Bachelor Thesis

On the right of Self-Determination of the Catalan People

by

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Inhoudsopgave

Introduction

When we are born, we are born into a group or community from which we obtain a big part of our identities. Within this community, a language is spoken, and culture is exercised within a certain territory. Whether this is a bigger community, or a smaller one, individual rights cannot protect this identity on an individual basis. This is especially relevant when a minority group is oppressed and/or abused by the majority group. One of the main legal remedies presented by international law is the right of self-determination. This right entails that a certain and identifiable group has the right to be politically organized as this group desires in accordance with international law.[1]

Self-determination has emerged in the aftermath of the First and Second World War as it developed from a principle to a right.[2] The legal foundation of the right can be found in the United Nations Charter (UN Charter), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESC). Article 1 of both covenants are identical. Article 1(2) of both the Covenants states that "All peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development."[3] [4] Providing 'all peoples' with the right of self-determination affects the principle of territorial integrity. This entails those states shall not interfere with the domestic affairs of other sovereign States. Henceforth, the scope of the right is limited to certain groups to preserve the political unity and sovereignty of States. Usually, the principle of territorial integrity prevails over the right of self-determination in the form of secession, but that is not always the case. The question, thus, remains which group of people have the right to self-determination and what is the scope that the group's right entail?[5]

Self-determination in the form of secession can lead to various forms of instability of already existing forms of statehood when it comes the political unity.[9] The UN Charter provides that the right of self-determination did not provide a 'right' for people of self-determination according to Daes.[6] Instead,

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[1] Jan Klabbers, *International Law* (2nd edn, Cambridge University Press, 2017) 129
[2] Antonio Cassese, *Self-determination of peoples: A legal reappraisal* (1st edn, Cambridge University Press 1995) 4
[3] UNGA*, International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171
[4] UNGA, *International Covenant on Economic, Social and Cultural Rights,* 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3
[5] Vita Gudelevičiūte, 'Does the Principle of Self-Determination prevail over the Principle of Territorial Integrity?' (2005) 2(2) International Journal of Baltic Law <https://www.tamilnet.com/img/publish/2009/10/Gudeleviciute.pdf> accessed on 12 February 2021
[6] Erica-Irena A Daes, 'Some Considerations on the Right of Indigenous Peoples to Self-Determination' 3(1) Transnational Law & Contemporary Problems <https://heinonline.org/HOL/Page?handle=hein.journals/tlcp3&div=7&g_sent=1&casa_token=uePAl8DzKWUA

the UN Charter reaffirmed another issue when it comes to territorial integrity. Article 2(7) of the Charter ensures the territorial integrity of the sovereign states; "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter…".[7] As a result, the UN Charter, by itself, only endorses self-determination instead of making it a legal right.[14] The alternative to self-determination in the form of secession, or external self-determination, is internal self-determination. This form of self-de termination does not affect the territorial integrity of a state as it can be exercised when a participatory democracy presence in a country.[8]

The Autonomous Community of Catalonia, a region of the Spanish State is situated in the North-Eastern corner of Spain. The Region is home to mostly Catalans, a group that has its own cultural identity, which is distinguishable from other Spanish regions.[9]
Being part of the Spanish nation, means that Catalans were part of the gradual development of the Spanish Constitution that established the Spanish democracy. The most influential developments in history include a devastating civil war followed by a dictatorship under General Francisco Franco until 1975[10], which heavily influenced the current Spanish Constitution of 1978.

The new Spanish Constitution of 1978 established that Autonomous Communities (such as Catalonia) have their own government which acts accordingly to its own interests whilst also securing and protecting the language native to the specific part of the Spanish State also under Article 137 and 3 of the Spanish Constitution.[11] Accordingly, the 'new' constitution allowed for Catalan cultural identity to flourish and allowed for the development of the nationalistic incentive due to newly attained form of autonomy.[12]

Despite these levels of autonomy, the gradual notion to secede from Spain grew and reached momentum in 2017 when a referendum was held by the Catalan Government. The question posed to the Catalonian population whether they would like for Catalonia to secede from the Spanish State and

AAAA:ta9xL_b57SL31JyAxB3NUttmnL954SazRnYVta3-7KrdAFg8aGVus-8PrgiXJa9sB4cCGDVA&collection=journals> accessed on 12 February 2021
[7] UN, *Charter of the United Nations,* 24 October 1945, 1 UNTS XVI
[8] cf Gudelevičiūte (n 12)
[9] André Lecours, 'Regionalism, Cultural Diversity and the State in Spain' [2010] 22(3) Journal of Mulitlingual and Multicultural Development < https://doi.org/10.1080/01434630108666433> accessed on 11 February 2021
[10] Gabriel Tortella, Catalonia in Spain: History and Myt (1 edn, Pelgrave Macmillan 2017) 170-176
[11] Agencia Estatal Boletín Oficial del Estado, 'The Spanish Consitution' (Agencia Estatal Boletín Oficial del Estado, 27 December 1978) <https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf> accessed 11 February 2021
[12] Marina Duque d, 'Catalan independence: challenges and perspectives' (Centro de Estudios de Política y Relaciones Internacionales, 27 October 2017) <https://cepri.upb.edu.co/index.php/lineas-de-investigacion/relaciones-internacionales/catalan-independence> accessed 11 October 2021

form an independent republican state.[13] According to the Explanatory Memorandum on 'The Law on the Referendum on Self-determination of Catalonia', the Catalan Parliament stated that this referendum is their ultimate form of expression of their right of self-determination. The memorandum goes on to address that the referendum would be legal and legit under the Spanish Constitution in correspondence with the Statute of Autonomy of Catalonia, and that law embodies the final attempt of the 2015 Parliament to secede from the Spanish state. Besides, the Catalan Parliament claims that it aims to abolish discrimination by the Spanish state against Catalonia and the Catalan people.[6] The outcome of the plebiscite was overwhelming in favor of secession, yet due to multiple factors, the referendum was deemed unconstitutional and illegal by the Spanish Constitutional Court.[14] That some Catalans want self-determination is clear, yet, it is the most far-reaching legal protection mechanism that international law provides to protect a/the Catalan minority in Spain.[15]

The question is whether the Catalan people can exercise, and to what extent, the right of self-determination as put forward by the international legal framework.

To effectively address the aforementioned question, the following research question is to be addressed in this paper; *To what extent is the right of self-determination exercised by the Catalan people, considering the current constitutional framework of Spain?*

This research questions shall be supported by the following sub-questions to effectively answer the research questions;

1) What is the legal international legal framework of self-determination?

2) What are the defying historical development/events of Catalan and Catalonia's identity?

3) What is the current Spanish constitutional legal framework in regard to the Autonomous Community of Catalonia?

4) To what extent does the constitutional legal framework meet the requirement(s) of the international legal framework of internal self-determination?

Methodology

To answer the research question, the research will primarily be conducted through literature and jurisprudence. By assessing what legal scholars and the judiciary have written on the right of self-determination of the Catalan people, the research question will be answered. The research strategy will be conducted in the systematic method. This method entails that the used literature and legal

[13] Catalan Parliament, 'The Law on the Self-Determination Referendum' (Catalan Parliament, 6 September 2017) <https://exteriors.gencat.cat/web/.content/00_ACTUALITAT/notes_context/Law-19_2017-on-the-Referendum-on-Self-determination.pdf> accessed 12 February 2021

[14] STC 114/2017

[15] Jan Klabbers, *International Law* (2nd edn, Cambridge University Press, 2017) 129-130

documents is to be found through searching systematically through various catalogues, journals, publications, academic articles, and bibliographies. The relevant jurisprudence is to be found through the same systematic method; by searching systematically through various catalogues, journals, publications, academic articles, and bibliographies the relevant jurisprudence could be identified, and consequently be used in this bachelor thesis. This applies to Spanish jurisprudence as well as relevant foreign jurisprudence, including the judgements and Advisory Opinions by the International Court of Justice.

The structure of this bachelor thesis aims to test the Spanish constitutional framework according to the standards put forward by the international legal framework regarding the right of self-determination. This requires an analysis of the international legal documents, such as court decisions and treaties, and legal principles. The legal framework of self-determination requires the historical contextualization from when the principle evolved into a right. The main treaties will be discussed and analyzed together with defining "all peoples" and the principle of territorial integrity. Jurisprudence will be analyzed of Kosovo and Quebec as these cases were influential on the general application of self-determination. Judgments of the Spanish Constitutional Court will be analyzed besides the Spanish Constitution, to provide the constitutional legal framework and its relation to the Autonomous Community of Catalonia. The brief historical overview, in the form of a systematic timeline of Catalonia, aims to provide an understanding and contextualization to Catalonia's claims to legitimacy. This will be discussed in the sub-questions and chapters in this bachelor thesis, which will provide an answer to the research question.

It is noteworthy that a lot of literature is 'colored' when it comes to Catalan self-determination and/or secession. Academic and non-academic articles are, therefore, occasionally peer reviewed. By doing this, the biased sources are kept out of this bachelor thesis.

Scientific relevance

The right of self-determination has always generated a significant amount of discussion and coverage by the international community and its subjects. As the subjects of the sovereign countries usually consists of a lot of different groups, such as minorities. The question of whether the Catalan people have the right to exercise, or already exercise, this right according to the international legal framework is, as reaching momentum in 2017, still relevant as the wish for secession or more autonomy will likely not fade overnight. The outcome of the 2021 Election resulted in a majority of parties that are pro-secession.[16] Clarity on the role of international law regarding the application of the right of self-

[16] Sam Jones and Stephan Burgen, 'Catalonia election: pro-independence parties increase majority' (The Guardian, 15 February 2021) <https://www.theguardian.com/world/2021/feb/14/catalonia-regional-election-covid-voting> accessed 20 June 2021

determination could nudge both the Catalan people and the (Spanish) State to negotiate towards a suitable and sustainable solution that can accommodate the desires of both the Spanish people and the Catalan people.

The answer to the research question can considered to be a precedent, whether legal or not, for other groups such as the Flemish people in Belgium.

Chapter 1: ***The Right of Self-Determination***

Before determining whether the Catalans have or already attain the right of self-determination, the legal framework of the right itself needs to be laid down which is done in this chapter by focusing on the historical development from self-determination from a principle to a right, the role of international legal documents, the role of both the cases of Quebec and Kosovo. Overall, this chapter gives an adequate overview of the international legal framework of the right of self-determination.

1.1 Historical Development of Self-Determination

1.1.1 Development of the Right prior to the Second World War

The right of Self-Determination prior to the First World War simply did not exist in the international (legal) framework. Only after the first World War, when Austria-Hungary was subdivided in the Paris Peace Conference (1920), self-determination was used as a guiding principle. The thought was that the new Eastern-European borders would be drawn from the idea that ethnicities/nationalities would determine where the new borders would be drawn.[17] Outside of the (international) legal framework, self-determination was a concept from the Enlightenment relating to individuals rather than nations. After the French Revolution, Article 2 of Title XIII of the Draft Constitution of the 15th of February 1793. It stated that the French could annex lands only if the inhabitants did not object nor surrounding states would object. However, the French used this article as a justification to annex lands of other sovereign states. The principle of self-determination thus originated in France and was not interpreted as the right of people to freely determine their own rulers. The concept later reached Italy during the time of its unification, and where it eventually reached the international scene in the aftermath of the First World War. [18]

During the First World War, both Wilson, President of the U.S., and Lenin, leader of the Soviet Union, had influential views on self-determination. Lenin saw it as an opportunity to realize socialism for the whole world whilst Wilson saw It as a tool to establish peace. [19]
Wilson understood self-determination as self-government as the governed need to give consent. He stated that "National aspirations must be respect: peoples may now be dominated and governed only by their own consent."[20] He therefore advocated self-determination because of his broader democratic

[17] Milena Sterio, *The Right of Self-Determination under International Law: Selfistans, Secession, and the Rule of Great Powers*, (1edn, Taylor & Francis Group) 10
[18] cf Cassese (n 9) 11-12
[19] ibid 13
[20] U.S. Department of State, 'Address of the President of the United States Delivered at a Joint Session of the Two Houses of Congress, February 11, 1918' (Office of the Historian, 11 February 1911) <https://history.state.gov/historicaldocuments/frus1918Supp01v01/d59> accessed 3 June 2021

commitment. However, due to the lack of his geopolitical knowledge, he shattered Europe where correspondence used to exist between the state borders and the ethnos, according to Lynch.[21]

The League of Nations, which was established by the Convenient of the League of Nations, did not mention self-determination. Nonetheless, through the 'Mandate System', the League tried to establish a system that was aimed towards the development of colonial people.[22] The Mandate System, according to Sasan, is the right of self-determination's first burgeon within positive international law. The system was aimed at preparing 'natives' from colonial countries in various regions for self-government.[23] When it comes to secession, the League of Nations provided us with the Åland Islands case in July 1920 when it created a commission to examine whether the people residing on the Aaland Islands were able to secede from Finland and join Sweden under international law.[24] The jurists of the Commission had ruled that "…Positive International Law does not recognize the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish, any more than it recognizes the right of other States to claim such a separation."[25] Thus, secession was not possible in this particular case.

1.1.2 The development of the Right after the Second World War

When the Second World War was over, the political concept of self-determination became legally underpinned on the international level with the formation of the United Nations Charter in . During the San Francisco Conference, where the United Nations was formed, Article 1(2); "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace…"[26]. Initially, the Charter's self-determination was to be interpreted that States should provide self-government to communities within their jurisdictions, and self-determination was not defined by the Charter (e.g. internal and external) and therefore did not result in any legal obligations for the Member States.[27]

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[21] Allen Lynch, 'Woodrow Wilson and the Principle of 'National Self-Determination': A reconsideration' (2002) 28(2) Review of International Studies < https://www.jstor.org/stable/20097800> accessed on 3 June 2021

[22] Valerie Epps, 'The New Dynamics of Self-Determination' (1997) 3(2) ILSA Journal of International and Comparative Law < https://nsuworks.nova.edu/cgi/viewcontent.cgi?article=1086&context=ilsajournal&httpsredir=1&referer=/> accessed on 3 June 2021

[23] Navdeep Kour Sasan, 'League of Nations and Self-Determination' (2013) 3(2) GNLU Journal of Law, Development and Politics <https://heinonline.org/HOL/Page?handle=hein.journals/gnlujldp3&div=24&g_sent=1&casa_token=&collection=journals> accessed on 3 June 2021

[24] cf Cassese (n 9) 27

[25] *Aaland Islands Case* (1920) League of Nations Official Journal.

[26] cf UN (n 14)

[27] cf Cassese (n 9) 42-43

Despite the initial interpretation, the UN Charter marked a turning point for self-determination; by the inclusion of it into a multilateral treaty; it transformed self-determination from the political domain to a legal standard.[28]

Eventually, Article 1(2) emphasized the friendly relations among states. Nevertheless, this changed after more and more colonized countries started to advocate independence of colonized states with the help of socialist countries, such as the Soviet Union. Thus, Article 1(2) was seen as legal legitimation of de-colonization[29] with the 1960 Declaration Granting Independence to Colonial Countries and Peoples, by the United Nations General Assembly Resolution 1514. It transferred the right and principle of self-determination to non-self-governing peoples, and it puts the emphasis of the principle of self-determination on decolonization and secession of colonized states in the context of the UN Charter.[30]

The Helsinki Final act of 1975 balanced the right of self-determination. Principle VIII balances the right by establishing that "…with the relevant norms of international law, including those relating to the territorial integrity of States."[31] The drafting States tried to balance the right with the principle of territorial integrity, although some states such as Ireland stressed that territorial integrity does not prevent peaceful border alterations.[32] According to Sadigbayli, the prevailing intention of the Final Act did not allow for external self-determination or secession. Even though the Final Act was not meant to be a legally binding treaty, it still is upheld next to binding treaties.[33]

1.2 UN Treaty Framework

The 1966 Covenants on Human Rights; the ICCPR and the ICSECR, were introduced to espouse the principle of self-determination in the UN Charter provisions. Both of the Covenants are the product of the wish to lay down the principles of the Universal Declaration of Human Rights in two separate legally binding treaties; ICCPR and ICSECR.[34] As seen before, Article 1(1) of both the Covenants

[28] ibid 43
[29] ibid 44-47, 65
[30] Malcom Shaw, *International Law* (6edn, Cambridge University Press, 2008) 253
[31] Organization For Security and Co-operation in Europe, 'Helsinki Final Act' (Organization for Security and Co-operation in Europe, 1 August 1975) <https://www.osce.org/files/f/documents/5/c/39501.pdf> accessed 4 June 2021
[32] James J Summers, 'The Right of Self-Determination and Nationalism in International Law' (2005) 12(4) International Journey on Minority and Group Rights <https://heinonline.org/HOL/P?h=hein.journals/ijmgr12&i=331> accessed on 4 June 2021
[33] Rovshan Sadigbayli, 'Codification of the inviolability of frontiers principle in the Helsinki Final Act: Its purpose and implications for conflict resolution' (2013) 24(3-4) Security and Human Rights <https://doi.org/10.1163/18750230-02404011> accessed on 4 June 2021
[34] cf Cassese (n 9) 47

state that "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[35] Four years later, in 1970, United Nations General Assembly Resolution 2625 or the Declaration on Principles of International Law concerning Friendly Relation and Cooperation among States in accordance with the Charter of the United Nations. Despite being a Resolution, and therefore not binding states, it is a vital document for crystalizing the consensus amongst states to what extent the scope of the right of self-determination reaches in the judicial sphere.[36]

Both the 1966 Covenants and the Declaration of Friendly Relations are to be seen as authoritative interpretations of the provisions on human rights and self-determination in the UN Charter. However, the 1966 Covenants especially broadened the notion that the right of self-determination was to be expanded beyond decolonization by introducing the distinction between internal and external forms of self-determination.[37] Internal self-determination entails that rights related to self-determination are enjoyed in the form of self-government within a larger 'mother'-state for which the people democratically elect their representatives[38] whilst external self-determination encompasses independence through secession. Usually in the context of decolonization [39] or if a majority within the whole nation wants/allows a territorially concentrated group to secede.[40]

The UN Treaty framework (e.g. UN Charter and 1966 Conventions) aimed to crystalize customary rules with various General Assembly Resolutions besides the UN Charter, the Declaration on Friendly Relations, the Declaration on Independence and Colonial Countries, and the 1966 Conventions on Human Rights. When the provisions of the treaty framework were adapted, the provisions became increasingly amendable due to the increasing number of memberships of the UN and, therefore, the number of contracting states grew. Due to this influx, the general norms of custom, that largely coincide with the treaty framework, have developed as the provisions felt that the treaty provisions did not suffice. General Assembly resolutions would solve this by laying down legal terminology which were political expressions of politics surrounding self-determination.[41]

1.3 Internal Self-Determination?

[35] UNGA*, International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171 and UNGA, *International Covenant on Economic, Social and Cultural Rights,* 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3
[36] cf Cassese (n 9) 70
[37] ibid 65-66
[38] cf Sterio (n 17) 13.
[39] James Summers, Peoples and International Law (2edn, BRILL 2013) 65
[40] cf Sterio (n 17) 19
[41] cf Cassese (n 9) 67-70

The scope of the principle of self-determination in the Treaty framework is determined by the term "peoples" in the aforementioned Declarations, Conventions, and Charter as they determine who holds the right and who not and thus which group can invoke it.[42] The scope is linked with the principle of territorial integrity, which is affected depending on the distinctive forms of self-determination: internal or external. Whilst internal self-determination is established through the 'mother'-state respecting and allowing groups to exercise their rights[43] by equal access to government.[44] External self-determination aims to secede from the 'mother'-state to become an independent self-government. Internal self-determination can be effectuated by political autonomy, self-government, religious, linguistic, and cultural freedoms.[45] Subsequently, internal self-determination, based on the Declaration on Friendly Relations, is exercised through equal access to government for racial and religious groups.[46] Equal access to government is exercised when equal access to the process of political decision-making and the State's political institutions and the State does not exclude any group.[47] If the sovereign State's government does not respect this, religious and racial groups may secede.[48]

Therefore, a claim to external self-determination refers to a claim to a territory.[49] However, the Declaration on Friendly Relations declared that the 'safeguard clause', "…Nothing in the foregoing paragraphs [which proclaims the right of self-determination] shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples…". Thus, this clause aimed to protect the principle of territorial integrity of the 'mother'-State, thereby reducing the grounds for justifications of secession. The only ground of justification is in the context of decolonization and the "…alien subjugation, [foreign] domination and exploitation…"[50] based on the Declaration on Friendly Relations, which needs to be narrowly interpreted to military occupation or intervention by uses of force.[51] Additionally, a religious or racial group may secede (attaint their right to self-determination externally) when internal self-determination cannot, whatsoever, be attained within a sovereign State, in combination with gross breaches of fundamental rights. Yet, this is not customary law according to Cassese.[52] Territorial integrity simply prevails.[53] The Canadian Supreme Court, found that it is

[42] cf Gudelevičiūte (n 12)
[43] cf Sterio (n 17) 19
[44] cf Cassese (n 9) 112-114
[45] cf Sterio (n 17) 18-19
[46] cf Cassese (n 9) 114
[47] ibid 112
[48] ibid 112-114
[49] cf Gudelevičiūte (n 12)
[50] UNGA, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, 24 October 1970, A/RES/2625(XXC)
[51] cf Cassese (n 9) 90-93
[52] ibid 119-121
[53] Ibid 122-124

customary law.[54] It seems that these are contradictory statements, and therefore, it is not known wheter this is customary law.

The 'safeguard clause' of the Declaration of Friendly Relations ends with "…peoples as described above and thus passed of a government representing the whole people belonging to the territory without distinction as to race, creed or color."[55] In 1993, the Vienna Declaration and Programme of Action, the 'safe clause' of the Declaration of Friendly Relations was reformulated: "In accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the [UN] Charter [...] this [right of self-determination] shall not be construed as authorizing or encouraging any action which would dismember or impar, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government represent the whole people belonging to the territory without distinction of any kind."[56] Subsequently, the 1993 Vienna Declaration in conjunction with the Declaration of Friendly Relations, provides that internal self-determination can be exercised without a distinction of racial and religious groups, and therefore, applies all people[57] "…without distinction of any kind."[58]

1.3.1 "All Peoples"

Determining the scope of the right of self-determination is done through the classification with "people", as one group might classify as a minority whilst the other as a colonized indigenous group. The 1966 Conventions and the Declarations speak of "all peoples". Yet if the right of external self-determination is invoked by 'all peoples', this would impose problems for states both the political unity and the principle of territorial integrity of a sovereign state. It provides that colonized, and foreign military occupied people can invoke the right of external self-determination.[59]

According to Castellino and Gilbert, the definition of minorities used by Francesco Capotoriti is overall the most working definition[60]: "[a] group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members - being nationals of the State, possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, religion or language."[61]

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[54] Reference Re Secession of Quebec, [1998] 2 SCR 217. Para. 134-135
[55] cf UNGA (n 49)
[56] UNGA, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23
[57] James Crawford, *The Creation of States in International Law* (2edn, Oxford University Press, 2006) 118-119
[58] cf UNGA (n 54)
[59] cf Cassese (n 9) 59-61
[60] Joshua Castellino and Jérémie Gilbert, 'Self-Determination, Indigenous Peoples and Minorities' (2003) 3(-) Macquarie Law Journal < https://www.researchgate.net/publication/228184464_Self-Determination_Indigenous_Peoples_and_Minorities> accessed on 6 June 2021
[61] Ibid.

Nevertheless, the Special Rapporteur on minority issues stated in 2019 that 'minorities', as enshrined in Article 27 of the ICCPR, is to be defined as "An ethnic, religious or linguistic minority is any group of persons which constitutes less than half of the population in the entire territory of a State whose members share common characteristics of culture, religion or language, or any of these. A person can freely belong to an ethnic, religious or linguistic minority without any requirement of citizenship, residence, official recognition or any other status."[62] According to the Special Rapporteur, Catalans are a minority within the Spanish State as they meet the aforementioned requirements of the definition.[63]

Article 27 of the ICCPR states that "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."[64] According to Guliyeva, internal self-determination applies to minorities under Article 1 ICCPR as the application applies to the whole population, thus it includes minorities. Article 25 ICCPR, which ensures the right of taking part of the government, needs to be interpreted in accordance with Article 1 ICCPR. This basis will allow a minority to tailor the rights of Article 27 ICCPR in accordance with their interests.[65]

1.3.2 Territorial Integrity

The principle of territorial integrity is one of the fundamental principles of the international legal framework. Article 2(7) of the UN Charter states that "Nothing contained in the present Charter shall authorize the United Nations to intervene in matter which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter…"[66]. This article essentially prohibits other states to intervene in matters that occur within another sovereign state. For the Declaration of Friendly Relations' 'saving clause' for territorial integrity; "…Nothing in the foregoing paragraphs [which proclaims the principle of self-determination] shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples…". This clause paved the way for internal self-determination, as this this does not affect the

[62] UNGA, *Effective promotion of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Note by the Secretary-General,* A/74/160 < https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/216/30/PDF/N1921630.pdf?OpenElement>
[63] UNGA, *Report of the Special Rapporteur on minority issues on his visit to Spain,* A/HRC/43/47/Add.1 < https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/063/88/PDF/G2006388.pdf?OpenElement>
[64] cf UNGA (n 10)
[65] Gulara Guliyeva, 'Collective Rights of Minorities: Exploring a Normative Basis for Internal and External Self-Determination' (2011) 68(1-2) <https://doi.org/10.24989/0014-2492-2011-12-50> accessed on 17 April 2021
[66] cf UN (n 14)

territorial integrity of states whilst still allowing 'people' to exercise their right to self-determination. [67]External self-determination, however, does violate the territorial integrity of the state. As Cassese puts it: "…affording a right of [external] self-determination to ethnic, linguistic or cultural groups would be the 'kiss of death' as far as territorial integrity was concerned."[68]

1.3.3. Customary Law and Case Law

Customary rules/law are formed by two elements: *opinio juris* and *usus*[69] (state practice). *Opinio juris sive necessitass*, or *opinio juris,* refers to that a certain (state) practice is accepted as law whilst state practice to consistent and general practice by states. Thus, a certain practice amongst sovereign States needs to be present in order to be qualified as customary law; *opinio juris* and *usus*.[70] However, as the General Assembly Resolutions expressed the political interpretation, the General Assembly resolutions to neither, strictly seen, considered to poses *usus* and *opinio juris*. Despite that, they gave each Member State their legal view which will result in States to gradually adapt the provisions of the resolutions.[71] Therefore, to understand how these resolutions are to be legally interpreted, one should consider the context of the adaptation of the resolutions. Even though *usus* nor *opinio juris* can be found in the resolutions per se, in the context of the of state behavior in (international) dealings and the state declarations during, before, and after the adaptation before the Declarations/General Assembly Resolutions, one can find state practice/*usus*. Together with declarations of state officials and/or international and domestic court rulings, which makes up *opinio juris,* customs can be found.[72]

1.3.3.1 ICJ Advisory Opinion in Context

The International Court of Justice (ICJ) has interpreted the right of self-determination throughout the years when the right of self-determination has evolved and is continuously evolving. Most of these advisory opinions by the ICJ are related to decolonization, however, this has changed over time considering the Kosovo case.[73]

Most ICJ cases, in the context of decolonization, are the Western Sahara case, the Namibia case, and the East Timor case. In the former advisory opinion, the ICJ has stated that the self-determination is

[67] cf Cassese (n 9) 110-114
[68] ibid 114
[69] cf Cassese (n 9) 69
[70] Rebecca Wallace, *International Law* (5edn, Oxford University Press, 2018) 92-93
[71] cf Cassese (n 9) page 67-70
[72] ibid 67-70
[73] Gentian Zyberi, 'Self-Determination through the Lens of the International Court of Justice' (2009) 56(3) Netherlands International Law Review <https://doi.org/10.1017/S0165070X0900429X> accessed on 21 April 2021

"…defined as the need to pay regard to the freely expressed will of peoples.."[74] that in order to exercise the principle of self-determination, the requirement of "…free and genuine expression of the will of the people concerned."[75] 'Free' and 'genuine' entails that the expression of self-determination is without outside interference and that the will expressed is the will of the people of the concerned territory.[76] In the Namibia Advisory opinion, the ICJ affirmed that the principle of self-determination was applicable to all non-self-governing territories due to the ongoing development of international law.[77] The ICJ has stated in its judgment of East Timor case that the "…assertion that the right of peoples to self-determination , as it evolved from the Charter and United Nations practice, has an erga omnes character, is irreproachable."[78] However, the ICJ did not elaborate on the exact scope of the erga omnes character.[79]

1.3.3.2 Kosovo

The main question in the Kosovo Advisory Opinion was "…whether or not the applicable international law prohibited the declaration of independence."[80] The ICJ stated that State practice during the eighteenth, nineteenth and early twentieth centuries, a long period of time when there were multiple declarations of independence issued, pointed out that there was no prohibition of declarations of independence.[81] (para 79) The ICJ also found that unilateral declarations of independence are prohibited due to the principle of territorial integrity as it is one of the most vital principles of international law (e.g. considering the Declaration of Friendly Relations, Article 2 of the UN Charter) and the Court accordingly stated that "…the scope of the principle of territorial integrity is confined to the sphere of relations between States",[82] rather to actions of entities that are non-State.[83] The Court also addresses 'remedial secession'. However, it noted that there was no consensus amongst States whether the circumstances regarding the Kosovo case allowed for 'remedial secession'. Despite the lack of consensus, the Court did not further address 'remedial secession' as it solely was asked to advise on whether the Kosovan declaration of independence was in accordance with international law.

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[74] *Western Sahara, Advisory* Opinion [1975] ICJ REP 1975 12. para. 59
[75] ibid para. 55
[76] cf Zyberi (n 70)
[77] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ REP 1971. Para. 52
[78] *Case Concerning East Timor (Portugal v Australia)* [1995] ICJ Rep 1995 P 90 Gen List No 84, para. 29
[79] cf Zyberi (n 70)
[80] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion* [2010] ICJ Report 403, para. 56
[81] Ibid para. 79
[82] Ibid para. 80
[83] Christopher J Borgen, 'From Kosovo to Catalonia: Separatism and Integration in Europe' (2010) 2(3) Goettingen Journal of International Law < https://www.gojil.eu/issues/23/23_article_borgen.pdf> accessed on 21 April 2021

By doing so, the ICJ has left the door open that there might be a right to remedial secession, which was, prior to this Advisory Opinion, considered to be not possible.[84]

The ICJ chose, in this case, narrow and restraint readings. According to Borgen, we are left with the consensus prior to this Advisory Opinion as declarations of independence are mostly a domestic affair, and thus, the UN should not condemn such declarations. If there seems to be a violation of international law, e.g., a violation of the prohibition of the use of force, the UN is allowed to condemn.[85]

1.3.3.3 Constitutional Case Law: Quebec

The Supreme Court of Canada, in the case of Secession of Quebec, was indirectly triggered by a referendum in 1995 (or plebiscite) which asked the Quebecois to vote whether they wanted to secede from Canada as the Quebecois had demanded more autonomy from Canada. The outcome of the referendum was 49.4 percent in favor of the secession of the Quebecois population. Despite the 'stay' outcome, the Canadian Parliament requested the Supreme Court of Canada to issue an opinion on whether the unilateral secession of Quebec would be possible under both international law and Canadian law.[86] The legal question put forward was the following:

"Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?"[87]

The Supreme Court found that international law does specifically grant sub-states the right to secede from a sovereign state unilaterally. Hence, the Court assessed the right of self-determination by balancing it with the principle of territorial integrity. The Court reaffirms that international law foresees that the right of self-determination can be exercised within the political framework of the sovereign states of which the sub-states are part and only in exceptional circumstances should the principle of territorial integrity of the sovereign state be breached for external self-determination (or secession) to prevail.[88] This is the case when internal self-determination is totally frustrated, then external self-determination can be exercised in unilateral secession.[89]

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[84] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion* [2010] ICJ Report 403, para, paragraphs 82 - 83
[85] cf Borgen (n 80)
[86] cf Sterio (n 17) 30
[87] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion* [2010] ICJ Report 403, para. 55
[88] Roya M Hanna, 'Right to Self-Determination in Re Secession of Quebec' (1999) 23(1) Maryland Journal of International Law < https://core.ac.uk/download/pdf/56355876.pdf> accessed on 21 May 2021
[89] cf Sterio (n 17) 31

However, the Court concluded that the Quebecois were "…equitably represented in legislative, executive, and judicial institutions…"[90] and thus the Quebecois's rights to (internal) self-determination was fully respected by the Canadian state.[91] More specifically, the Quebecois "…freely make political choices and pursue economic, social and cultural development within Quebec, across Canada, and through the world."[92] Moreover, Quebecois "occupy prominent positions within the government…"[93] Therefore the Court notes that "…Canada is a 'sovereign and independent state conducting itself in compliance with the principle of equal rights and self-government with the principle of equal rights and self-determination of peoples and thus posed of government represents the whole people belonging to the territory without distinction."[94] Consequently, the Quebecois peoples could exercise their right to internal self-determination, and thus, external self-determination was deemed not relevant.[95]

Conclusion

The international legal framework of the right of self-determination is legally underpinned by the United Nations Charter, the International Covenant on Civil and Political rights, the International Covenant on Economic, Social and Cultural Rights. Resolution 2625 provided the 'saving clause' for the principle of territorial integrity; political unity and territorial integrity of a state prevails. This resulted into the prevalence of internal self-determination over external self-determination. Internal self-determination applies for all people, including minorities, and entails equal access to government. External self-determination, or secession, is solely reserved for certain groups; colonized people, oppressed people in the form of foreign military occupation, and exploited people.

The following chapter will the discuss the historical development of the Catalan people and Catalonia. The historical argument for self-determination can both add depth to the claim but also can add more weight to the interpretation of some principles. Even though the interpretation is outside of the scope of this thesis, it is important to be aware of the context of the Catalan people and of their claim to the right of self-determination.

[90] Reference Re Secession of Quebec, [1998] 2 SCR 217. Para. 136
[91] cf Sterio (n 17) 31
[92] Reference Re Secession of Quebec, [1998] 2 SCR 217. Para. 136
[93] Ibid 136
[94] ibid 136
[95] cf Sterio (n 17) 31

Chapter 2: ***Catalonia and the History of Catalans***

In the Preamble of Declaration of sovereignty and the right to decide of the people of Catalonia, issued by the Catalan Parliament in January 2013, states that the People of Catalonia has throughout history expressed its commitment to self-government. This is, according to the Declaration, based on the historical rights of the Catalan people.[96] The Catalan interpretation of their historical identity shapes the right of self-determination and the legal principles which defies international law.

The historical ties do not only play a vital role in providing legitimacy and dept to nationalistic ideas[97], but also in interpreting legal principles.[98] If there is a conflict between the right of self-determination and territorial integrity, historical claims could potentially allow one to prevail over the other.[99] Therefore, the history of the Catalan people and Catalonia are discussed in this chapter.

2.1 Spain prior to the 20th Century

From Hispania to Castille and Aragon

Romans were the first to effectively conquer the Iberian Peninsula and established their colony 'Hispania'. After the Roman empire fell, the Visigoths established their kingdom, so the peninsula was under Visigoth rule.[100]

Eventually, the Muslims from northern Africa invaded in 711 A.D. and established their Caliphate, of Córdoba which covered the whole landmass of the peninsula, except for the Pyrenees where small Christian kingdoms/states still prevailed over the Caliphate. The Muslim rule, however, was challenged by the Christians who, around 1000 A.D., started their Holy Quest in the form of a crusade to reconquer the peninsula in name of Christianity, which ended around 1400 A.D. when the last Muslim state of Granada fell and became Christian rule.[101]

During the Spanish Inquisition, most of these smaller Christian kingdoms/states unified into a bigger kingdom such as: Castille, Navarre, Portugal, and Aragon, (of which Catalonia was part.)[102] Aragon and Castille were essentially unified in 1492, by the marriage of Isabel of Castille and Fernando of Aragon. This unification marks the 'starting point' of the modern Spanish State.[103] This unification did not result into the 'same' policy for both of the kingdoms.[104] Since the marriage between Isabel and

[96] Resolution 5/X of the Parliament of Catalonia, adopting the Declaration of sovereignty and the right to decide of the people of Catalonia (23 January 2013) <https://www.parlament.cat/document/intrade/7176> accessed on 15 March 2020.
[97] cf Summers (n 39) 121
[98] Ibid. 122
[99] Ibid. 122
[100] Gabriel Tortella, Catalonia in Spain: History and Myt (1 edn, Pelgrave Macmillan 2017) 1-5
[101] Ibid. 1-5
[102] Ibid. 1-5
[103] Ibid. 1-5
[104] Ibid. 25

Fernando was the only formality that kept the two kingdoms together, not any official document or such. Consequently, when the eldest grandson of Isabel and Fernando, Charles of Gaunt (or Carlos I of Castille and Aragon), solely inherited the throne, he was the first undisputed king of both kingdoms.[105] Both kingdoms were ruled separately which led to different policies as Aragon enjoyed less arbitrary taxation compared to Castille, yet Castille enjoyed a more stable government and judiciary due to the presence of the king's seat compared to the irresponsible Aragonese aristocracy who brought arbitrary forms of 'justice'.[106]

War of the Reapers; the First Rebellion

A deep recession that hit Spain and a conflict between France and Spain eventually led to the War of the Reapers that took place from 1640 until 1652 according to Guibernau.[107] This conflict is the first rebellion of Catalans against the Spanish Crown. As France invaded and took the Catalan counties on the northern side of the Pyrenees in 1640 and threatened to take the counties situated on the southern part of the Pyrenees. As a result, the Spanish soldiers had to be billeted in Catalonia, something which was extremely unpopular and unwanted amongst the Catalans. The Catalans resisted to this military presence and some prominent Catalan clergymen were imprisoned. This sparked rebellion in the Catalan countryside that eventually reached the cities such as Barcelona. The rebellion had turned Catalonia into a state of anarchy and chaos, and eventually, the rebellion against the Spanish monarchy turned into a rebellion against the wealthy nobles.[108] During this period of chaos, a Catalan clergyman known as Pau Claris negotiated with the French that allowed him to proclaim the Catalan Republic on the 16th of January 1641. However, this republic didn't last longer than a week (23rd of January)[109] as the Spaniards were approaching to restore order. To prevent Spanish occupation, Pau Claris agreed with the French that the French king Louis XIII would become the count of Barcelona and that Catalonia would become a French suzerainty.[110] As Elliot stated, "Catalonia had exchanged one master for another.".[111]

The Spaniards eventually managed to gradually take Catalonia back from the French with Barcelona eventually in 1652. This was both due to the fact that Catalans subjected themselves to the

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[105] Ibid. 31
[106] John H. Elliott, The Revolt of the Catalans. A Study in the Decline of Spain (1598-1640) (1edn, Cambridge University Press 1984) 16
[107] Montserrat Guibernau, Catalan Nationalism Francoism, transition and democracy (1edn Taylor & Francis Group 2004) 33
[108] Gabriel Tortella, Catalonia in Spain: History and Myt (1 edn, Pelgrave Macmillan 2017) 39-41
[109] Joana Margarida Ribeirete de Fraga, 'Three Revolts in Image: Catalonia, Portugal and Naples' (Universitat de Barcelona: Facultat de Geografia i Història, 2013) <https://www.tdx.cat/bitstream/handle/10803/664390/01.JMRDF_PhD_THESIS.pdf?sequence=1&isAllowed=y> accessed 8 February 2021, 76
[110] Gabriel Tortella, Catalonia in Spain: History and Myt (1 edn, Pelgrave Macmillan 2017) 41-42
[111] John H. Elliott, The Revolt of the Catalans. A Study in the Decline of Spain (1598-1640) (1edn, Cambridge University Press 1984) 522

French, but also since Spain was in a state of bankruptcy. Under the French rule, Catalonia was treated like a colony and forced Catalans to fight against the Castilians towards whom the Catalans were quite hostile. The French forced them to fight against the Spaniards by threatening with imprisonment, besides, the French also brought French businessmen who 'displaced' the Catalans. Eventually, in October 1652, the city of Barcelona peacefully copulated, and king Felipe IV pardoned the Catalans in January 1653. The conflict between France and Spain eventually came to end and with the Peace of the Pyrenees in 1659 when Spain officially handed over the counts of Catalonia situated on the northern side of the Pyrenees to France.[112]

With the pardoning the Catalans, Felipe wanted to demonstrate inclusivity within the Spanish Kingdom; he even went on to provide a restitution of belongings which were dispossessed in the war. The War of the Reapers was a war that overall did not work out in favor of Spain nor especially Catalonia.[113]

The War of Succession; the Second Rebellion

The conflict that commenced the War of Succession, resolved around the succession of the Spanish throne. After the death of Carlos II, who didn't have a legitimate and recognized heir, stated in his will that Philip of Anjou would succeed him in November 1700. Philip sat on the Spanish throne as Felipe V as he inherited all of Carlos II's domains.[114] However, the archduke of Austria (who was a Habsburg) Charles and a close relative of Carlos II of Spain contested the legitimacy of Felipe V on the Spanish throne. As some states such as the Low Countries and England would favor a Habsburgian on the throne rather than a Bourbon as they hoped to take parts of the overseas territories of the Spanish Empire. However, despite these claims, Felipe V was coronated as strict legitimacy proffered him as he was the closest relative to Carlos II.[115]

The coronation based on the strict legitimacy did not prevent the hostilities between the French and the Dutch. Austria and England sided with the latter.[116] Felipe V (Philip of Anjou) was the second grandson of Louis XIV of France, creating a union between France and Spain which was undesirable for a lot of surrounding European states as that would create an undesired 'power block'. According to Dhondt, this is where the War of Succession essentially commenced.[117] With the French and Bourbon siding together and the Austrian Habsburgians and English siding together during the conflict.

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[112] cf Tortella (n 97) 42-43
[113] Ibid. 48
[114] Frederik Dhondt, 'From Contract to Treaty: The Legal Transformation of the Spanish Succession' (2010) -(3) Journal of the History of International Law-Revue d'hisoire du droit international XII <https://biblio.ugent.be/publication/1027201/file/6742623.pdf> accessed on 25 March2021
[115] cf Tortella (n 97) 49-50
[116] ibid 51
[117] cf Dhont (n 111)

The international war came eventually to an end when the English wanted what they wanted; Felipe V would renounce his disputed 'rights' to the French crown, preventing the potential creation of a French-Spanish power block. This was enshrined in the Treaty of Utrecht (April 1913) and the Treaty of Rastatt (March 1714). The conflict did however continue solely in Spain; it thus continued as a civil war as the Archduke of Austria still refused to identify Felipe V as legitimate king until 1725 when the Treaty of Vienna was created.[118] This treaty essentially consolidated the Bourbon rule in Catalonia.[119] During the eleven years of civil conflict that lasted until 1725, Barcelona supported the Habsburgian claim to the throne which put them at conflict with Felipe V. Eventually, when Felipe's army reached the city, the pro-Habsburgian rebels wanted to negotiate about reforms Felipe wanted to implement which they resented, however that was long past. Felipe resented Catalans as he saw them as traitors and renegades as they had sworn a loyalty oath towards him; Felipe saw the Catalans as a vulnerability of his kingdom.[120]

'Nueva Planta'

Because of the Catalan vulnerability, king Felipe V ratified his *Nueva Planta* decrees which essentially demolished the whole regional political structures in Spain that differed from the one in Castille, thus including the Catalan/Aragonse's political structure. The decrees dismantled the fueros, Generalitat, and the Corts (Catalan local government); consequently, the Catalans essentially were stripped of the control of their legislative, fiscal, and economical powers. Felipe centralized his power and thus instated his 'general sovereignty'.[121] To compensate for the abolishment of the Catalan/Aragonese political institutions, the Crown benefitted Barcelona, besides other Spanish ports, as the city, from that moment, could directly trade with ports in the Spanish colonies in South America as of 1778. This gave a great boost to the Catalan economy. Additionally, the Nueva Planta decrees abolished the internal tolls between Aragon and Castille which stimulated trade within Spain even more and benefitted the Catalan economy even more.[122]

2.2 Spain after the 20th Century

The turn of the 20th century

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[118] cf Tortella (n 97) 52-53

[119] Agustí Alcoberro, 'The War of the Spanish Succession in the Catalan-speaking Lands' (2010) 3(-) Catalan Historical Review <https://doaj.org/article/30132dc00e2c4b20824a9e0f3fd6d560> accessed on 26 April 2021

[120] cf Tortella (n 97) 53-56

[121] Velentyna Hodlevska, 'Catalonia: Endeavor for Independence' (2019) 7(2) European Journal of Transformation Studies <https://www.journal-transformation.org/docs/EJTS_2019_7_2/6/EJTS%202019%20vol%207%20no%202%20Catalonia%20Endeavor%20for%20Independence.pdf> accessed on 26 April 2021

[122] cf Tortella (n 97) 58-68

A decade later, when the 20th century commenced, which is a century that is marked by conflict and economic growth on a global scale considering World War I and II and the aftermath of both international conflicts. Over the course of the 19th century, the Spanish Empire had shrunk to such proportions that the term, that the sun eventually did set on the 'Empire' due to the losses of the overseas territories as a result of the Spanish-American War in 1898.[123]

Three decades earlier, the First Republic was declared in 1873 however this republic was abolished in 1875, when the monarchy was restored again until the 14th of April 1931 when the Second Republic was declared.[124] Even though the monarchy was restored, on the 13th of September 1923, Primo de Rivera staged a coup that made him the president (and thus became in charge) of a government that still required the approval of the monarch (King Alfonso XIII)[125], when he suspended the Cádiz Constitution.[126] Since Primo de Rivera spoke Catalan and was, prior to the coup, captain-general of Catalonia, his dictatorship was received initially well by the Catalans. However, this radically changed due to reorganization of the Catalan administrative offices and its political organization in general. Besides, Primo de Rivera forbade any manifestation of regional identity (such as flags) and forbade the usage of regional languages. In the case of Catalonia, Catalan obviously became forbidden to be spoken or written and the Catalan flag was not exhibited. The Prima de Rivera dictatorship rule eventually ended in January 1930 due to the failed implementation of the Golden Standard in Spain and the resentment of Spaniards towards him. King Alfonso to prevent what was to come; he appointed another general essentially as dictator (Dámaso Berenguar) who resigned in February of 1931 due to a lack of support. King Alfonso made himself extremely unpopular which led to republicans crafting the Pact of San Sebastián which laid down what the system of government should be and how the Republic would politically be organized. When King Alfonso eventually fled Spain due to pro-republican demonstrations, he fled out of fear of intense violence. Consequently, the Second Spanish Republic was established on the 14th of April 1931.[127]

The Second Republic and Catalonia

On the same day when the Second Republic was established, a Catalan republic was proclaimed simultaneously; the *'Esquerra Republicana de Catalunya'*. This Catalan republic was to be part of an 'Iberian Federation' that would provide autonomy to Catalan-speaking regions within the territory of the Spanish Republic. In the draft Estatut, the term used for the Statute of Autonomy, the Spanish Republic was to be a federal republic where the Catalan government (Generalitat) would have

[123] ibid 102
[124] ibid 100
[125] Shlomo Ben-Ami, 'The Dictatorship of Primo de Rivera: A Political Reassessment' (1977) 12(1) Journal of Contemporary History <https://www.jstor.org/stable/260237> accessed on 28 March 2021
[126] cf Tortella (n 97) 153
[127] ibid 153-157

extensive powers, and Catalan would be the sole language in the territories of the Catalan Republic. However, as to be expected, the draft Estatut was incompatible by simply being too contradicting the newly established Spanish Constitution in December of 1931.[128] As a result, the final 'Estatut' or *'Estatuto de autonomía de Cataluña'* came into force in 1932 where a lot of concessions were made. For example, according to Article 2, both Catalan and Castilian [Spanish] are the official languages, and Article 1 states that Catalonia makes up an autonomous region of the Spanish state.[129] This meant that the Catalan language could not be the sole official language of Catalonia and that the powers of the Generalitat were considerably more limited than indented by the Catalans.

The Second Republic, however, was not feasible for all. During the time of the Republic, Spain had experienced the modernization of the Spanish state through reforms during a period of political and economic turmoil that swept through Europe. Consequently, scares capital for reforms eventually dried up, and the support for the Republic with it too. Both the left and the right radicalized. As the left trade union (*Confederación Nacional del Trabajo* or CNT) which was a cooperation between different parties on the left spectrum by the *Federación Anarquista Ibérica* (FAI) who strived for a revolution. On the right, parties such as the *Conferderación Española de Derechas Autónomas* (CEDA) saw the reforms that led to the modernization of Spain as a threat to traditions and traditional societal organization; they wanted to destroy the Republic from within by joining the government. This was the case in October 1934, when CEDA joined the government. Socialists organized a strike which led to the imprisonment of 40.000 militants whilst it forced others to flee abroad and/or go into hiding. CEDA abolished trade unions, abolished wages, restored the Church's prominent position and abolished the Catalan autonomy by replacing the Catalan Generalitat with a governor-general appointed by the central government in Madrid. Eventually, in February 1936, the coalition with the Radical Party and CEDA fell and new elections were held. CEDA lost and a new coalition was formed between Communists, Liberal Republicans, and Socialists.[130] This new coalition pardoned all the exiled and restored the Catalan Generalitat and the autonomous status of Catalonia. Therefore, tensions boiled up, especially when the coalition wanted to prosecute the military for their actions.[131] The boiling point was reached, after many of political assassinations. On the 13th of July 1936, when a socialist policeman was killed known as José Calvo Sotelo, to retaliate the assassination of a leftist police officer who was well known. This was enough to stage a coup d'etat in Morocco during the

[128] ibid 157-160

[129] Parliament of Catalonia, 'Estatuto de autonomía de Cataluña 1932' (1932 Statute of Autonomy of Catalonia, 9 September 1932) <http://www.tufs.ac.jp/ts/personal/hirotate/documentacion/autonomia-catalunya/Estatuto%20de%20autonomia%20de%20Cataluna%201932.pdf> accessed on 28 March 2021

[130] Francisco J. Romero Salvadó, *Historical Dictionary of the Spanish Civil War,* (1edn, The Scarecrow Press, 2013) 33-50

[131] cf Tortella (n 97) 162-165

night of the 17th of July 1936 that essentially commenced the Spanish Civil War that lasted up until 1939.[132]

The Spanish Civil War and Francisco Franco

The conflict between the Nationalistic Spaniards and the Republican Spaniards was fierce. Yet clarity amongst which smaller grouping belonged to either the Nationalists or the Republicans was not there; the conflict mostly took place locally as differing smaller armed clashes. However, both the Nationalists and the Republicans put forward a single leader as they believed that one leader that could fully control public order and the military strategy in order to obtain victory. The Republicans were led by Francisco Largo Caballero, later Juan Negrín, who was head of the *Unión General de Trabajadores* (UGT), and he was to be the leader of the newly installed government if victory for the Republicans was to be claimed. He managed to secure support from Communists, Liberal Republicans, Catalan and Basque Nationalists, and Socialists. General Francisco Franco was appointed to lead the Nationalists into victory as he was into the gray area between different political leanings which made him appealing to all the different political factions that supported the Nationalists. The Catholic Church also provided their support to Franco by preaching about the patriotic crusade that General Franco was embarked on as he was the *'caudillio'*; the supreme leader or dictator. General Franco managed to secure an efficient army with support from both Germany and Italy. Various events and battles later, the Republicans eventually surrendered which led to the victory of the Nationalists, which resulted in the Spanish Civil War officially ending on April 1st, 1939.[133]

On the 1st of October 1936, General Francisco Franco became the official and uncontested leader of the Spanish State. For Catalonia and the other regions of Spain, this meant a firm nationalistic and fascist rule from Franco that would last upon his death in 1975. During his regime, Both the Catalan language and culture were forbidden to be exercised in the public sphere; but such rules of oppression applied to the Spanish state as a whole. Rebellion against the regime resulted in silencing or persecution. In 1947, Franco made himself 'kingmaker' as the Law of Succession declared the Spanish state to be a monarchy and the successor of Franco was to be king. Twenty-two years later, in 1969, Franco made Juan Carlos de Borbón (Bourbon) his successor as king of Spain when Franco was to die on his deathbed.[134] For Juan Carlos to be Franco's successor, he swore alliance to the 'Principles of the National Movement', which were Franco's principles.[135]

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[132] cf Romero Salvadó (n 127) 33-50
[133] ibid 33-50
[134] cf Tortella (n 97) 170-176
[135] Ignasi Bernat and David Whyte, 'Postfacsim in Spain: The Struggle for Catalonia' (2020) 46(4-5) Critical Sociology <https://journals.sagepub.com/doi/pdf/10.1177/0896920519867132?casa_token=VbQoaKJfzYcAAAAA:yCKxbp

1975-1979

On the 20th of November 1975, at the age of 82, General Francisco Franco died. Consequenlty, Juan Carlos de Borbón became the king of Spain. He had a very different vision for the Spanish State than Franco had; he wanted to restore democracy, which was to be welcomed with open arms within the Spanish society. The king wanted, based on the advice of Torcuato Fernández Miranda, to demolish the 'old' franquist institutions and to build a new democratic Spanish state from the ground by not violating any laws of the Franco dictatorship. This was to be done by the franquist Cortes as they would annul themselves and new elections for a new democratic Cortes would be held in June 1977. This democratic government would restore Catalonia's Estatut, which reinforced the Catalan government. On the 23rd of October 1977. The Catalan model would then serve as a precedent for other Spanish regions which became Autonomous Communities as well.[136] The idea was that decentralizing the state was to be a beacon of democracy as it was opposite from Franco's nationalism that led to centralization.[137] On the 27th of December 1978, the King sanctioned the Constitution (of 1978) before the Cortes.[138] According to Article 147 paragraph 1 of the 1978 Constitution; "Within the terms of the Constitution, the Statutes shall constitute the basic institutional rules of each Autonomous Community and the State shall recognize and protect them as an integral part of its legal order."[139]. Consequently, the new status for Catalonia was presented in 1979 and was approved by the Cortes and the King by passing the law 4/1979 of 18 December.[140]

The last fifteen years

In 2006, a new Statute of Autonomy was ratified by a referendum held on the 19th of July 2006 in Catalonia. When the initial draft was formulated, the legislator tried to extend the powers of the Catalan Generalitat compared to the 1979 Statutes.

However, the most impacting changes were related to the use of the Catalan language. Before the referendum was held in July 2006, the Congress of Deputies (lower chamber) made alterations to the text. As a result, the 2006 Statute of Autonomy become legally binding on the 9th of August 2006. The new statutes were immediately met with criticism and allegations that it would be unconstitutional by the Ombudsman (Defensor de Peublo) and the Partido Popular, as they contested most of the

vF42i_345XO_Q23yCtnbvBdFB-WkoUG2NZMQhDIjcvklSjmKYvcfcKExGmB7opUMieJp4s> accessed on 30 March 2021

[136] cf Tortella (n 97) 192-197

[137] ibid 202

[138] cf Agencia Estatal Boletín Oficial del Estado (n 4)

[139] ibid

[140] Organic Law 4/1979 of 18 December, Statute of Autonomy of Catalonia <https://www.global-regulation.com/translation/spain/1490455/law-4-1979-of-18-december%252c-statute-of-autonomy-of-catalonia.html> accessed on 30 March 2021

provisions in the statute. Eventually, the Spanish Constitutional Court ruled on the 28th of June 2010 that some articles had to be reformulated or interpreted as presented by the Spanish constitutional court for the articles to be constitutional.[141]

2017 Referendum

In 2017, the referendum was held in Catalonia which asked the Spaniards living in the Autonomous Community of Catalonia whether they wanted to secede from Spain. As mentioned before in the introduction, the Spanish Constitutional court ruled that the law on which the referendum was enacted was unconstitutional and therefore the referendum was annulled. During the momentum, thousands of Catalans went protesting on the streets, shouting anti-fascist songs whilst they were met with approximately 11.000 police officers from both the Guardia Civil and National Police on the Catalan streets shooting, dragging, and arresting voters of the referendum.[142] According to Bernat and Whyte, the aftermath of the referendum and pro-independence politics clearly shows that fascism and Francoism is still present in the Spanish police and military considering their response to the referendum.[143] After the 2017 referendum, Catalan officials were imprisoned or held in custody based on charges of rebellion. As an act of support for these imprisoned Catalan officials, a yellow ribbon was worn by people who supported both the Catalan independence movement and/or support for the imprisoned. Eventually, the color yellow was banned to be used by human rights activists, thus also the yellow ribbon. According to Bernat and Whyte, this is an act of the Spanish government to silence any political discussion in this case.[144]

Reflection of Franco's influence on current Spanish State

The current contemporary Spain is a post-fascist state considering the aftermath of the regime of Franco of fascist Spain that lasted up until 1975. The term post-fascism applies since the current Spanish state is far from fascist, yet, the remnants of fascist Spain under Franco in the economic, political and culture are still present to this day. The transition after Franco's death to democracy can therefore be considered to be biased due to these remnants.

Culturally, Spanish nationalism, resulting from Spanish fascism, has marginalized non-Castilian cultures and nations. Under Franco, the oppressing language policy, as mentioned before, is a good example. The diverse cultures within Spain, such as the Catalan culture, are subject to a

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[141] Eva Pons Parera 'The effects of Constitutional Court ruling 31/210 dated 28 June 2010 on the linguistic regime of the Statute of Catalonia' (2013) 3(-) Catalan Social Sciences Review < https://doi.org/10.2436/20.3000.02.14> accessed on 31 March 2021

[142] cf Bernat and Whyte (n 132)

[143] ibid

[144] ibid

hierarchy culture in which the Castilian/Spanish culture is seen as the 'supreme'.[145] This can be traced back to Article 3 of the Constitution, which states that "Castilian is the official Spanish language of the State. All Spaniards have the duty to know it and the right to use it. […] The other Spanish languages shall also be official in the respective Autonomous Communities in accordance with their Statute".[146] Thus, Castilian 'prevails' over Catalan. Another example is that music is considered to be part of Spanish culture whilst it originated from a region in Spain; Flamenco music and dance is often seen as Spanish culture whilst it originated in Andalucía. These two can be seen as reminiscent of Franco's suppression non-Spanish culture to protect his dictatorship by creating a unifying consensus. After his death, this oppression has led to a basis for national unity that comes prior to the cultural differences within the nation. (e.g., Article 2 of the Constitution). If one deviates from the Spanish nationalistic narrative is seen as insubordination.

The Spanish Crown, and other official institutions, also contribute to the post-fascist Spain. As established before, Juan Carlos pledged alliance to the 'Principles of the National Movement'. Besides, the King is not only head of state, but also of the Spanish army according to the constitution. Franco himself was a general, also head of both the state and army; this can be seen as political succession. According to Bernat and Whyte, the Spanish Constitutional Court has a pattern in protecting the conservative interests, as the judges are directly chosen by the government, and therefore are not accredited judges.[147] Another is example is the Law 46/1977 (the Amnesty Law) which enacted in 1977 and provided that perpetrators in the Franco regime were amnestied as Article 1 of this law states that all the political acts which were classified as misdemeanors and crimes or with the same nature are to be pardoned/amnestied.[148] The United Nations urged the Spanish authorities to withdraw this law and put the perpetrators on trial.[149] However, the Spanish authorities have stated that they are not going to the Amnesty law under review as the law had popular support when it was passed in parliament.[150]

After the 2017 referendum, Catalan officials were imprisoned or held in custody based on charges of rebellion. As an act of support for these imprisoned Catalan officials, a yellow ribbon was worn by people who supported both the Catalan independence movement and/or support for the imprisoned. Eventually, the color yellow was banned to be used by human rights activists, thus also

[145] ibid
[146] cf Agencia Estatal Boletín Oficial del Estado (n 4)
[147] cf Bernat and Whyte (n 132)
[148] BOE-A-1997-24937 < https://www.boe.es/eli/es/l/1977/10/15/46>
[149] United Nations, 'UN expert urges Spain to probe alleged atrocities during 1930's civil war' (United Nations News, 5 February 2014) <https://news.un.org/en/story/2014/02/461222-un-expert-urges-spain-probe-alleged-atrocities-during-1930s-civil-war> accessed on 31 March 2021
[150] Robert Evens, 'Spain tells UN no rethink on post-Franco amnesty' (Reuters, 6 November 2013) <https://www.reuters.com/article/us-un-rights-spain-idUSBRE9A513C20131106> accessed on 31 March 2021

the yellow ribbon. According to Bernat and Whyte, this is an act of the Spanish government to silence any political discussion in this case.[151]

Conclusion

It must be noted that the historical ties add complexity to the right of self-determination. They add weight to the interpretation of (international) legal principles and add dept to nationalistic ideas. Therefore, the history should not be interpreted differently to add weight and/or dept to the claim to self-determination. Besides, the legal principle of self-determination is relatively modern and, therefore, the interpretation of historical ties should be done with extreme care in the context of a relative modern right.[152]

The historical development of Catalonia is intertwined with the historical development of Spain. During the War of the Reapers, Catalonia was independent for a week. Only to be annexed by the French and later by the Spanish. The Spanish Crown also stripped Catalan/Aragonese local governments of their power but allowed for Catalonia/Aragon to prosper by trading with ports in the America's. Under the two dictatorships, Catalonia and its culture were suppressed, just like other regions in Spain, under the nationalistic rule of both Primo de Rivera and Franco. It seems that the sentiment of Catalan nationalism and pro-secession sentiments seem to have surged in the end and beginning of the 20th and 21st centuries considering the ventures that resulted in alterations made in the draft Estatut of 2006 and the 2017 referendum. According to Tortella, the History of Catalonia shows that it has hardly even been independent.[153]

The interpretation of these historical events as to whether they deepen and/or add weight to the claim of self-determination is outside of the scope of this bachelor thesis. However, they should be taken into account.

The following chapter will lay down the Spanish constitutional legal framework of self-government and autonomy of Catalonia. This framework was influenced by the remnants of the Spanish nationalism and fascism of the Franco dictatorship.

[151] cf Bernat and Whyte (n 132)
[152] cf Summers (n 39) 129
[153] cf Tortella (n 97) 281

Chapter 3: ***The Contemporary Spanish Constitutional Legal Framework***

This chapter shall lay down the legal framework of the Spanish Constitution of 1978 and the 2006 Statute of Autonomy of Catalonia, or Estatut. As the first chapter laid down the international legal framework on the right of self-determination, the constitutional framework in this chapter can be tested in the fourth chapter whilst the second chapter has provided context to this chapter.

2.1 Decentralization of the 1978 Constitution

Article 2 of the 1978 Spanish Constitution states that Spain is an indivisible nation whilst it recognizes the undefined nationalities[154] (e.g. the Catalan nationality). By stating that the Spanish State is an indissoluble nation, it seems that the Spanish State can be defined as a unitary State.[155] The unitary state is a state "…where power can be devolved to regions but can also be taken back from them of the central government without the involvement of the regions themselves."[156] Nevertheless, Article 2 of the Constitution also states that "it recognizes and guarantees the right to autonomy of the nationalities and regions…"[157], one of those regions being Catalonia. This means that the Spanish State also meets the definition of a feudalistic state. Heringa defines federalism as "…the component regions of a state have their privileges, especially their constitutional autonomy, their legislative competences and their participation in federal decisions, enshrined in the national constitution."[158]

The Spanish Constitution, under Part VIII of Territorial Organization of the State, Chapter Three lays down the organization of the Autonomous Communities. Article 143(1) establishes the autonomy of the Autonomous Communities with self-government. Article 147 establishes the Autonomous Statues and what they should contain, this includes the name of the Community, its territorial boundaries and the powers of the Community's government that are in line with the Constitution. Article 148 establishes the competencies of the Autonomous Communities whilst Article 149 establishes the exclusive competencies of the central government in Madrid.[159] These articles of the constitution give the intention that the Spanish State can be defined as a federal state. Despite these articles, Article 155(1) states that "If an Autonomous Community does not fulfill the obligations imposed upon it by the Constitution or other laws, or acts in a way seriously prejudicing the general interests of Spain, the Government […] take the measures necessary in order to compel the latter

[154]cf Agencia Estatal Boletín Oficial del Estado (n 4)
[155] Daniele Conversi, 'Asymmetry in quasi-federal and Unitary States' (2007) 6(1) Formerly Global Review of Ethnopolitics < https://doi.org/10.1080/17449050701233064> accessed on 3 May 2021
[156] Aalt Willem Heringa, *Constitutions Compared: An Introduction to Comparative Constitutional Law* (5edn ed Intersentia 2019) 69
[157] cf Agencia Estatal Boletín Oficial del Estado (n 4)
[158] cf Heringa (n 150) 69
[159] cf Agencia Estatal Boletín Oficial del Estado (n 4)

forcibly to meet said obligations, or in order to protect the above-mentioned general interests."[160] As a result of this article, the Spanish State also meets the definition of a unitary state as this article allows the central government to seize power. Consequently, the Spanish State is a quasi-federal state.[161]

Spain currently consists of seventeen Autonomous Communities. Since different regions have different conceptions of what autonomy entails, and therefore the requisite to attain it differs from community to community. The Statutes of Autonomy of the various Communities, therefore, differ in substance which creates a discrepancy between the seventeen Communities which makes the Spanish State an asymmetrical quasi-federal state.[162]

Spanish decentralization provides that the 'nationalities and regions', as enshrined in the second article of the 1978 Constitution, were provided political autonomy within the borders of the unity of the Spanish state, which is also enshrined in the second Article of the 1978 Constitution.[163] Article 2, therefore, seems to encompass the struggle for autonomy between Catalonia and Madrid. Emphasizing national political unity, the 'door' to some form of secession seems to be shut, as nationalists and Francoists believe that secession from the Spanish State by any region is one of the worst-case scenarios. Therefore, according to Bofil, the sentence "the indissoluble unity of the Spanish Nation" as enshrined in Article 2 of the Spanish Constriction, was an imposition forcefully orchestrated by the nationalists/Francoists as a remnant of Franco's dictatorship.[164] According to Bernat and Whyte, this is thus a remnant that contributes to Spanish post-fascism.[165]

Article 8(1) of the Spanish Constitution states that "The mission of Armed Forces […] is to guarantee […] and to defend its territorial integrity and the constitutional order."[166] This provision was established due to the nationalists/Francoists efforts to protect the Spanish national unity prescribed in Article 2 of the Constitution.[167] Moreover, Article 8 is a result of Francoism in a post-fascist Spain. It is noteworthy that such a provision in a constitution is unique, as it is unlikely that the constitutional agent is the armed forces in other constitutions, let alone that the army protects the territorial integrity. The semantics reveal that there seems to be an implication that the democratic process cannot be trusted when it comes to handling issues or crises regarding territorial integrity as the armed forces

[160] cf Bernat and Whyte (n 132)
[161] Joaquim Rius-Ulldemolins and Mariano M. Zamorano, 'Federalism, Culture Policies, and Identity Pluralism: Cooperation and Conflict in the Spanish Quasi-Federal System' (2014) 45(2) The Journal of Federalism < https://academic.oup.com/publius/article-abstract/45/2/167/1890717> accessed on 3 May 2021
[162] cf Conversi (n 149)
[163] Hèctor López Bofill, 'Hubris, constitutionalism, and "the indissoluble unity of the Spanish nation": The repression of Catalan secessionist referenda in Spanish Constitutional law' (2019) 17(3) International Journal of Constitutional Law <https://doi.org/10.1093/icon/moz064> accessed on 5 May 2021
[164] Ibid.
[165] cf Bernat and Whyte (n 132)
[166] cf Agencia Estatal Boletín Oficial del Estado (n 4)
[167] cf Bofill (n 156)

should be ultimately the ones enforcing it.[168] Therefore, the Spanish Defense Minister invoked Article 8 of the Constitution to protect the Spanish territorial integrity amidst the Catalan referendum and 'declaration of independence' in 2017.[169]

Article 168(1) of the Spanish Constitution provides that "If a total revision of the Constitution is proposed, or a partial revision thereof, affecting the Preliminary Title, […] the principle shall be approved by a two-thirds majority of the members of each House, and the Cortes shall immediately be dissolved."[170]. The Preliminary Title/Part includes Article 2 and Article 8(1) of the Constitution. Thus, the "the indissoluble unity of the Spanish Nation"[171] and "The mission of the Armed Forces […] [is] to defend its territorial integrity and the constitutional order.".[172] It is, thus, very unlikely that these articles can be amended, let alone scrapped, as Article 168 posts an insuperable barrier.[173]

The interplay amongst Articles 2, 8, and 168 are essentially at heart of keeping Spain unified under the Spanish Constitution of 1978. Amongst these articles of the Constitution, Nationalists and Francoists pressure have provided institutional changes that allow the unity of the Spanish State to prevail over the interests of the Autonomous Communities. [174]

2.2 Estatut d'Autonomia de Catalunya

As mentioned before, the Spanish Constitution lays down the establishment and the relation between the Central Spanish Government and the Autonomous Communities in Part VIII of Territorial Organization of the (Spanish) State. Resulting from these provisions, Catalonia has its own statutes: the 2006 Statute of Autonomy which replaced the 1979 Statutes of Autonomy. The 2006 Statute of Autonomy was ratified by a referendum held on the 19th of July 2006 in Catalonia. When the initial draft was formulated, the legislator tried to extend the powers of the Catalan Generalitat compared to the 1979 Statute of Autonomy.

2.2.1 The legal position of the Estatut

The 2006 Statute of Autonomy is subdivided into multiple titles. The Preliminary Title, Title I relates to the rights, obligations and governing principles, Title II relates to the (Catalan) institutions, Title III relates to the judicial powers in catalonia, Title IV relates to the powers (of Catalonia), Title V relates to the institutional relations of the Generalitat, Title VI relates to the funding of the Generalitat, and

[168] Ibid.
[169] Ibid.
[170] cf Agencia Estatal Boletín Oficial del Estado (n 4)
[171] ibid
[172] ibid
[173] cf Bofill (n 156)
[174] Daniele Conversi, 'The Smooth Transition: Spain's 1978 Constitution and the Nationalities Question' (2002) 4(3) National Identities < https://doi.org/10.1080/1460894022000026105> accessed on 11 May 2021

lastly, Title VII relates to the reform of the Estatut. These titles give a general overview of the Estatut.[175]

As the Constitutional Court has stated in Judgment 31/2010 paragraph 3, the Statues of Autonomy, thus the Catalan Statute, are subordinated to the Spanish Constitution. The provisions/rules provided for by the Statutes of Autonomy "…corresponds to normative provisions that are not an expression of a sovereign power, but of a devolved autonomy based on the Constitution, and guaranteed by it, for the exercise of legislative powers within the framework of the Constitution itself…"[176] The Court, therefore, reaffirms the hierarchical position of the Constitution as it states that the Spanish Constitution does not allow equal nor superior as to other legal basis for supreme rule over the Spanish legal system.[177] Article 81(1) of the Constitution provides that "Organic laws are those relating to the development of fundamental rights and public liberties, those which establish Statues of Autonomy […] and other laws provided in the Constitution."[178] Article 147(3) on the other hand states that "Amendment of the Statutes [of Autonomy] […] require the approval of the Cortes through an organic law."[179] The Court states that Statutes are organic law, and such organic laws are thus inferior to the Constitution due to the principle of hierarchy. On the other hand, organic laws are superior to the infra-legal rules, which are handed down within the scope of the organic laws accredited competencies. Consequently, this indirectly constitutes the grounds for invalidity for rules that infringe the distribution of power/competencies as laid down from the hierarchical supreme rule.[180]

Article 1 of the Statute (Estatut), under the Preliminary Title, establishes that "Catalonia, as a nationality, exercise its self-government constituted as an autonomous community in accordance with the Constitution and the Estatut, which is its basic institutional act."[181]. This Article establishes that people in the region Catalonia, the Catalans, are a nationality as mentioned in Article 2 of the Spanish Constitution. Thus, it gives them the right to self-government, which is addressed in the Estatut, which is the basic institutional act/law of Catalonia.

Article 2(1)(2) of the Estatut establishes the Generalitat, which is "…the institutional system around which Catalonia's self-government is politically organized."[182]. The Generalitat "… consist of Parliament, the Presidency of the Generalitat, Government and the other institutions…" such as The Council for Statutory Guarantees and the Ombudsman. Both the (limits of the) powers of the subdivisions of the Generalitat are enshrined. Paragraph 4 of Article 2 establishes that "The powers of

[175] Organic Act 6/2006 of the 19th of July, on the Reform of the Statute of Autonomy of Catalonia, < https://www.parlament.cat/document/cataleg/150259.pdf> accessed on 11 May 2021
[176] STC 31/2010, of June 28. (Unofficial Translation) < https://www.tribunalconstitucional.es/ResolucionesTraducidas/31-2010,%20of%20June%2028.pdf>
[177] ibid
[178] cf Agencia Estatal Boletín Oficial del Estado (n 4)
[179] ibid
[180] cf STC 31/2010, of June 28. (Unofficial Translation) (n 169)
[181] cf Organic Act 6/2006 (n 168)
[182] ibid

the Generalitat emanate from the people of Catalonia and are exercised according to [the] Estatut and the [Spanish] Constitution"[183] This paragraph legitimizes the competencies of the Generalitat as it is in accordance with both Article 1 of the Estatut and Article 2 of the Spanish Constitution as it establishes itself on the Catalan's right to self-government.

Article 3(1) of the Statute, which established the Political Framework of Catalonia, provides that "The relationship of the Generalitat with the [Spanish] State is based on the principle of mutual institutional loyalty, is regulated by the general principle according to which the Generalitat is State, by the principle of autonomy, by that of bilateralism and the by that of multilateralism."[184]. This paragraph establishes the principle of mutual institutional loyalty, through the principle of autonomy, which provides the legitimacy of the Generalitat as a state.[185] Article 3(2) states that Catalonia and the Generalitat is subordinate to Spanish State and the European Union (EU), and is therefore, bound to the principles,obligations, and the values of both the Spanish State and the EU.

These articles provide a brief overview of the (legal) position of the Estatut relating to the Spanish Constitution of 1978. The competences of the Generalitat seems to be in accordance with the Constitution considering Article 148, which lays down the minimum matters on which the Autonomous Communities may assume competences over, which is limited by Article 149 of the Constitution as these competences of Article 149 are solely attributed to the central government in Madrid. The competences and powers of the Autonomous Communities stem from the Statues and therefore indirectly form the Constitution.[186]

2.2.2 The Constitutional Court on the 2006 Estatut (Judgment 31/2010)

Before a plebiscite was held in July 2006, the Congress of Deputies (Lower Chamber) made alterations to the text. As a result, the 2006 Statute of Autonomy became legally binding on the 9th of August 2006. The new statutes were immediately met with criticism and allegations, arguing that it would be unconstitutional by the Ombudsman and the Partido Popular, as they contested most of the provisions in the statute. Eventually, the Spanish Constitutional Court ruled on the 28th of June 2010 that some articles had to be either reformulated, abolished, or interpreted as presented by the Spanish Constitutional Court in order for the articles to be constitutional.[187]

This judgment determines where the competencies of the Generalitat and the Autonomous Community of Catalonia start and end. Due to the Constitution providing the minimum competencies attributed in Article 148 of the Constitution whilst Article 149 determines where the competencies end for the Autonomous Communities as Article 149 lays down the exclusive competencies of the State.

[183] ibid
[184] ibid
[185] cf STC 31/2010, of June 28. (Unofficial Translation) (n 169)
[186] ibid
[187] cf Pons Parera (n 137)

With the introduction of the 2006 Statutes, the Generalitat tried to push the boundary of the powers and competences of the Autonomous Communities within the boundaries of the Constitution.

Article 5 of the Estatut stated that "The self-government of Catalonia is also based on the historical rights of the Catalan people, on its secular institutions, and on the Catalan legal tradition, which this Estatut incorporates and modernizes under Article 2…"[188] This article tries to establish additional legitimacy of the self-government of Catalonia, exercised by the Generalitat, as it aims to recognize the history and 'historical rights' of the Catalans. As seen before in the second chapter of this bachelor thesis, history only add depth to the claim to self-determination.[189] The Court states that Article 5 of the Statute would be deemed unconstitutional if this article was an attempt to legally legitimize the self-government of Catalonia outside of the scope laid down in the Constitution.[190] Yet, the Court finds that this is not the correct interpretation as it needs to be interpreted in such a way that it does not provide the self-government legitimacy outside of the scope of the Spanish Constitution. This interpretation must be applied accordingly for the statement of the preamble of the Estatut: "Catalonia's self-government is founded on the Constitution, and also on the historical rights of the Catalan people, which in the framework of the Constitution, give rise to recognition in this Statute of Autonomy of the unique position of the Generalitat."[191]

Article 7(1) of the Estatut states that "Spanish citizens legally resident in Catalonia benefit from the political status of Catalans or citizens of Catalonia. Their political rights are exercised in accordance with this Estatut and the law."[192] This article provides the Estatut's scope of projection on the power of self-government enshrined in the Estatut which is done by classifying Spanish citizens as Catalans living in Catalonia. The Court states that classifying a Spanish citizen as well as a Catalan citizen does not affect the Spanish unity and therefore Article 7 is in accordance with the Constitution.[193]

Article 8(1) of the Estatut states that "The flag, the holiday and the anthem are the national symbols of Catalonia, defined as a nationality by Article 1."[194] The Court found that the usage of "national" in Article 8(1) can lead to confusion as it is indeed possible to address Catalonia as a nation on a historical, linguistic, cultural, and sociological reality, yet, the Constitution only recognizes the "…indissoluble unity of the Spanish Nation…"[195] under Article 2 of the Constitution. Therefore, there are no circumstances where another 'nationality', besides the Spanish Nationality, can exist within the Spanish State. As "…proclaimed by the will of that Nation, nor through an ambiguity that is

[188] cf Organic Act 6/2006 (n 168)
[189] cf Summers (n 39) 122
[190] cf STC 31/2010, of June 28. (Unofficial Translation) (n 169)
[191] ibid
[192] cf Organic Act 6/2006 (n 168)
[193] cf STC 31/2010, of June 28. (Unofficial Translation) (n 169)
[194] cf Organic Act 6/2006 (n 168)
[195] cf Agencia Estatal Boletín Oficial del Estado (n 4)

completely irrelevant in the judicial/constitutional context, the only guide that this Court can follow, by referring the that "nation' to any other subject that is not the people holding that sovereignty."[196]. Consequently, the Court held that reference to 'national' symbols of Catalonia could lead to confusion as it legally contradicts Article 2 of the Constitution, thus the mention of the Catalan national reality is to be removed, and therefore, should not legally be interpreted and thus have no legal effect. That also counts for any other references in the Estatut of "national reality" and "nation", which therefore have no legal effect.[197]

2.3 The Constitutional Court in Judgement 42/2014

In January 2013, the Catalan Parliament passed Resolution 5/X, of the Parliament of Catalonia, adapting the Declaration of sovereignty and the right to decide of the people of Catalonia.[198] This Declaration resulted in a judgement of the Spanish Constitutional Courts which confronted the claims made in the declaration.[199]

The Preamble of the Declaration aims to create historical legitimacy for the Declaration as it states that "The people of Catalonia, throughout its history, has democratically expressed its commitment to self-government…"[200] The most notable paragraph of the Declaration states that "The people of Catalonia has, for reasons of democratic legitimacy, the nature of a sovereign political and legal subject."[201] This paragraph aims to proclaim that the Catalan people are sovereign and thus have the 'right to decide' their future.[202]

The Court stated that Article 1(2) of the Spanish Constitution provides that "…national sovereignty belongs to the Spanish people, from which all State powers emanate."[203], and basically underpins the entire Spanish legal system. The Court, thus, provides that national sovereignty is solely attributed to the Spanish people. Therefore, the constitutional order provides that the Spanish people are indivisible, exclusive, and sovereign and, therefore, no other sub-State group can be bestowed with sovereign status. The Court, thus, ruled that the claim of sovereignty is unconstitutional as it can only

[196] cf STC 31/2010, of June 28. (Unofficial Translation) (n 169)
[197] ibid
[198] cf Resolution 5/X (n 93)
[199] STC 42/2014, of 25 March 2014. <https://www.tribunalconstitucional.es/ResolucionesTraducidas/STC%2042-2014E(2)%20%20DECLARACION%20SOBERANISTA%20%20SIN%20ANTECEDENTES.pdf>
[200] cf Resolution 5/X (n 93)
[201] ibid
[202] Víctor Ferreres Comella, 'The Spanish Constitutional Court Confronts Catalonia's 'Right to Decide' (Comments on the Judgment 42/2014)' (2014) 10(3) European Constitutional Law Review < https://doi.org/10.1017/S1574019614001369> accessed on 18 May 2021
[203] cf Agencia Estatal Boletín Oficial del Estado (n 4)

be held by the Spanish people in accordance with Article 1(2) of the Spanish Constitution[204], as two coexisting sovereign states within one state is impossible.[205]

Resulting from this conclusion, the Court found that "…the autonomous State is based on a fundamental premise that the Spanish Constitution endows the Spanish people with national sovereignty [considering Article 1(2) of the Constitution], which is why sovereignty is not the outcome of an agreement between historical territorial instances that hold pre-constitutional and higher rights, but a rule of constituent power that becomes generally binding in its field, without excluding former historic situations."[206] Besides, the Court stated that sovereignty is not the same as autonomy.[207] Consequently, the Court deduced that, therefore, an Autonomous Community cannot unilaterally hold a referendum of self-determination that relates to the integration of Spain.[208] According to Ferreres Comella, besides that Catalonia cannot hold a unilateral referendum on independence, it thus does not allow Catalonia to secede unilaterally due to the prevalence of Spanish people's sovereignty.[209]

The Court, however, did state that 'the right to decide' is, unlike the claim of sovereignty of Catalonia, deemed constitutional. The Court states that 'the right' to decide' needs to be understood generally in line with other paragraphs of the Declaration. One of them being the proclamation of the principle of legality. This principle pushes for the prevalence of the law and legal (constitutional) order of Spain.[210] Thus, 'the right to decide' is constitutional when the right is enacted in accordance with the Constitutional framework. This framework can be revised in accordance with different political directions, to which there is no limit.[211] Thus, if 'the right to decide' entails the expression of the political aspiration of Catalonia[212], and is exercised within the constitutional framework, it is constitutional.[213] It should, however, not be interpreted "…as a manifestation of the right of self-determination not recognized in the Constitution."[214]

2.4 The Constitutional Court in Judgement 114/2017

In September 2017, Law 19/2017, on the Referendum on Self-determination was passed by the Catalan Parliament. Article 1 states that "This law governs the holding of a binding self-determination referendum on the independence of Catalonia, the consequences depending on the result, and the

[204] cf STC 42/2014, of 25 March 2014 (n 191)
[205] cf Ferreres Comella (n 194)
[206] STC 247/2007, of 12 December 2007.
[207] STC 247/2007, of 12 December 2007.
[208] cf STC 42/2014, of 25 March 2014 (n 191)
[209] cf Ferreres Comella (n 194)
[210] cf STC 42/2014, of 25 March 2014 (n 191)
[211] cf Ferreres Comella (n 194)
[212] cf STC 42/2014, of 25 March 2014 (n 191)
[213] cf Ferreres Comella (n 194)
[214] cf STC 42/2014, of 25 March 2014 (n 191)

creation of the Electoral Commission of Catalonia."[215] As a result, according to Article 4(2), the question posed was "Do you want Catalonia to be an independent state in the form of a republic?"[216] The outcome was, according to Article 4(3) to be binding.[217]

This law was challenged by the Spanish Constitutional Court and stated that Law 19/2017 was enacted unconstitutional as it didn't have any supporting powers as the law on which the referendum was enacted exceeded the statutory powers of the Autonomous Communities, as Article 149(1.32) of the Constitution provides that the State/central government holds the exclusive competence over "…authorization for popular consultations through holding of referendums."[218] The State is also entitled to organize a plebiscite through Article 92 of the Constitution when an occasion puts itself forward when a political decision needs to be taken of special importance.[219] However, the Court stated that the referendum, as put forward in Law 19/2020, absolutely affects (Spanish) unity and identity of the holder of sovereignty, which are the Spanish people as a whole, put forward in the Spanish constitution. Therefore, the referendum should be channeled through Article 168 of the Constitution, as a constitutional amendment should provide a referendum. Besides, the whole Spanish electorate would be involved[220] considering Article 168(3) of the Constitution.[221]

The Court reaffirms the Spanish unity, as it states that Law 19/2017 is unconstitutional as it wrongly challenges "…national sovereignty vested in the Spanish people, the unity itself of the nation established as a […] State, and the supremacy of the Constitution, to which all public authorities are bound…"[222], thus, including the Catalan Parliament, considering the conjunctions of Articles 1(2), 2, (1(1), and 9(1) of the Constitution. This corresponds to Judgement 42/2014.

Moreover, the Court states that Article 2 of Law 19/2017 states that "The people of Catalonia are a sovereign political subject and, as such, exercise their right to freely and democratically decide upon their political condition."[223] Therefore, this law claims its supremacy, which 'allows' it to subvert the constitutional legal order, thus 'allows' for Catalan 'sovereignty' to be claimed, which results in proclaiming itself representative over the Catalan people. The Court reaffirms that the Catalan people are not sovereign people, and therefore, should not be seen as a legal entity. The people in Catalonia should not be understood as sovereign people as "…the ideal unity of allocation of

[215] Law 19/2017, of 6 September, on the Referendum on Self-determination, DOGC 7449A < https://exteriors.gencat.cat/web/.content/00_ACTUALITAT/notes_context/Law-19_2017-on-the-Referendum-on-Self-determination.pdf>
[216] ibid
[217] ibid
[218] STC 114/2017, 17 October 2017. < https://www.tribunalconstitucional.es/ResolucionesTraducidas/Ley%20referendum%20ENGLISH.pdf>
[219] cf Agencia Estatal Boletín Oficial del Estado (n 4)
[220] cf STC 114/2017, 17 October 2017. (n 210)
[221] cf Agencia Estatal Boletín Oficial del Estado (n 4)
[222] cf STC 114/2017, 17 October 2017. (n 210)
[223] cf Law 19/2017 (n 207)

constituent power and as such source of the Constitution and legal system."[224] The Court re-enforces the notion that the Spanish Constitution is a legal text that imposes a binding force within its scope and that is legal which emanates from the sovereign Spanish people, instead of certain rights of 'historical territorial institutions' that are superior to the Spanish Constitution.[225]

Conclusion

The Spanish constitutional legal framework relies heavily on the unity of the Spanish people. Amongst these people, are the Catalans. Yet, the framework does not recognize the Catalan people as sovereign; solely the Spanish people are sovereign. The framework is rigid and is aimed to protect the unity of the Spanish people at all costs despite the autonomy that nationalities, such as the Catalan nationality, possess. Sub-State groups, like the Catalan people, can exercise autonomy and self-government within the confinements of Spanish unity.

The Spanish constitutional legal framework, as provided for in this chapter, can be assessed according to the standards provided for in the first chapter which laid down the international legal framework of the right of self-determination. The assessment will, accordingly, be done in the next chapter.

[224] cf STC 114/2017, 17 October 2017. (n 210)
[225] ibid

Chapter 4: ***Legal Analysis***

As the legal framework of both the Spanish Constitution and the right to self-determination are established in the first and third chapters, this chapter will focus on the legal analysis of the Spanish Constitutional framework according to the international legal framework of the right of self-determination.

4.1 Unity vs. Autonomy: International Law Analysis

Both the ICCPR and the ICESCR (1966 Conventions) state that "All peoples have the right of self-determination…"[226] Nevertheless, considering clear developments throughout the international community, mostly through the UN, the right of self-determination has to be applied within limits which aims to protect the sovereign state's unity and territorial integrity.

The 'saving clause', for territorial integrity and political unity, of the Declaration of Friendly Relations (GA Resolution 2625) provided that the political unity and territorial integrity of sovereign states shall prevail. However, there are exceptions to the prevalence of territorial integrity. The state must possess a government that represents the whole people, who belong to the territory of the state, and for which there is no distinction to be made to people.[227] Henceforth, the legal scope of external self-determination, or secession, is reduced to the context of decolonization, foreign occupation, and exploitation. The Supreme Court of Canada has reaffirmed this as it states that "…international law right to self-determination only generates, at best, a right to external self-determination in situation of former colonies; where a people are oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development..."[228]

The question whether Spain's territorial integrity and political unity prevails over the Catalan people' right to self-determination, is determined by what the people of Catalonia qualify as. According to the Special Rapporteur, Catalans are a minority within the Spanish State[229], as 'minorities', as enshrined in Article 27 of the ICCPR, are to be defined as "An ethnic, religious or linguistic minority is any group of persons which constitutes less than half of the population in the entire territory of a State whose members share common characteristics of culture, religion or

[226] cf UNGA (n 35)
[227] cf UNGA (n 50)
[228] Reference Re Secession of Quebec, [1998] 2 SCR 217. Para. 138
[229] cf UNGA (n 60)

language, or any of these. A person can freely belong to an ethnic, religious or linguistic minority without any requirement of citizenship, residence, official recognition or any other status."[230]

As the Catalan people are defined as a minority, it can be concluded that the Catalan people do not possess the right to external self-determination, which does not allow them to secede from the Kingdom of Spain under international law. Nevertheless, the same law provides that the Catalan people, as a minority, do have the right of internal self-determination, the right to equal access to government, its political decisions and (political) government institutions.

4.1.1 Article 10 of the Constitution

Article 10(2) of the Spanish Constitution regulates that the fundamental rights shall be interpreted in accordance with international agreements and treaties which are ratified by Spain.[231] Moreover, Article 96(1) of the Constitution states that "Validly concluded international treaties, once officially published in Spain, shall form part of the internal legal order…"[232]

As seen in Chapter 1, the legal treaties that are relevant to the right of self-determination are the UN Charter, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

On the 14th of December 1955, Spain declared that it accepts the obligations of the UN Charter and the entry of Spain to the UN through their Declaration of Acceptance, which does not hold any reservations nor declarations of interpretation.[233] The UN Charter was published in the Official State Gazette (*Boletín Oficial del Estado*) on the 16th of November 1990 on number 275, from pages 33862 to 33885.[234]

The ICCPR was signed by Spain on the 28th of September 1976 and was subsequently ratified on the 27th of April 1977, thus making the ICCPR in force for Spain, without any relevant reservations nor declarations of interpretation regarding self-determination.[235] The ICCPR was published in the Official State Gazette on the 30th of April 1977 on number 103, from pages 9337 to 9343.[236]

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[230] cf UNGA (n 61)
[231] cf Agencia Estatal Boletín Oficial del Estado (n 4)
[232] ibid
[233] United Nations Treaty Collection, 'No 3053 Spain Declaration of acceptance of the obligations contained in the Charter of the United Nations Madrid, 23 September 1955' (United Nations Treaty Collection Depository, 14 December 1955) <https://treaties.un.org/doc/source/docs/spain.pdf> accessed on 1 June 2021
[234] BOE-A-1990-33862 <https://www.boe.es/boe/dias/1990/11/16/pdfs/A33862-33885.pdf>
[235] United Nations Treaty Depository, 'Status on International Covenant on Civil and Political Rights' (United Nations Treaty Collection Depository, 4 June 2021) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en#EndDec> accessed 4 June 2021>
[236] BOE-A-1977-10733 <https://www.boe.es/boe/dias/1977/04/30/pdfs/A09337-09343.pdf>

The ICESCR was signed, just as the ICCPR, on the 28th of September 1976 and was also ratified on the 27th of April 1977, therefore making Spain bound to the ICESCR, without any relevant reservations nor declaration of interpretation regarding self-determination.[237] The ICESCR was published on the 30th of April 1977 on number 103, from pages 9343 to 9347.[238]

As the aforementioned international documents related to the right to self-determination are ratified by Spain and published in the Official State Gazette, therefore, according to Article 96(1) in conjunction with Article 10(2) of the Constitution, these shall be interpreted and form part of the Spanish legal order.

4.2 Spanish Unity vs. Catalan Autonomy: Constitutional Analysis

The Constitution of the Kingdom of Spain of 1978 provides that Spain can be defined as a quasi-federal state that tries to combine recognized cultural and territorial autonomy whilst preserving the nation state, which is considered to be a unique system. The core of this balance of regional autonomy and central authority is displayed in Article 2 of the Constitution: "…the indissoluble unity of the Spanish nation […] it recognizes and guarantees the right to autonomy to the nationalities [e.g. Catalans] and regions…"[239] This resulted into the formation of 17 Autonomous Communities including the Autonomous Community of Catalonia, which occasionally has a lot of friction with the central government. Judgment 76/1983 of the Spanish Constitutional Court stated that "The autonomy regime is characterized by a balance between homogeneity and diversity in the public law position of the territorial corporations of which it is composed. Without the proper there would be neither unity nor integration within the common State; without the latter, there would be neither authentic diversity nor the capacity for self-government: the State of the Autonomous is marked by both elements."[240] This declaration of the Court clearly showcases the tension between the State and Catalonia.

With the reformulation of the 2006 Statute of Autonomy of Catalonia, the 'grey area' where the competences of the central government prevail over the competences of the Autonomous Communities were clarified in the Constitutional Court Judgement 31/2010. As the competences of the 2006 Statute were challenged, the Court reaffirmed Spanish indissoluble unity by stating that the Generalitat cannot create (additional) legitimacy, based on historical rights, outside of the scope provided for by the Constitution. Moreover, the Constitution only recognizes the Spanish nationality.

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[237] United Nations Treaty Depository, 'Status on International Covenant on Economic, Social and Cultural Rights' (United Nations Treaty Collection Depository, 4 June 2021) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en> accessed on 4 June 2021

[238] BOE-A-1977-10734 <https://www.boe.es/boe/dias/1977/04/30/pdfs/A09343-09347.pdf>

[239] cf Agencia Estatal Boletín Oficial del Estado (n 4)

[240] STC 76/1983, 5 August 1983.

This was reaffirmed by the Court in Judgement 42/2014. National sovereignty emanates from the Spanish people, and to the Spanish people belongs sovereignty. No sub-State can be recognized as a nationality, as the sole nationality is the Spanish nationality considering Article 1(2) of the Spanish Constitution. The same judgment does, however, provide that the Catalans have the 'right to decide' within the scope of the Spanish Constitution. The Constitutional framework can be politically altered to which there is no limited, if the procedure of Article 168 of the Constitution is exercised. The 'right to decide' does not portray a manifestation whatsoever of self-determination.

The Constitutional Court provided, in Judgement 114/2017 that Spanish unity prevails. Law 19/2017, on the Referendum on Self-determination directly affected Spanish unity and the identity of the Spanish people as whole, who provide sovereignty to Spain. Law 19/2017 was ruled to be unconstitutional as the Court concluded that Spanish national sovereignty is vested in the Spanish people from which the Spanish state is the product, which is bound to the constitutional rule of law.

It seems that the Constitutional Court prioritizes the 'insolvable Spanish unity' over autonomy over Catalonia. If the Court would allow the Catalan people to be considered a sovereign people and therefore have legitimization resulting from their historical rights, the Court would both undermine the unity and the territorial integrity of Spain. As this solely concerns external self-determination, the Catalan people can still exercise their right to internal self-determination. The Court affirms that the Catalan people have the right to decide their political future within the scope of the Constitution. Additionally, the Court provides that participation in government, as the Constitution, the Estatut, and the Spanish legal system overall is enjoyed by every Spaniard (thus, including the Catalan people as a whole), or in other words, those who fall under the scope of the status of being a Catalan provided for under Article 7 of the Estatut.[241] The enjoyment of participating in the government*, ius in officium*[242], is enshrined in Article 23 of the Constitution; citizens have the right to participate in public affairs, directly or through representatives and they hold the right to access public office.[243]

This allows the Catalan people to exercise their right of self-determination internally within the Spanish unity as they have equal access to government of both the Autonomous Community and the Spanish State.

4.3 Article 155: a threat?

The Spanish constitution provides three ways to resolve conflicts between the State and the Autonomous Communities: recourse through the Constitutional Court, negotiations and coercive

[241] cf STC 114/2017, 17 October 2017. (n 210)
[242] Enoch Albertí Rovira, 'Constitutional Questions on the Application of Article 155 SC to the Catalan Conflict' (2019) 9(-) Catalan Social Sciences Review < https://doi.org/10.2436/20.3000.02.46> accessed on 3 June 2021
[243] cf Agencia Estatal Boletín Oficial del Estado (n 4)

imposition of the State over the Autonomous Community. The latter resulted into the formation of Article 155 of the Constitution, which provides that the State's use of force, coercion, or unilateral imposition to reinforce itself in a conflict with an Autonomous Community, in that the case that the Autonomous Community[244] "...does not fulfil the obligations that the Constitutional or other laws impose, or if it is acting in a way that is seriously prejudicial to the general interest of Spain."[245]

One of the issues with Article 155 are the vague semantics and the scope which provides the State with far-reaching powers. According to Rovira, Article 155 does not provide the Spanish central government unlimited power, nor it does to the Senate, yet the Article is still intrusive. Therefore, the invocation of this article requires need, proportionality, and purpose. Need is established when there is no other solution to resolve the conflict. Proportionality is established when the least intrusive measure is taken that affects the autonomy. Purpose is established when the invocation of Article 155 must be aimed to force the Autonomous Community to fulfil the obligations put forward in the Constitution, or other law, and/or that harms the general interest of Spain.[246]

Article 155 of the Constitution was, to this day, solely applied during the 2017 referendum as the Constitutional Court forbade the Catalan to orchestrate a referendum on Catalan self-determination to unilaterally secede. The Catalan government still organized the referendum, and as a response, the State dismissed the Catalan government, dissolved the Catalan Parliament, placed the whole Generalitat under full State control, dismissed Catalan officials, and started to organize elections for the Generalitat. The main issue is that these measures affected fundamental rights. By dissolving Parliament, the rights of political participation (Article 23 of the Spanish Constitution) were infringed for both the elected representatives and officials and the citizens. The former's right was affected as they were dissolved not in accordance with any law as the law did not provide for causes and by whom they could be dismissed, thus their *ius in officium* was violated. The right of *ius in officium* of the citizens was also violated as their political participation, in the form of electing officials, was not able to be exercised as these officials were unable to exercise their duties during their terms.[247]

The invocation of Article 155 was neither proportionate nor necessary. Proportionality was not met as the purpose should find whether the potential unilateral declaration of independence of Catalonia was affirmative, and if so, the measures used should aim for restoring the constitutional legal order. However, the measures of dissolution of Parliament and removal of government, are not aimed at restoring the constitutional legal order and therefore probably do not pass the proportionality test. Moreover, the measures were even less necessary to achieve this goal as it could have been done with less intrusive measures. The political majority of the Catalan government could have been reproduced by the Catalans in new elections, and thus the calling of new elections and the dissolution

[244] cf Albertí Rovira (n 234)
[245] cf Agencia Estatal Boletín Oficial del Estado (n 4), Article 155
[246] cf Albertí Rovira (n 234)
[247] ibid

of the Catalan government and Parliament was not appropriate to address to the harm to the general interest of Spain nor the non-compliance with the Constitution, as accused.[248]

It seems that Article 155 of the Spanish Constitution, as applied in the aforementioned case, can pose a violation when it comes to the right of internal self-determination of the Catalan people. The right to participate in government (Article 23 of the Constitution) was violated by dissolving the elected officials by the Catalan people.

4.4 Written Comments of Spain on Kosovo

When the ICJ published its Advisory Opinion on Kosovo, Spain reacted by emphasizing the importance of the principle of territorial integrity. In the Spanish Written Comments it was stated that "Spain considers it untenable to reduce the principle of territorial integrity to a principle operation at an exclusively international level."[249], as "…the fact should not be overlooked that a violation of the principle of territorial integrity through actions carried out by domestic actors with the State will inevitably bear international consequences…"[250] Moreover, the Spanish Ministry of Foreign Affairs stated that it is Spain's opinion regarding secession, in the form of remedy or sanction, "…has no proper basis in contemporary international law."[251] Therefore, Spain does not recognize Kosovo as a sovereign country. According to Sarriá, the non-recognition of Kosovo is not solely explained through the interpretation of international law, but also through the Spanish internal situation with Catalonia.[252] Since Spain was likely not amused with the ICJ's Advisory Opinion on Kosovo as it found that there is no prohibition, and therefore allows, declarations of independence in international law. The Advisory Opinion also did not extend that sub-State actors (e.g. independence movements) have to respect the principle of territorial integrity. Lastly, the Advisory Opinion refrained from affirming whether remedial secession is possible or not possible under contemporary international law.[253] The Catalans believed that the Kosovan precedent can be reapplied within Spain as it would comply with

[248] ibid
[249] International Court of Justice, 'Accordance with International Law of the Unilateral Declaration of independence by the Provisional Institutions of Self-Government in Kosovo; Written Comments of the Kingdom of Spain (Request for Advisory Opinion)' (International Court of Justice, - July 2009) <https://www.icj-cij.org/public/files/case-related/141/15706.pdf> accessed on 4 June 2021, Paragraph 5
[250] Ibid Paragraph 4
[251] Ibid Paragraph 8
[252] Pol Vila Sarriá and Agon Demjaha, 'Kosovo-Spain Relations and the Dilemma's on the Problem of Non-Recognition' (2009) 14(1) South East European University Review < https://doi.org/10.2478/seeur-2019-0005> accessed on 4 June 2021
[253] Christopher J Borgen, 'From Kosovo to Catalonia: Separatism and Integration in Europe' (2010) 2(3) Goettingen Journal of International Law < https://www.gojil.eu/issues/23/23_article_borgen.pdf> accessed on 4 June 2021

international legal standards. Consequently, this played a vital role for Spain not recognizing Kosovo.[254]

[254] cf Sarriá and Demjaha (n 2441

Conclusion

International law presents the right of self-determination as a remedy for minorities that are oppressed. The application of the right is, unlike what the semantics in the treaties provide, rather strict in its application. Only certain groups of people in certain situations can exercise their right of self-determination externally; people of former colonies; where a people are oppressed, or people under foreign military occupation. Groups of people, such as minorities, cannot exercise their right of self-determination externally. Yet, they can exercise internal self-determination, as this form of self-determination does not affect the principle of territorial integrity, nor does it affect the political unity of a state. As the Catalan people are classified as a minority, we can conclude that the Catalan people enjoy the right to internal self-determination within the Spanish state and the Spanish unity. The Catalan people, therefore, do not possess the right to external self-determination. However, the Catalan people are classified as a minority, therefore Spain has the obligation under Article 27 of the ICCPR to protect the rights of the Catalan minority. The application of Article 155 of the Constitution by the Spanish state during the 2017 referendum has resulted in a violation of the right to internal self-determination by the people by denying them the right to participate, directly or indirectly, in public affairs.[255] Yet, this violation seems far from enough to constitute denial of the exercise of internal self-determination nor grossly breached Catalan fundamental rights systematically.[256] Therefore, secession based on the denial of internal self-determination is not possible for the Catalan people.[257] As was in the case of Kosovo: situations between Catalonia and Kosovo differ too much.[258]

Articles 1(2) and 2 of the Spanish Constitution provide that "Nationality is vested in the Spanish people…"[259] and "…the indissoluble unity of the Spanish nation, to [the] common and indivisible country of all Spaniards [yet] it recognizes and guarantees the right to autonomy of the nationalities and regions of which [Spain] is composed…"[260] The Constitution both recognizes the indissoluble Spanish unity whilst also recognizing the autonomy of the diverse people and its local legal status with self-government but also the recognition of its subordination and loyalty to the Spanish State when exercising the attributed duties and rights to the (minority) groups.[261] The Autonomous Statute of Autonomy is a legal framework that regulates the self-government as provided for by the Constitution, as it attributes competences to the Government of Catalonia (Generalitat).[262]

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[255] cf Albertí Rovira (n 234)
[256] cf Cassese (n 9) 119-120
[257] Reference Re Secession of Quebec, [1998] 2 SCR 217. Para. 134-135
[258] cf López-Jacoiste (n 251) 314
[259] cf Agencia Estatal Boletín Oficial del Estado (n 4)
[260] ibid
[261] STC 46/1990, 15 March 1990.
[262] Eugenia López-Jacoiste, *Autonomy and self-determination in Spain: Catalonia and Independence* from The Perspective of International Law (Peter Hilpold ed. Autonomy and Self-Determination, Edward Elgar Publishing 2018) 311-312

Various attempts to increase the allocated rights have been ruled unconstitutional by the Spanish Constitutional Court. The proclaimed historical rights by the Catalan Parliament have been deemed unconstitutional, as the Court states that it considers these historical rights cannot serve a basis for legal legitimacy outside of the scope of the Constitution.[263] The Court provides that since the Spanish national sovereignty belongs to all the Spanish people, which underpins the whole Spanish legal system, thus two distinct sovereign people cannot coexist within the Spanish State. The Court states that sovereignty is not the result of historical rights, which existed long before the 1978 Constitution and are to prevail over the Constitution, but the result of the endowment of sovereignty by the Constitution itself, which is according to Article 1(2), to the Spanish people.[264] Moreover, the (political) indissoluble unity of Spain is breached when acts or legislation is enacted by the Catalan Parliament that surpasses the provided allocated competences (such as organizing a plebiscite on unilateral secession) in the Statute of Autonomy, based on claims of 'Catalan' sovereignty. The Catalan people do not possess sovereignty, only the Spanish people provide sovereignty from which deceives unity, which forms a State. The State is governed by the supreme Constitution to which all public authorities of the State are bound, including the Catalan Parliament.[265] The prevalence of the Spanish (political) unity can be attributed to the State being a post-fascist state. The central political institutions are highly influenced by the remnants of fascist rule of General Franco still influences the Spanish economics, politics, and culture to this day.[266]

Despite the prohibition on unilateral declarations of independence[267], and the unconstitutionality of it, Catalonia cannot unilaterally secede.[268] To do so, the Constitution needs to be amended in accordance with Article 168 of the Constitution, which is a complicated process as it would require a two-third majority of both chambers, a ratifying referendum, and new elections.[269] This seems very unlikely considering the post-fascist political discourse. A plebiscite held like the situation of the Quebecois, seems unlikely.[270]

The interpretation of the right of self-determination is in Spain rather restrictive as it is based on the constitutional rigidity.[271] This interpretation and attribution of meaning to the history of Catalonia and

[263] cf STC 31/2010, of June 28. (Unofficial Translation) (n 169)
[264] cf STC 42/2014, of 25 March 2014 (n 191)
[265] cf STC 114/2017, 17 October 2017. (n 210)
[266] cf Bernat and Whyte (n 132)
[267] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion* [2010] ICJ Report 403, para. 80
[268] cf Ferreres Comella (n 194)
[269] cf López-Jacoiste (n 251) 314
[270] ibid 314
[271] Coppieters Foundation and Centre Internacional Escarré per a les Minories Èthniques i Nacionales, The Situation of the right to self-determination in Spain: Right to Autonomy and collective rights at stake <

the Catalan people, is as a result of the constitutional rigidity, disregarded by the Constitutional Court. However, these should be interpreted and meaning should be attributed as it can either deepen or lighten the claim to self-determination.[272]

It seems that negations between the Catalan Parliament and the State seems like the only way forward. A solution would be to write a new constitution that would satisfy all the parties involved as the 1978 Constitution's legal framework does not reflect a consensus for both Spanish people and sub-State groups as Catalan people. The major issue is that is it seems to be impossible to reach a new constitutional consensus considering the current fragmented political discourse in Spain.[273]

Overall, the Catalan people can exercise the right to internal self-determination within Spain. The Catalan people have the right to equal access to government, its political decisions and (political) government institutions. This applies to both the central government in Madrid and the Generalitat in Catalonia, as the Spanish Constitutional legal framework meets the requirements put forward by the international legal framework on the right of self-determination with precaution to the application of Article 155 of the Spanish Constitution.

Further Research

Further research can be conducted on the attribution of meaning on the historical developments of the Catalan people and Catalonia to determine whether these historical developments create more (historical) legitimacy, and therefore deepen or add weight, to the claim of self-determination. Further research can also be conducted on the role of the European Union on the Catalan claim to self-determination as Spain is a Member State of the EU, and what kind of implications EU law plays in this case.

https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjF1anJlZzxAhUMMewKHer4AxoQFjAAegQIAxAD&url=https%3A%2F%2Fuprdoc.ohchr.org%2Fuprweb%2Fdownloadfile.aspx%3Ffilename%3D7372%26file%3DEnglishTranslation&usg=AOvVaw2mq2-pLv5VD3C7rEMCH99f> accessed on 8 June 2021

[272] cf Summers (n 39) 122

[273] cf Ferreres Comella (n 194)

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