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Secession of States and Self-determination in contemporary International Law

A right of all peoples: the internal dimension of self-determination and its relationship with democracy

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Abstract: Regulated for the first time in article 1 of the 1966 International Covenants on Human Rights, internal self-determination is configured as a collective human right which is linked to the democracy, whose subject is the people constituted in a state and whose content is related to the rights of political participation and the procedural aspects of the democratic principle. So have reminded the Spanish constitutional bodies that have ruled on the Catalan question. The international order does not go far regarding the internal dimension of self-determination and its generic proclamation.

Keywords: Internal self-determination – Democracy - Article 1 of the 1966 International Covenants on Human Rights - Democratic clause - Catalonia

(A) INTRODUCTION

A review of the most relevant literature on the right of peoples to self-determination points to two common features worth emphasizing at the outset: its long-standing link to decolonization and its complexity.

The former casted doubt about the future of the principle after most territories under colonial domination gained their independence. In 1989, a renowned expert on the subject warned that:

> "The question that remains is whether the concept of self-determination will continue to play a legal as well as political role in the future."[1]

Needless to say, time has proved that there was no cause for concern about the vitality of this right. Regarding its complexity, it is unanimously acknowledged, as shown by the following remarks drawn from the literature on the right to self-determination:

> "it is difficult, extraordinarily intertwined with other norms of international law, controversial, topical, and well illustrates the complexities of the law-creating process."[2]

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1 K. Hannum, 'The limits of Sovereignty and Majority Rule: Minorities, Indigenous People and the Right to Autonomy', in E.L. Lutz, H. Hannum and K.J. Burke (eds.), *New Directions in Human Rights* (University of Pennsylvania Press, Philadelphia, 1989), at 9.

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> "No other area of international law is more indeterminate, incoherent, and unprincipled than the law of self-determination."[3]
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> "The international law of self-determination is in fact full of gaps, contradictions, and incongruences."[4]
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> "The right of peoples to self-determination is frustratingly ambiguous. Its subject, 'the people', is not defined and unlikely ever to be so. The right can be used in contradictory ways: to support or split states, to protect sovereignty or to encourage intervention. This vagueness is the perennial attraction of self-determination..."[5]

This paper focuses on the internal dimension of the right to self-determination. Although it has always existed, for decades it has been overshadowed by its external dimension linked to decolonization.[6] In the post-colonial era, self-determination is associated precisely to its internal aspect,[7] but that does not mean neglecting the peoples that have not been able to exercise external self-determination.

(B) THE EMERGENCE OF INTERNAL SELF-DETERMINATION IN THE ACADEMIC LITERATURE

As is well known, in the 1990s a nourished set of doctrinal contributions on the internal dimension of self-determination came to light, with works that are an inexcusable reference[8]; in them is where the expression is consecrated, which today is generally accepted. The Supreme Court of Canada's opinion in *Re Secession of Quebec*[9] in 1998 contributed decisively

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[2] R. Higgins, *Problems and Process. International Law and How We Use It* (Clarendon Press, Oxford, 1994), at. 111.

[3] F. R. Tesón, 'Introduction. *The Conundrum of Self-Determination*', in F.R. Tesón (ed.), *The Theory of Self-Determination* (CUP, 2016), at 1.

[4] E. Rodríguez-Santiago, 'The Evolution of Self-Determination of Peoples in International Law', in F.R. Tesón (ed.), *The Theory of Self-Determination*, *supra* n. 3, at 202.

[5] J. Summers, 'The internal and external aspects of self-determination reconsidered', in D. French (ed.), *Statehood and Self-Determination. Reconciling Tradition and Modernity in International Law* (CUP, 2013), at 229.

[6] L.-A. Sicilianos, *L'ONU et la démocratisation de l'État. Systèmes régionaux et ordre juridique universel* (Pedone, Paris, 2000), at 33; See, in a similar vein, Th. Christakis, *Le droit à l'autodétermination en dehors des situations de décolonisation* (La Documentation Française, Paris, 1999), at 327-328; also, J. Summers, *supra* n. 5, at 230.

[7] As highlighted by Ch. Tomuschat, 'Self-Determination in a Post-Colonial World', in Ch. Tomuschat (ed.), *Modern Law of Self-Determination* (Nijhoff, Dordrecht, 1993), at 1-20.

[8] Th. Franck, 'The Emerging Right to Democratic Governance', 86 *AJIL* (1992), at 46-91; J. Crawford, 'Democracy and International Law', 64 *BYIL* (1993), at 113-133; Ch. Tomuschat (ed.), *Modern Law of Self-Determination*, *supra* n. 7; A. Cassese, *Self-Determination of Peoples. A Legal Reappraisal* (CUP, 1995); Th. Christakis, *Le droit à l'autodétermination en dehors des situations de décolonisation*, *supra* n. 6; M. Koskenniemi, "National self-determination today: problems of legal theory and practice", 43 ICLQ (1994), at 241-269; G. Palmisano, *Nazione Unite e autodeterminazione interna* (Giuffré, Milan, 1997); J. Salmon, "Internal Aspects of the Right to Self-Determination: towards a Democratic Legitimacy Principle", in Ch. Tomuschat (ed.), *Modern Law of Self-Determination*, *supra* n. 7.

[9] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

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to consolidating the concept, which was also integrated into the Spanish literature,[10] although with some reluctance in certain cases.[11]

That set of literature from the 1990s continues to be an essential reference, even after the new wave of publications stemming from the Kosovo affaire and other conflicts.[12] In any case, the content of the right to self-determination remained unchanged.

(C) THE REGULATION OF INTERNAL SELF-DETERMINATION: THE RELEVANT TEXTS

It is notorious that the internal dimension of self-determination was first reflected in Article 1 of the 1966 International Covenants on Human Rights. Its content is the outcome of the negotiations between two groups of states: on the one hand, the socialist and developing countries supported the USSR's initial proposal to include a provision on the right to self-determination, understood as linked to the struggle against colonial domination; on the other, Western states —particularly those with colonies— opposed such inclusion.

The preparatory work took place in the framework of the UN Commission on Human Rights, and the draft covenants were submitted to the Third Committee in 1955, thus setting the wording of Article 1.[13] Paradoxically, as noted by A. Cassese, the strategy of those opposed

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[10] F. Mariño Menéndez, 'Naciones Unidas y el derecho de autodeterminación', in F. Mariño Menéndez (ed.), *Balance y perspectivas de Naciones Unidas en el cincuentenario de su creación* (Univ. Carlos III de Madrid, BOE, 1996), at 98-99; P. Andrés Sáenz de Santa María, "La libre determinación de los pueblos en la nueva sociedad internacional", I *Cursos Euromediterráneos Bancaja de Derecho Internacional*, (1997), at 113-203.

[11] J. Soroeta Liceras, in his 2011 course in Vitoria, warns that "although the distinction between both dimensions is now uncontested, it barely contributed to the debate on its scope, and it has caused more problems than it has solved."Therefore, "we don't see the need to broaden its scope to 'all peoples'."However, he finally accepts it with resignation: "Nevertheless, the debate is now closed... so we will not insist on this issue."("El derecho a la libre determinación de los pueblos en el siglo XXI: entre la realidad y el deseo", *Cursos de Derecho Internacional y Relaciones Internacionales de Vitoria-Gasteiz* (2011), at 468-469). He was not the only one to show some reluctance: V. Abellán pointed out that the concept of internal self-determination deprives the principle of its conceptual autonomy, which is thus limited to the common features with international human rights law. That is why he expressed doubts regarding this new concept and advocated the original formulation linked to colonization ('Consideraciones jurídicas internacionales sobre la libre determinación de los pueblos', in *Soberanía del Estado y Derecho Internacional. Homenaje al profesor Juan Antonio Carrillo Salcedo*, T. I (Sevilla, Universidad de Córdoba, Universidad de Sevilla, Universidad de Málaga, 2005), at 70-72).

[12] To mention but a few works: D. Raič, *Statehood and the Law of Self-Determination* (Kluwer, La Haya, 2002); D. French (ed.), *Statehood and Self-Determination. Reconciling Tradition and Modernity in International Law*, *supra* n. 5; A.K. Coleman, *Resolving Claims to Self-Determination. Is there a role for the International Court of Justice?* (Routledge, London, New York, 2013); J. Vidmar, *Democratic Statehood in International Law. The Emergence of News States in Post-Cold War practice* (Hart Publishing, Oxford/Portland, 2013); J. Fisch, *The Right of Self-Determination of Peoples. The Domestication of an Illusion* (CUP, 2015); P. Hilpold (ed.), *Autonomy and Self-Determination* (Edward Elgar, Cheltenham, 2017).

[13] On the preparatory work, see, *inter alia*, H. Hannum, "Rethinking Self-Determination", 34 *Virginia Journal of International Law* (1993), at 1-69; A. Cassese, *supra* n. 8, at 47-52, Th. CHRISTAKIS, *supra* n. 6, at 335-337. A. Jarillo Aldeanueva has pointed out that Article 1 "was directly proposed by the General Assembly, thus limiting the scope for redrafting within the Human Rights Commission"(*Pueblos y Democracia en Derecho*

to enshrining the principle of self-determination led to a wider regulation than the one initially proposed by its supporters.[14] The date, 1955, is relevant because it shows that section 2 of General Assembly resolution 1514 (XV) merely reproduced what had been agreed 5 years before.[15]

The second relevant text is U.N. General Assembly's Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res. 2625 (XXV). From the outset, Western states were resolved to extend the right to self-determination to all peoples, especially since they considered that it could be a political weapon against authoritarian socialist governments.[16] From the perspective that concerns us here, it is worth noting that the Declaration does not only contain a general enunciation but also what some have called a safeguard clause and others a democratic or representative government clause, depending on whether the focus is on territorial integrity or the substantive content of internal self-determination. It is worth recalling that the original wording "without distinction as to race, creed or colour", which led to different interpretations, was later replaced by the generic expression "without distinction of any kind", already to be found in the 1993 Vienna Declaration and other subsequent instruments.[17]

Considering the dates when the *leading texts* were adopted, 1966 (actually 1955, as explained above) and 1970, the intervening states –and particularly those of the Socialist bloc– could not have foreseen all the subsequent effects, but the potential was already there.[18]

What is the meaning and scope of these texts? As discussed below, the general aspects do not raise doubts, but their scope and boundaries are much less clear.

(D) THE CLEAR ASPECTS OF INTERNAL SELF-DETERMINATION: A COLLECTIVE RIGHT OF ALL PEOPLES LINKED TO THE PRINCIPLE OF DEMOCRACY

There is consensus that Article 1 of the Covenants links self-determination to human rights, the former being construed as a collective right underpinned by the principle of democracy.

Internacional (Tirant lo Blanch, Valencia, 2012), at 67). This author notes that the internal aspects of self-determination were also addressed during the discussions in the Third Committee (*Ibid.*, p. 79).

[14] A. Cassese, *supra* n. 8, at 52.

[15] As pointed out by J. Fisch, *The Right of Self-Determination of Peoples. The Domestication of an Illusion*, *supra* n. 12, at 198.

[16] A. Cassese, *supra* n. 8, at 109.

[17] U.N. General Assembly's Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, GA Res. 50/6, U.N. Millennium Declaration, GA Res 55/2, U.N. 2005 World Summit Outcome, GA Res. 60/1.

[18] On the potential of these UN texts, see L.-A. Sicilianos, *L'ONU et la démocratisation de l'État. Systèmes régionaux et ordre juridique universel*, *supra* n. 6, at 122-126.

Among the Spanish writers, X. Pons Rafols has argued that the Covenants give rise to "a conceptual and systematic relationship between self-determination and human rights",[19] "which remains constant and upholds its preeminence indefinitely."[20] Also, "this connection between self-determination and human rights bears testimony to the value of such important issues as the principle of democracy."[21] A. Mangas Martín relies on the GA Res. 2625 (XXV) to point out that "the internal dimension of self-determination corresponds to the very content of the idea of democracy."[22]

Similar opinions can be found in other countries' literature. Regarding the Covenants, A. Cassese highlights in his reference work that it "is the first time that an international legal rule proclaimed self-determination *qua* the right of a whole people to democratic rule."[23] As highlighted by J. Crawford, Article 1 "asserts the principle of democracy at a collective level",[24] without forgetting the link established by T. M. Franck between internal self-determination and what he calls the "emerging right to the democratic governance."[25] According to L. A. Sicilianos, internal self-determination "constitutes the very essence of democratic legitimacy."[26]

As for the subject of the right, most scholars understand the expression "all peoples"as the people constituted in a state. Therefore, in the words of A. Remiro, "the peoples concerned

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19 "Legalidad internacional y derecho a decidir", 27 *REEI* (2014), at 29; also in *Cataluña: Derecho a decidir y Derecho internacional* (Ed. Reus, Madrid, 2015), at 134.

20 "Legalidad internacional y derecho a decidir", *supra* n. 19, at 29, and *Cataluña: Derecho a decidir y Derecho internacional*, *supra* n. 19, at 136. The idea had already been put forward by A. Cassese, *supra* n. 8, at 101.

21 "Legalidad internacional y derecho a decidir", *supra* n. 19, at 30, and *Cataluña: Derecho a decidir y Derecho internacional*, *supra* n. 19, at 142.

22 "Democracia y Estado de Derecho: respuestas legales desde las Naciones Unidas", 50 *Revista catalana de dret públic*, (June 2015), at 5. In the same vein, F. Mariño Menéndez considers that the ultimate aim is the "realization of democracy" ("Naciones Unidas y el derecho de autodeterminación", in F. Mariño Menéndez (ed.), *Balance y perspectivas de Naciones Unidas en el cincuentenario de su creación*, *supra* n. 10, at 99). J. Roldán Barbero remarks that, in its internal dimension, self-determination "evokes, also in its origins, political democracy" (*Democracia y Derecho internacional* (Civitas, Madrid, 1994, at 162).

23 *Supra* n. 8, at 65-66.

24 "Democracy and International Law", *supra* n. 8, at 16.

25 "The Emerging Right to Democratic Governance", *supra* n. 8, at 65-66. According to P. Thornberry, it is the "democratic aspect" of self-determination ("The Democratic or Internal Aspect of Self-Determination with some remarks on Federalism", in Ch. Tomuschat (ed.), *Modern Law of Self-Determination*, *supra* n. 7, at 120). For H. Thierry, this dimension of self-determination "is confused with a right to democracy" ("L'évolution du droit international", 222 *RCADI* (1990-III), at 169).

26 *Supra* n. 6, at 126.

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are assimilated to the population of the states",[27] while A. Mangas refers to "the people or peoples within a constituted state."[28] Many authors endorse this stance.[29]

Hence, the general ideas are shared, but –as always– the devil is in the details. How far does the principle of democracy underpinning internal self-determination extend? Is it acceptable to claim, as Prof. Mangas does, that "internal self-determination and democracy are ultimately interchangeable concepts"?[30]

The first challenge arises from the fact that the United Nations has acknowledged that there is no single pattern of democracy. The 2005 United Nations World Summit Outcome document states that "while democracies share common features, there is no single model of democracy, that it does not belong to any country or region",[31] and the same has been affirmed by other Resolutions.

(E) THE BLURRED BOUNDARIES OF INTERNAL SELF-DETERMINATION: WHAT IS THE SCOPE OF THE PRINCIPLE OF DEMOCRACY?

Thus, one can attempt to outline the scope of the democratic principle from the concrete perspective of the collective human right to self-determination using two main perspectives: scholarly literature and the comments of the supervisory bodies established by human rights treaties.

(1) The content of internal self-determination in the literature

A review of the scholarly works shows a wide consensus regarding the content of internal self-determination.

For instance, A. Rosas has pointed out three aspects: the people's right to define its own political system; to have its own voice in the amendment of the constitution; and to take part in the conduct of public affairs, including participation in elections and referendums.[32] A. Cassese refers to the people's right to choose freely its own rulers through democratic processes and, in particular, through free elections,[33] considering that internal self-determination presupposes that all members of a population are able to exercise those rights

[27] 'Soberanía del Estado, libre determinación de los pueblos y principio democrático', in F. Mariño Menéndez (ed.), *El Derecho internacional en los albores del siglo XXI. Homenaje al profesor Juan Manuel Castro-Rial* (Trotta, Madrid, 2003), at 553.

[28] *Supra* n. 22, at 5.

[29] See, *inter alia*, D. Raič, *Statehood and the Law of Self-Determination*, *supra* n. 12, at 237 and 284.

[30] *Supra* n. 22, at 6.

[31] GA Res. 60/1, para. 135.

[32] 'Internal Self-Determination', in *Modern Law of Self-Determination*, *supra* n. 7, at 249.

[33] *Supra* n. 8, at 346-348.

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and freedoms allowing the expression of the popular will.[34] D. Raič mentions a right to participation[35] and links internal self-determination to Article 25 of the International Covenant on Civil and Political Rights (ICCPR).[36] H. Hannum invokes that provision as well as Articles 19 (freedom of opinion and expression) and 21 (freedom of association).[37] L.A. Sicilianos points to the people's right to adopt its own constitution and to amend it, as well as the right to choose its rulers and to take part in the conduct of public affairs, including in particular participation in elections.[38] According to this author, the ICCPR contains other provisions conceptually related to the right to self-determination: Article 19 (freedom of expression), 21 (right of peaceful assembly), 22 (freedom of association), 25 (right to take part in the conduct of public affairs), since:

> "only if individuals effectively enjoy the abovementioned rights does the people as a whole have a real right to self-determination, and vice versa."[39]

Among Spanish scholars, X. Pons refers to "the existence of representative governments, the participation of all in public affairs or the respect for the rights of groups and minorities";[40] A. Mangas elaborates on the "right of the whole population to take part in political, economic and cultural life ... [which] is only possible through free elections", pointing out that "the people or peoples in a constituted state are entitled to demand, based on the right to self-determination, respect for the law, (political, cultural, racial, religious...) pluralism, and personal rights and freedoms."[41] F. Mariño has stressed the importance of "respect for all civil and political human rights regarding, in particular, the exercise of the freedoms of thought, expression, assembly, and association, and the right to take part in free, secret and regular elections."[42] In the words of C. Gutiérrez Espada, Article 25 of the ICCPR is "the very core of the peoples' right to internal self-determination."[43]

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[34] It expressly refers to Articles 19, 21, 22 and 25 of the ICCPR (*op. cit.*, p. 53).

[35] *Supra* n. 12, at 237.

[36] *Ibid.*, pp. 274-275.

[37] *Supra* n. 13, at 58-59.

[38] *Supra* n. 6, at 33; also at 125. In his view: "The right to internal self-determination, collective in nature, is conceptually different from the individual political rights. Although on a different level, they are both closely linked in the sense that the collective right is fully realized through the exercise of individual rights" (at 155).

[39] *Ibid.* at 126. In a similar sense, P. Hilpold cites Articles 21, 22 and 25 of the ICCPR ("Self-determination and Autonomy: Between Secession and International Self-determination", 24 *International Journal on Minority and Group Rights*, (2017), at 327).

[40] "Legalidad internacional y derecho a decidir", *supra* n. 19, at 30.

[41] *Supra* n. 22, at 5-6.

[42] *Supra* n. 10, at 98-99.

[43] 'El derecho de libre determinación de los pueblos', in F.J. Ansuátegui Roig, J.M. Rodríguez Uribes, G. Peces-Barba, E. Fernández García (eds), *Historia de los Derechos Fundamentales*, Vol. 4, T. 3 (Dykinson, Madrid, 1998), at 680. A. Jarillo Aldeanueva also highlights the complementarity between Articles 1 and 25 of the ICCPR (*supra* n. 13, at 94).

Ultimately, the common approach is to relate internal self-determination to the political rights enshrined in the ICCPR; hence the oft-used expression "political self-determination."

The most recent works introduce some nuances. For instance, J. Vidmar holds that the connection between the clause on representative government and human rights does not necessarily imply a right to democracy in the sense of an obligation to establish a multi-party political system or a specific electoral model. In his opinion, the former only evokes certain democratic elements –i.e., some general democratic principles.[44] D. Raič also considers that representative government does not mean liberal democracy *per se*.[45] Even A. Cassese acknowledges that the democratic model outlined in the Covenant —which is the common reference point— is so generic that states can easily contend that they live up to it.[46]

However, there is no actual disagreement since all of them ultimately advocate a procedural democracy, implemented through regular elections and political participation rights. That is the same approach adopted by the Canadian Supreme Court when it highlighted that the people of Quebec has always had access to government:

> "Residents of the province freely make political choices and pursue economic, social and cultural development... The population of Quebec is equitably represented in legislative, executive and judicial institutions... Canada is a 'sovereign and independent state conducting itself 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.'"[47]

It is nevertheless worth mentioning that some authors are not fully convinced by these arguments, which brings us back to a vague scenario. Along these lines, C. Gutiérrez Espada claims that the true revolution stemming from the principle of self-determination lies on its application to the state's population:

> "I do not believe that any general international law enshrines, as part of a people's right of self-determination, the subjective right of every State's population to have a true representative

[44] *Democratic Statehood in International Law. The Emergence of News States in Post-Cold War practice*, *supra* n. 12, in particular at 199-201. This author even argues that "via the right of self-determination, international law requires a *representative* government, but representative is not necessarily a synonym for democratic" (*ibid*. at 8).

[45] *Supra* n. 12, at 275-279. According to this author, "the notion of 'representativeness' assumes that government and the system of government is not imposed on the population of a State, but that it is based on the consent or assent of the population and in that sense is representative of the will of the people, regardless of the forms or methods by which the consent or assent is freely expressed" (*ibid*., at 279).

[46] *Supra* n. 8, at 54.

[47] Para. 136 of the Opinion.

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> government, establishing supervisory and enforcement mechanisms for that purpose. At least, that is not yet the case..."[48]

On the other hand, it is important to bear in mind that the collective right to self-determination is associated with individual rights to political participation and, to a great extent, it is materialized through them, but its identity transcends such rights. At the same time, the former is a precondition for the exercise of the latter.

(2) The content of internal self-determination according to the supervisory bodies established by human rights treaties

The Observations and Comments of the human rights treaty bodies provide some guidelines on the content of this right, even if they are scarce and do not add much to academic contributions.[49]

The reference text is the well-known General Comment No. 12 of the Human Rights Committee (CCPR), of 1984, on the right to self-determination enshrined in Article 1 of the Covenant.[50] Three main ideas stand out.

First, its link with human rights: according to the Committee, "The right... is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights."[51]

Second, its content draws on other rights in the Covenant: in the words of the Committee, "This right and the corresponding obligations concerning its implementation are interrelated with other provisions of the Covenant and rules of international law."[52]

Finally, somehow assuming the relationship between the right to internal self-determination and the right to political participation, the Committee points out that, in their reports, "States parties should describe the constitutional and political processes which in practice allow the exercise of this right."[53]

However, it has been rightly noted that the General Comment's way of referring to internal self-determination is "vague and abstract."[54] Upon analysing certain country reports, the Committee has subsequently recalled that it is a right of all peoples linked to Article 25 of

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[48] *Supra* n. 43, at 681. The still uncertain content of the right to internal self-determination has led some authors to affirm that "it still remains obscure to what extent protecting the right of political self-determination actually requires democratic governance" (S. Van Den Driest, "'Pro-democratic' intervention and the right to political self-determination: the case of operation Iraqi freedom", *NILR* (2010), at 38).

[49] Even less can be found in the periodic reports submitted by the states, which at best enunciate the features of the state's constitutional system and political structure.

[50] CCPR/4/Add.1.

[51] Para. 1.

[52] Para. 2.

[53] Para. 4.

[54] Th. Christakis, *supra* n. 6, at 341.

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the ICCPR.[55] In any case, such reports do not add any relevant information, since they merely enunciate the characteristics of the constitutional system and political structure of the state concerned.

Article 25 was indeed the object of the 1996 Committee's General Comment No. 25. After noting that this provision "lies at the core of democratic government", it points out that "[t]he rights under article 25 are related to, but distinct from, the right of peoples to self-determination. By virtue of the rights covered by article 1 (1), peoples have the right to freely determine their political status and to enjoy the right to choose the form of their constitution or government."[56]

However, the Human Rights Committee has warned that the relationship between the right to self-determination in Article 1 of the ICCPR and other rights enshrined in that same text does not mean that the individual complaint mechanism provided by the Optional Protocol can be used with respect to the former. The Protocol is not applicable to this provision.[57]

Also relevant for this analysis of the practice of supervisory bodies is General Recommendation XXI of the Committee on the Elimination of Racial Discrimination (CERD), on the right to self-determination, adopted in 1996. It stresses once again the relationship between self-determination and human rights:

> "the implementation of the principle of self-determination requires every State to promote, through joint and separate action, universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter of the United Nations"[58]

It also reiterates the relationship with the right to take part in the conduct of public affairs:

> "In respect of the self-determination of peoples two aspects have to be distinguished. The right to self-determination of peoples has an internal aspect, that is to say, the rights of all peoples to pursue freely their economic, social and cultural development without outside interference. In

[55] See L.M. Sicilianos, *supra* n. 6, at 127-129; Th. Christakis, *supra* n. 6, at 341-347.

[56] Paras. 1 and 2 of the General Comment (CCPR/C/21/Rev.1/Add.7).

[57] As emphasized by A. Jarillo Aldeanueva (*supra* n. 13, at 76), who adds that "given the individual nature of the right, Article 25 of the ICCPR has more specific procedural consequences than Article 1 –referred to self-determination" (*Ibid.*, at 132). This procedural limitation explains why C. Puigdemont's complaint specifies that it is filed in reference to Articles 19, 22, and 25 of the ICCPR, adding that "This application concerns the right to political participation reflected in the cluster of constituent rights set out in articles 19, 22 and 25 of the ICCPR. Although article 1 guarantees the right to self-determination, this application does not invoke article 1 directly. Mr. PUIGDEMONT is not asking the UNHRC to declare its support for the cause of self-determination for the Catalan people. That is not the function of an individual petition under the Optional Protocol. However, the ICCPR does expressly guarantee the right of individuals to argue and advocate in favor of self-determination and constitutional reform, and to stand for election on a pro-independence manifesto. This is guaranteed through the collection of political rights that lie at the heart of this application." (para. 76). Last accessed 16 November 2018.

[58] Para. 3 (HRI/GEN/1/Rev.7).

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> that respect there exists a link with the right of every citizen to take part in the conduct of public affairs at any level, as referred to in article 5 (c) of the International Convention on the Elimination of All Forms of Racial Discrimination. In consequence, Governments are to represent the whole population without distinction as to race, colour, descent or national or ethnic origin. The external aspect of self-determination implies that all peoples have the right to determine freely their political status and their place in the international community based upon the principle of equal rights and exemplified by the liberation of peoples from colonialism and by the prohibition to subject peoples to alien subjugation, domination and exploitation."[59]

It is worth noting that the Committee on Economic, Social and Cultural Rights, in its General Comment No. 21, Right of everyone to take part in cultural life (Article 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights), of 2009, stated that this right "is also interdependent on other rights enshrined in the Covenant, including the right of all peoples to self-determination (art. 1)."[60]

(F) INTERNAL SELF-DETERMINATION BEFORE THE ICJ: THE *KOSOVO* CASE

C. Jiménez Piernas has remarked that the Court's treatment of the principle of self-determination in the Kosovo case was "dreadful", although the related documentation produced during the written and oral proceedings makes it possible to know the position of a considerable number of states.[61] Indeed, some asked the ICJ to address the case from a different angle,[62] while others invoked internal self-determination in the general terms explained above: as a right of a state's population, with political content, and to be exercised within a state.[63] Of course, the Canadian Supreme Court's decision was widely cited. Discrepancies arouse concerning the remedial-secession, but that falls beyond the scope of this work.

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[59] *Ibid.*, para. 4.

[60] Para. 2 (E/C.12/GC/21).

[61] C. Jiménez Piernas, "Los principios de soberanía e integridad territorial y de autodeterminación de los pueblos en la opinión consultiva sobre Kosovo: una oportunidad perdida", LXIII *REDI* (2011), at 30.

[62] Albania (Written Comments, paragraph 61), United States of America (Written Comments, Chapter IV, Section II), Norway (Written Comments, paragraph 8), United Kingdom (Written Comments paragraph 10) and the authors of the Unilateral Declaration of Independence (Written contribution, paragraph 8.38).

[63] See Written Statements: Cyprus (paragraph 135), Estonia (paragraph III.2.1), Germany (paragraph VI.2), Netherlands (paragraphs 3.5-3.11); Russian Federation (paragraph VI.2), Ireland (paragraph III.D.30), China (paragraph III), Romania (paragraph III), Egypt (Part IV), Poland (Part VI), Serbia (Chapter 7.III), Switzerland (Part IV.c).ii)), Slovenia (pp. 2-3); Written Comments: Netherlands (paragraph 3), Bolivia (Part. II), Serbia (Chapter 8.D); Oral Statements: Albania (Verbatim record 2009/26, pp. 19-21), Azerbaijan (Verbatim record 2009/27, p. 30), Belarus (Verbatim record 2009/27, p. 29), Bolivia (Verbatim record 2009/28, p. Germany (Verbatim record 2009/26, p. 30), Netherlands (Verbatim record 2009/32, pp. 8-10), Spain (Verbatim record 2001/30, p. 11), Venezuela (Verbatim record 2009/33, pp. 7-8).

As is well known, the Advisory Opinion did not consider it necessary to deal with the scope of self-determination.[64] Judge Yusuf, however, did so in his Separate Opinion in unequivocal terms:

> "In this post-colonial conception, the right of self-determination chiefly operates inside the boundaries of existing States in various forms and guises, particularly as a right of the entire population of the State to determine its own political, economic and social destiny and to choose a representative government; and, equally, as a right of a defined part of the population, which has distinctive characteristics on the basis of race or ethnicity, to participate in the political life of the State, to be represented in its government and not to be discriminated against. These rights are to be exercised within the State in which the population or the ethnic group live, and thus constitute internal rights of self-determination. They offer a variety of entitlements to the concerned peoples within the borders of the State without threatening its sovereignty."[65]

(G) INTERNAL SELF-DETERMINATION IN LEGAL STATEMENTS AND RULINGS ON THE CATALAN ISSUE

The reference made in the Preamble of the Law of the Catalonian Parliament 19/2017, of 6 September, on the self-determination referendum, to the "peoples' right to self-determination as the first of human rights", invoking the 1966 Covenants and the UN Charter, has given rise to certain statements and rulings by the Spanish constitutional bodies in charge of reviewing the regulations and decisions adopted in Catalonia with regard to the so-called *procés*.

In this sense, the Advisory Opinion of the Council of State (*Consejo de Estado*) on the action of unconstitutionality against the said Catalan Act,[66] affirms the following after referring to the UN texts and the ICJ case law:

> "In the current state of affairs, the right to self-determination of the peoples within a sovereign state is therefore limited to their participation in the government of that state through democratic means on equal footing with the rest of the population. It also includes the respect and protection of their fundamental rights and civil liberties, as well as their historical, cultural and linguistic heritage —the so-called "internal self-determination"—, but it does not in any way imply the right to impair the territorial integrity of the state —"external self-determination", using the same terminology— which is reserved to the colonies or non-self-governing territories and to the peoples subject to alien subjugation, domination and exploitation."[67]

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[64] See paras. 82 and 83 of the Advisory Opinion.

[65] Separate Opinion of Judge Yusuf, paragraph 9. In less precise terms, Judge Cançado Trindade also referred to internal self-determination; see para. 184 of his Separate Opinion.

[66] Advisory Opinion 793/2017, of 7 September 2017, last accessed 16 November 2018.

[67] Section IV of the Opinion.

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In its Judgment 114/2017, the Constitutional Court (*Tribunal Constitucional*) also recalled the content of international instruments and the democratic clause, concluding that:

> "It is obvious that such [political] participation, under the Constitution, the Statute of Autonomy and the overall of the legal system, is enjoyed by every Spaniard who benefits from the political status of being Catalan (art. 7 SAC) or, in other words, the Catalan peoples as a whole, as the Constitution notes in its preamble when referring to "peoples of Spain.
>
> The aforementioned is enough to exclude all supposed grounds on international right invoked in the preamble of Law 19/2017 to the 'self-determination' of Catalonia."[68]

Previously, in its Order 122/2015, the Court had disconnected the "right to decide" from "a non-existent right to self-determination."[69] This was partially based on Judgment 42/2014, which had already established that the right to decide could only be conceived as a "political aspiration" so that it may be constitutionally interpreted.[70] This Judgment briefly refers to the Opinion issued by the Canadian Supreme Court to support its position that "in the constitutional order an Autonomous Community may not unilaterally hold a referendum of self-determination in order to decide on its integration in Spain."[71]

To this should be added the considerations set out in Order 24/2017 regarding the democratic principle as well as the political and territorial pluralism enshrined in the Constitution.[72]

By contrast, theoretical considerations on the Catalan issue have not taken into consideration the internal dimension of self-determination with few exceptions,[73] since the debates have focused on aspects that go beyond this dimension. From the secessionist point of view, the current content of internal self-determination under international law is

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[68] STC 114/2017, 17 October 2017, FJ 2, last accessed 16 November 2018; English version available here, last accessed 16 November 2018. The Spanish Constitutional Court (TC) marks out the limits of external self-determination, pointing out that while it is true that both Covenants state that all peoples have the right to self-determination, "[i]t is nevertheless clear that a number of unequivocal decisions issued by the United Nations (...) have limited that right, which is understood as a desire of unilateral access to the independence in those cases of "alien subjugation, domination and exploitation". Apart from them, "any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations", as stated in no. 1 and 6 of the Declaration on the granting of independence to colonial countries and peoples, adopted by Resolution 1514 (XV)..."It then cites Declaration 50/6, which reproduces the democratic clause of Resolution 2625 (XXV), not cited by the TC (*ibid.*).

[69] ATC 122/2015, 7 July 2015, FJ 5, last accessed 16 November 2018).

[70] STC 42/2014, 25 March 2014, FJ 3, last accessed 16 November 2018; English version available here, last accessed 16 November 2018, reiterated in STC 259/2015, 2 December 2015, FJ 3, last accessed 16 November 2018; English version available here, last accessed 16 November 2018.

[71] FJ 3. According to the TC, "This is the same conclusion as the one formulated by the Supreme Court in Canada in its pronouncement of 20 August 1998, where it decided that a unilateral secession project presented by one of its provinces was both contrary to the Canadian Constitution and to International Law" (*ibid.*).

[72] ATC 24/2017, 25 March 2017, FJ 8, last accessed 16 November 2018.

[73] Chief among them is X. Pons Rafols, *supra* n. 19.

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insufficient —and hence irrelevant. That explains their selective and fragmented invocations of the ICJ's Advisory Opinion on Kosovo and of the Opinion of the Canadian Supreme Court regarding Quebec's secession,[74] including some gross misrepresentations.[75]

(H) CONCLUDING REMARKS

From the perspective of structural principles, the internal dimension of self-determination implies the absence of outside interference and has the clear limit of territorial integrity. In the context of the Kosovo case, the Netherlands referred expressively to a right that "is exercised in a manner that preserves international boundaries (internal self-determination)."[76] The Supreme Court of Canada was equally clear when stating that the right to self-determination is normally exercised by peoples, within the framework of an existing state, and according to the principle of the protection of its territorial integrity.

Its content is linked to the manifestations of the principle of democracy, but until now it has only experienced a moderate implementation and always related to the procedural aspects of such principle. The international order does not go far regarding the internal dimension of self-determination. Indeed, beyond the uncontroversial recognition of this dimension and its generic proclamation, it is easier to identify when a government is not representative: when it does not allow the population or part of it to take part in the conduct of public affairs, when minorities are discriminated or when basic human rights are seriously and systematically violated.[77] Debates are thus focused on flagrant breaches and their consequences –in other words, cases that may eventually give way to the classic manifestation of the external dimension of self-determination.

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[74] The blog of the European Journal of International Law has been the stage for this approach. In his post published on October 18, 2017 and titled *Secession and Self-determination in Western Europe: The Case of Catalonia*, M. Weller offered a presentation based in part on the Legal Opinion by an International Commission of Legal Experts commissioned by *Esquerra Republicana de Catalunya*, although warning that the post represents the views of the author (available here). There, M. Weller invokes the ruling of the Canadian Supreme Court in the Quebec case and cites part of its considerations on negotiation as a solution, while at the same time ignoring that this same Court also affirmed that "No negotiations could be effective if their ultimate outcome, secession, is cast as an absolute legal entitlement" (para. 91). He also fails to mention the following statement: "The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination —a people's pursuit of its political, economic, social and cultural development within the framework of an existing state" (para 126).

[75] A prime example of which is the pamphlet by A. De Zayas, former United Nations Independent Expert on the promotion of a democratic and equitable international order, containing not only a biased description of the right to self-determination and its impact on domestic law, but which also neglects the internal dimension of self-determination. Last accessed 16 November 2018.

[76] Written Statement, paragraph 3.5.

[77] D. Raič, *supra* n. 12, at 279-280.

In the last pages of his reference work, A. Cassese asked three questions about the existing international norms on self-determination: whether they have contributed to fueling a new tribalism; whether they are capable of putting a stop to the centrifugal tendency of this tribalism; and whether they may furnish satisfactory solutions to the demands of these "micronationalisms".[78] The answers were in all cases negative, which is why Cassese put forward some *de lege ferenda* proposals, including among others greater international supervision of representative democracy and a more effective protection of ethnic groups and minorities (invoking the Spanish regional legislation as an example to follow).[79]

In the light of the foregoing, we can safely conclude that such proposals —referred in any case to the 1990s context— have not been adopted. Furthermore, legal solutions are not always enough to face the social phenomenon underpinning self-determination, which, as noted by Ph. Allott, galvanizes "high levels of social and psychological energy."[80] In these cases, our role as international law scholars, is to explain the existing law, its content and its boundaries, as well the legal basis (or lack thereof) for certain social demands.[81] On the other hand, in a representative democracy it is up to the politicians to look for solutions within the framework of the rule of law.

[78] *Supra* n. 8, at 339.

[79] *Ibid*., at 339-363; the references to the Spanish system are at 355-356.

[80] Ph. Allott, 'Self-Determination – Absolute Right or Social Poetry?', in Ch. Tomuschat (ed.), *Modern Law of Self-Determination*, *supra* n. 7, at 177-21.

[81] In the words of Th. Christakis, "the only solution for a lawyer is to explore objectively the existing positive law. Depending on one's standpoint, such law may be considered good or bad, moral or immoral. However, our main task is not to assess the morality of the law, but to determine its current status and its consequences. A group of separatists may have sensible arguments on a moral level, without however being entitled to declare secession. Legitimacy is often a subjective matter; lawfulness is objective. Without neglecting the former, our aim is to seek the latter leaving aside our personal preferences" (Th. Christakis, *Le droit à l'autodétermination en dehors des situations de décolonisation*, *supra* n. 8, at 21-22).

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