Populism and the International Law of Self-Determination: Charting the Emergence of Populist Legal Movements from South Africa to Palestine

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I Introduction

In her article “The East Timor Story: International Law on Trial”, Catriona Drew examines, inter alia, the failures of the International Court of Justice (ICJ) as well as the United Nations (UN)-sponsored ‘popular consultation’ to uphold the international legal right of self-determination of the East Timorese.1 Self-determination, as a legal concept, is paradoxical. On the one hand,

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self-determination is characterized as the most sacred of international legal norms; it is both a universal right (*erga omnes*) and a peremptory norm (*jus cogens*) from which no derogation can be permitted. On the other hand, the norm is characterized as indeterminate. Questions of defining ‘people’ – the competing interest of maintaining the territorial integrity of existing states and questions of recognition – may very well cultivate the conclusion that the right is far too indeterminate to create any overarching principles which can be consistently applied across the board. The paradox is reminiscent of the Norse myth of Loki’s wager. According to legend, the Norse god Loki entered into a wager with a group of elves; should he lose he would have to forfeit his head. The elves won the wager and returned to claim their prize. Loki agreed to surrender his head, but tells them that they have no right to take his neck. After much deliberation, the elves cannot determine where the neck ends and where the head begins and, consequently, Loki keeps his head indefinitely.

Drew refutes the argument that the right to self-determination is in fact indeterminate. She claims that the right has a discernible core content, which can be divided into two distinct types of entitlements: self-determination as process and self-determination as substance. Drew also states that since the case of East Timor was a case of decolonization, the relevant set of rules are those which emerged during the decolonization era, and are readily discernible through UN practice. Self-determination seems to evince a ‘universal exceptionalism’ with each individual case being *sui generis* whether it is Kosovo, East Timor or South Sudan. The case of Palestine, like East Timor, has all the necessary ingredients for statehood. There can be no doubt that the Palestinians constitute a people. Additionally, the issue of borders is incontestible. Despite the absence of many of the usual self-determination related problems, the Palestinian question has proven to be extraordinarily resilient. Despite the almost unanimous calls for a two-state solution on the part of the UN General Assembly, the Quartet, the European Union (EU) and other institutions, international legal and political engagement has failed in securing any measure of Palestinian self-determination. It is at this point that I wish to take Drew’s analysis in a different direction.

The above-mentioned failures have given rise to a unique phenomenon – the emergence of populist legal movements (PLMs). The simple definition of populism would be “any various, often anti-establishment or anti-intellectual, political movements or philosophies that offer unorthodox solutions or

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2 Id., 655.