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# The Right to Self-Determination as a Strategy to Dispute the Legal Field

*El derecho a la autodeterminación como estrategia para la disputa en el campo jurídico*

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***ABSTRACT***

This article proposes several reflections on the development of human rights, in particular the right to self-determination. As a framework of interpretation, I claim that self-determination has had drastic perspectives and it can constitute an important instrument to support the emancipation process promoted by social movements. The methodology developed was grounded on a theoretical, historical and bibliographic analysis, taken into account the main milestones of the legalization of the right to self-determination. In that sense is illustrated the case of the global indigenous movement, which reinterpreted the notion of self-determination through the Bolivian Constitution and the concept of *Sumak Kawsay*

**Keywords:** Human rights, self-determination, legal field, indigenous movement

***RESUMEN***

El presente artículo lleva una reflexión crítica-propositiva de los derechos humanos y el derecho a la autodeterminación. Como marco de interpretación propongo que el derecho a la autodeterminación ha generado diferentes interpretaciones y puede constituirse en un baluarte para los procesos de emancipación social promovidos por distintos movimientos sociales. La metodología desarrollada consistió en un análisis teórico, histórico y bibliográfico de los principales hitos de la legalización internacional a la autodeterminación. En este sentido presento como ejemplo el caso del movimiento indígena global, el cual reinterpretó la noción de autodeterminación a través del concepto de la constitución boliviana Sumak Kawsay.

**Palabras clave:** Derechos humanos, autodeterminación, campo legal, movimiento indígena

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## *INTRODUCTION*

Human rights may be analysed from different points of view. On the one hand it might represent the preservation of an unfair *status quo* through the law (Rubio:2019)[1], leading to discouraging the struggle of social movements, for instance, Thusnet, (1984)[2], identified four criticisms of the role of law as an obstacle for the social emancipation: Instability, the generalization, indeterminacy, and reification. On the other side, some authors believed though human rights speech, it turns out plausible to carry out a deep and global legal movement, which would intertwine with social demands, for example (De Sousa y Rodrigues, 2005), whose use the concept subaltern cosmopolitan legality as a strategy to deploy counter-hegemonic globalization.

To describe this duality, I will retake a sociological (Bourdieu) and anthropological (Moore) approaches. From different points of view, these authors agree on the understanding of law as a disputable territory.

With this scenario, I place the right to self-determination as an example of the dual character of human rights. Focusing on the historic process of the right of self-determination and analysing its theoretical framework, emphasizing the period of African decolonization through the Fanonian theory. Moreover, I will make some reflections on the legal development that it has had and its scope of applicability. To conclude self-determination represents a valuable tool of struggle for the social movement.

## *LAW AS A SOCIAL FIELD*

In Bourdieu's (1986) [3]the conception of a social field is the site of struggle, of competition for control. (Indeed, the field defines what is to be controlled: it locates the issues about which dispute is socially meaningful, and thus those concerning which a victory is desirable.

Moreover, according to Bourdieu:

The social practices of the law are the product of the functioning of a "field" whose specific logic is determined by two factors: on the one hand, by the specific power relations which give it its structure and which order the competitive struggles (or, more precisely, the conflicts over competence) that occur within it; and on the other hand, by the internal logic of juridical functioning which constantly constrains the range of possible actions and, thereby, limits the realm of specifically juridical solutions"(Bourdieu, 1986)[4]

Additionally, Bourdieu considers social practices of the law are operates within a "field" which is determined by two factors: on the one hand, by the specific power relations which give its structure or more precisely, the conflicts over competency that occur within it; and on the other hand, by the inner logic of legal thought, which constantly constrains the range of possible actions and, thereby, limits the realm of specifically juridical solutions (Boudieu, 1984).

As a consequence, the history of law represents an internal development of its concepts and methods, formalist jurisprudence sees the law as an autonomous and closed system, in doing so, and development can be understood solely in terms of its "internal dynamic." This insistence upon the absolute autonomy of legal thought and action results in the establishment of a specific mode of theoretical thinking, entirely free of any social determination. However, it does not mean that be a rigid and modifiable frame, on the contrary law may make viable and effective, moreover the notion of law depends also on specific cultural, socio-politics contexts.

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[1] Rubio Medina, E. (2019). Tres teorías sobre el derecho a la autodeterminación. *Diálogos De Saberes*, (50), 119-134. https://doi.org/10.18041/0124-0021/dialogos.50.2019.5555

[2] Thusnet, M (1984). An Essay on Rights. Texas L. Wisconsin Law Review. Volume 62, Number 8.

[3] Bourdieu, P (1986). The Force of Law: Toward a sociology of the Juridical Field. Hastings Law. Journal, 38 (5).

[4] Ibíd., p.808

In sum, law, as a social field must be a territory of dispute for power, employing various language, political and juridical levels.

To expand on this point, important results of the work of the anthropologist Sally Falk Moore, who used the notion of law as a "semi-autonomous field".

> This rationalist framework is widely used in the legal profession and appears as one of the keys to modernity in Weber's sociology. Conceptions of law as essentially problem-solving were also embedded in the essays of the well-known legal realist, Karl Llewellyn" (Moore, 2001)[5].

Although she is conscious that law can be interpreted as domination, Moore posts from the process of decolonization in the sixties, the field´s law has been expanded in favour of the oppressed. "This contemporary political activity, there was not much place for an anthropology of law focused on conformity. Agency came into its own. Cases were heard and read in terms of litigants' motives. Law was seen as a representation of social order, but it was understood to be usable in a great variety of ways by people acting in their interest. The strong and powerful could, of course, further their interests more effectively than the weak" (Moore, 2001, 104)[6].

Moreover, in this essay Moore cites several authors who find in the legal mechanism constants negotiation process, which constitutes an indeterminate legal field. She illustrates this with some examples from an analytic attitude towards normative justice which appeared in Gulliver. This author observed that the Arusha, in colonial Tanganyika often managed their legal disputes, not by going to existing (colonial) Native Courts, but through a system of "informal ", non-official, negotiated settlements. Lineage representatives of the contending parties assembled and bargained solutions on behalf of the principals. Gulliver (1963)[7] concluded that the winners of these negotiated settlements were always the more politically powerful parties.

In conclusion, both author claim that law means a malleable language which contains an inner logic, but also depends on several contexts such as culture, politics, social relation so on and so forth. Thus, it is not the simplistic and classical approach of law as an instrument to maintain a status quo, since utilizing linguistic resistance and negotiations are plausible to reformulate the notion of legal thought. Therefore, in the next part, I will exemplify how self-determination is a good example of this assumption.

## *RIGHT TO SELF-DETERMINATION (DEFINITIONS)*

The concept of self-determination has classically been linked to the idea of self-government at the present day, a rough definition could be given for self-determination as the right of people to decide their political status. Przetacznik 1999[8] One of the first political and social thinkers to refer to the idea of self-determination was Bakunin when in 1866 he stated that society should be re-organized so that 'every individual, every association, every commune, every region, every nation' would have 'the absolute right to self-determination, to associate or not to associate, to ally themselves with whoever wished to live and the form of government that they wished installed Escudero 2017[9]. Moreover, was President Woodrow Wilson who in 1919 and 1920

[5] Moore, S. (2001). Certainties have undone: fifty turbulent years of legal anthropology, 1949-1999. The Journal of the Royal Anthropological Institute 7. P 103.
[6] Ibíd., p.104.
[7] Gulliver, P (1963) Social Control in an African Society. London: Routledge and Kegan Paul, p.302
[8] Przetacznik, F, A Definition of Peace, 11 Sri Lanka Journal of International Law (1999), p 51.
[9] Escudero J. (2017) Self-Determination and Humanitarian Secession in International Law of a Globalized World. Springer, p10.

enunciated the principles on which the free determination of people should be based. He even used the expression 'self-determination' as a replacement for 'self-government'.

The newer term incorporated the right of a people to choose its form of government in a continuing process that would be synonymous with a democratic type of regime. Wilson's ideas were expressed as an amalgam of the concepts of internal self-determination, universal democracy and guardianship over primitive peoples as they moved towards the ultimate goal of full autonomy. Moreover, Woodrow Wilson went further in his concepts, as he understood democracy to be not merely an ally of the idea of self-determination, but fused with it to form a notion of 'free option of peoples' and 'self-government'. As he saw it, the governments of nations, controlled by the will and the votes of their peoples, were a guarantee of the preservation of peace in the world (Escudero, 2017)[10].

Additionally, it is important to take into account three essential elements that may be identified as shaping the right to self-determination. First, the owner of this right to self-determination is peoples, groups of individuals having some social cohesion, with a clear identity and their characteristics, and an implicit relationship with a territory. (Raic) 2002. Secondly, the material content extends both to all aspects of political status and the economic, social and cultural system. Regarding its formal content, the right to self-determination is centered on the exercise of the people's sovereignty through democratic governance manifested through channels that imply a free and genuine expression of their will in the internal context and the external dimension (Cassese, 1981)[11]. Thirdly, the legal status of the right to self-determination formed by these elements would also be shaped by a further four aspects which have been gradually identified by legal doctrine. It is a principle applicable to all non-self-governing territories and trust territories, and not merely a policy guiding the behaviour of member states of the UN in their relations with these (Crawford, 1988)[12].

## *THEORETICAL CONCEPTUALIAZATION OF FRANZ FANON*

Fanon was one of the most remarkable thinkers of African decolonization and inspired the struggle of Afro movements in many countries. He created the notion "the non-being zone". In his first book "Black Skin, White masks" published in 1953, Fanon (2008)[13] pointed out that:

> *There is a zone of nonbeing, extraordinary sterile and arid region, an incline stripped bare of every essential from which a genuine new departure can emerge.* The author did not intent carried out an ontological approach upon the being. In The Wretched of the Earth, he put his argumentation in terms of social inequality of humanity from one particular, historic and material phenomenon called colonization.

Furthermore,"The colonized world is a world divided in two. The dividing line, the border, is represented by the barracks and the police stations. In the colonies, the official legitimate agent, the spokesperson for the colonizer and the regime of oppression, is the police officer or the soldier. In the capitalist societies, education, whether secular or religious, the teaching of moral reflexes handed down from father to son" (Fanon, 2004)[14]

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[10] Ibíd., p.11
[11] Cassese A. 1981. The Self-Determination of Peoples. In The International Bill of Rights: The Covenant on Civil and Political Rights, ed. L. Henkin. New York: Columbia University Press, p 95–113.
[12] Crawford, J (1999) State Practice and International Law concerning Secession, Clarendon Press
[13] Fanon F (2008). Black skin, white masks. Grover press
[14] Fanon, F (2004). The Wretched of the Earth. Translated from the French by Richard Philcox. Grover Press, p 4.

He reinterpreted social division not merely in terms of class, otherwise also in terms of race. In this aspect, the author states that Marxist theory was not enough to understand colonialism.

"In the colonies, the economic infrastructure is also a superstructure. The cause is the effect: you are rich because you are white; you are white because you are rich. This is why Marxist analysis should always be slightly stretched when it comes to addressing the colonial issue" (Fanon, 2004)[15]

Moreover, the author claimed that the world is "compartmentalized", it means inhabited by two different human species. In a petric and machinean structure. For him "the colonial subject learns to remain in his place and not overstep its limits*" (*Fanon, 2014)[16]. The aforementioned Fanon considered that decolonization would be the most appropriate path to move out of the non-being zone. It results of the encounter between two congenitally antagonistic forces that owe their singularity to the kind of reification secreted and nurtured by the colonial situation (Fanon, 2004,)[17].

Despite Fanon legitimized violence, He awarded that in the decolonization struggle turns out indispensable the "compromise" with the local bourgeoisie. Following his Marxist education. As well the Fanonian theory appropriated from Marx some topics as reification and ideology, for instance, He characterized how could be the differentiation between one real or false decolonization process:

The intellectual who adopted the abstract, universal, values of the colonizer is prepared to fight so what that colonist and colonized can live in peace in a new world. But he does not see, because precisely colonialism and all modes of thought have seeped into him, is that the colonist is no longer interested in staying on and coexisting once the colonial context has disappeared. It is no coincidence that, even before any negotiation between the Algerian government and the French, the so-called "liberal" european minority has already made its position clear: clamoring for dual citizenship (Fanon, 2004)[18]

In adittion, he understood why turn out necessary make up bridges between the non-being zone and being zone, particularly is remarkable as Fanon encouraged the creation of one right for both zones concomitantly. "To dislocate the colonial world does not mean that once the borders have been eliminated there Will be a right of way between the two sectors.

To destroy the colonial world means nothing less than demolishing the colonist´s sector, burying it deep within the earth or banishing it from the territory" (Fanon, 2004)[19] Despite all obstacles and unfulfilled promises in the African decolonization process. It was a crucial time to formulate a key to include the right to self-determination within the international human right body, in doing so, this speech worthwhile, for whose inhabitant the non-being zone. In the next part, I explain briefly the origins of the right to self-determination concerning the African decolonization.

## *ORIGINS OF THE RIGHT TO SELF-DETERMINATION AND AFRICAN DECOLONIZATION*

To expand on this point, I will quote some parts of Samuel Moyn´s bibliography, especially his book "The last utopia". The scholar argued that the right to self-determination was a consolation prize for a process of struggle that sought have became more trasncendent. He asserted anticolonialism rarely framed their cause in the rights language before 1945. Colonial subject was painfully aware that Western "humanism", had not been kind to them so far (Moyn, 2010)[20].

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[15] Ibíd., p.5
[16] Ibíd., p.14
[17] Ibíd., p.6
[18] Ibíd., p.11
[19] Ibíd., p.6
[20] Moyn, S (2010). The last utopia. Harvard University Press, p 87.

Subsequently, Moyn claimed the auto-determination born from American declaration which was not really concerns on the category rights; it had above all been intended to announce postcolonial sovereignty. The author brings out the Ho Chi Minh´s speech when he promoted his Vietnamese declaration of Independence. In his own words, Moyn said:

> *The utopia that still mattered most was postcolonial, collective liberation from the empire, not individual rights canonized in international law (*Moyn, 2010)[21] Thereby he says "*when the decolonization resulted in enough new states to matter at the UN, the phrase Human rights itself came to be incorporated in the master principle of collective self-determination".* (Moyn, 2010)[22]. Concluding what: The anticolonialism lesson for the history of human rights is not about the growing relevance of the concept across the post-war era. It is about the ideological conditions in which human rights in their contemporary connotations become a plausible doctrine. (Moyn, 2010.[23]

Paradoxically, the author considers that human rights are the last utopia: "Human rights emerged, apparently out of nowhere, in 1977 as a global movement functioning much as it does today, and then only because the alternative, more political internationalism-pan-africanism, anticolonialism, communism, and marxist humanism among them-had proven unable to transcend nation-state sovereignty to achieve the kind of revolutionary change each had promised" (Terreta, 2013)[24].

Although, I agree with the critical vision of the author in his historical analysis about the concept of self-determination. However, I retake the category of law as "social field", despite this right emerged how the consequence of a consolation, it has become an important tool for the conquest of social claims. In that sense, Terreta (2013)[25] believes inappropriate undermine the discursive empowerment that human rights have reached after the period of African decolonization.

> The human rights movement parted ways with liberation politics to achieve the prominence it eventually did in the global North, where human rights were narrowly redefined as negative protections for individuals, a safeguard against physical pain and trauma.7 But I date this divergence to the end of the UN trusteeship system circa 1960 and demonstrate that the new sort of human rights movement that swept in muted—but did not fully displace—the revolutionary one that had preceded it". (Terreta, 2013).[26]

## *SELF-DETERMINATION WITHIN HUMAN RIGHTS SPEECH*

The origins of the right to self-determination were carried out by Lenin and Woodrow Wilson who created the conditions for anticolonialism in which international human rights –not yet formulated as an idea, were not nor the goal, with one collective right cherished over others. Also (Raic, 2002)[27] claimed that Wilson was:

> Among the first to give the concept a place in international relations and seeking to give substance. Wilson developed the ideas which formed the core of his understanding of self-determination well

[21] Ibíd., p.85.
[22] Ibíd., p.97.
[23] Ibíd., p. 87-88.
[24] Terretta, M (2013). From below and to the left. Human Rights and Liberations Politics in Africa´s Postcolonial Age. Journal of World History, Volume 24, Number 2, June 13, p 391.
[25] Ibíd.,391
[26] Ibíd.,391
[27] Raic, David (2002). Statehood and the law of self-determination. Kluwer law international Press.

> before his famous 14 points speech of January 8, 1918, he referred to self-government: ethnically identifiable people or nations should have the right to select their democratic government… Although the fourteen points do not mention the concept of self-determination as such, it is generally accepted that six out of the fourteen points implicitly address the concept. Few weeks after his 14 points speech, Wilson Made it explicitly clear that his ideas concerning the peace settlement were based on self-determination (Raic, 2002)[28].

Furthermore, Lenin already before 1917 developed the theory of Bolshevik "national self-determination", (Raic, 2002)[29], exclusively mean the right of oppressed nations to political separation; that is secession from alien oppressor bodies and nations and the formation of an independent national State. Likewise (Cobban, 1969)[30], argued *"the Russian revolution and the Russian Provisional Government´s emphasis on self-determination as a base for both peace with the central Government".* Legal development of the right to self-determination. The United Nations Charter constitutes the first document with legal force to proclaim the principle of the self-determination of peoples, although the formulation adopted saw the principle as something to be aimed at, not a definite obligation (Ryngaert2010)[31].

The wording used was the result of compromises between colonial powers and those who presented themselves as anti-colonialist. It did manage to ensure the development of friendly relationships and strengthen world peace, but it was far from recognizing a real right to choose one's government. The expression 'self-determination' appears in the UN Charter: in Art.1, concerning the purposes listed in Chap. I 'Purposes and Principles', and in Art. 55 of Chap. IX 'International Economic and Social Co-operation', considered a sort of 'second preamble (Pellet, 1991).[32]

In the first of the appearances it is described as a means to develop friendly relations among nations to strengthen universal peace, whilst in the second there is a listing of the actions that the United Nations (UN) should promote to ensure 'peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. (Lauwers & Smis, 2000).[33]

In the next section, I will conduct the trajectory of the concept of self-determination in terms of international law, especially how it has been incorporated through international instruments enacted by the United Nations. The aim is to evaluate the evolution of it by means different epochs and framework of interpretation, establishing their achievements and challenges, this background is useful to understand why indigenous people have could resort to this notion.

**Resolution 1514 of the United Nations**

The resolution that confirms the right of self-determination on the part of the United Nations may be a good example to highlight, as human rights are a territory of dispute. Law has a particular formalism, but knowing how to address it can imply practical and positive effects for the recognition of social demands. In this case the differentiation between the sentence: "All people shall have the right of self-determination", instead of "all people have the right of self-determination".

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[28] Ibíd., p.177-182
[29] Ibíd., p.177.
[30] Cobban, A (1969). The nation-state and national self-determination. London Collins, p 179.
[31] Ryngaert, C. 2010. The ICJ Advisory Opinion on Kosovo's Declaration of Independence: A Mixed Opportunity?: International Court of Justice, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, p 481-494.
[32] Pellet, A. 1991. Chapitre IX: 'Cooperationéconomiqueetsocialeinternationale'. Article 55, (a) et (b). In La Charte des Nations Unies. Commentaire article par article, ed. J.P. Cot and A. Pellet, 2nd ed., 841–861. Paris/Brussels: Economica/Bruylant. P 841-861.
[33] Lauwers, G., and S. Smis. 2000. New Dimensions of the Right to Self-determination: A Study of the International Response to the Kosovo Crisis. N & EP6: 43–70

"Although the charter refers to self-determination of "people", and Resolutions 1514 proclaims that "all people" have the right to self-determination analysis of United Nations practice until the mid-1960 reveals that is was mainly the decolonization aspect of self-determination which was developed during that period. In sum, has been referred to as a right to decolonization, was applied to all inhabitants of a colonial territory…

"All people shall have the right of self-determination", the text which was finally agreed upon provides that all people have the right of self-determination. The verb had been changed from the future to the present, to emphasize the fact that the right referred to was a permanent one" (Cassese, 1995)[34]Thus, for instance in 1966 by article 27 ICCPR[35] called "collective individuality" established criteria to recognize the existence of groups that requested the application of the right to internal self-determination as such:

- A group of individual beings who enjoy some or all of the following features
- A historical territorial connection, on which territory the group forms a majority.
- A common history.
- Common ethnic identity or origin.
- A common language.
- A common culture.
- A common religion or ideology.
- The belief of being a distinct person distinguishable from any other person. (Cassese, 1995).

**The Helsinki and Algier Declaration (expanding self-determination)**

In the legal field although Helsinki (1975) and Algier[36] (1976) Declarations are statements that do not have the legal effects that an international covenant. Both have been remarkable attempts to expand the achievements of the sixties, according to Cassese:

> Two documents share the same premise: a people´s ability to achieve internal self-determination turns out to the extent to which the individual who comprises that group are free to enjoy their fundamental Human Rights. Both documents seek to strengthen and improve international rules governing self-determination by bolstering individual Human rights (Cassese, 1995)[37].

Both declarations controverted the western country's principle that claimed "the self-determination must carry out for the whole population of a sovereign country. Additionally, there have been other interpretations after the covenant of 1966. For instance, through some concepts as the right to self-determination as a continuous process and the relationship of this right with the materialization of other human rights.

"Self-determination is not a one-off exercise. I cannot be achieved for any people by one revolution or one election. It is a continuous process. It requires that people be given continuing opportunities to choose their governments and social systems and to change them when they so choose. This, in turn, requires that they should be enabled to exercise other rights to freedom of thought, expression, the right to peaceful assembly and freedom of association". (Cassese, 1995)[38].

[34] Cassese, A. (1995). Self-determination of people. Legal reappraisal. Henkin editor. Cambridge University Press, p 98.
[35] International Covenant on Civil and Political Rights.
[36] Algier Declaration are more radical than Helsinki Declaration since it attempted that the right to self-determination includes the right to secede and right to use force as last resort. Moreover, its statements have generated greater resistance in Western countries.
[37] Op. cit. p.302
[38] Ibíd., p. 304

These texts adopted by very diverse groups of states, do not all possess the same legal force, nor do they all bind the same states. However, as stated by Elihu Lauterpacht, the right of peoples may be considered an integral part of positive law and not simply a political principle. (Virally1983).[39]

## *ACHIEVEMENTS AND CHALLENGES OF THE RIGHT TO SELF-DETERMINATION*

Self-determination was not born in the context of human rights rather; this idea was initially thought in the context of the interpretations of colonialism through the vision of Lenin and Wilson.

Subsequently, the process of African decolonization generated a new theoretical, political and legal struggle platform. In my view due to the rise of the human rights discourse after the Second World War, the decolonization process was reinterpreted by means law, particularly human rights speech. For example, Terretta asserted that:

> African human rights activists working at the grassroots level who had previously advocated self-determination concurrently with calls for human rights protections now prioritized the preservation of political and civil liberties in the postcolonial state. In so doing, they often found themselves in confrontation with the political office holders who had been the ones to wrest self-determination from former colonial rulers. In other words, liberation politics in postcolonial African states shifted, after independence, to mean the protection of political and civil rights—whether collective or individual—from the excesses of the state. In practice, new definitions of human rights emerged differently depending on whether the independent state government claimed to support a human rights agenda (Terreta, 2013)[40].

Although from Moyn's stance, legalization the right to self-determination just seems "the consolation prize". The truth is that the legal field to be a field of the on-going dispute has generated achievements on the one hand, without ignoring that many other challenges have failed to carry out. As a result, in the legal field, I categorized in two aspects.

### Achievements

Since the adoption of the UN, charter self-determination has gradually acquired the status and force of a set of general and legally binding guidelines for the action sovereign states. Legal standards considerably enhance the status of various classes of people: colonial peoples, peoples under foreign military occupation, racial groups living in sovereign countries, the whole population of sovereign States as an example: liberation movements representing peoples entitled to self-determination are no longer passive objects of State´s.

Self-determination has also a significant impact on the most traditional segment of international law, namely the acquisition, transfer, and loss of title over territory. It has cast doubt on traditional legal titles such as colonial conquest and acquisition by a cession of sovereignty over overseas territories…Self-determination also prevents States from regarding as *terra nullius* territories inhabited by organized collectivities lacking the hallmarks of State authority. (Cassese, 1995)[41].

In terms of the use of force, self-determination has had a twofold impact. On the one hand, it has extended the general ban on the force, in that is has brought about the prohibition of the resort to force by states against

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[39] Virally, M. 1983. Panorama de Droit international Contemporain (Cours général de Droit international public). Recueil des Cours 183: 9–382.
[40] Op. cit. p.398
[41] Op. cit. p.324

racial groups in their territory who are denied equal access to government. On the other hand, self-determination has resulted in the granting to liberation movements of a legal license to use force to react to the forcible denial of self-determination by a colonial state, an occupying power or a state refusing a racial group. (Cassese, 1995)[42].

**Challenges**

The right to self-determination is only bestowed upon the peoples of the States that are parties to the two 1966 UN covenants on Human Rights. Here yet turns out prevalent the principles of sovereignty and the legal applicability of treaties. Self-determination is marred with imperfections (Cassese, 1995). The rule on the external self-determination of colonial people does not include any freedom of choice for ethnic groups living in a colonial country. As well as the wishes of the population concerned must only be ascertained by means plebiscite or referendum. Legal regulation of self-determination is that it is not assisted by a piece of effective enforcement machinery or at least a significant body of measures capable of implementing the right (Cassese, 1995)[43].

## *THE RIGHT TO SELF-DETERMINATION ADOPTED BY INDIGENOUS SOCIAL MOVEMENT*

In this section, I will highlight how indigenous people reinterpreted the right to self-determination, first, it is necessary to identify who is indigenous in terms of international law, and second, I explain briefly the relevance of ILO Convention No. 169, which have been the instrument used by indigenous people movement to defence their priorities by means self-determination. Finally, I take into account a particular example through the Bolivian Constitution, intending to illustrate precisely how indigenous movement has incorporated their cosmovision, readdress the classical purpose of self-determination.

**Who are consider indigenous?**

According to (Thornberry 2000)[44] there are several characteristics to identify who would be considered indigenous recognized by international law. "Distinctiveness, in the sense of being different and wanting to be different. This aspect of being indigenous is closely related to the importance given to the group's self-identification as indigenous. 'Dispossession of lands, territories, and resources, through colonization or other comparable events in the past, causing today a denial of human rights or other forms of injustice."[45]Lands (located in a specific geographic area) as a central element in the history, identity, and culture of the group, usually giving rise to traditional economic activities that depend on the natural resources specific to the area in question.

A third starting-point in the quest for a definition is ILO Convention No. 169 which includes in the article 1 a complex provision on the scope of application of the convention:

This Convention applies to: (a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their customs or traditions or by special laws or regulations; (b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which

[42] Ibíd., p. 325
[43] Ibíd., p. 332
[44] Thornberry P, (2000) 'Self-Determination and Indigenous Peoples: Objections and Responses', in P. Aikio and M. Scheinin (eds.) Operationalizing the Right of Indigenous Peoples to Self-Determination (Turlen: Institute for Human Rights, Åbo Akademi University, pp. 39-64
[45] UN Doc. E/CN.4/Sub.2/1994/2/Add. United Nations Draft Declaration on the Rights of Indigenous Peoples (1994).

inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply. The use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

To the question of the right of self-determination. Having earlier referred to ILO Convention No. 169, it needs to be clarified that the fact that this convention does not include a clause on the right of self-determination does not mean that indigenous peoples would never qualify as beneficiaries of that right. Article 1, paragraph 3, of ILO Convention No. 169 should be taken as meaning what it says, namely that the use of the term 'peoples' in that Convention does not have 'any implications' as regards the rights which may attach to the term 'peoples' under public international law. Just as the reference to 'peoples' in the ILO Convention does not have positive implications in respect of turning into people groups that otherwise would fall short of the distinctiveness required under international law, the same reference does not have the negative implication of denying the status of a people to a group that irrespective of the ILO Convention qualifies as a people under public international law (Ghanea N. & Xanthaki A, 2004)[46].

However, not necessarily all indigenous movements in Latin American have defended their claims utilizing this legislation, for instance (Tomaselli, 2016)[47].who affirms there are three macro-categories of Autonomous or self-determined indigenous territories recognized by their states: a). Indigenous autonomy arrangements that have been legally established as a result of conflict resolutions (Chittagong Hill Tracks in Bangladesh; Papua and Aceh in Indonesia; the Atlantic Coast in Nicaragua etc.). b). Self -government arrangements derived from high-level debates followed by incisive constitutional or domestic law reforms (the Indigenous Peasant Native Autonomies in Bolivia; the *circumscriptions* in Ecuador; the indigenous autonomies of Mexico, the reformed autonomy of Greenland from Denmark, etc.) and .c). Arrangements developed into new legal autonomy understanding by constitutional or other amendments of domestic laws (the *resguardos* systems in Colombia).

In conclusion, this part has demonstrated the first proposal, the law can be readdressed from different perspectives which had not planned previously, such as ILO legislation in favour of the recognition of the indigenous people as the rights holder of self-determination. Now, I will point out the Bolivian case background to demonstrate how they have adopted their vision of the right to self-determination.

## *THE BOLIVIAN CONSTITUTION OF 2009*

One of the most important backgrounds of this Constitution was developed by Mst (*Movimiento Socialists de Los Trabajadores* in Spanish) they take parts of the ayllu[48] model and adapts them to structure their political organization at the community, regional, and national levels. Fabricant (2012).[49]

The Bolivian constitution in my view is the most important social lab in terms of Latin American constitutionalism and the one that most directly challenges capitalism, and the liberal vision of legal pluralism.

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[46] Ghanea N. & Xanthaki A (2004). Minorities, people and self-determination. Brill academic publishers.
[47] Tomaselli, A. (2016). Exploring indigenous self-government and forms of autonomy. En E. b. Short, In Handbook of Indigenous People´s Rights
[48] The traditional form of a community in the Andes, especially among Quechuas and Aymaras. They are an indigenous local government model across the Andes region of South America, particularly in Bolivia and Perú.
[49] Fabricant, N. (2012). Mobilizing Bolivia's displaced. Indigenous politics & struggles over land. The University of North Carolina Press chapel hill, p 79.

According to (Manuel, 2015)[50] the first article of the constitution should be understanding beyond the classic state structure and normative of the political charter.

This article of the Bolivian Constitution establishes that: "Bolivia is constituted as a Social Unitary State of Plurinational Community Law [...] Bolivia is based on plurality and political, economic, legal, cultural and linguistic pluralism, within the integrating process from the country".

The configuration "Social Unitary State of Plurinational Community Law" (without commas), reflects the constitutional, social and political transition of the Bolivian State. In simple words, this transition, in our opinion, seeks the "overturn" of the old to the new, of the alien to the own; of a Social Rule of Law anchored in the Republican "Nation-State", towards a Plurinational Community State, founded on the plurality and pluralism of nations and peoples (Manuel, 2015)[51].

Moreover, the African-self-determination is overpassed from this perspective, since it was focusing on the relationship between a colonizing and a colonized precept. In the Bolivian case, the concept of plural nations is located in the contours of the nation-state. But also, it turns away from the classic notion of self-determination by Locke, because the concept of the property-owning citizen and individual rights has no bearing. Here too appear different actors: Indigenous, community, *Pachamama* and the rights of Mother Nature.

As well as this, there is a plurinational representation. I refer to Pacari (1984)[52], who says that "the solution for the colonial situation would be *the "transformation of the current power of the Uninational … State toward a plurinational state*". This truly multinational and pluricultural state in which each nationality has the right to self-determination and the free choice of social, political and cultural alternatives".

Additionally, the concept of self-determination is fully recognized within the principles of the Bolivian constitution. "*Plurinationality as the succinct expression of the diversity of Bolivian reality; founded on four fundamental bases: a) The "self-determination of peoples", b) "Plurality" and "pluralism", c) "Decolonization" and d)* Thus, Self-determination of indigenous peoples is exercised through harmony with nature and respect for community values from a holistic way. For example, "the notion of *Sumak Kawsay aims to restore collective life in all its dimensions, as an alternative reaction to the dominant development model".* (Macías)*2011*[53] Likewise, Houtart asserts that: "

> Sumak Kawsay is a new word for integral development, inspired by the tradition and the discourse of the indigenous peoples, and that wants to propose, with an original contribution, a change of paradigm in front of the capitalist conception of the development. Similar intellectual efforts exist in African and Asian societies, and it is the set of all these initiatives that will help to specify the objectives of the various social movements and political organizations that fight for a change of society" (Houtart, 2011)[54].

Likewise, *Sumak Kawsay* is grounded in some values which are intrinsically connected: *Pakta kausay*, (Balance): Through communal work, individual and collective equilibrium is achieved, *Alli kausay* (harmony): the balance allows sustaining the collective and individual harmony, *runakay (know-how be)* is the sum of all

[50] Manuel, C. (2015). "*Lo plurinacional" como reto histórico avances y retrocesos desde la experiencia boliviana. En: Constitucionalismo, descolonización y pluralismo jurídico en América latina*.Translated by me. "Lo plurinacional" como reto histórico avances y retrocesos desde la experiencia boliviana. En: *Constitucionalismo, descolonización y Ed. Centro de Estudios Jurídicos y Sociales Mispat NEPE - Universidad Federal de S.*

[51] Ibíd., p.243.

[52] Pacari, N. (1984*). Las Culturas Nacionales en el Estado multinacional ecuatoriano. Revista del banco central de Ecuador. N 6*, 113-123.

[53] Macías, L. (2011). Sumak Kawsay. La Vida en plenitud. América Latina en Movimiento. Editorial Época, Volumen II. Editorial Época, Volumen II. P.452

[54] Op. cit. p.16

the elements noted above. Runa means the person, the human; the *runakay synthesizes the realization of the human being, to achieve this dimension* it is essential to learn to gradually comply, each one of the values described above.

As a consequence, the notion of self-determination implemented in the Bolivian constitution has other parameters that are born in their cultural practices, without the classic division between "man" and "nature". Thereby, Indigenous intend to preserve their culture and cosmogony as a political act.

## *CONCLUSIONS*

The article illustrates how different actors have formulated theories from a different episteme to defend certain interests through the law, since I believe that, taking up Bourdieu and Merry, the law is an indeterminate social field and disputed territory. In this concrete case, the concept of self-determination was addressed utilizing other paths. It works to point out as the right to self-determination has been used at the international level, through the United Nations Declaration on Indigenous People (2007) for example. Moreover, the Latin American indigenous movement uses the law as a strategy to achieve self-determination, its claim arises from an ancestral right that is outside the western logic of the nation, sovereignty and civil society. This right is exercised concomitantly with another right, such as the right to ancestral territories.

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