

# Michigan Law Review

---

Volume 77 | Issue 3

---

1979

## Reflections on Self-Determination

William Burnett Harvey  
*Boston University*

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Human Rights Law Commons](#), and the [Rule of Law Commons](#)

---

### Recommended Citation

William B. Harvey, *Reflections on Self-Determination*, 77 MICH. L. REV. 389 (1979).

Available at: <https://repository.law.umich.edu/mlr/vol77/iss3/10>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

## REFLECTIONS ON SELF-DETERMINATION

*William Burnett Harvey\**

SECESSION: THE LEGITIMACY OF SELF-DETERMINATION. By *Lee C. Buchheit*. New Haven: Yale University Press. 1978. Pp. xi, 260. \$17.50.

Today, limited resources, intersecting trade flows, and exposure to the foibles of the great (and less-than-great) powers, among other causes, produce a *human* condition that communications technology brings home to all of us. Claims that are more and more powerful and insistent are asserted, simultaneously, on behalf of the individual, the group, and the nation, each stressing the claimants' distinctiveness. Respect for selfhood may well be essential to individual, group, and national health and well-being. Clearly, however, self-awareness and self-assertion also emphasize differences from other selves; to prevent the dissimilar from causing abrasions and conflict, open space may be needed that an increasingly crowded world does not easily provide.

Daily the news media illustrate at the national level such drives and the dangers they create: Quebec separatists win control of the provincial government and demand basic changes in the Canadian federation; Shaba is invaded by forces opposed to the distant and "alien" government of Zaire; Britain seeks to mollify Scottish nationalism by the delegation of greater regional autonomy. Whether expressed in calm parliamentary debate, in strident oratory, or with a rifle in a guerilla's hands, the strong assertions that "we are different," that "it is humiliating to be ruled by strangers," and that "we are entitled to govern ourselves and define our own destiny," strike deep responsive chords in individual, group, and national experience throughout the world. Simultaneously they can and often do arouse deep-seated fears of social and political fragmentation.

For better than half a century at least, the separatists' claim has invoked the "right to self-determination." To a substantial literature on the subject, Lee C. Buchheit has added a thoughtful small book that probes the inherent ambiguities of the asserted right, seeks its philosophical underpinnings and its claim to validation by positive international law, state practice, or juristic

---

\* Professor of Law and Political Science, Boston University. A.B. 1943, Wake Forest University; J.D. 1948, University of Michigan.—Ed.

opinion, and finally proposes a set of standards by which the legitimacy of a claim to self-determination might, in his view, be assessed.

Aside from the radical anarchist whose right to self-determination—as he asserts it—is highly self-centered, most who claim the right have a group in view. By reference to what determinants of shared identity is the group “self” entitled to determine its political status, to be located on the linear progression from the minimal gathering to vast aggregations? In developed modern societies most individuals are associated with groups in diverse ways—Democrats, professors, union members—and each association implies a certain distinctive attribute. Buchheit sensibly rejects such perceptions of distinct identity as a basis for asserting a right to self-determination, finding more plausible “relatively objective, verifiable criteria” such as religion, history, geography, language, race, and economic activity. He acknowledges, however, the current lack of consensus on any set of conditions as either necessary or sufficient to define the self and thereby earn the right of determination. Nor does the development of such a consensus seem likely. Buchheit quotes Sir Ivor Jennings’ trenchant remark: “On the surface it seemed reasonable: let the people decide. It was in fact ridiculous because the people cannot decide until somebody decides who are the people.” As with the devotees of Savigny’s older romanticism, so with those like Buchheit who would raise the cry of self-determination from the level of political rhetoric to the status of a norm of international law: uncertainty as to the structural concept of “*Volk*” or “self” is fundamental and embarrassing.

The murkiness of self-determination raises troublesome problems at every level of political life and action, but Buchheit narrows the focus to secession from established states. While a limited number of “legal” arguments can be marshalled against recognition of a right to secede (*e.g.*, *pacta sunt servanda*), it seems clear that the principal resistance to such recognition does not rest on law, but on fears of the consequences of undermining the present units of a precarious international order: consequences implicit in fragmentation into more numerous weak states which have neither political nor economic viability.

Basically sympathetic to some claims of a right to secede, Buchheit presses a balanced—and ultimately, I think, unsuccessful—search for a basis for validating that right: in philosophic or jurisprudential thought, positive international law, state prac-

tice, and juristic opinion. If secession has a philosophical home, it lies in the natural law tradition. Yet classic natural law lacked a mediating structure between the individual and the state. Grounding a right to secede on aggregated individual rights to resist oppression interposes no barriers to the ultimate fragmentation—"infinite divisibility"—of the structure of public order.

Before the creation of the United Nations, positive international law lent little if any support to a claimed right of secession. The impetus that right received from Wilsonian idealism was rapidly dissipated by the realistic recognition that self-determination could not plausibly be limited to those areas where military defeat provided opportunities for territorial adjustments. With Wilson unable to marshal the support even of his own advisors, the post-war treaties were silent on self-determination. Concern for it survived only in a pattern of treaty provisions aimed at the protection of minority rights in multi-ethnic states.

With the creation of the United Nations and the beginning of the dynamic of decolonization, self-determination again became prominent in international discussion. The United Nations Charter contains two references, in articles 1(2) and 55, to the "self-determination of peoples." Subsequently, the Assembly's 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (both adopted by the General Assembly in 1966), and the 1970 Declaration on Friendly Relations articulated a principle of self-determination. Nevertheless, profoundly difficult problems remain in ascertaining the parameters of any resulting norm that validates the right to self-determination, particularly if expressed in secession from an established state. In this regard classic decolonization must surely be treated as a special case. The insistent demands of dependent peoples, the imperial fatigue of the European colonial powers, and the opportunism of the Socialist bloc combined to produce an early consensus, buttressed by state practice keyed to perceptions of national interest, that the peoples of the colonial territories were entitled to throw off their foreign yokes and determine their political status in the international community. It may well be, however, that self-determination as a norm of positive international law largely spent its force in dealing with the classic form of colonialism. Certainly one should discount the broad language of some United Nations pronouncements that appear in declara-

tions specifically addressed to colonialism, especially if one takes note that the nations created by its demise seem to be entirely unreceptive to the right in their area. The Organization of African Unity, for example, has made respect for territorial integrity a cardinal principle, despite the fact that each state's territory includes diverse peoples—distinguishable often by language, culture, religion, and other factors that might plausibly define a distinct "self"—some of whom could advance, and indeed have asserted, a right to self-determination.

Controversy over an asserted right to self-determination is rarely limited to the parent state and the people seeking to secede. The separatists may seek outside help—moral and material—and affirmative responses from other states may rest on principle, interest, or both. And the parent state itself may request assistance in suppressing rebellion and separation. This radiating influence of a separatist effort further complicates any effort to appraise the proposal by the United Nations of a broadly stated right to self-determination. The Charter itself does not speak unequivocally, but antinomically: if self-determination is a basic principle, so also are nonintervention in the internal affairs of sister states and proscription of the use of force. But surely assistance to either a parent state in putting down a secession or to the secessionists in furthering it will involve intervention that frequently calls for force.

Perhaps the most dramatic illustration of the tension between norms appears in the 1970 Declaration on Friendly Relations. Though early paragraphs state broadly the principle of self-determination, including specifically the "right to secession," paragraphs 7 and 8 reassert the norm of nonintervention and the values of territorial integrity and of the political unity of sovereign states. Perhaps these divergent norms and values can be reconciled by conceding a limited license to intervene in aid of a secessionist effort if the parent state in its internal administration has infringed "the principle of equal rights and self-determination of peoples." If immunity from intervention must be earned by showing consent of the governed, then relatively few states in the contemporary world could successfully claim it and resist the demands for self-determination, even if those demands caused disintegration and risked provoking violent intervention. It appears likely that few states would welcome a realistic scrutiny of such a basis for their claim to nonintervention and territorial integrity.

State practice, much more than the lofty rhetoric of United

Nations debate and declarations, reveals the actual status of the right to self-determination and specifically of the right to secede. National rhetoric may obscure reality, however. For example, the Constitution of the U. S. S. R. explicitly provides for the reservation of "the right freely to secede from the U. S. S. R. . . . to every Union Republic." Soviet spokesmen, citing this commitment, probably have realized significant propaganda gains when United Nations discussions have turned to Third World claims to separation from their Western colonial masters. The gap between Soviet rhetoric and Soviet reality is starkly revealed, however, when attention is given to the treatment accorded separatist sentiment and action in the Ukraine and Georgia and to the brutal interventions by Soviet forces in Hungary and Czechoslovakia. The Chinese have not behaved differently except, recently, to show greater candor. While the Chinese Communist leaders in 1931 made a "constitutional" commitment to self-determination and the right of each national minority in China to secede and form its own independent state, the 1975 Constitution bluntly asserts that the "People's Republic of China is a unitary multinational State. The areas where regional national autonomy is exercised are all inalienable parts of the People's Republic of China." As noted earlier, the new states of Africa have accorded primary value to the sovereignty and territorial integrity of states despite, or perhaps because of, the ethnic diversity and centrifugal forces within each of the nations defined by European colonialism. In the United States, despite our revolutionary ancestry and early recognition that the time may come "for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them," we fought a civil war to establish that there was no right to secede; nor have we accorded to peoples in other parts of the world the entitlement we once claimed for ourselves. Where we have instigated a foreign secession (Panama), pledged "respect [to] the right of all people to choose the form of government under which they will live" (Atlantic Charter), or castigated our Communist adversaries for denying self-determination to the peoples of the Eastern Bloc satellite nations, we have been guided by national self-interest rather than by a norm of the international community.

It is surely not surprising that established states should be reluctant to open the floodgates of self-determination, thereby spilling its acid over their own cohesion and even more widely

over the other national units on which a precarious international order is grounded. In view of the hazards of fragmentation and the deep-seated fears these hazards engender, it is perhaps surprising that the international community has been recurrently willing to articulate a principle of self-determination, however unclear its scope, and has not labelled all secessions unworthy of support. Something might be gained, therefore, by formulating more precisely the criteria of a legitimate secession, so that outside supporters could be praised, not condemned, for their intervention and so that the parent state would have no principled basis for asking assistance in suppressing the secession. Possibly also, a state's anticipation of isolation in dealing with its separatists could stimulate its respect for its minorities, their culture, and their claims to full civic participation.

Buchheit concludes by attempting to define and explicate the criteria of legitimacy. Adopting a utilitarian perspective with an avowedly conservative bent (that is, favoring the protection of existing states), Buchheit proposes to test the legitimacy of secessionist demands by inquiring whether meeting them would increase "the general 'amount' of world harmony." To convert that general—and fatally vague—test into a usable framework for discussion and decision, he suggests that two basic factors, each reflecting the interplay of a number of variables, be considered: the internal merits of the secessionists' claim and the net increase in the disruption of the international community that would result from supporting or acquiescing in the claim.

The internal merits of the claim would depend on the distinctiveness of the claimant group; its "selfhood" in terms of cultural, racial, or historical factors; its occupancy of a distinct territory; and its viability as a continuing, coherent, independent community. Assessment of the disruption factor would involve balancing (a) the disruption currently existing as a result of unfulfilled aspirations for separation from the parent state and (b) the disruption that would flow from their fulfillment. Only a significant net increase in disruption would allow the calculator to assess the disruption factor as high. This leads to the curious result that if the present lot of separatists is disruptive, perhaps because of violent agitation or either the threat or actuality of third-party interventions, and if the prospect of the secession's success would seriously disquiet or upset the international balance, the disruption factor would nevertheless be calculated as "low." This terminological oddity can be ignored if one keeps in mind that the calculus is aimed at the *net increase* of disruption. Disruption

itself is a multi-faceted concept, involving the effects of both continued unity and separation on the parent state itself, on other states closely concerned, and on the general international order with respect to humanitarian, economic, military, and structural concerns.

Buchheit illustrates the operation of his analytical framework by considering the successful secession of East Pakistan (Bangladesh). Despite the area's rather poor prospects for future economic viability, the distinctiveness of the Bengali majority would have brought a fairly high rating of the internal merits of the secessionist claim. On the other hand, the explosive situation created by secessionist agitation, its brutal suppression by the Western-controlled Pakistani army, and the dangers implicit in possible Indian intervention meant that secession and independence would change the form but not greatly increase the scale of disruption. In any event, whether influenced by these calculations or by other factors, the international community readily accorded legitimacy to the Bangladesh secession.

A test case for Buchheit's decisional model that is in some ways more significant than Bangladesh, since it is still topical in the international community, is Transkei, the first African "homeland" to be granted independence by South Africa. Following an extended constitutional evolution, the South African Parliament in 1976 granted full legislative competence to the Transkei legislative assembly, which then enacted its own constitution, asserted its sovereign independence, and sought recognition as a new member of the community of nations. Transkei's international reception has been chilly indeed: only South Africa has recognized Transkeian independence; its legitimacy has been denied by the United Nations, which branded its independence a "sham" and its government a "puppet." Clearly the Transkeian secession has been deemed illegitimate for an immediately obvious reason: it is regarded as functional, perhaps essential, to the odious South African policy of *apartheid*. If the Buchheit model had structured the international reaction to Transkei, would the result have been different? My answer can be only impressionistic, since hard data on some of the relevant variables are not available.

Though Transkeian territory comprises three separate parcels aggregating about 14,887 square miles, the largest, bounded on the east by the South Indian Ocean, is the traditional homeland of a number of groups speaking dialects of the Xhosa language. While subgroup identities and loyalties probably exist

among the Xhosa speakers, their language and other cultural factors provide a common group identity for about ninety-four percent of the total population. The remainder are primarily Zulu-Sotho people, with a miniscule representation of whites, Asians, and persons of mixed descent. Since the majority's self-identity rests on ethnicity rather than on such transitory factors as resistance to an external oppressor, group cohesion is likely to continue and, with it, the at least potential capacity for an independent existence in the political sense. If such capacity has an economic dimension, any assessment of prospects after secession becomes much more doubtful. I know of no reliable resource inventory for Transkei. If it has minerals or oil, they are unknown. The present economy depends almost entirely on subsistence farming, the earnings of migrant workers in the Republic of South Africa, and subsidies from the South African government. Despite the negative factors of economic uncertainty and a possibly vulnerable "trapped minority," the majority's strong ethnic identity, particularly as counterposed to the alien and oppressive parent state, leads to a fairly high assessment of the "internal merits" of Transkei's claim to self-determination.

The Buchheit calculus presents its greatest difficulties when we turn to the disruption factor. As a starting point, it seems clear that agitation for Transkeian secession in no way disrupted international harmony: There was no significant terrorist activity; no troublesome interventions were imminent; and parent-state oppression embraced all of the nonwhite population, not merely Transkeian secessionists. Indeed, secession as timed and planned was welcomed by the South African government. If the effects of actual secession are to be called seriously or even moderately disruptive, the net increase in disruption would have to be assessed as high, when measured against such a low base line.

What would these effects be? The loss of territory would exact no prohibitive costs, economic or military, from South Africa. No resource base would be depleted, no trading patterns disturbed, no new military dangers or defense needs created. While the birth of a mini-state might be thought disquieting to the international order itself, the net loss of structural coherence resulting from the addition of one more tiny polity would be minimal. With respect to such diminutive progeny, the world community already resembled the Old Woman Who Lived in a Shoe. International concern might be traced to doubt that the new state would respect human rights and other basic norms of behavior, but Transkei's anticipated conduct should not have contrasted

unfavorably with the historic conduct of South Africa. In one respect, of course, the Transkeian secession might be thought disruptive of international harmony: It led to a spate of furious rhetoric and self-righteous resolutions in the United Nations, but that was hardly new. That rhetoric had long been directed at South Africa because of its *apartheid* policy. Finally, threats to peace through armed intervention do not seem to have been increased by the Transkeian spin-off. Such threats, however remote, have long been suggested as an ultimate possibility if South African racial policy is not changed.

On the calculus thus far developed it may appear in the case of Transkei that a claim to self-determination whose internal merits are fairly high should be balanced against a relatively low net disruption factor, so that the Transkeian claim to self-determination through secession should have been deemed legitimate. It would be plausible to argue that legitimacy as defined by a recognized international norm should obligate other nations to recognize Transkei's independence, accept it into the family of nations, and accord it the usual benefits of friendly relations.

Perhaps, however, the calculus presented is too simplistic. In his own discussion of the disruption factor, Buchheit suggests that the promotion of general international harmony involves more than the elimination or reduction of strife, that it involves "the goal of fostering conditions conducive to social development and the protection of human dignity." Such a goal is clearly relevant to the legitimate concern underlying United Nations hostility toward Transkei and the virtually unanimous denial of recognition of its independence: a fear that the Transkeian secession, followed by similar actions by Bophuthatswana and other homelands, would merely protect and strengthen *apartheid*, with all its dehumanizing implications and consequences.

From this perspective one may raise the ultimate issue of ends and means: if international concerns and supportive norms properly embrace internal "conditions conducive to social development and the protection of human dignity," do the denial of legitimacy to Transkei's secession and the withholding of recognition and normal intercourse best lead to these conditions? The present international policy maximizes the chances that Transkei will remain totally in the dark shadow of South Africa, that its political and cultural influence will remain undiluted, and that the material well-being and freedom of the people of Transkei will depend almost entirely on the goodwill or self-interest of South Africa. In short, the denial of Transkeian independence becomes

a self-fulfilling prophecy. One must recognize, of course, that the price of human freedom and dignity is often high. If denial of the right of self-determination to the people of Transkei were a price that must be paid in order to subvert *apartheid* and open the gates of South Africa to racial justice and freedom, that price might be reasonable indeed. But can one say with any assurance that the price buys more than another expression of the widespread and intense outrage over South African racial policy?

The Transkei case illustrates both the virtues and the inadequacies of Buchheit's model for testing the legitimacy of secession. Like its remote ancestor, the Benthamite hedonistic calculus, it has a beguiling appearance of objectivity that quickly disappears as one recognizes the dependence of the calculus on the weighing and measuring of such intangibles as individual and group perceptions, human aspirations and suffering, and any potential for disruption. Buchheit expressly recognizes this problem but cannot resist the temptation to present the model in a two-axis graph, one axis scaled "poor" to "excellent," the other "low" to "high." If the vectoring of variables to define positions on each axis depends on judgment, not quantification, the critical problem becomes the identity of the judge, the calculator. Majority votes in the General Assembly or even in the Security Council provide no assurance that those votes rest on even a democratized application of the calculus Buchheit proposes. Rather, the pivotal datum seems to be national interest assessed by each state before it casts its vote. Only nationalistic imperatives offer a plausible basis for understanding and explaining the shifting positions of individual states and international agencies on secessions thus far attempted: for example, Soviet support for East Pakistan but condemnation of Biafra; passionate espousal by the African states of anti-colonial self-determination but rejection of functionally similar efforts by the Katangese and the Somalis; American laments over eastern Europe but support of Pakistan's effort to retain Bangladesh and of Zaire's suppression of the Shaba insurgency. Short of a radical restructuring of the international order—in both the articulation of norms and the allocation of power—there is surely not much reason to believe that Buchheit's legitimacy calculus will induce each nation to discard from its own calculations those perceptions of its national interest that influence its judgment in innumerable ways.

Buchheit's decisional model is nevertheless a useful attempt to clarify thought on the factors that might be adduced in support of the legitimacy of secessionist self-determination. An interna-

tional consensus on what those factors are could advise the parties immediately involved as well as sharpen and elevate discussion when political separation—independence—is desired or demanded. Such gains might be realized short of the development of a norm specifying the respective weights of various factors or of institutions empowered to apply it. As in many less-developed (“primitive”) legal orders, norms can contribute to conflict resolution even in the absence of any expectation that a particular norm will be directly enforced. The norm still provides useful reference points for argument and a framework for the community’s appraisal and decision. No winner or loser may emerge, but a “give-a-little, get-a-little” adjustment aimed at reconciliation of the disputants and the viability of an ongoing community might. For the international community, such a development in its processes of decision and the objective those processes seek would be a distinct gain.