) of the 52 percent of those who voted in the referendum and who voted to leave the European Union. But what is the “will of the people” now? There are several Brexit options, and, at the time of writing, none was supported by 50 percent of the people.

Self-determination in the form of democracy also raises questions about the rights of those excluded from the “demos.” Refugees, asylum-seekers, and stateless persons may have no right to participate in democratic politics, and thus the democratic self-determination of peoples fails to provide for the self-determination of such people.

The common article 1 of the two 1966 UN human rights covenants says that, by virtue of the right of self-determination, all peoples “freely determine their political status.” The original meaning of political self-determination was independence from colonial rule, and the international community has generally been unwilling to concede a right of secession beyond the context of European colonialism. The international legal principles of the sovereignty and territorial integrity of states trumps the right of peoples to self-determination. This fact is a reminder that the “international community” is a legal order of states not peoples. There are several plausible objections to interpreting the right of peoples to self-determination as a right to secession: (1) secession is often accompanied by violence; (2) secession often leaves one or more vulnerable minorities in the seceding state; since secession is often motivated by strong nationalist sentiments the seceding majority will often fail to respect minority and human rights; (3) the majority in the original state usually opposes secession; thus, secession by a minority violates the right to self-determination of the majority; (4) secession may create problems of distributive justice if the secessionists are the richest part of the population and control the richest part of the territory. Opposing arguments appeal to the right to self-determination as a democratic right. Problems of secession often arise not from the secessionists’ exercising their right of self-determination but from the state’s and the international community’s failing to observe the peoples’ right of self-determination. Some scholars propose that there is no general right of secession but there may be a right of secession in particular circumstances when justice or pragmatic politics demand that such a right be recognized.

International lawyers and political philosophers generally favor limited autonomy (roughly what we in the United Kingdom call “devolution”) to secession. This may be, in certain circumstances, the best available solution to the problem of tensions between the state and the majority, on one hand, and minorities, on the other hand. But it raises, in a less extreme form, similar problems to those raised by secession: it may aggravate rather than heal relations between the national majority and the state and aggrieved national minorities; it may ignore the legitimate rights of majorities; and it may not guarantee justice within the autonomous entity. Autonomy may, in practice, be a step on the path to secession: Communist Yugoslavia and democratic Spain both recognized regional autonomies; both faced strong secessionist demands with serious (though quite different) consequences.

Another alternative to secession is that of “consociational democracy.” In this form of democracy, groups (usually national or ethnic) share power. Northern Ireland, Cyprus, and Lebanon are all examples. Objections to consociational democracy include the following: (1) it violates the democratic principle of one citizen, one vote; (2) it imposes on citizens identities that they may not be willing to accept; (3) it makes problematic identities permanent or semi-permanent. Consociational democracy is, however, favored when it is the only practicable alternative to violent conflict.

The right to self-determination may also be problematic because it overstates the extent of freedom that individuals, communities, or peoples have in the real world. The UN covenants say that, by virtue of the right to self-determination, peoples “freely pursue their economic, social and cultural development.” But they don’t. The people may, in exercising their right to self-determination, adopt a policy that turns out to be impossible or unexpectedly and excessively costly to implement. In 2015, for example, the Greek people voted by 61 percent to 39 percent to reject an international bailout of their economy. The Greek government, however, faced with possible retaliation by the European Union, accepted

the bailout and imposed additional austerity measures on the Greek people. The Greek people could not “freely pursue their economic development” because economic realities constrained their options. Cultural self-determination presents a similar problem: in the age of the internet, efforts to protect national cultures may be defeated by the power or the appeal of global (often American) culture. Nature also itself places constraints on self-determination, as climate change threatens the security of the planet and its inhabitants, requiring collective self-determination at the global level.

Historically, national self-determination has been the principal rival to individual self-determination. But other forms of self-determination have also been important. Various collectivities or “communities” that lie between the nation-state and the individual have made claims to self-determination: for example, national minorities, ethnic minorities, indigenous peoples, local government, “workers” organizations, and women’s groups. Clearly, some self-determination claims can conflict with other self-determination claims. Local forms of self-determination raise issues of capacity and the interests of others and of society as a whole. All self-determiners need resources from their environment (often from the state) and all have impacts on, and therefore obligations to, others. These fundamental realities of self-determination place practical and moral limits on self-determination.

The European Union and the European Court of Human Rights have a principle that is intended to provide solutions to the problems that arise when different entities claim the right to self-determination in forms that are not mutually compatible: the principle of subsidiarity. This principle says that power and authority should be located at the lowest level that is compatible with the values of those affected and a reasonable level of efficiency. This principle seeks to allocate self-determination to appropriate levels of decision making. The principle of subsidiarity is promising in theory but has turned out disappointing in practice. The fact that there is a perceived need to “rethink” self-determination expresses a dissatisfaction with the distribution of powers even within liberal democracies. Dissatisfaction with the European Union and the European Court of Human Rights reflects unresolved problems of subsidiarity.

Why, then, do we need to rethink self-determination? Historically, self-determination was claimed by various communities and by individuals and nations. There is widespread discontent around the world about the current distribution of decision-making power. Much of this discontent focuses on “globalization” and on such remote organizations as the United Nations, the International Monetary Fund, and the European Union. Enhancing self-determination may seem to be a plausible solution but begs the question about the level at which self-determination should be implemented: individuals, communities, nation-states, beyond the nation-state. Different problems require solutions at different levels. The traditional values of individual and national self-determination are not obsolete, but they are not enough. We face the daunting challenge of finding solutions that are big enough for the problems but small enough to remain human.

Self-determination is a necessary feature of the human condition: human beings are self-determining animals (whether they like it or not). Self-determination is a human right in that it is grounded in the values of individual and collective freedom. It is, however, in part illusory because we must and should exercise freedom under the constraints of others and of nature. It is potentially dangerous because freedom can be, and often is, exercised to harm others. Self-determination is an intrinsic good in that it is good that individuals and communities retain some control over their lives. But self-determination is good only if the self is good and its determinations are good. The value of self-determination, therefore, must be located in the wider contexts of the values of democracy, human rights, and justice.

Notes

¹ Quoted in Ian Brownlie, ed., *Basic Documents on Human Rights*, 3rd ed. (Oxford: Clarendon Press, 1992), 114, 125.

² Quoted in Eric D. Weitz, “Self-determination: How a German Enlightenment Idea Became the Slogan of National Liberation and a Human Rights,” *American Historical Review* 120, no. 2 (April 2015), 486.

³ *Ibid.*, 462–496.

⁴ Emma Stone Mackinnon, “Declaration as Disavowal: The Politics of Race and Empire in the Universal Declaration of Human Rights,” *Political Theory* 47, no. 1 (February 2019): 57–81.

⁵ Quoted in *ibid.*

⁶ Will Kymlicka, “Human Rights and Ethnocultural Justice,” in *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship*, 69–90 (Oxford: Oxford University Press, 2001).

⁷ Antonio Cassese, *Self-determination: A Legal Appraisal* (New York: Cambridge University Press, 1995).

⁸ Albert Weale, *The Will of the People: A Modern Myth* (Cambridge: Polity Press, 2018).