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## **“Catalonia – a New State in Europe?”**

Exploring the legal possibilities of creating an independent Catalan State

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## Summary

Support for the creation of an independent Catalan state has increased significantly during the past two decades. In 2017, an estimated 40.2 percent of the total Catalan population supported the creation of an independent Catalonia.

The road towards independence has shown to be filled with legal obstacles. While the separatists tend to base their demand for independence on a supposed “right to self-determination” and a “right to decide”, the meaning and effects of invoking these “rights” can be questioned. The purpose of this thesis is to investigate the legal possibilities of forming an independent Catalan state based on these commonly invoked rights.

With regard to self-determination, this thesis concludes that all peoples have a right to self-determination, but this right does not necessarily entail a right to secession. Only under grave circumstances can self-determination lead to secession. The Catalans are not in such a situation and cannot therefore successfully claim that their right to self-determination entails a right to secede from Spain.

As to a “right to decide”, the right as such exists neither within international law nor Spanish national law. This right can be broken down into two parts: The possibility to hold a referendum on independence and the possibility to declare independence based on the referendum. The thesis concludes that despite a referendum being complicated, but not impossible, to organise based on the Spanish Constitution, the Catalans can organise such a referendum based on international human rights law. The Catalans can also unilaterally declare independence since there is no explicit prohibition against doing so.

Finally, the thesis discusses the issue of international recognition. Catalonia is unlikely to receive international recognition under the current circumstances. The thesis then concludes that even though the Catalans do not have a right to self-determination in the form of secession, they could organise a referendum and unilaterally declare independence. Such a declaration will however have no effect in practice without recognition from the international community.

## Sumario

El apoyo a la creación de un estado catalán independiente ha incrementado considerablemente en las últimas dos décadas. En 2017, se estimaba que un 40,2 por ciento de la población catalana apoyaba la creación de una Cataluña independiente.

El camino hacia la independencia ha demostrado varios obstáculos jurídicos. Las personas que abogan por esta independencia, tienden a fundar su anhelo de establecer una Cataluña independiente apoyándose en un “derecho a la autodeterminación” y un “derecho a decidir”. El significado y los efectos de invocar estos “derechos” pueden ser cuestionados. El objetivo de esta tesis es investigar las posibilidades e incertidumbres legales que podrían conllevar el crear una Cataluña independiente protegiéndose en estos derechos.

Con respecto a la autodeterminación, esta tesis concluye que todos los pueblos tienen un derecho a la autodeterminación, pero este derecho no implica un derecho a la secesión. El derecho a la autodeterminación sólo puede implicar un derecho a la secesión bajo circunstancias graves. Hoy en día los catalanes no se encuentran en una situación de tal gravedad, es por ello que el derecho a la autodeterminación no les da un derecho a la secesión de España unilateralmente.

El “derecho a decidir” no existe en el orden jurídico español ni en el nivel internacional. Sin embargo, este derecho puede ser dividido en dos partes: La posibilidad de organizar un referéndum, y la posibilidad de unilateralmente declarar independencia según el resultado del referéndum. Esta tesis concluye que, a pesar de que un referéndum es complicado, no sería imposible organizar uno según la constitución española. Es por ello que la población catalana que aboga por la independencia, podrían organizar un referéndum apoyándose en derechos humanos internacionales. Los catalanes también pueden unilateralmente declarar la independencia, porque no hay ninguna prohibición explícita contra una declaración de independencia.

Para finalizar, la tesis examina el tema de reconocimiento internacional. Es improbable que Cataluña obtenga reconocimiento internacional como un estado independiente. La tesis concluye que, a pesar de no disfrutar de un derecho a la autodeterminación, los catalanes podrían organizar un referéndum y unilateralmente declarar la independencia. Pero, en todo caso, sería una declaración vacía de contenido y no tendría ningún efecto sin un reconocimiento de la comunidad internacional.

## Sumari

El suport a la creació d'un estat català independent ha incrementat considerablement les últimes dues dècades. El 2017, s'estimava que el 40,2% de la població catalana va donar suport a la creació d'una Catalunya independent.

El camí cap a la independència s'ha topat diversos obstacles jurídics. Les persones que advoquen per aquesta independència, tendeixen a fundar el seu anhel d'establir una Catalunya independent en un "dret a l'autodeterminació" i un "dret a decidir". El significat i els efectes d'invocar aquests "drets" es poden qüestionar. L'objectiu d'aquesta tesi és investigar les possibilitats i incerteses legals que podria comportar el fet de crear una Catalunya independent protegida per aquests drets.

Pel que fa a l'autodeterminació, aquesta tesi conclou que tots els pobles tenen un dret a l'autodeterminació, però aquest dret no implica un dret a la secessió. El dret a l'autodeterminació només pot implicar un dret a la secessió sota circumstàncies greus. Avui dia, la població catalana que advoca per la independència no es troba en una situació d'aquesta gravetat, és per això que el dret a l'autodeterminació no els dona un dret a la secessió d'Espanya unilateralment.

Pel que fa al "dret a decidir", aquest dret no existeix en l'ordre jurídic espanyol ni en l'àmbit internacional. No obstant, aquest dret pot dividir en dues parts: la possibilitat d'organitzar un referèndum, i la possibilitat d'unilateralment declarar la independència segons el resultat del referèndum. Aquesta tesi conclou que, tot i que un referèndum és complicat, no seria impossible organitzar-ne un segons la constitució espanyola. És per això que els catalans podrien organitzar un referèndum basant-se en drets humans internacionals. Els catalans també podrien unilateralment declarar la independència, perquè no hi ha cap prohibició explícita contra una declaració d'independència.

Per finalitzar, la tesi examina el tema del reconeixement internacional. És improbable que Catalunya obtingui reconeixement com a un estat independent de la comunitat internacional. La tesi conclou que els catalans, malgrat no tenir un dret a l'autodeterminació, podrien organitzar un referèndum i podrien unilateralment declarar la independència. Però, en tot cas, seria una declaració buida de contingut i no tindria cap efecte sense un reconeixement de la comunitat internacional.

## **Abbreviations**

ARSIWA	ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts
ECHR	European Convention on Human Rights
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant of Economic, Social and Cultural Rights
ICJ	International Court of Justice
TEU	Treaty on European Union
UDHR	Universal Declaration on Human Rights
UDI	Unilateral Declaration of Independence
UN	United Nations
VCLT	Vienna Convention on the Law of Treaties



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# 1 Introduction

## 1.1 Background

On October 1<sup>st</sup> 2017 Spain received massive international attention as news stations from all over the world broadcasted the dramatic events that were unfolding on the streets of Catalonia, an autonomous community in North-Eastern Spain. Policemen could be seen breaking up demonstrations, confiscating what appeared to be ballot boxes and preventing citizens from casting their vote in the ongoing referendum. As protesters could be heard pleading for independence and for the creation of a sovereign Catalan Republic, people from around the world found themselves asking who these seemingly radical separatists were and why they were demanding independence from Spain, but also how such violent and dramatic scenes could take place in a modern and democratic country like Spain.<sup>1</sup>

Even though the Catalan independence movement can be traced back to the unification of Catalonia and Spain in 1714, the movement did not gain serious momentum until the 2010s. A combination of economic, historical and cultural factors have led to 40.2 percent of the Catalan population supporting a secession from Spain.<sup>2</sup>

The wish for a secession from Spain does not only result in moral and political questions but it also poses a number of legal questions. On the one hand, state sovereignty and territorial integrity have been fundamental principles of international law since the Peace of Westphalia in 1648, and with that comes a difficulty to change current state borders.<sup>3</sup> On the other hand, the Catalan separatists argue that they have a right as a people to external self-determination and/or a right to decide on their own future. The separatists claim that by exercising these rights, they can legally declare independence from Spain and form their own sovereign state.<sup>4</sup>

## 1.2 Purpose

The purpose of this thesis is to examine what legal possibilities, with regards to both public international law and Spanish constitutional law, Catalonia has to secede from Spain and form a sovereign, independent State. I have observed two main arguments used by the pro-separatists to legally justify their demand for independence: A right to self-determination and a right to decide,

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<sup>1</sup> See John, 'What to Know About the Catalan Independence Referendum' and Dewan., 'Catalonia Independence Referendum: What Just Happened?'

<sup>2</sup> Centre d'Estudis d'Opinió, 'Barómetro de Opinión Política 1ª ola 2020', p. 10 Question 33.

<sup>3</sup> Shaw, 'International Law', p. 19.

<sup>4</sup> Ridao, 'El dret a decidir: La consulta sobre el futur polític de Catalunya', p. 26.

two rights the separatists claim can lead to secession. These two arguments will be the focus of this thesis. The questions I aim to answer are:

1. Can the Catalans legally claim a right to external self-determination from Spain?
2. Can the Catalans legally use a “right to decide” to justify their demands for independence?

### 1.3 Method and Sources

In order to examine the legal possibilities of Catalan independence, the legal dogmatic research method will be used. This entails an analysis of the current legal situation based on appropriate, authoritative legal sources.<sup>5</sup>

Both Spanish national law and public international law will be investigated. National law needs to be examined for two reasons. Firstly, because secession is primarily considered a matter of domestic jurisdiction, making it necessary to investigate how the Spanish Constitution regulates the possibility of a Catalan separation from Spain.<sup>6</sup> Secondly, a solution to the conflict would likely be more stable and sustainable if made in accordance with Spanish national law. Public international law also plays an important role in the investigation of a possible Catalan independence. International treaties concluded by Spain form a part of Spanish national law, and international law shall prevail over national law.<sup>7</sup> Both how Spanish constitutional law and public international law regulate the topic of investigation will therefore be examined in this thesis.

In terms of sources, the Spanish Constitution and cases related to the provisions found in the Constitution will be analysed when examining Spanish national law.

With regard to the public international law aspect of this thesis, the sources of public international law as established in Article 38 of the ICJ Statute will be used. These sources are international conventions, international customary law and general principles. Judicial decisions and teachings from scholars will also be used as subsidiary sources.

International conventions and treaties create binding law between states based on their consent.<sup>8</sup> Binding international treaties make up a relatively small part of the sources used in this thesis due to the lack of binding treaties regulating the issue of secession. The UN Charter, the ICCPR, the

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<sup>5</sup> Hjertstedt, 'Beskrivningar av rättsdogmatisk metod: om innehållet i metodavsnitt vid användning av ett rättsdogmatiskt tillvägagångssätt', p. 167.

<sup>6</sup> Corten, 'Territorial Integrity Narrowly Interpreted: Reasserting the Classical Inter-State Paradigm of International Law' p. 88.

<sup>7</sup> See Article 96(1) of the Spanish Constitution and Article 27 of the VCLT.

<sup>8</sup> Shaw, 'International Law' p. 69.

ICESCR and the ECHR are however binding treaties that are applicable when it comes to the conflict in Catalonia.

The existence of applicable customary law will also be investigated. Customary law can be determined by evaluating the actual behaviour of states (state practice) and by examining the existence of a belief that a certain behaviour is law (*opinio juris*).<sup>9</sup> Current state practice can be observed when studying how states are treating secession and secessionist entities today, for example in terms of recognition and acceptance into the UN. The behaviour of domestic courts and ICJ advisory opinions can also indicate state practice.<sup>10</sup> *Opinio juris* can be established by examining non-binding declarations and conventions including the Montevideo Convention, the Vienna Declaration Programme of Action and the UDHR.<sup>11</sup> UN resolutions may also indicate *opinio juris*.<sup>12</sup>

As for general principles, the main general principle referred to in this thesis is the principle of territorial integrity, a principle that is also established in a number of international treaties.<sup>13</sup>

By analysing Spanish constitutional law and the abovementioned sources of international law in combination with the opinions of scholars and my own reflections, I aim to determine if and how there is a legal possibility for a Catalan secession from Spain based on the right to self-determination and/or a right to decide.

## 1.4 Outline

This thesis consists of five chapters, each chapter aiming to investigate the research topic from a different perspective. The thesis includes an introductory part (Chapters 1-2), a part discussing the possibility to claim a right to external self-determination (Chapter 3), one chapter evaluating the “right to decide” (Chapter 4) and lastly proposed solutions to the conflict and final conclusions (Chapter 5).

Chapters 1 and 2 are introductory chapters, aiming to provide the reader with background information regarding the Catalan conflict and the growth of the independence movements. Chapter 2 also includes a shorter investigation on whether or not Catalonia as an entity, taking into account its political administration, its geography and demography, can qualify as a state in the eyes

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<sup>9</sup> Shaw, 'International Law' p. 55.

<sup>10</sup> Shaw, 'International Law' p. 61.

<sup>11</sup> Ryngaert and Hora Siccama, 'Ascertaining Customary International Law: An Inquiry into the Methods Used by Domestic Courts' p. 10.

<sup>12</sup> Öberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ' p. 898.

<sup>13</sup> See Article 2(1) UN Charter and Article 4(2) TEU.

of public international law. This is necessary to establish before further investigating the possibility to separate from Spain.

Chapter 3 investigates whether the Catalans can claim an external right to self-determination and therefore legally separate from Spain. Firstly, it will be discussed whether such a right can be derived from national law, evaluating the role Catalonia has as an autonomous region within Spain and its possibility to constitutionally claim a right to external self-determination. Secondly, it will be examined how the Spanish Constitution regulates external self-determination.

Chapter 4 examines the argument of seceding from Spain due to a supposed “right to decide”, irrespective of the Catalans having a right to external self-determination or not. The issue of “a right to decide” is divided into two parts: The possibility of organising and prohibiting a referendum on independence and the possibility of issuing a unilateral declaration of independence including the significance of such a declaration. Finally, the possibility and importance of gaining international recognition will be discussed.

Taking into account the conclusions regarding the possibilities of secession from the previous chapters, possible solutions to the conflict will be discussed in Chapter 5. Lastly, the thesis is concluded with some final remarks.

## 2 Catalonia as a State

### 2.1 The Early History of Catalonia

Until the early 1700s, Catalonia was considered a principality under the Kingdom of Aragon. A marriage between King Ferdinand of Aragon and Queen Isabel of Castile, officially united the two kingdoms in 1469 and laid the foundation of today's Spain.<sup>14</sup>

Within this united kingdom, the Principality of Catalonia enjoyed a large degree of autonomy, and could freely adopt its own laws, institutions and elect its own rulers.<sup>15</sup> The Spanish War of Succession, that took place between 1701 and 1714, did however drastically change Catalonia's status as an autonomous entity within the kingdom. The war was caused by the death of the King which led to a power struggle between the pro-Catalan ruler Archduke Charles and the pro-Spanish ruler Philip V. After Philip V had won the war on September 11<sup>th</sup> 1714, Catalonia lost its autonomy and became fully governed by Madrid. Following this power shift, the Catalan political and administrative institutions were dissolved and the Catalan language was abolished and prohibited and replaced by Castilian Spanish.<sup>16</sup>

As Catalonia became increasingly industrialised during the 19<sup>th</sup> Century, there was an increased demand for more autonomy to be returned to the region. The people supporting more autonomy were however scattered, and no unified movement for independence developed until the 20<sup>th</sup> Century.<sup>17</sup> During the Second Spanish Republic, which lasted between 1931-1939, Catalonia enjoyed a larger degree of autonomy. This autonomy was however short-lived and ended with Franco taking over the country in 1939.<sup>18</sup>

### 2.2 The Franco Era

The *coup d'état* led by Franco in 1936 marked the beginning of the three years-long Spanish Civil War. The war came to an end in 1939 when Franco and his forces declared themselves victors and Spain turned into a fascist dictatorship that would last until 1975.<sup>19</sup>

The fascist regime viewed Catalans as betrayers of Spain.<sup>20</sup> After the declaration of the regime, Franco was quick to dissolve the Catalan political institutions.<sup>21</sup> The Catalan Autonomy Statute was abolished and the administrative and educational systems underwent severe "cleansing" in order

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<sup>14</sup> Castilla, 'Historia Moderna de España' p. 30.

<sup>15</sup> Guibernau., 'Prospects of an Independent Catalonia' p. 9.

<sup>16</sup> Ibid. p. 10.

<sup>17</sup> Ibid. p. 10.

<sup>18</sup> Reinu, 'Could Catalonia become independent?' p. 70.

<sup>19</sup> Guibernau., 'Prospects of an Independent Catalonia' p. 10.

<sup>20</sup> Dowling, 'Catalonia since the Spanish Civil War: Reconstructing the Nation' p. 38.

<sup>21</sup> Guibernau., 'Prospects of an Independent Catalonia' p. 10.

to get rid of individuals who were considered disloyal to the new fascist regime.<sup>22</sup> The main Catalan political party, *Esquerra Republicana*, suffered severe repression, and a great number of their members were put into labour camps and prisons. The Francoist regime is estimated to have committed 4,000 political executions in Catalonia between the years of 1939 and 1953.<sup>23</sup>

Franco aimed to unify Spain by harmonising the country linguistically and culturally.<sup>24</sup> In order to reach this goal of harmonisation, the regime banned the Catalan language, the Catalan anthem and the Catalan flag amongst other things supposedly symbolising Catalan nationalism. Some historians argue that the drastic anti-Catalan policy implemented by Franco is considered a cultural genocide.<sup>25</sup>

During the final 20 years of the Francoist regime, Catalan cultural practices and traditions became increasingly permitted, however still strictly controlled and limited by the central government. During this time period Catalan nationalism grew.<sup>26</sup>

Franco's death in 1975 was the beginning of a transition to democracy in Spain. In accordance with Franco's will, Franco was succeeded by then prince Juan Carlos who began a process of democratisation. The first general election since the beginning of the dictatorship was held in 1977 and a new Constitution was adopted in 1978 making Spain a democratic constitutional monarchy.<sup>27</sup>

## 2.3 Post-Franco and the Modern Independence Movement

### 2.3.1 The independence movement today and its main arguments

With the end of the dictatorship and the start of democracy, a Statute of Autonomy was established in Catalonia. This Statute gave Catalonia a certain degree of autonomy within areas such as the police force, social services, education, culture and tourism. The central government in Madrid however kept the main tax collection power.<sup>28</sup> During the first twenty years of the modern Spanish democracy that followed the dictatorship, a certain demand for increased autonomy and independence existed in Catalonia.<sup>29</sup> There were some organised demonstrations, but no senior figures of the regional Catalan government claimed to support secessionism.<sup>30</sup>

The separatists have had many of the same arguments for centuries to support their claim that Catalonia would be better off as an independent state, and that it has the right to become just that.

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<sup>22</sup> Dowling, 'Catalonia since the Spanish Civil War: Reconstructing the Nation' p. 51.

<sup>23</sup> Ibid. p. 50.

<sup>24</sup> Ibid. p. 49.

<sup>25</sup> Ibid. p. 49.

<sup>26</sup> Ibid. p. 76.

<sup>27</sup> Payne, 'The Franco Regime' p. 639

<sup>28</sup> Morató, 'Catalonia: A new Independent State in Europe? A Debate on Secession with the European Union' p. 64.

<sup>29</sup> Barrio, 'Spain Steals from Us!' The "Populist Drift" of Catalan Regionalism' p. 998.

<sup>30</sup> Ibid.

One popular argument is based on the belief that Catalonia is being “robbed” by the central government. After the end of Franco’s dictatorship, Catalonia quickly became the wealthiest region in Spain. Today Catalan GDP makes up 19 percent of the country’s total, despite Catalonia only being home to 16 percent of Spain’s total population. This has caused a widespread feeling among Catalans that they are forced to pay to uphold other regions in Spain, while getting little in return for themselves.<sup>31</sup> Another popular argument is the difference in language and cultural practices that exists between Catalonia and the rest of Spain.<sup>32</sup> Politically, the Catalans have traditionally viewed themselves as more left-wing in comparison to the rest of Spain that has been leaning more to the right and been more conservative.<sup>33</sup>

By the end of the first decade of the 21<sup>st</sup> Century, the independence movement gained increasingly more support. The independence movement has grown from having support from 14.5 percent of the population in 2007 to 40.2 percent in 2017.<sup>34</sup> This increase has been caused by a number of factors, in addition to the arguments mentioned above.

Firstly, the burst of the Spanish housing bubble in 2008, followed by a serious economic crisis in the country, caused the support for independence to increase significantly.<sup>35</sup> Another reason was the discussion regarding a new Statute of Autonomy that took place in 2006. A new Statute of Autonomy for Catalonia was approved by a majority of Catalan voters in a referendum in 2006.<sup>36</sup> This Statute gave great powers to the regional parliament in Catalonia and referred to Catalonia as a “nation”. The Statute was however partly annulled and reinterpreted by a sentencing from the Constitutional Court of Spain in 2010 due to it being considered unconstitutional.<sup>37</sup> This sparked anger amongst many Catalan separatists and increased the support for the independence movement.<sup>38</sup> The burst of the housing bubble and the economic crisis that followed it, and the sentencing against the Catalan Statute of Autonomy, are considered the two main factors that, in addition to the previously mentioned traditional arguments regarding the differences in language, culture, political views and the sense of financial injustice, gave the independence movement a significant upswing by the end of the first decade of the 21<sup>st</sup> Century.

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<sup>31</sup> Mortimer, ‘Catalan crisis: Why does Catalonia want independence? Do the majority really support it?’.

<sup>32</sup> Riera, ‘100 arguments per dir sí a la independència’.

<sup>33</sup> Della, ‘Social Movements and Referendums from Below: Direct Democracy in the Neoliberal Crisis’ p. 53.

<sup>34</sup> Centre d’Estudis d’Opinió, ‘Barómetro de Opinión Política 1ª ola 2020’ p. 11 Question 33.

<sup>35</sup> BBC News, ‘Catalonia’s bid for independence from Spain explained’.

<sup>36</sup> BBC News, ‘Catalan protesters rally for greater autonomy within Spain’.

<sup>37</sup> STC 31/2010.

<sup>38</sup> BBC News, ‘Catalan protesters rally for greater autonomy within Spain’.

### 2.3.2 Referendums

Since the sentence from the Constitutional Court in 2010, the Catalan regional government has made various attempts to hold a referendum regarding the independence of Catalonia.

In 2014 the Catalan government conducted a “non-binding independence referendum” in which 2.3 million out of the 5.4 million voters in Catalonia took part, and 80 percent voted in favour of independence.<sup>39</sup>

In 2017 the regional Catalan parliament passed a law deeming a referendum on independence legal. Despite this law being called out by the Constitutional Court for being unconstitutional, the Catalan parliament proceeded with its plans and conducted a referendum in October of 2017. This resulted in violent confrontations and conflicts between separatists and police trying to stop the referendum by seizing ballot boxes and preventing people from casting their vote. In multiple locations the Spanish police shot rubber bullets towards citizens attempting to vote.<sup>40</sup>

According to the organisers, 90 percent of voters voted in favour of an independent Catalonia. Due to the turmoil taking place during the referendum, many sources are critical towards the reliability of the results.<sup>41</sup> However, the voter turnout was only 42 percent of the Catalan population.<sup>42</sup> There are a number of reasons why a large number of Catalans chose not to vote in the referendum. Many pro-Spanish Catalans who did not vote stressed the illegality of the referendum, meaning it was meaningless to vote, and others claim they simply did not know whether or not Catalonia would be better off as an independent state.<sup>43</sup>

Following the 2017 referendum, the Catalan parliament approved a declaration of independence, with 70 votes in favour and 10 votes against.<sup>44</sup> The central government of Spain stressed the unconstitutionality of the referendum and as a result invoked Article 155 of the Spanish Constitution. The purpose of Article 155 is to strip a region of its autonomy in case of disobedience or actions threatening the general interests of Spain. By applying Article 155, Catalonia was deprived of its autonomy and the Spanish government and took full control of the region.<sup>45</sup>

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<sup>39</sup> Jones, 'What is the story of Catalan independence – and what happens next?'

<sup>40</sup> BBC News, 'Referéndum del 1 de octubre en imágenes: entre la violencia y el desafío los catalanes se movilizaron para votar'.

<sup>41</sup> Dewan, 'Catalonia independence referendum: What just happened?'

<sup>42</sup> Ibid.

<sup>43</sup> Botella, 'La Cataluña que no votó: "Soy catalán y no voté porque no creía en el referéndum"'

<sup>44</sup> BBC News, 'Catalans declare independence as Madrid imposes direct rule'.

<sup>45</sup> Mannheimer, 'Katalonien utropar självständighet'.

## 2.4 The Significance and Criteria of an Independent State

### 2.4.1 The significance of forming an independent state

The creation of a new independent state would have numerous consequences for Catalonia itself as well as for Spain and the rest of the world. Forming an independent country would mean becoming a sovereign state and acquiring legal personality.<sup>46</sup> Catalonia would thus be able to decide over its own territory and people without the interference of other states, as well as conclude treaties with other states.<sup>47</sup> Whether today's Catalonia fulfils the criteria for statehood needs to be established before examining Catalonia's possibility to separate from Spain and form a sovereign state of its own. The statehood criteria need to be fulfilled in order for Catalonia to have a chance to be internationally recognised as a new state.

### 2.4.2 Criteria for statehood: The Montevideo Convention

The generally accepted criteria for statehood are established in the Montevideo Convention. The Convention has a limited number of signatories, Spain *not* being one of the signing parties.<sup>48</sup> The statehood criteria as established in the Montevideo Convention do however constitute international customary law, making it applicable when evaluating the possible statehood of Catalonia.<sup>49</sup>

Article 1 of the Montevideo Convention stipulates that the entity in question shall possess the following qualities in order for it to be able to be recognised as a state: a permanent population, a defined territory, a government and the capacity to enter into relations with other states.

Regarding the criteria of a territory, there is no minimum area required and the exact borders do not need to be established.<sup>50</sup> Catalonia has a defined territory as the region already has established borders as an autonomous community within Spain.<sup>51</sup>

The size of the permanent population required according to the Convention is not specified, and no minimum number of inhabitants is required.<sup>52</sup> Catalonia has a stable and permanent population of 7.6 million inhabitants.<sup>53</sup> The criteria of a permanent population is therefore fulfilled.

The requirement of a government consists of two main parts. Firstly, the government should be a body that has central control over the territory, indicating the existence of a political structure

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<sup>46</sup> Raic, 'Statehood and the law of self-determination' p. 21.

<sup>47</sup> Crawford, 'The Creation of States in International Law' p. 28.

<sup>48</sup> See "Preamble" Montevideo Convention for list of signatories.

<sup>49</sup> Anderson, 'Unilateral non-colonial secession and the criteria for statehood in international law' p. 14.

<sup>50</sup> Shaw, 'International Law' p. 158.

<sup>51</sup> See Chapter 3.2.2.

<sup>52</sup> Shaw, 'International Law' p. 158.

<sup>53</sup> Institut d'Estadística de Catalunya, 'Població a 1 de gener: Províncies'.

and society.<sup>54</sup> Secondly, this government shall also be able to exercise independent and effective authority over the territory and its population.<sup>55</sup> As an autonomous community, Catalonia currently has its own regional parliamentary body, *La Generalitat*, consisting of the democratically elected regional Parliament, the Presidency, the Government and other institutions.<sup>56</sup> *La Generalitat* exercises significant and effective control in the region and shows the existence of a political and administrative structure in Catalonia.<sup>57</sup> Worth noting however is that in 2017 the Spanish central government imposed Article 155 of the Spanish Constitution as a result of the illegal independence referendum. This led to *La Generalitat* being stripped of all its power and with that depriving Catalonia of its autonomy. The autonomy was however returned to Catalonia in 2018 and as of today (2020) Catalonia enjoys a significant amount of self-governing as an autonomous community within Spain.<sup>58</sup> *La Generalitat* shows all functions of an effective government, fully capable of governing Catalonia. This criterion is therefore also fulfilled.

The final criterion for statehood according to the Montevideo Convention is the capacity to enter into relations with other states. *La Generalitat* has a Ministry of External Affairs, Institutional Relations and Transparency (formerly known as the Ministry of Foreign Affairs before the name was deemed unconstitutional by the Constitutional Court).<sup>59</sup> The Ministry works to promote international goals, such as Agenda 2030, and has diplomatic representations abroad, also known as “Catalan Embassies”.<sup>60</sup> However, Catalonia currently does not have the possibility to enter into relations with other states, as foreign policy is under the exclusive competence of the Spanish central government.<sup>61</sup> According to Raic however, it is important to note that it is the *capacity* to enter into relations with other states that needs to be considered, not if the entity wishing to obtain statehood currently has entered into any such relations.<sup>62</sup> As previously discussed, Catalonia has a stable and well-functioning government, including the Ministry of External Affairs and some established diplomatic connections with other states. Catalonia would seemingly be fully capable to enter into relations with other states if it were to achieve independence.

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<sup>54</sup> Shaw, 'International Law' p. 159.

<sup>55</sup> Anderson, 'Unilateral non-colonial secession and the criteria for statehood in international law' p. 22.

<sup>56</sup> See The Catalan Statute of Autonomy Title I Chapter I-V.

<sup>57</sup> See The Catalan Statute of Autonomy Title IV Chapter I-II.

<sup>58</sup> Comissionat per a Desplegament de l'Autogovern, '155CE: Els efectes de la intervenció de l'Administració General de l'Estat mitjançant l'aplicació de l'article 155CE a la Generalitat de Catalunya' p. 14.

<sup>59</sup> STC 77/2017.

<sup>60</sup> Generalitat de Catalunya, Departament d'Acció Exterior, Relacions Institucionals i Transparència: 'Delegacions del Govern a l'exterior'.

<sup>61</sup> See Article 149 of the Spanish Constitution.

<sup>62</sup> Raic, 'Statehood and the law of self-determination' p. 74.

In conclusion, Catalonia does seem to fulfil all the criteria to be able to qualify as a state according to the requirements in the Montevideo Convention, which also make up international customary law.

With all the statehood criteria being fulfilled, the question of recognition by other states become relevant, as recognition can be viewed as a final step towards achieving full statehood by being able to effectively operate in the international community as an independent state.<sup>63</sup> The question of the possible recognition of a future Catalan state, and the consequences of such a recognition, will be discussed in Chapter 4.4.

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<sup>63</sup> Geldenhuys, 'Secession and Contested States' p. 269, see further Chapter 4.4.



## 3 Claiming a Right to External Self-Determination

### 3.1 Introduction

In this Chapter, it will be examined whether or not the Catalans have a right to self-determination, and whether this right could lead to secession from Spain.

Firstly, the regulation of self-determination in the Spanish Constitution will be investigated. Secession is an issue primarily within domestic jurisdiction of a state, which is why it is essential to establish whether the Constitution allows or prohibits Catalonia from separating from Spain.<sup>64</sup>

Secondly, international law will be discussed. If a right to secede can be found in international law, this right could prevail over Spanish national law prohibiting secession. Furthermore, if a right to secession could be considered a human right, and Spain is violating this right, the violation is likely to attract the attention of the international community. States breaching human rights risk diplomatic reprisals or economic sanctions.<sup>65</sup> Investigating the view of international law with regards to secession, in addition to national law, is therefore relevant when determining whether the Catalans legally can secede from Spain based on a right to self-determination.

#### 3.1.1 Defining internal and external self-determination

The right to self-determination is a collective right, meaning it gives rise to rights for a group of people rather than to an individual.<sup>66</sup> The right to self-determination derived from the idea that people of a territory should be heard, and their consent should be given, before their status could be altered.<sup>67</sup>

Self-determination can be divided into two sub-categories: internal and external self-determination.<sup>68</sup> The former refers to the right a people has against its own state, such as the right to pursue their economic, social and cultural development.<sup>69</sup> This includes the people being allowed to freely choose a government and a right for the people to be fairly represented in this government, without interfering with the territorial integrity of the state in question.<sup>70</sup> The right to internal self-determination is established in numerous international treaties and human rights conventions, and is considered a human right in most parts of the world.<sup>71</sup>

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<sup>64</sup> Corten, 'Territorial Integrity Narrowly Interpreted: Reasserting the Classical Inter-State Paradigm of International Law' p. 88.

<sup>65</sup> Kohen, 'Secession International Law Perspectives' p. 300.

<sup>66</sup> Eide, 'Economic, Social and Cultural Rights' p. 115.

<sup>67</sup> Hofbauer, 'Sovereignty in the Exercise of the Right to Self-Determination' p. 63.

<sup>68</sup> McCorquodale, 'Group Rights', p. 352.

<sup>69</sup> Eide, 'Economic, Social and Cultural Rights' p. 115.

<sup>70</sup> Yusuf, 'The Role That Equal Rights and Self-Determination of Peoples Can Play in the Current World Community' p. 384.

<sup>71</sup> Hannum, 'The Right to Self-Determination in the Twenty-First Century' p. 773.

External self-determination on the other hand, entails the right of a people to separate from an already existing state, in other words, a right to secede.<sup>72</sup> The existence of such a right is far more controversial.

It is undisputed that the Catalans, like any other people, have a right to internal self-determination. What the separatists in Catalonia want to exercise however, is a supposed right to external self-determination and by claiming that right being able to legally separate from Spain.

### **3.1.2 Who are a “people”?**

As previously stated, the right to self-determination, whether internal or external, is a collective right that is to be enjoyed by a “people”. In order to know who can exercise a right to self-determination, the significance of the term “people” needs to be examined, and whether or not the Catalans qualify as a “people”.

The term “people” is not defined in any legal documents regulating self-determination, making its meaning unclear. The Supreme Court of Canada seemingly suggests that a common language and culture tend to be characteristics of a “people”.<sup>73</sup> It is also established that a “people” can be made up of a portion of an existing state, meaning the term is not dependent on current state boundaries.<sup>74</sup> I would argue that the Catalans make up a people, as they are a group with distinct cultural practices and a separate language, however within Spain. They therefore have a right to self-determination.

### **3.1.3 The principle of territorial integrity**

On the other side of the right to self-determination is the principle of territorial integrity, a principle that the pro-Spanish anti-separatists tend to favour when debating a possible Catalan secession.

The principle of territorial integrity is traditionally seen as one of the main principles within international law.<sup>75</sup> According to the principle a state enjoys full power over its own territory and no other country should interfere with the state’s internal affairs. This principle is expressed in the UN Charter. The UN is based on the sovereign equality of all members, according to Article 2(1) of the Charter. Article 2(7) further stipulates that no state shall intervene in matters that are within the domestic jurisdiction of another state. An example of territorial integrity can be seen in Article

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<sup>72</sup> McCorquodale, ‘Group Rights’ p. 353.

<sup>73</sup> The Supreme Court of Canada, Sentence no. 2 SCR 217 25506 August 20<sup>th</sup> 1998 [cit.: Reference re Secession of Quebec] para. 125.

<sup>74</sup> Reference re Secession of Quebec para. 123-124 and Crawford, ‘The Right of Self-Determination in International Law: Its Development and Future’ p. 59.

<sup>75</sup> Joseph, ‘Resolving conflicting claims of territorial sovereignty and external self-determination, part 1: A proposed formula’ p. 41.

2(4) of the same Charter according to which the use of force or threat of use of force against the territorial integrity of another state is prohibited. These Articles are considered to be international customary law.<sup>76</sup>

Internal self-determination can be exercised while still respecting the principle of territorial integrity.<sup>77</sup> A right to external self-determination exercised by allowing a people to secede from an already existing state could be considered an infringement upon a state's integrity. The importance of territorial integrity therefore has to be kept in mind when investigating the question of the Catalans secession from Spain.

## 3.2 A Right to Self-Determination in the Spanish Constitution

### 3.2.1 Constitutionally regulating secession

States generally have three ways to constitutionally regulate secession: Either they can explicitly recognise such a right in the Constitution, explicitly prohibit such a right, or they be silent on the matter, oftentimes leaving room for ambiguous interpretations. Explicitly establishing a right for a part of the territory to secede is rare in modern day constitutions, Ethiopia and Saint Kitts and Nevis being the only states containing such a provision.<sup>78</sup> Recognising such a right may risk encouraging independence movements in the state. However, such independence movements are likely to be non-violent, as violence is not needed for the separatist groups to achieve their aim.<sup>79</sup> On the other hand, not mentioning a right to secession may entail an increased risk for instability and violence, as independence movements need to fight for their rights.

In the following section the possibility of secession according to the Spanish Constitution will be examined. Firstly, the political division of Spain will be discussed in order to determine Catalonia's role within Spain and its current degree of independence as an autonomous community. The concept of *regiones forales* will also be discussed as it may be a part of a possible solution to the Catalan conflict. Secondly, the status of self-determination in the Spanish constitution will be analysed in order to determine the constitutional legality of Catalonia claiming a right to external self-determination from Spain.

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<sup>76</sup> Ibid.

<sup>77</sup> Reference re Secession of Quebec para. 127.

<sup>78</sup> See Article 113 of the Constitution of Saint Kitts and Nevis, Article 39 in the Constitution of Ethiopia and Schenone, 'Derecho a decidir y autodeterminación en el caso catalán. Análisis y reflexiones de acuerdo al derecho constitucional español', p. 158.

<sup>79</sup> Ginsburg, 'From Catalonia to California: Secession in Constitutional Law' p. 925.

### 3.2.2 The political division of Spain – the autonomous communities

The first level of the territorial organisation of Spain is the autonomous communities. Spain consists of 17 autonomous communities, one of them being Catalonia, and two autonomous cities. Each autonomous community enjoys a large degree of independence, which is why Spain often is considered a “quasi-federal” state.<sup>80</sup> Federalisation of the autonomous communities is however explicitly prohibited according to Article 145(1) in the Spanish Constitution, making Spain *one* sovereign state, however highly decentralised.<sup>81</sup>

According to Article 147 of the Spanish Constitution, each autonomous community shall have a Statute establishing the institutional rules of the autonomous community. Article 148 lists 22 areas of legislation and organisation that the autonomous communities have competence to decide on. Those areas include, amongst others, changes in municipal boundaries *within* their territory, social assistance, health and hygiene and environmental protection management. Areas exclusively under the competence of the State include international relations, defence, justice system, foreign trade and authorisation for popular consultations through the holding of referendums. The laws of the State shall prevail in case of conflict between the central legislation and a Statute of Autonomy.<sup>82</sup>

Article 155 regulates the consequences if an autonomous community is not adhering to the Constitution or other laws, or acting against the general interests of the Spanish state. In such a case, the state may forcibly intervene in matters concerning the autonomous community to ensure compliance with the legislation and interests of Spain. According to the Article, if needed, the state may dissolve the regional government not adhering to the provisions established in the Constitution.

When it comes to finance and taxation in Spain, two separate systems co-exist: the common system and the foral system. The common system is the one more widely used, and is applied in 15 out of the 17 autonomous communities in the country, amongst them Catalonia. The autonomous communities within the common system enjoy some fiscal autonomy, with some of the taxes being decided and collected directly by the State, and some by the autonomous community itself.<sup>83</sup>

The second financial and taxation system is the foral system, which is applied in two autonomous communities: The Basque Country and Navarre. The main difference between the foral system

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<sup>80</sup> Ferreres Comella, 'The Spanish Constitutional Court Confronts Catalonia's "Right to Decide"' p. 571.

<sup>81</sup> Schenone, 'Derecho a decidir y autodeterminación en el caso catalán. Análisis y reflexiones de acuerdo al derecho constitucional español' p. 161.

<sup>82</sup> Article 149 in the Spanish Constitution.

<sup>83</sup> See Articles 156-157 in the Spanish Constitution.

and the common system, is that the foral system gives the communities a larger degree of fiscal autonomy. The Basque and the Navarre governments collect all taxes from their respective autonomous community. The regional governments then independently decide on how to distribute the tax money among the different public services in their communities. The communities also conclude an agreement with the Spanish central government on the quota that is to be paid to the central regime. This quota shall correspond to the cost of the centralised services, such as defence and foreign affairs, that the Spanish state has in the foral region in question.<sup>84</sup>

The foral system is not without controversy, as it tends to be regarded as discriminatory towards the other communities. The Basque Country and Navarre are among the richest regions in Spain, often generating a sense of injustice in the other regions. Catalonia is one of the regions that repeatedly has expressed their discontent towards the system, since Catalonia is a part of the common system and is the autonomous community that contributes the most economically to the central government.<sup>85</sup> If Catalonia were to be a foral region like the Basque Country and Navarre, Catalonia would be more fiscally independent and more money would stay within the autonomous community itself, rather than being sent to the central government and then distributed among the other autonomous communities.

### **3.2.3 The regulation of self-determination in the Constitution**

The Constitution acknowledges the existence of various nationalities and regions within the Spanish territory, however without explicitly mentioning a right to internal self-determination. The Preamble states that the Constitution shall “protect all Spaniards and peoples of Spain in the exercise of human rights, of their cultures and traditions and of their languages and institutions”. This shows how the Constitution recognises the existence of multiple nationalities and peoples within the Spanish state and how they all shall be protected. Furthermore, in Article 2, a right to autonomy for the different regions and nationalities is guaranteed. According to Article 3(2) other languages than Castilian Spanish shall be official in their respective communities, and Article 4(2) states that the individual Statutes of the autonomous communities may recognise their own flags and ensigns. These Articles show the importance of the regional differences in Spain and how they are all protected by the Spanish state in the Constitution. One could therefore argue that the Spanish Constitution implicitly prescribes a right to internal self-determination.

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<sup>84</sup> See Article 41(d) in the Statute of Autonomy of the Basque Country and Article 49 and 52 Ley 12/2002 de 23 de mayo por la que se aprueba el Concierto Económico con la Comunidad Autónoma del País Vasco as well as Article 45 of the Ley Orgánica 13/1982, de 10 de agosto, de reintegración y mejoramiento del Régimen Foral de Navarra.

<sup>85</sup> Zubari I., ‘Los sistemas forales: características, resultados y su posible generalización’, p. 356.

With regard to external self-determination, it is not explicitly established nor explicitly prohibited in the Constitution.<sup>86</sup> There are however Articles that can be interpreted in such a way that makes them applicable in situations of conflict regarding secession from Spain.

Article 1(1) of the Spanish Constitution stipulates that “Spain is hereby established as *a* social and democratic state (...)”<sup>87</sup>, implying the existence of one, not more, social and democratic state. Article 1(2) establishes that the national sovereignty is vested in the Spanish people, affirming that the national sovereignty belongs to the Spanish state and not to other nationalities or peoples within the sovereign state. Proclaiming that the sovereignty is ascribed the Spanish people, makes it impossible to provide different peoples within Spain with sovereignty as well, since it is legally impossible for the two to coexist.<sup>88</sup> In STC 42/2014 the Constitutional Court commented on Article 1(2) in relation to a resolution<sup>89</sup> passed by the Catalan Parliament in which Catalonia declared itself politically and legally sovereign. The Court concluded that this resolution violated the sovereignty of the Spanish State as established in Article 1(2). This shows that despite Spain consisting of many communities and peoples, it is still just one sovereign state according to the Constitution.

Article 2 of the Spanish Constitution states that the Constitution is “based on the indissoluble unity of the Spanish nation (...) and indivisible country of all Spaniards”. The indissoluble character of the Spanish state as stated in this provision is by many scholars interpreted as an implicit prohibition on secession.<sup>90</sup> In STC 25/1981 the Court stated that the right to autonomy the regions enjoy shall be exercised on the basis of the principle of national unity of the state. This shows the importance of the unity of Spain and that the unity prevails over the communities’ right to autonomy.<sup>91</sup>

It is also noteworthy that Articles 1 and 2 form part of what is the “Preliminary Part” of the Constitution, meaning they make up fundamental parts of the Spanish Constitution. One way in which the importance of the Preliminary Part is manifested is through the complex procedure that is required to amend this part of the Constitution. Amendment of the Preliminary Part of the Constitution requires approval by two-thirds of the members of both the Senate and the Congress.

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<sup>86</sup> Schenone, ‘Derecho a decidir y autodeterminación en el caso catalán. Análisis y reflexiones de acuerdo al derecho constitucional español’, p. 158.

<sup>87</sup> Original wording: “España se constituye en un Estado social y democrático (...)”.

<sup>88</sup> Ferreres Comella, ‘The Spanish Constitutional Court Confronts Catalonia’s “Right to Decide”’ p. 580.

<sup>89</sup> Resolución del Parlamento de Cataluña 5/X de 23 de enero de 2013.

<sup>90</sup> López, ‘La secesión de territorios en la constitución española’, p. 88.

<sup>91</sup> Schenone, ‘Derecho a decidir y autodeterminación en el caso catalán. Análisis y reflexiones de acuerdo al derecho constitucional español’ p. 160.

The Parliament shall also be immediately dissolved following a proposed amendment of the Preliminary Part. An amendment would also require a referendum in order to be ratified.<sup>92</sup>

### 3.3 A Right to Self-Determination in International Law

#### 3.3.1 The UN and international conventions

As previously mentioned, despite secession primarily being an issue within the domestic jurisdiction of a state, it is relevant to examine the existence of a right to external self-determination in international law. If such a right were to be established in a treaty validly concluded and officially published in Spain, that right would, according to Article 96(1) of the Spanish Constitution, form a part of Spanish national law. Furthermore, according to Article 27 of the VCLT, in case of a discrepancy between international law and national law, international law shall prevail.

Article 1 of the UN Charter establishes that one of the main purposes of the UN should be to encourage the “respect for the principle of equal rights and self-determination of peoples”. Article 55 of the UN Charter discusses the “conditions of stability and well-being (...) based on respect for the principle of equal rights and self-determination of peoples.” The incorporation of the right to self-determination in the UN Charter seemingly points towards its importance in the international legal field. The Charter however does not define the term “people” nor the term “self-determination”. It is not clear whether the Charter refers to internal or external self-determination, nor does it specify who the “people” are that get to exercise the right.

The UN General Assembly adopted two resolutions in 1960 possibly clarifying the meaning of self-determination in the UN Charter. Resolutions passed by the General Assembly are merely recommendations and therefore not legally binding on member states.<sup>93</sup> The resolutions by the General Assembly do however carry important political weight and can be seen as a manifestation of the current *opinio juris*.<sup>94</sup>

Resolution 1514 aims to “bring an (...) end to colonialism” and prescribes, amongst other things, that “the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights” and that “all peoples have the right to self-determination (...) [it] includes the right to freely determine their political status (...)”.<sup>95</sup> A second resolution, resolution 1541, was adopted shortly thereafter and further affirms the necessity of self-

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<sup>92</sup> Article 168 and Article 66 in the Spanish Constitution.

<sup>93</sup> See Art. 10-17 of the UN Charter.

<sup>94</sup> Legality of the Use or Threat of Nuclear Weapons, (Request for Advisory Opinion), ICJ July 8<sup>th</sup> 1996 p. 254-255 para. 70.

<sup>95</sup> General Assembly Resolution 1514 (XV) Declaration on the granting of independence to colonial countries and peoples” December 14<sup>th</sup> 1960.

determination to ensure decolonisation.<sup>96</sup> In accordance with the UN Charter and the two mentioned resolutions from 1960 colonised people seemingly have a right to secession from their colonial powers. Whether such a right exists outside a colonial situation is not clear in these documents.

The right to self-determination has further been established in a number of human rights instruments. The common Article 1 of the ICCPR and the ICESCR, both established in 1966, stipulates that all peoples have the right to self-determination and the right to freely determine their political status and freely pursue their economic, social and cultural development. The incorporation of the right to self-determination in these human rights instruments, in addition to the previously mentioned UN documents, shows the importance of self-determination in international law, however its exact meaning remains unclear. Neither the term “self-determination” nor the term “peoples” is defined, so these documents provide no further guidance to the question whether they refer to a right to external self-determination in the form of secession and whether such a right is applicable outside a colonial context. However, the presence of a right to self-determination in a human rights convention is relevant because it seemingly categorises the right to self-determination as a human right. Human rights are in turn considered universal and indivisible, making them equally applicable to all persons irrespective of time and place.<sup>97</sup> Hannum however argues that the *travaux préparatoires* of the ICCPR promotes a restrictive interpretation of the right to self-determination, and that the right may only lead to secession in colonial situations, despite its status as a human right.<sup>98</sup> The significance of the establishment of a right to self-determination in the human rights conventions ICCPR and ICESCR does not therefore seem to clarify the meaning of the right, and to what extent and by whom such a right can be exercised. The question of whether a right to external self-determination can be enjoyed outside colonial situations therefore remains.

When studying the abovementioned conventions and resolutions, it is clear that a right to external self-determination exists in international law. This right seems to be limited to colonised peoples, and its applicability outside colonial situations is disputable. With regard to the history of Catalonia as discussed in Chapter 2, Catalonia is not a colonised territory. The Catalans’ chance to successfully invoke a right to external self-determination based on the above-mentioned UN documents therefore seems to be limited.

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<sup>96</sup> General Assembly Resolution 1541 (XV) Principles which should guide members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter December 15<sup>th</sup> 1960.

<sup>97</sup> General Assembly Resolution 60/251 April 3<sup>rd</sup> 2006, preamble para. 5.

<sup>98</sup> Hannum, ‘Rethinking Self-Determination’ p. 24.

### 3.3.2 Circumstances leading to a right to external self-determination

According to the discussion above, even though a right to self-determination is established in international law, such a right does not entail a right to secession outside colonial contexts. By analysing state practice and further interpreting relevant UN documents however, scholars frequently discuss two possible circumstances which may lead to a right to secession outside a colonial context, if there is no other remedy available. These situations need to be of a certain degree of gravity for a secession to be justified and the people wanting to secede need to be victims of serious injustice.<sup>99</sup> The two circumstances and their possible applicability to the case of Catalonia will be discussed in the following.

#### 3.3.2.1 *A denied right to internal self-determination*

One circumstance that may give rise to a right to secession is if a people has been denied the right to internal self-determination. An example could be if the people does not have a right to practice their culture, to speak their language or they lack representation in the central government.

It is challenging to find legal support for the claim that denied internal self-determination entails a right to secede. Such a right can be considered to be established in the Friendly Relations Declaration when doing an *e contrario* interpretation of paragraph 7:

“This [referring to the previously discussed right to self-determination] shall not be construed as authorising or encouraging any action that 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 and thus possessed of a Government representing the whole people belonging to the territory without distinction as to race, creed or colour.”<sup>100</sup>

Worth noting however, is that the Friendly Relations Declaration as such is not a legally binding treaty since it is a resolution adopted by the General Assembly.<sup>101</sup> The Declaration has however been considered customary law by the ICJ, making it highly relevant in investigating the current legal situation.<sup>102</sup> Paragraph 7, read *e contrario*, seemingly establishes that a state cannot rely on its territorial integrity or political unity unless it respects the principle of equal rights, self-determination of peoples and has a representative government. The state has to respect the right of internal self-determination of its peoples, and if it does not, its peoples have the right to external self-determination.<sup>103</sup> This would mean that the people of the region wishing to secede could

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<sup>99</sup> Brando and Morales-Gálvez 'The Right to Secession: Remedial or Primary?' p. 108.

<sup>100</sup> General Assembly Resolution 2625 The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States December 18<sup>th</sup> 1962.

<sup>101</sup> See Art. 10-17 of the UN Charter.

<sup>102</sup> Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion), ICJ, July 22<sup>nd</sup> 2010. [Cit.: Kosovo Advisory Opinion] para. 80.

<sup>103</sup> Vidmar, 'Remedial Secession in International Law: Theory and (Lack of) Practice' p. 38.

unilaterally declare independence despite them not being considered a colonised region.<sup>104</sup> Some scholars, such as Shaw, are however critical towards this inverted reading, meaning that it would result in a major change in basic principles of public international law, considering that territorial integrity always has been seen as one of the core principles regulating relations between states. He argues that such a massive legal change should not be introduced using an ambiguous subordinate clause.<sup>105</sup>

Further support for a right to secession in case of denied internal self-determination can seemingly be found in the Vienna Declaration.<sup>106</sup> The Vienna Declaration was adopted by the UN Conference on Human Rights in 1993 and expanded on the idea established in paragraph 7 of the Friendly Relations Declarations. Principle 2 is identically worded to the previously mentioned paragraph 7, but instead of stating that a government needs to be representative of all people “without distinction as to race, creed or colour”, as is established in the Friendly Relations Declaration, the Vienna Declaration states that there shall be no “distinction of any kind”. This seems to further expand the meaning of paragraph 7, making it applicable to all people, not just racial or religious groups, which is insinuated by the Friendly Relations Declaration. As previously stated with regards to the Friendly Relations Declaration, the Vienna Declaration is not a legally binding instrument as it is a declaration, but it can still show the commitment and will of the international community.<sup>107</sup>

In addition to the somewhat unclear and ambiguous clauses in the Friendly Relations Declaration and in the Vienna Declaration, there is some state practice and case law that may point towards that denied internal self-determination could entail a right to external self-determination.

In 1998 the Supreme Court of Canada issued its decision in the case of the attempted secession of the Canadian province Quebec.<sup>108</sup> The judgement was the result of an independence referendum that had been held in Quebec three years prior, where the Premier of Quebec promised to unilaterally declare Quebec independent in case of a separatist victory in the planned referendum. The side wishing to remain within Canada won the referendum with 50.6 percent of the votes, and therefore no independence was declared.<sup>109</sup> The central government of Canada did however refer the issue to the Supreme Court of Canada in order to establish the legality of unilateral secession.<sup>110</sup> In the case, the Supreme Court states that a people may have a right to secession in cases where

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<sup>104</sup> Anderson, 'Unilateral non-colonial secession and the criteria for statehood in international law' p. 8.

<sup>105</sup> Shaw, 'Peoples, Territorialism and Boundaries' p. 483.

<sup>106</sup> The 1993 Vienna Declaration and Programme of Action. Adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

<sup>107</sup> DagDok – Guide of UN Documentation: 'Conventions and Declarations'.

<sup>108</sup> Bayne, 'So Near and Yet So Far: The 1995 Quebec Referendum in Perspective' p. 36.

<sup>109</sup> Ibid. p. 25.

<sup>110</sup> Ibid. p. 36.

the people in question are denied meaningful access to government to pursue their political, economic, social and cultural development.<sup>111</sup> This seems to confirm the view that denied internal self-determination may lead to a right to secession. In the case of Quebec, the Court establishes that the Quebecois has meaningful access to the Canadian central government. Canada has had a majority of Quebecois Prime Ministers during the last 50 years, and as Canada is a democracy, it guarantees all its citizens the right to participate in the government. It is thereby established that the people in the province of Quebec has a right to self-determination, and since they can enjoy this right fully while respecting the territorial integrity of Canada, they could not claim a right to external self-determination.<sup>112</sup>

### ***3.3.2.2 Severe human rights violations***

Serious and persistent human rights violations towards a people can also justify secession as a last resort.<sup>113</sup> Hannum argues that in order for the human rights violations to justify secession they should be massive, discriminatory and approaching genocide. The violations do not however need to fulfil the technical definition of genocide, but the idea is that the aim of the mother state should be to destroy the people in question.<sup>114</sup> In other words, the human rights violations need to reach a certain degree of gravity before they can be said to justify secession. An attempt to make a culture extinct (a “cultural genocide”), but not the people itself, does not entail a right to secession on the basis of human rights violations.<sup>115</sup>

State practice supports the theory that grave human rights violations can entail a right to secession. One example is Bangladesh, which achieved independence from Pakistan in 1972. The Bangladeshis had been subject to serious human rights violations by the central government, in form of torture and genocide. In addition, they were not allowed the same political participation as the rest of the Pakistani citizens and they were not represented in the central government.<sup>116</sup> The secession of Bangladesh seems to have been a combination of gross human rights violations and denied internal self-determination, eventually leading up to the creation of an independent state recognised by the international community.

Another example is East Timor, which was under the rule of Indonesia. The Indonesian military was severely violating the human rights of the East Timorese population. These violations increased the pressure of the international community on Indonesia, which eventually contributed

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<sup>111</sup> Reference re secesion of Quebec para. 131.

<sup>112</sup> Ibid. para. 135.

<sup>113</sup> Freeman, 'Human Rights: An Interdisciplinary Approach' p. 144.

<sup>114</sup> Hannum, 'The Right to Self-Determination in the Twenty-First Century', p. 776.

<sup>115</sup> Ibid.

<sup>116</sup> Kohen, 'Secession International Law Perspectives' p. 307.

to a referendum on independence in 1999. Following the referendum, East Timor achieved independence and international recognition.<sup>117</sup>

Allowing for human rights violations to breach the important principle of territorial integrity is also aligned with the general development of international human rights law. Human rights have during the 20<sup>th</sup> Century gone from being considered an issue to be handled internally within a country, to be considered a topic of interest for the international community irrespective of where the violations are taking place.<sup>118</sup> I would therefore consider it reasonable for the increasing importance of human rights at the expense of territorial integrity to be applicable also to cases of secession.

Furthermore, other states are more likely to recognise the creation of a new state if the people wishing to secede have been subject to gross human rights violations.<sup>119</sup> Recognition is an essential part in achieving independence. This will be discussed further in Chapter 4.4.

### **3.4 Can the Catalans Claim a Right to External Self-Determination?**

When studying the Spanish Constitution it is clear that Spain is a decentralised state, consisting of a number of regions, amongst them Catalonia, that enjoy high degrees of independence. The unity of Spain is however prominent throughout the Constitution and it is clear that Spain is *one* sovereign and indivisible state. The Constitution acknowledges the vast amount of nationalities, languages and cultures coexisting within the Spanish territory and they enjoy the protection of the Spanish state.

By examining the provisions in the Constitution that touch on the issue of secession, there is no explicit mention of this right, nor is secession explicitly prohibited. The Constitution does however, as previously discussed, stress the importance of the unity and sovereignty of Spain, which shows that Spain is one, indivisible state that does not allow for smaller entities within the state to secede. The importance of the sovereignty of the Spanish state is also confirmed by cases from the Spanish Constitutional Court.<sup>120</sup> One can therefore claim that external self-determination is implicitly prohibited in the Spanish Constitution and therefore incompatible with the current wording of the Constitution. The Catalan separatists' attempts to secede from Spain is therefore a violation of the Spanish Constitution.

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<sup>117</sup> Velasco, 'Self-determination and Secession: Human-Rights based Conflict Resolution' p. 93.

<sup>118</sup> The 1993 Vienna Declaration and Programme of Action. Adopted by the World Conference on Human Rights in Vienna on 25 June 1993 para. 4.

<sup>119</sup> Kohen, 'Secession International Law Perspectives' p. 300.

<sup>120</sup> See STC 42/2014, STC 25/1981 and Chapter 3.2.3.

Spain is however bound by international law, and treaties concluded by Spain shall be considered national law. This makes international law highly relevant in the case of Catalonia. In addition, if the separatists were to find support within international law for their arguments, it would significantly strengthen their position and likely attract international attention.

According to what has been discussed in this chapter, internal self-determination is an inherent human right that shall be enjoyed by all peoples. Since the Catalans should be considered a people they have the right to internal self-determination. External self-determination on the other hand, is more controversial. In colonial situations, the right to secession seems undebatable, as it is established in numerous international legal documents and further confirmed by state practice.

Catalonia cannot be considered a colony, and the Catalans' potential right to external self-determination is therefore controversial and seemingly limited to being a last resort in specific circumstances. Despite a supposed right to secession as a last resort being debated, support for the existence of such a right can be found in international conventions and in state practice.

One circumstance that could lead to the Catalans having a right to secede from Spain would be if they are denied internal self-determination. Catalonia, being an autonomous community, enjoys a large degree of autonomy within Spain. The Catalans have a right to speak their own language, practice their cultural traditions and they are represented in the Spanish governmental bodies. A right to internal self-determination can therefore be considered to be implicitly established in the Spanish Constitution. The Catalans claim to suffer some degree of discrimination for example by public servants having intolerant attitudes towards Catalan-speakers and standardised exams not being available in Catalan.<sup>121</sup> When studying cases where a denied right to internal self-determination has caused or contributed to secession, such as in Bangladesh, one can determine that the oppression amongst the people in these cases has been far more severe than the supposed discrimination towards the Catalans.

I would argue that Catalonia is more comparable to the situation in Quebec, since Quebec is a province that enjoys a large degree of autonomy in Canada, similar to Catalonia in Spain.<sup>122</sup> Despite there being some degree of conflict between the Quebecois and the central government of Canada, the Quebecois are fully able to exercise their right to internal self-determination within Canada.<sup>123</sup> According to the Canadian Supreme Court, Quebec therefore cannot claim a right to external self-determination. The conclusions of the Supreme Court are seemingly in accordance with international law. I would consider Catalonia to be in a similar position to Quebec. I consider the Catalan people to enjoy full internal self-determination, as established in the Spanish Constitution.

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<sup>121</sup> Plataforma per la llengua, 'We don't have the exam in Catalan: so you either do it in Spanish or leave' p. 15, p. 5.

<sup>122</sup> See Article 91-95 in the Constitution Act 1867, 30 & 31 Victoria (U.K.).

<sup>123</sup> Reference re secession of Quebec para. 136.

However, the application of Article 155 in 2017 deprived Catalonia of its autonomy and led to the dissolution of *La Generalitat*. During the time the Article was in effect, the Catalans were under total control of the central government of Spain, and left without a possibility to independently decide on matters concerning them. One might argue that the application of Article 155 took away the Catalans' right to internal self-determination leading to them having a right to external self-determination. I would however argue that because the Catalans were still able to develop culturally, linguistically and socially, and they were still represented in the Spanish central government during the time Article 155 was in effect, they still enjoyed a right to internal self-determination as defined by international law. As of 2020, Article 155 is no longer in effect and the Catalans enjoy the large degree of autonomy that is guaranteed in the Spanish Constitution, such as having their own parliamentary body. Overall, I think Catalonia cannot claim to be denied a right to internal self-determination to justify their demand for a right to secession.

The other way in which the Catalans could enjoy a right to external self-determination, would be if they were victims of severe human rights violations. Some human rights violations have been observed in Catalonia, mainly during the referendum in 2017. Protesters and voters were forcefully silenced and protests were violently broken up by police. In addition, the nine politicians considered responsible for the referendum were taken into custody by police, and later received prison sentences up to 12 years as a result of organising the referendum.<sup>124</sup> These actions could be considered human rights violations, since the Catalan leaders can be considered to have been arbitrarily detained as a result of exercising their right to freedom of opinion, expression, association, assembly and political participation. The limitation of these rights have not been successfully justified.<sup>125</sup> However, as previously discussed in Chapter 3.3.2.2, the human rights violations need to be massive, discriminatory and approaching genocide. The aim of the mother state shall be to destroy the people in question. I would not consider that the Catalans have suffered human rights violations of this degree in today's Spain.

Worth noting however, is that this situation may have been different if the independence claims would have been made during the dictatorship. As discussed in Chapter 2.2, the Catalans suffered massive discrimination and violence during this time. I would argue that the Catalans would have had the right to external self-determination according to international law during this time, since they were denied both internal self-determination and they were also victims of human rights violations. Since the end of the dictatorship however, the Catalans enjoy both internal self-determination and they are not victims of any severe human rights violations.

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<sup>124</sup> STS 459/2019.

<sup>125</sup> See Opinion A/HRC/WGAD/2019/6 adopted by the Working Group on Arbitrary Detention at its 84<sup>th</sup> Session.

In conclusion, the Catalans have a right to self-determination. However, this self-determination is primarily meant to be exercised in the form of internal self-determination while respecting the territorial boundaries of Spain. The exercise of internal self-determination does not entail a right to separate from Spain. The Catalans seemingly cannot claim a right to external self-determination in the form of secession from Spain. Separating from Spain would be prohibited according to the Spanish Constitution. In today's Catalonia, in addition to secession being prohibited in the Constitution, the Catalans do not qualify to enjoy a right to external self-determination in the eyes of international law. Claiming a right to self-determination will in other words not lead to a right to secede from Spain, but rather a right to develop socially, economically and culturally within Spain.



## 4 A Right to Decide

### 4.1 Introduction

The Catalans cannot according to the Spanish Constitution nor according to international law, claim a right to external self-determination. A separation from Spain would entail a violation of the Spanish Constitution. As to international law, no treaties or conventions provide the Catalans with a right to secession, and more serious circumstances are required in order for the Catalans to have the possibility to gain a right to external self-determination.

The absence of a right to external self-determination does not entail an impossibility for the Catalans to declare independence anyway. The separatists claim that a possibility to secede could be based on their so called “right to decide” as a people. The “right to decide” is not recognised in any national or international legal instruments, and would therefore on its own likely be an unsuccessful argument for independence. However, the “right to decide” can be determined to consist of two separate legal issues: Firstly, the possibility to organise a referendum on independence, and secondly, the possibility to unilaterally declare independence from Spain in case of a separatist victory in the referendum. These two issues need to be investigated in order to know whether the separatists can justify a secession from Spain using a “right to decide”.

Firstly, the Catalans’ possibility to organise a referendum on independence according to the Spanish Constitution and according to international law will be discussed. Secondly, the legality of a unilateral declaration of independence and the possible consequences of such a declaration will be investigated. Finally, the possibility and significance of obtaining international recognition will be discussed. International recognition is a crucial step for a Catalan state to be able to effectively operate in practice after a referendum and a declaration of independence.

### 4.2 Referendum

#### 4.2.1 A referendum according to the Spanish Constitution

As a first step towards achieving independence based on a “right to decide” is the organisation of a referendum. The possibility of organising such a referendum in accordance with Spanish Constitutional law will be discussed in the following.

Catalonia has organised two referendums regarding the question of independence, both of them having been deemed unconstitutional by the Spanish state.<sup>126</sup>

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<sup>126</sup> See Chapter 2.3.2.

According to Article 23 of the Spanish Constitution the citizens of Spain shall have the right to participate in public affairs, either directly or indirectly through democratically elected representatives. In STC 76/1994 the Spanish Constitutional Court declared that, in accordance with Spain being a constitutional monarchy as stated in Article 1(3) of the Constitution, the main form of democracy shall be practiced through democratically elected representatives. According to Article 149(1)(32)(a) a referendum can be held, but the decision to organise such a referendum is under exclusive competence of the state. As to when such referendums shall be held is stipulated in Article 92(1) which states that “Political decisions of special importance may be submitted to all citizens in a consultative referendum”. The referendum shall be called by the King and an *organic law*<sup>127</sup> shall be passed to regulate the terms and procedures of the referendum.<sup>128</sup>

*La Generalitat* does not therefore have the competence to independently decide that a referendum shall be held, as was done in 2014 and 2017. There may be a possibility for the Spanish state, in accordance with Article 150(2), to through an organic law delegate the power to organise a referendum to Catalonia. Such a delegation had however not been done prior to the referendums.

Another issue would be the binding nature of the referendum in 2017. Even though a referendum can be held regarding questions of special importance in accordance with Article 92(1), such referendums shall only be of consultative nature. According to the law which the referendum in 2017 was based on, the referendum was to be of binding nature, meaning in case of a separatist victory, a declaration of independence was to follow.<sup>129</sup> This is in violation of Article 92(1).

The process of organising the referendum is also questionable. In accordance with Article 92(1) the Congress shall by absolute majority authorise the referendum which shall lead to the Prime Minister proposing the organisation of a referendum to the King who shall then call for the referendum.<sup>130</sup> This was not the case in the Catalan independence referendum, as the referendum was solely based on a law passed by *La Generalitat*.

Another issue that needs to be addressed regarding the Catalan independence referendums is the right to participate. Article 92(1) states that in case of a referendum being held, all citizens shall participate. Furthermore, Article 1(2) establishes that the sovereignty of Spain is vested in the Spanish people, meaning that the entire Spanish population is in charge of questions concerning the sovereignty of the country. The Spanish Constitutional Court clarified the meaning of Article

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<sup>127</sup> Article 81 of the Spanish Constitution defines *organic laws* as laws relating to “the development of fundamental rights and public liberties, the establishment of Statutes of Autonomy and electoral system and other laws provided in the Constitution.” According to the same Article, in order to pass, amend or repeal an organic law an absolute majority of votes in the Congress is required.

<sup>128</sup> Article 92.2-3 the Spanish Constitution.

<sup>129</sup> See Article 1 of Ley 19/2017 del referéndum de autodeterminación de Cataluña.

<sup>130</sup> See Article 6 “Ley Orgánica 2/1980 de 18 de enero sobre regulación de las distintas modalidades de referéndum” for the requirement of an absolute majority.

1(2) in the case STC 103/2008. The case concerned a law passed by the regional government in the Basque Country, authorising the President of the Basque Country to conduct a non-binding referendum on independence. The Constitutional Court concluded that the organisation of such a referendum meant that the Basque Country considered themselves a sovereign entity, which is a violation of Article 1(2). Through this judgement the Constitutional Court implied that only letting one part of the Spanish population decide on something that would affect the entire territory of Spain is not in line with the Constitution.<sup>131</sup>

In the 2014 and the 2017 referendums only Catalans were allowed to vote, resulting in violations of Article 92(1) and Article 1(2) of the Spanish Constitution. This also poses questions for a possible future referendum, since the separatists demand only Catalans should be allowed to vote in a future referendum.<sup>132</sup> Article 92(3) states that an organic law shall regulate the terms and procedures of referendums. The Organic Law 2/1980 concerning the regulation of referendums, stipulates in Article 5 that the geographical area the referendum in question concerns shall be the area that has the right to vote.

In conclusion, according to the Constitution all Spaniards shall have the right to vote in a referendum. However, Article 5 in the Organic Law 2/1980 opens up for an exception to be made according to which the Catalans could be the only ones allowed to vote in an independence referendum.

#### **4.2.2 A referendum according to international law**

In international law, there is a right to democracy and free elections.<sup>133</sup> No explicit right to organise a referendum is however established within international law. There are however other rights that could give the Catalans the possibility to conduct a referendum on independence as was done in 2014 and in 2017.

Spain is party to both the ICCPR and the ECHR and both conventions are to be integrated into the Spanish legal system.<sup>134</sup> Even though the conventions do not establish any right to hold a legally binding referendum on independence, the conventions do establish other rights that could be used as arguments to protect the Catalans' supposed right to hold a referendum, if so "only" a consultative one.

Article 25 of the ICCPR recognises the right of all citizens to take part in public affairs. This right can be exercised in numerous ways, one of them being through debate with elected

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<sup>131</sup> Tajadura, 'Referéndum en el País Vasco (Comentario a la STC 103/2008, de 11 de septiembre' p. 385.

<sup>132</sup> Serrano and López, 'Qui té dret a votar? Altres assumptes polèmics sobre els referèndums de secessió' p. 25.

<sup>133</sup> See Article 21 UDHR, Article 25 ICCPR, Article 3 Protocol 1 ECHR.

<sup>134</sup> Article 96 of the Spanish Constitution.

representatives or through citizens' capacity to organise themselves.<sup>135</sup> This includes activities such as the organisation of peaceful demonstrations, assemble to discuss political matters, advertise political ideas and publish political material.<sup>136</sup> This right is closely tied to the freedom of expression established in Article 19 of the same convention.<sup>137</sup> The right to freedom of expression is broad and includes expressing opinions and ideas in a variety of ways such as through leaflets, books and via the internet.<sup>138</sup> Another closely related right is the freedom of assembly, which is stipulated in Article 21 of the ICCPR. This right establishes that people are free to peacefully organise non-violent gatherings, indoors as well as outdoors, in public or in private.<sup>139</sup> An assembly is considered peaceful as long as no violence that may injure or kill people is used by the participants. Violence by authorities, for example in an attempt to break up an assembly, does not make an assembly violent in the way that it is no longer protected by the convention.<sup>140</sup> Such assemblies can have different forms, but the purpose shall be for the people involved to express themselves collectively, for example with the aim to convey a collective opinion.<sup>141</sup> Whether or not notification or request of permission has been made to relevant authorities prior to the assembly, the assembly is protected under Article 21.<sup>142</sup>

The freedom of expression and the freedom of assembly may however be limited and thereby hindering people from exercising those rights. Such limitations may only be justified if their aim is to protect the right or freedoms of others or if it is to protect a public interest. In both cases the limitation needs to be prescribed by law and it needs to be necessary in a democratic society.<sup>143</sup>

The right of all citizens to participate in public affairs, the freedom of expression and the freedom of assembly, are not only established in the ICCPR, but also in numerous other human rights conventions such as the ECHR, the UDHR and the EU Charter of Fundamental Rights.<sup>144</sup>

### **4.2.3 The possibility of a referendum on independence in Catalonia**

According to national law, the referendums held in 2014 and 2017 have been deemed unconstitutional and have not led to a successful secession from Spain. The only constitutional option the Catalans would have to conduct a referendum, would be if the referendum would be

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<sup>135</sup> UN Human Rights Committee, CCPR General Comment no. 25: Article 25, 12 July 1996 para. 8.

<sup>136</sup> CCHR Fundamental Freedom Series: 'Rights to Participate in Public Affairs – September 2017'.

<sup>137</sup> UN Human Rights Committee, CCPR General Comment no. 25: Article 25, July 12<sup>th</sup> 1996 para. 8.

<sup>138</sup> McGoldrick 'Thought, Expression, Association and Assembly' p. 218.

<sup>139</sup> Ibid. p. 228.

<sup>140</sup> UN Human Rights Committee, CCPR Draft General Comment No. 37: Article 21, March 6<sup>th</sup> 2020 para. 20.

<sup>141</sup> Ibid. para. 14.

<sup>142</sup> Ibid. para. 18.

<sup>143</sup> Ibid. para. 16.

<sup>144</sup> Article 19-21 UDHR and Article 10-11 ECHR, Article 11-12 Charter of Fundamental Rights of the EU

called by the King after a prior authorisation by the Congress according to Article 92. Even though it would be theoretically possible to organise a referendum this way, it would, as previously mentioned, require an absolute majority of the votes in the Congress in order for the King to be legally able to authorise the referendum. Considering that the Congress currently consists of a majority of anti-independence politicians, it seems unlikely that the absolute majority required would vote to authorise a referendum.<sup>145</sup> Even in a situation where a majority of the Congress would support a referendum in accordance with Article 92, making it legally possible to organise the referendum, its constitutionality could still be questioned, due to implicit prohibition on secession in the Constitution. In other words, the topic of the referendum would still be unconstitutional.<sup>146</sup> The purpose of conducting a referendum where the result cannot legally be put into practice is of course debateable.

However, Spanish law shall, according to Article 10 and Article 96 of the Spanish Constitution, be interpreted in the light of international human rights conventions and treaties ratified by Spain, and they should be considered a part of national law. With the support of international human rights conventions, one can question the legality of prohibiting the organisation of a referendum.

Organising a referendum can be considered to be protected by numerous human rights conventions, as discussed in Chapter 4.2.2. The right to participate in public affairs gives citizens the right to publish political material and promote political ideas. By the Catalans using their freedom of assembly they can gather with the aim to convey their collective message of an independent Catalonia. The Catalans shall be allowed, according to the freedom of expression, to promote the referendum and freely express their desire for independence and due to the broad nature of the right to freedom of expression, expressing their opinion using a referendum therefore seems to be allowed. In other words, even though the Catalans cannot claim a right to conduct a referendum, the Spanish state can seemingly not stop them if they conduct it anyway.

The nature of the referendum that could be held using the abovementioned human rights, would be of a consultative nature. A legally binding referendum that would lead to an instant declaration of independence resulting in Catalan separation from Spain is not guaranteed by the human rights discussed, since no right to hold a legally binding referendum exists in international law. A consultative referendum on the other hand would enjoy protection by international human rights law and could not be interrupted or prohibited by the Spanish state unless the participants turn violent or if it had to be interrupted to protect public interests or the rights and freedoms of others. The Catalan independence movement today does not show any sign of aiming to use violence, and

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<sup>145</sup> For current composition in the Congress ‘Congreso de los Diputados: “Congreso de los Diputados – Grupos: XIV Legislatura”’.

<sup>146</sup> See Chapter 3.2.3.

the violence in the 2017 referendum stemmed from excessive force used by police.<sup>147</sup> As previously stated, violence used by the police to break up an assembly does not make the assembly itself violent. A referendum on independence could be argued to threaten public interests such as public order, moral and safety as it could be considered a threat to the stability of both the Catalan and the Spanish society and the political system. Limitations can however only in strictly limited circumstances be justified based the message the group is trying to convey, in this case independence.<sup>148</sup> Overall, the threshold for limiting the human rights in question is high and reserved for extreme situations.<sup>149</sup> A peacefully conducted consultative “referendum” does not seem to make out ground for such a limitation, and the “referendum” can be held under the protection of the freedom of assembly, expression and the right to participate in public affairs.

Overall, the Spanish state prohibiting and/or preventing a referendum from taking place as was done in 2017, seems to be a violation of fundamental human rights. The Catalans can in other words according to international law, which prevails over Spanish Constitutional law, organise a new consultative referendum on independence, and the voters would be protected by international human rights.

One should however keep in mind the consequences of such a referendum. Being consultative, it will not bind any of the parties to the conflict to act in a certain way, but is merely a manifestation of the will of the people. The Supreme Court of Canada, in the case regarding the attempted secession of the province Quebec in 1998, adds an interesting aspect to this debate. The Supreme Court argues, that in case of a referendum on independence being held and the separatists win, this victory shall spark a political discussion between the separatist entity and the central government in question.<sup>150</sup> The Catalan separatists could use this to their advantage to be able to initiate negotiations with the Spanish government.

In conclusion, despite a referendum being unconstitutional, it would seem to be protected by international human rights law under the freedom of expression, assembly and political participation. The Spanish state could not legally interrupt or prevent such a referendum. However, with the referendum being of a consultative nature, its consequences are uncertain, but could, following the case of Quebec, be the starting point for a political agreement between the two sides.

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<sup>147</sup> See Chapter 2.3.2.

<sup>148</sup> UN Human Rights Committee, CCPR Draft General Comment No. 37: Article 21, March 6<sup>th</sup> 2020 para. 56.

<sup>149</sup> UN Human Rights Committee, CCPR Draft General Comment No. 37: Article 21, March 6<sup>th</sup> 2020 para. 8.

<sup>150</sup> Reference re Secesion of Quebec para. 88.

## 4.3 Declaring Independence

### 4.3.1 A unilateral declaration of independence

It was concluded in the previous section that the Catalans can conduct a consultative referendum under protection of fundamental human rights such as the freedom of expression, assembly and the right to participate in public affairs.

The next step in investigating a “right to decide” as a justification for independence would be to examine the possibility of legally issuing a unilateral declaration of independence following a referendum. In 2017 *La Generalitat* promised to declare independence in case of separatist victory, and such a declaration was issued in October of 2017.<sup>151</sup> If the Spanish state and the Catalan separatists do not reach a political agreement regarding secession in the future, a referendum organised independently by the separatists would in case of victory likely lead to another unilateral declaration of independence, due to the lack of consent by the Spanish state.

As for national law, based on the conclusion drawn in Chapter 3, it is prohibited for an autonomous community to secede from Spain. A unilateral declaration of independence would therefore be considered invalid in the eyes of the Spanish state.

With regards to international law on the other hand, just because the Catalans do not have a right to secession, that does not mean declaring independence would be prohibited in the eyes of international law. In the following, the legality of a unilateral declaration of independence according to international law will be examined. Due to the lack of international legal documents regulating the issue of unilateral declarations of independence, the Kosovo Advisory Opinion, in combination with the analysis and conclusions drawn by legal scholars, will be the main basis of the following discussion. Advisory opinions from the ICJ are not legally binding, but they do provide information on the current developments within international law and carry legal weight and moral authority.<sup>152</sup>

### 4.3.2 The Kosovo Advisory Opinion

#### 4.3.2.1 *Background and significance*

The legality of a unilateral declaration of independence was evaluated by the ICJ in an Advisory Opinion from 2010 concerning the case of Kosovo.<sup>153</sup> The Advisory Opinion followed a unilateral declaration of independence issued by the Serbian province Kosovo in 2008. This case is of high significance when investigating the legality of a unilateral declaration of independence, since there

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<sup>151</sup> See Chapter 2.3.2.

<sup>152</sup> ICJ, ‘Advisory Jurisdiction’.

<sup>153</sup> Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion), International Court of Justice (ICJ), July 22<sup>nd</sup> 2010.

is little regulation regarding the topic. Three main points of interest brought up by the ICJ will be discussed in the following: The importance of who issues the unilateral declaration of independence, how international law regulates (or does not regulate) such a declaration and how a declaration relates to the principle of territorial integrity.

Following the division of the Federal Republic of Yugoslavia during the 1990's, Kosovo became part of the federation of Serbia-Montenegro.<sup>154</sup> Kosovo was dominated by Albanians, but was also home to a Serb minority. In 1989 Kosovo's previously enjoyed special autonomy was abolished. The Kosovars suffered ill-treatment from the Serbian regime such as arbitrary detentions, killings, forced expulsions and property destruction.<sup>155</sup> An increased demand for independence and/or autonomy for the province of Kosovo during that time resulted in the Serbian government sending police and military to the province. This led to an increased UN presence in the area in the 1990's in an attempt to reach an agreement between the separatists in Kosovo and the Serbians. Such an agreement was not reached however, leading the Parliament of Kosovo to declare Kosovo to be "an independent and sovereign state".<sup>156</sup> The independence declaration led the UN General Assembly, after pressure from Serbia, to seek an advisory opinion from the ICJ.<sup>157</sup> The question posed by the General Assembly to the ICJ was whether or not Kosovo's declaration of independence was "in accordance with international law".<sup>158</sup>

#### **4.3.2.2 Who issued the UDI?**

One first step the ICJ takes when evaluating the legality and consequences of the independence declaration is whether or not the declaration is within the scope of application of international law. One essential question that is considered is whether or not the group issuing the independence declaration was legally qualified to do so.<sup>159</sup> The ICJ states that the declaration needs to be issued by an "effective authority", meaning a declaration of independence made by an individual or a group not representing the people will have no effects and will therefore fall outside the scope of international law.<sup>160</sup>

In the case of Kosovo, the ICJ states that despite the declaration being issued by a group of people forming part of the self-governing institution in Kosovo, the group of people issuing the declaration acted outside their capacity as the self-governing institution when declaring

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<sup>154</sup> Panagiota, 'Human Rights Violations in Kosovo' p. 199.

<sup>155</sup> Ibid. p. 198.

<sup>156</sup> See the Kosovo Advisory Opinion para. 58-74.

<sup>157</sup> Milanovic M. and Wood M., 'The Law and Politics of the Kosovo Advisory Opinion' p. 9.

<sup>158</sup> See the Kosovo Advisory Opinion para. 49.

<sup>159</sup> See the Kosovo Advisory Opinion para. 102.

<sup>160</sup> Ibid. para. 109.

independence.<sup>161</sup> In other words, the declaration is considered not to be issued by the Kosovar self-government.<sup>162</sup> The Court concluded that the authors of the declaration acted outside their role as the self-government of Kosovo, and that they rather acted in their capacity as representatives of the people of Kosovo.<sup>163</sup> The declaration was therefore considered to be issued by a group of people representing the people of Kosovo and with that considered to be an issue of international law.

#### **4.3.2.3 *The regulation of UDIs in international law***

In the case of Kosovo, the Court also evaluates if and how unilateral declarations of independence are regulated in international law.

The Court concludes that some unilateral declarations of independence in the past have sometimes been deemed illegal, and sometimes they have successfully led to the creation of a new state.<sup>164</sup> Declarations made by South Rhodesia and Northern Cyprus for example have been considered illegal in the eyes of international law by the UN Security Council.<sup>165</sup> These declarations were however not considered illegal due to their unilateral character, but rather due to their connection with unlawful use of violence and violations of *jus cogens* norms.<sup>166</sup> In the case of Kosovo the ICJ concluded that in cases where a declaration of independence is *not* the result of violence or a breach of a *jus cogens* norm, the declaration is neither prohibited nor allowed in the eyes of international law.<sup>167</sup>

By claiming that the lack of a prohibition on unilateral declarations of independence makes issuing such declarations not prohibited nor allowed, some scholars argue that the ICJ is applying the Lotus principle to cases of unilateral declarations of independence.<sup>168</sup> The Lotus principle establishes that sovereign states are free to act however they want as long as they do not violate international law, in other words, what is not explicitly prohibited is allowed.<sup>169</sup> The application of this principle in cases of unilateral declarations of independence would mean that because such a declaration generally is not prohibited in international law, the declaration is allowed. Worth mentioning however, is that in the case of Kosovo, the ICJ does not explicitly mention that the

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<sup>161</sup> Ibid. para. 105.

<sup>162</sup> Ibid. para. 109.

<sup>163</sup> Ibid.

<sup>164</sup> Ibid. para. 79.

<sup>165</sup> See Security Council Resolution 216 (1965) and 217 (1965) as well as Security Council Resolution 541 (1983).

<sup>166</sup> Kosovo Advisory Opinion para. 81.

<sup>167</sup> Ibid.

<sup>168</sup> Peters, 'Does Kosovo Lie in the Lotus-Land of Freedom' p. 100.

<sup>169</sup> Ibid.

principle is applied, and it is therefore unclear whether an application of the principle can make unilateral declarations of independence permissible in the eyes of international law.

The supposed possibility of applying the Lotus principle in order to make unilateral declarations of independence permissible has been met with criticism amongst scholars.<sup>170</sup> One main problem with its application in cases of unilateral declarations of independence, is that the principle concerns sovereign states, meaning its purpose is to justify the actions of a state. Since a declaration of independence is issued by an entity that is not yet a state, it cannot be considered an action committed by a sovereign state. This means that the declaration cannot be justified using the Lotus principle.<sup>171</sup>

Due to the ambiguity of the ICJ in the case of Kosovo regarding the Lotus principle, the case seemingly cannot be used as grounds for the argument that the Lotus principle can justify a declaration of independence.<sup>172</sup> The Advisory Opinion can either be read as allowing declarations of independence based on the Lotus principle, or it can be read as simply stating that international law is neutral with regards to unilateral declarations of independence. Irrespective of which conclusion one might draw from the case, the ICJ indisputably avoids the question whether a right to secession exists or not, and under what circumstances such a right would exist, and instead states that the Kosovars issuing a unilateral declaration independence was not illegal in the eyes of international law.

Finally, the ICJ also clarifies the meaning and scope of application of territorial integrity, in order to address the issue whether the declaration of independence can be said to violate the territorial integrity of Serbia and therefore be considered illegal in the eyes of international law. The ICJ concludes that a unilateral declaration of independence issued by a region of a state wishing to secede is not a breach of the territorial integrity of the mother state in question. The principle of territorial integrity is only applicable to relations between states. An entity of a state wanting to separate is not a separate state meaning the mother state cannot claim the declaration of independence is against its territorial integrity.<sup>173</sup>

### **4.3.3 A Catalan UDI**

Drawing extensive conclusions based on the Kosovo Advisory Opinion shall be done with care, since the circumstances in the case were special, and the Kosovars had suffered human rights violations prior to their declaration. In addition, the case is ambiguous and somewhat unclear. It

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<sup>170</sup> Walter, 'Self-Determination and Secession in International Law' p. 23.

<sup>171</sup> Peters, 'Does Kosovo Lie in the Lotus-Land of Freedom' p. 100.

<sup>172</sup> Ibid. p. 101.

<sup>173</sup> Kosovo Advisory Opinion para. 80.

does however give some guidance as to how unilateral declarations of independence shall be viewed according to international law.

The group or the person issuing the unilateral declaration of independence, has to be the effective authority of the region in question for the declaration to be relevant to the international community. In the case of Catalonia, the declaration of independence in 2017 was issued by *La Generalitat* and a future declaration would likely be issued by the same body. *La Generalitat* is the effective authority of Catalonia. It is also democratically elected and is therefore representative of the Catalan people.<sup>174</sup> By the declaration being issued by them, the declaration falls within the scope of international law as established in the case concerning Kosovo.

Furthermore, the ICJ remains silent on whether or not a secessionist group can claim a right to independence, but the ICJ seems to establish that international law does not prohibit a declaration of independence. The ICJ also states that a unilateral declaration of independence cannot be considered to be a violation of the mother state's territorial integrity, since the principle of territorial integrity is only applicable between states.

In conclusion, regarding case of Catalonia, *La Generalitat* would be able to unilaterally declare independence, since there is no prohibition against doing so. The declaration of independence issued in 2017 cannot therefore be considered illegal in the eyes of international law. The Spanish central government cannot claim that an independence declaration would be a violation of Spain's territorial integrity, since Catalonia is not (yet) a sovereign state. However, a declaration of independence on its own does not necessarily mean a new sovereign state has been formed.<sup>175</sup> The declaration would still be illegal in the eyes of Spanish national law. The consequences of a unilateral declaration of independence issued by Catalonia may therefore be limited. This issue will be discussed further in the following section concerning international recognition.

## 4.4 Recognition by Other States

### 4.4.1 The theories of recognition and UN membership

It has been concluded that the right to decide would entail a right for the Catalans to hold a referendum protected by established international human rights, and in case of victory, the Catalans could issue a unilateral declaration of independence. This leads to the question whether or not Catalonia will be able to operate effectively as a state after declaring independence. A vital part of this discussion is the meaning and importance of recognition of Catalonia by other states. As

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<sup>174</sup> See Chapter 2.4.2.

<sup>175</sup> Rickart, 'Emerging Issues: To Be or Not to Be, That Is the Statehood Question' p. 146.

previously stated, Catalonia declared independence in October of 2017, but the new state did not receive recognition from any sovereign state.<sup>176</sup>

In order to determine Catalonia's possibility of receiving international recognition, the regulation of recognition in international treaties, conventions and customary law regarding the question needs to be investigated.

There are two main theories that dominate the view on state recognition within international law: the constitutive theory and the declaratory theory. According to the constitutive theory, an entity becomes a state when it is recognised by the international community. In other words, without recognition from other states, statehood cannot be achieved, despite the entity fulfilling all of the statehood criteria as established in the Montevideo Convention.<sup>177</sup> The declaratory theory on the other hand, establishes that recognition by other states is only to be viewed as a confirmation of an already existing state. This means that the state exists irrespective of it being recognised by other states or not, as long as it fulfils the statehood criteria and has declared independence.<sup>178</sup>

In practice, the issue of recognition tends to be governed by a combination of the declaratory and the constitutive theories.<sup>179</sup> Just because an entity otherwise fulfilling the statehood criteria is not recognised by a certain state, that does not give the non-recognising state the right to intervene in the entity's internal affairs, to deny the entity the right to exercise state rights under international law or to ignore its nationality.<sup>180</sup> However, if a self-declared state is not recognised internationally it will not be able to enter into relations with other states. A non-recognised state will furthermore be denied access into the UN, and diplomatic relations with other states will be severely limited.<sup>181</sup> Examples of states that have declared independence but have received limited recognition are Palestine and Abkhazia. Palestine has received recognition from 139 states and has acceded to international treaties. The legitimacy and effects of Palestine accession to international treaties is debated.<sup>182</sup> Furthermore, Palestine has been denied UN membership, but holds the status of an observer, which allows Palestine to participate in some activities taking place in the General Assembly without having all the benefits of a UN membership.<sup>183</sup> Self-declared states such as Abkhazia have received far more limited recognition than Palestine, and have as a result not

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<sup>176</sup> Porteiro, 'Nadie en el mundo reconoce a Cataluña'.

<sup>177</sup> Shaw, 'International Law', p. 330.

<sup>178</sup> Ibid.

<sup>179</sup> Crawford, 'The Creation of States in International Law' p. 27.

<sup>180</sup> Ibid.

<sup>181</sup> Geldenhuys, 'Secession and Contested States' p. 286 and Ker-Lindsay, 'Engagement without recognition: the limits of diplomatic interactions with contested states' p. 276.

<sup>182</sup> Power and Koek, 'International Legal Personality for Palestine' p. 51.

<sup>183</sup> General Assembly Resolution 3237 (XXIX) Observer status for the Palestine Liberation Organisation November 22<sup>nd</sup> 1974.

obtained neither UN membership nor observer status and have few diplomatic relations.<sup>184</sup> Achieving international recognition is therefore important in order for the state to be able to operate effectively.

I would therefore like to claim that it should be less important if one is a promoter of the declarative or of the constitutive theory, since recognition undoubtedly is an important key to be able to operate effectively in today's globalised world. Observing state practice, I find it undisputable that despite a unilateral declaration of independence bringing a new state into existence according to the declaratory theory, such a declaration will have little meaning in practice, since the self-proclaimed state will not be able effectively act as a sovereign state with international legal personality. Working towards international recognition shall therefore be of a high priority for all independence movements including Catalonia.

## **4.4.2 Recognition following secession**

### ***4.4.2.1 International treaties and declarations***

The principle of territorial integrity is one of the fundamental pillars within international law, meaning that the general view of international law is that current territorial boundaries shall be upheld.<sup>185</sup> Article 2(7) of the UN Charter establishes the non-intervention principle, meaning that a state shall not intervene in other states' internal affairs. An early or otherwise illegitimate recognition of a separatist region could be considered a violation of this principle.

The Friendly Relations Declaration seemingly reinforces the principle of territorial integrity by stating that "Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country". A state recognising a separatist entity following the entity's unilateral declaration of independence would be a way to disrupt the national unity or territorial integrity of the mother state in question. This principle in the Friendly Relations Declaration could therefore be interpreted as an obligation for states not to recognise a secessionist entity that has unilaterally declared independence.<sup>186</sup>

Furthermore, Article 42(2) of the ARSIWA establishes that "no State (...) shall recognise as lawful a situation created by a serious breach [of *jus cogens*] nor render aid or assistance in maintaining the situation". This is seemingly an explicit obligation for states not to recognise a newly declared state that has achieved independence by violating *jus cogens* norms. Examples could be independence achieved through racial discrimination, crimes against humanity, genocide or

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<sup>184</sup> United Nations, 'Non-member States'

<sup>185</sup> See Chapter 3.1.3.

<sup>186</sup> Vidmar, 'Unilateral declarations of independence in international law' p. 74.

torture.<sup>187</sup> This can be observed in the case of South Rhodesia where the racial discriminatory regime resulted in the UN pleading for the international community not to recognise South Rhodesia as an independent state. South Rhodesia did not achieve international recognition.<sup>188</sup>

Spain's membership in the EU may also affect the willingness of other EU member states to recognise a self-declared Catalan state. The importance of respect for the territorial integrity of the member states is established in Article 4(2) of the TEU. In other words, the EU shall not interfere in the domestic affairs of its member states. Recognising an entity that has unilaterally declared independence against the Constitution of its mother state would be against Article 4(2) of the TEU.<sup>189</sup> The EU has issued opinions on recognition of newly declared states, acting as collective declarations of recognition, in the past. Such opinions have however never concerned an entity seceding from a EU member state. In addition, recognition of the entity in question have been met with full consensus among all EU member states.<sup>190</sup>

#### **4.4.2.2 State practice**

With regards to state practice, the international community rarely recognises newly declared states that have been formed as a result of a separatist movement without consent of the mother state.<sup>191</sup> Examples of the international community's reluctance to recognise secessionist regions can be observed in state practice. Regions having unilaterally declared independence include Abkhazia, South Ossetia (both from Georgia), Somaliland (from Somalia), Transnistria (from Moldova) and the Turkish Republic of Northern Cyprus (from Cyprus). Some of these regions have not achieved recognition from any states, and some have received recognition from a limited number of states. None of them have UN membership.<sup>192</sup> Their possibilities to operate effectively as independent states are therefore severely limited.<sup>193</sup>

There are however examples of regions that have managed to successfully secede from their mother states, such as South Sudan and Eritrea. They have both achieved international recognition and they have become members of the UN. In the case of South Sudan, an agreement was signed between the central government of Sudan and the region wanting to secede. In accordance with the agreement, the region was allowed to organise a referendum that, in case of a separatist victory,

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<sup>187</sup> See Commentary to Article 26 para. 2 ILC Articles on Responsibility of States for Internationally Wrongful Acts, 2001.

<sup>188</sup> ICJ Report: Racial Discrimination and Repression in Southern Rhodesia, p. 10, General Assembly. Resolution 2151 (XXI) 17th of November 1966 and Security Council Resolution 216 (1965).

<sup>189</sup> Piris, 'La Unión Europea, Cataluña y Escocia' p. 111.

<sup>190</sup> Newman and Visoka, 'EU Practice of State Recognition' p. 778.

<sup>191</sup> Ker-Lindsay, 'The Foreign Policy of Counter Secession: Preventing the Recognition of Contested States' p. 24.

<sup>192</sup> Ker-Lindsay, 'The Foreign Policy of Counter Secession: Preventing the Recognition of Contested States' p. 39.

<sup>193</sup> See Chapter 4.4.1.

would lead to independence.<sup>194</sup> After the separatists won the election in 2011, South Sudan declared independence. South Sudan was recognised internationally shortly thereafter and earned UN membership later on the same year.<sup>195</sup> In the case of Eritrea, a referendum on independence was organised by the UN. After a separatist victory, Eritrea successfully seceded from Ethiopia and was recognised by the international community and admitted to the UN shortly after the independence declaration. The independence of both South Sudan and Eritrea were the results of a political agreement, and in both cases the former mother states were quick to recognise the new state after the declaration of independence had been issued.<sup>196</sup> The consent of the mother state, which was the result of an agreement between the opposing parties, was likely the reason for the willingness of the international community to recognise the new states.

There are also a number of states that have successfully gained international recognition, despite the lack of an agreement between the separatist region and its former mother state. Examples of states like this are Bangladesh and Croatia. As discussed previously, Bangladesh (known before as East Pakistan) was formerly a part of Pakistan. Due to years of denied internal self-determination and violence towards East Pakistan by the central government, the region successfully seceded from Pakistan in 1970 and received recognition from the majority of the international community as the new sovereign state of Bangladesh in 1972. Pakistan itself eventually recognised Bangladesh in 1974 and shortly afterwards Bangladesh earned UN membership.<sup>197</sup> Croatia is another state that was internationally recognised after a unilateral declaration of independence.<sup>198</sup> The Croats had at the time of independence been oppressed by the central regime and they were victims of grave human rights violations.<sup>199</sup>

#### **4.4.3 The potential recognition of Catalonia**

As has been discussed above, international treaties and declarations stress the importance of territorial integrity. The importance of territorial integrity is prominent in the legally binding UN Charter, and further reinforced in non-binding declarations such as the Friendly Relations Declaration and the ARSIWA. Despite the latter two not being legally binding, they do provide guidance as to the *opinio juris* of the international community and could be an indicator of customary law. By valuing territorial integrity so highly, it could be viewed as an implicit obligation for states

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<sup>194</sup> Nathan, 'The South Sudan Referendum' p. 25.

<sup>195</sup> UN News, 'UN welcomes South Sudan as 193rd Member State'.

<sup>196</sup> Akongit, 'Impact of Political Stability on Economic Development: Case of South Sudan' p. 90 and Sturman, 'Case Study 10: Eritrea: A Belated Post-Colonial Secession' p. 497.

<sup>197</sup> Vidmar, 'Remedial Secession in International Law: Theory and (Lack of) Practice', p. 43.

<sup>198</sup> Ramet, 'Disputes about the Dissolution of Yugoslavia and its Wake' p. 42.

<sup>199</sup> Human Rights Watch World Report 1992.

not to recognise regions that have unilaterally declared independence without the consent of the mother state.

This can also be seen in state practice, where the international community seems unwilling to recognise regions that have unilaterally declared independence without prior consent of the mother state. The exception to this seems to be situations where the entity in question fulfils not only the statehood criteria in the Montevideo Convention, but also when its people have been subject to serious human rights violations. In other words, international recognition seems to coincide with whether or not the group has a right to external self-determination as discussed in Chapter 3.3. Without a state having a right to external self-determination, they will likely not receive international recognition and they will not be able to operate effectively as a sovereign state despite having declared independence. However, even if the newly declared state receives some international recognition despite the lack of consent from the former mother state, the possibility of a UN membership needs to be evaluated.

The vast majority of states that have been admitted into the UN after 1945 have been former colonies, however some secessionist entities have managed to earn membership. According to my study of the current UN member states, all member states that have been created as a result of secession, have received recognition from their former mother state prior to their UN membership. As was discussed previously regarding Bangladesh, Bangladesh was not admitted to the UN until *after* having received recognition from its former mother state Pakistan. A conclusion that could be drawn from this is that the UN is reluctant admit new members that have been created through secession, unless their mother state agrees. An example of this is Kosovo which, as previously stated, has been recognised by 97 of the 193 UN member states, former mother state Serbia not being one of the recognising states. Kosovo has not gained UN membership.<sup>200</sup>

Receiving recognition from the EU could be a valuable first step for Catalonia to achieve international recognition. I would however argue that there is little possibility that the EU would recognise Catalonia. The principle of territorial integrity is highly valued within EU law, and it would be infringed upon if Catalonia was to be recognised as a new state independent from Spain. A collective recognition of Catalonia from the EU would be valuable for Catalonia since the EU is an important actor in the international community and it could possibility steer the international opinion regarding Catalonia. However, the EU has not agreed to collectively recognise a new state if there is not full consensus amongst the EU member states. This means Catalonia is dependent on Spain's consent in order to earn collective recognition from the EU. Considering the current

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<sup>200</sup> United Nations, 'Member States'.

situation, Catalonia is unlikely to receive recognition from Spain and therefore recognition from the EU seems highly unlikely.

In conclusion, territorial integrity is of high importance within international law, and recognising a secessionist region could violate this principle. Even though a region could claim to achieve statehood without international recognition based on the constitutive theory, this statehood would have little meaning in practice, since the “state” would not be able to operate effectively. Recognition is therefore crucial. A self-declared state seems to have two ways to achieve recognition: Either if the mother state has consented to the secession, or, if the region wishing to secede can claim a *right* to external self-determination, for example by its people having been victims of grave human rights violations. However, despite a state gaining recognition by other states, that does not mean they are automatically admitted into the UN. For UN membership, consent of the mother state is invaluable, and getting admitted into the UN seems nearly impossible if the new state is not recognised by its former mother state. This seemingly leads the secessionist region back to square one: Attempting to achieve recognition from the former mother state is crucial in order to achieve international recognition, UN membership and finally the possibility to act independently as a sovereign state within the international community.

In order for Catalonia to effectively secede from Spain and act as a sovereign state, international recognition is necessary. By observing state practice, one can conclude that under the current circumstances, Catalonia cannot claim a right to external self-determination and therefore Spain’s recognition is necessary in order for Catalonia to achieve international recognition. Spain’s recognition is also necessary in order for Catalonia to get admitted into the UN. The unilateral declaration of independence that may follow a referendum will in other words be without any real effects, if Spain does not give its consent.



## 5 Conclusion and Proposed Solutions

### 5.1 Current Possibilities to Achieve Independence

Catalonia fulfils all the criteria necessary to become an independent, sovereign state. It has a permanent population, a defined territory, an effective government and, despite Catalonia not currently being able to reach agreements with other states, it would be able to do so if it were to be recognised as an independent state. Today, multiple complex legal issues containing both Spanish Constitutional law and international law, make the road to an independent Catalan Republic difficult.

It can be concluded that international law does not contain any clear and explicit regulations on secession, making it within the domestic jurisdiction of Spain to regulate the case of Catalonia. The Spanish Constitution implicitly prohibits secession, seemingly making it impossible for the Catalans to secede. International law does however prevail over Spanish national law, and international treaties and conventions ratified by Spain shall be considered to form a part of Spanish internal law. If there is international law governing a situation, or parts of a situation, it will be applied despite it not being in accordance with the Spanish Constitution.<sup>201</sup>

The Catalan separatists tend to present two main arguments when attempting to legally justify their demand for independence from Spain: Their right to self-determination and their “right to decide”.

With regard to the right to self-determination, the Catalans, like any other people, have a right to internal self-determination. This means they have a right to develop economically, socially and culturally while remaining a part of the Spanish territory.

The right to external self-determination is however more controversial. If the Catalans were able to claim a right to external self-determination they would be able to successfully gain independence from Spain. A right to external self-determination has been the basis of state creation in the past, most commonly during the decolonisation period, but it has also led to independence in a few, rather extreme, cases in more recent years. The Catalans are however unlikely to be able to claim a right to external self-determination. They are not a colonised people, and they are not suffering the oppression required to be able to claim a right to external self-determination. They are not denied access to any fundamental human rights, and as an autonomous community within Spain they enjoy a large degree of independence.

In conclusion, when the Catalans claim a right to self-determination as a basis for secession it has to be specified which type of self-determination that is being referred to. They have a right to

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<sup>201</sup> Art. 27 VCLT and Art. 96 the Spanish Constitution.

internal self-determination, this will not however lead to secession. External self-determination would entail a right to separation from Spain, but the Catalans do not under the current circumstances have such a right.

The second possible basis for secession that has been investigated is the “right to decide”. The right as such does not have any foundation in national or international law, but it can be considered to consist of two issues that in combination make up what the separatists refer to as a “right to decide”: The right to hold a referendum and the right to unilaterally declare independence.

As previously discussed, the Catalans have attempted to organise referendums, both supposedly legally binding ones, and purely consultative ones. According to Spanish national law, organising a legally binding referendum would not be possible due to the restrictions in the Spanish Constitution. A consultative referendum could theoretically be organised, but it would require consent of the Spanish government or an amendment of the Spanish Constitution. Furthermore, the Catalans cannot rely on international law to claim a right to hold a referendum. However, I would argue that despite a consultative referendum being unconstitutional, it would be protected under international law. This protection would stem from the freedom of expression, assembly and political participation, all being rights and freedoms that are guaranteed to all Spanish citizens. This would mean that a consultative referendum may be unconstitutional to organise, but it cannot legally be prevented or interrupted by the Spanish state. In other words, I would claim that the actions by the Spanish state with regards to the referendum in 2017 were against international human rights law. Worth noting however, is that these human rights violations are not serious enough to give rise to external self-determination. The Catalans would however be able to organise a new consultative referendum on the basis of human rights law, giving an indication of the degree of support amongst the Catalans for independence.

The result of a future consultative referendum is unclear, but after the referendum in 2017 the Catalan Parliament unilaterally declared independence. If a future referendum were to be held and protected by human rights law, another unilateral declaration of independence could follow. Unilateral declarations of independence are not valid according to the Spanish Constitution, due to the sovereignty and indivisibility of the Spanish state. International law on the other hand, is silent on the matter, but based on the Kosovo Advisory Opinion, it seems as if the ICJ establishes that such a declaration is not explicitly prohibited, possibly implying that it is therefore allowed.

With regards to the supposed “right to decide”, the right as such does not exist and does not on its own make up a valid legal argument to form a basis for the claim for independence. The right however, seemingly consists of two separate legal issues, a referendum and a unilateral declaration of independence, that can legally be exercised with basis in international law.

Despite a referendum being conducted and a unilateral declaration of independence being declared in accordance with international law, the action will be considered illegal in the eyes of the Spanish Constitution. Spain's recognition of a new Catalan state is therefore, in my opinion, highly unlikely. This in turn opens up for the last issue discussed in this thesis; the significance of recognition.

Recognition becomes of utmost importance, since despite the Catalans unilaterally declaring independence after a consultative referendum, international recognition will ultimately determine their future as a state. As previously discussed, international recognition is an important part of becoming a state, since recognition will allow the newly declared state to enter into relations with other states. Regarding Catalonia, the region has not been recognised as a state by any UN Member. The international community seems to be reluctant to recognise new states in general, unless they have been formed following extreme events, such as severe human rights violations. Without Spain's recognition, and without Catalonia being able to claim a right to external self-determination, I think the international community will not recognise Catalonia as an independent state. If the Catalans had a right to external self-determination they would however likely be recognised by the international community. However, the Catalans cannot claim such a right considering the current circumstances. Furthermore, a UN membership seems to be the last step towards achieving an effective statehood. When studying the history of the current UN Member States, one can observe that without the consent of the mother state, no entity created through secession has managed to gain UN membership. This also shows the importance of Spain's recognition.

In conclusion, the claim for self-determination may be a valid argument to support a secession from Spain. The circumstances do however need to be more extreme in order for such a right to be valid. Considering the current situation in Catalonia, the Catalans can only claim a right to internal self-determination, a right which does not entail secession, but allows the Catalans to develop as a people while remaining a part of Spain.

In terms of a "right to decide", such a right does not exist but could entail a possibility to hold a referendum protected by international human rights law and a possibility to unilaterally declare independence, since such a declaration is not prohibited in international law. Even though independence theoretically could be achieved that way, it would have little to no effect without international recognition and UN membership. This leads to the conclusion that independence is seemingly impossible without the consent of the Spanish state, unless the circumstances change massively and the Catalans fall victims of grave human rights violations or serious oppression by the Spanish state.

The dependency on Spanish consent has resulted in an involuntary stalemate between the separatists and the Spanish state. The conflict remains and the arguments posed by the Catalan separatists are not enough to lead to a successful separation from Spain. Considering the current national and international legal framework, the amount of available solutions to the conflict is limited. In the following section I will therefore discuss my proposed solutions to this conflict based on the current legal situation, taking into account both the Spanish Constitution and international law.

## 5.2 Proposed Solutions

### 5.2.1 Leave it be

Currently in Spain, the parties are not actively negotiating in order to find a solution. I believe this lack of active solution-seeking will continue in Spain in the close future lying ahead. I believe this passivity risks worsening the situation. In addition, according to a public opinion poll conducted in 2019, only 5 percent of the Catalans and 11.9 percent of non-Catalan Spaniards think continued passivity is a viable solution.<sup>202</sup>

If this passivity continues, I think the Catalans may once again take matters into their own hands. They may organise another referendum that, based on the results from the previous referendums, likely would result in a separatist victory. The Catalans may unilaterally declare independence again, which they are not prohibited to do, but they will not be recognised by Spain and they are unlikely to be recognised by any other state. Such a declaration of independence would therefore be without any practical value. Using force to achieve independence would not be a viable solution either, due to it being prohibited in international law and such a declaration would be considered illegal.

If the Catalan separatists do not organise a referendum or take any other active steps to achieve independence, I believe the independence movement will grow even stronger. I think that when people, in this case the Catalans, are prevented from voicing their opinions and prohibited to decide on their own future, it will cause the people to feel oppressed by the central state. I think it likely will cause the separatists to gain more support.

In conclusion, letting the situation progress without actively taking steps towards finding a solution is not, in my opinion, a sustainable way forward. In the following, I will present three possible ways forward: Organising a referendum and amending the Constitution, give Catalonia more autonomy within Spain and/or using an international mediator.

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<sup>202</sup> Castro, 'España apuesta por el diálogo para resolver el conflicto catalán'.

### 5.2.2 Organising a referendum

I would argue that one important step towards finding a stable, peaceful and sustainable solution to the conflict would be to hold a referendum on independence. Even though it seems to be theoretically possible to organise a referendum protected by international human rights and without consent of the Spanish state, I believe this would be an unsustainable solution. Organising a referendum against the Constitution would likely have little effect in practice and is likely to spread further hatred between the two opposing groups. I think a referendum in accordance with Spanish national law would be the most sustainable way forward.

A first option would be a referendum in accordance with the current wording of the Constitution. Such a consultative referendum can be organised according to the Constitution. This referendum would have to be called on by the King after authorisation by the Congress. An exception could be made from the provision that all Spanish citizens should be allowed to vote, making it possible to only allow Catalans to vote. This referendum would however only be consultative, but even so, it could spark a political discussion between the two sides on the conflict. This could be an important first step towards finding a viable solution.

A second option would be to amend the Constitution. I would argue there are two main ways such an amendment could be made: Either to allow autonomous regions to independently organise consultative referendums and/or making it possible to organise legally binding referendums. Important to consider is that a constitutional amendment would require an absolute majority of the votes in the Congress. One can only speculate what the results of such a voting in the Congress would be, but considering that the current parliamentary composition consists of a majority of anti-independence parties, I would consider it unlikely that such amendments would gain approval by an absolute majority.<sup>203</sup>

Out of the two presented options of holding a referendum, I believe the first option would be the most sustainable one, i.e. holding the referendum in accordance with the current wording of the Constitution. It would however require a political agreement to be made between the two parties in order for such a referendum to be organised. In addition to procedurally organising the referendum there is one other issue: the fact that the topic of the referendum would be unconstitutional, due to the implicit prohibition on secession in the Constitution.

According to the Constitution, Spain is one sovereign and indivisible nation, implying that secession is prohibited. This provision likely needs to be changed before having a referendum on the independence of Catalonia, if not, the referendum would be organised to decide on a matter

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<sup>203</sup> For current composition in the Congress ‘Congreso de los Diputados: “Congreso de los Diputados – Grupos: XIV Legislatura”’.

impossible to carry out in practice. As previously mentioned, the implicit prohibition on secession is established in the preliminary part of the Spanish Constitution, which results in a more complex amendment procedure. A proposed amendment would require approval of two thirds of the Congress and of the Senate, as well as dissolution of the Parliament. Since a request of constitutional amendment to remove the prohibition on secession has never been formally presented, one can only speculate on what the results of such a voting would be. Considering secessionist parties, including pro-independence parties from other regions than Catalonia, do not exceed two thirds of the Senate nor of the Congress, I would argue for it to be highly unlikely for a suggestion of amendment to be approved.

In conclusion, organising a referendum would be a possible but complicated process that may require constitutional amendments. I would argue that the most sustainable solution would be for the King to call on a referendum after authorisation by the Congress. The referendum should not result in an immediate separation of Catalonia, but would rather act as a consultative vote to investigate what percentage of the Catalans that would wish for a serious political dialogue with the Spanish State regarding their future.

### **5.2.3 Give Catalonia more autonomy within Spain**

Another way of solving the conflict would be to look at the reasons why such a large number of Catalans want to separate from Spain, and examining the possibility of solving these issues while remaining one, unified, country. This way, complicated constitutional amendments could be avoided and Spain could remain a unified State whilst satisfying some of the separatists' demands.

As discussed in Chapter 2, there are many reasons for why some Catalans think they would be better off as an independent State rather than as a part of Spain. Two main reasons are the differences in language and culture between Spain and Catalonia. There is a widespread fear in Catalonia that their language and culture will be oppressed and many Catalans today feel that the Catalan language and culture are not given space and importance in the Spanish society. The economic aspect is another important reason. Many Catalans do not want to be dependent on the Spanish State and are discontent with the division of the governmental funding between the different autonomous communities.

One way to solve this would be by giving Catalonia more autonomy within Spain. This could be done either by making Spain a federal state with all communities enjoying a larger degree of independence, or, by reaching a separate agreement with Catalonia.

With regards to federalisation, as stated in Chapter 3.2.2, federalisation of the communities is explicitly prohibited in the Constitution. Such an arrangement would therefore require an

amendment of the Spanish Constitution. Federal states are characterised by having one central government and a number of states enjoying a large degree of independence.<sup>204</sup> In practice, this would not likely contribute to a big difference, since Spain today is equally decentralised or more decentralised than federal states.<sup>205</sup>

Another option would be for the Spanish state to sign a separate agreement with Catalonia, giving them more economic freedom and freedom in terms of deciding over the Catalan culture and the usage of the Catalan language. One way of going about an economic agreement could be to convert Catalonia into a foral regime like the Basque Country and Navarre. This would allow the Catalans to have more power over their economy and would lessen the feeling of economically contributing a disproportionate amount to other communities. Disadvantages of converting Catalonia into a foral regime would be that it would entail no differences in terms of competences of deciding over language and culture. Converting Catalonia into a foral regime would also likely spread a sense of injustice in other communities. It could be hard for the Spanish state to successfully argue why Catalonia deserves this increased fiscal independence while other communities do not. Furthermore, due to the economic advantage the foral regimes enjoy, it could be economically impossible for all autonomous communities to enjoy these advantages. Another risk with allowing the Catalans more self-government would be that it could lead to discontentment amongst the Catalans. The Catalans want independence for economic, linguistic and cultural reasons, but also because many Catalans experience a feeling of not belonging in Spain and a feeling of being foreigners in their own country. Increased independence within Spain would not take away this feeling. Rather, by attempting to eliminate the independence movements by giving Catalonia economic advantages could spread anger in Catalonia as economic reasons are only a part of a bigger problem.

A third option would be to conclude separate agreement with Catalonia, but not in the form of a foral regime. This agreement could regulate both the economic aspect and the linguistic and cultural aspect. In addition to giving Catalonia more fiscal independence, I believe such an agreement would need to target the points regarding language and culture that upset many Catalans today. It could for example give Catalonia the right to decide on whether the primary language in Catalonia should be Castillian Spanish or Catalan, and give Catalonia the right to decide on when to have public holidays.

A new agreement could however cause similar problems to the problems that may follow a conversion of Catalonia into a foral regime. It could result in a higher demand for more

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<sup>204</sup> Bull T., 'Tyskland' p. 119.

<sup>205</sup> See degree of autonomy in the communities in Chapter 3.2.2.

independence in other communities, and perhaps even sparking more separatist movements in Spain. A large part of the Catalan population want independence and nothing but independence, and compromising with the Spanish state may cause increased discontent within Catalonia.

#### **5.2.4 An international mediator**

Both the suggestions of organising a referendum or giving Catalonia more autonomy within Spain, would require a political agreement between the Spanish state and the Catalan separatists. So far, such an agreement has proven difficult to conclude. One option, promoted by the separatists, is to bring in an international mediator to help solve the conflict.<sup>206</sup> This would allow a third party to make sure a political solution is actively sought for, it could aid in finding an appropriate solution and it could make sure the agreement is being followed properly by both sides.

The EU or the UN may be potential appropriate mediators in the case of Catalonia. One main issue with this solution would be that both the EU and the UN value the principle of territorial integrity highly. Secession is, as previously stated, primarily an issue of domestic jurisdiction.<sup>207</sup> I therefore believe both the EU and the UN would be reluctant to intervene in the conflict without the consent of Spain.

### **5.3 Concluding Remarks**

In summary, forming an independent Catalan State has proven to be difficult. The Catalans do have legal support when claiming a right to self-determination, this self-determination will however not lead to secession from Spain. The supposed “right to decide” as such lacks a legal foundation, but could in theory be exercised by organising a referendum protected by international human rights and followed by a unilateral declaration of independence. A new Catalan state would however likely not be recognised by Spain and therefore not recognised by the international community and with that denied access into the United Nations. The declaration of independence would be without significant meaning in practice.

I believe it is of high importance to find a solution to the Catalan conflict soon. The conflict takes up a lot of space in Spanish politics and prevents the elected politicians from effectively ruling Spain. It would be possible for the King to call on a referendum after authorisation of the Congress. This would result in a referendum held in accordance with the Constitution, whose result would indicate the percentage of Catalans that want to secede from Spain. I would argue it is important to conduct such a referendum in order for the political leaders to know how to proceed. In case of

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<sup>206</sup> Oficina del President: ‘An international mediation for Catalonia’.

<sup>207</sup> See Article 2(7) of the UN Charter and Article 4(2) of the Treaty of the European Union.

a separatist victory, a political negotiation where both parties act in good faith should follow the referendum. With the consent of Spain an international mediator such as the EU could be brought in to help solve the conflict. Based on the negotiations a second referendum could be held, determining which proposed solution, for example increased autonomy, federalisation or an independent sovereign state, that is favoured by the Catalans.

I agree with the pro-unionists that letting Catalonia negotiate a partial secession from Spain could cause a spread of independence movements within Spain and possibly within Europe. This could be detrimental for Spain, the European Union and for the peace and stability in the world. I would however argue that not letting people voice their opinions and ignoring the problem entails a far greater risk.



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