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Secession of States and Self-determination in contemporary International Law

The right to political participation in International Law, independence referendums, and international good practice

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Abstract: The object of this study is to analyse how to address secessionist tensions in democratic States based on the fundamental human right to political participation. In this vein, secessionist tensions in democratic States and the indissoluble connection between human rights, democracy and the rule of law are considered. Secondly, the right to political participation in International Law is analysed, and the formulation of this right, its content and scope, and its interaction with other human rights and fundamental freedoms are addressed. Thirdly, international good practice and standards for elections and referendums, and their application to independence referendums, are analysed with particular emphasis on the main principles and democratic safeguards that originate in these good practices.

Keywords: Right to political participation – Independence referendums – International good practice

In the framework of the Seminar on "Secession of States and self-determination in contemporary International Law", organised by the *Asociación Española de Profesores de Derecho Internacional y Relaciones Internacionales*, AEPDIRI [Spanish Association of Professors of International Law and International Relations] held at the University of Alcalá on 12 and 13 April 2018, I gave a presentation on "International standards in electoral processes and referendums." Preparing the presentation and delivering it at the Seminar, and the debates that took place there have led me to refocus and retitle my presentation (while still maintaining the original perspective), dedicating it more specifically to "The right to political participation in International Law, independence referendums, and international good practice." The presentation was included in a further round table on "Processes of secession within the framework of democratic States", where Professor Javier Roldán gave a presentation on "Internal democracy and International Law".

I have organised this contribution into three sections: in the first, I present the general concept behind my approach, which caused me to consider secessionist tensions in democratic States and the indissoluble connection between human rights, democracy and the rule of law (A). In the second section, I analyse the right to political participation in

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International Law, and address the formulation of this right, its content and scope, and its interaction with other human rights and fundamental freedoms (B). In the third, I analyse international good practice and standards for elections and referendums, and their application to independence referendums, with particular emphasis on the main principles and democratic safeguards that originate in these good practices (C).

(A) SECESSION PROCESSES AND DEMOCRATIC STATES: GENERAL PERSPECTIVE

In order to position the approach that I am attempting to take, and how it fits into the context of the round table and Seminar, appropriately, I will present preliminary considerations on how secessionist tensions are addressed in democratic States (1) and the value and indissoluble nature in International Law of the trio made up of human rights, democracy and the rule of law (2).

(1) Secessionist tensions in democratic States

My starting point is that this type of tension can exist in States with a long democratic tradition that, precisely because of this tradition, have eventually implemented civilised and democratic responses to accommodate secessionist tensions, so (and it could not be otherwise) they have crafted and articulated the appropriate political, legal and constitutional solutions.[1] This is no obstacle to highlighting, from the start, that States with democratic systems also flatly reject secessionist claims and their purported foundation in a non-existent right of secession, or as an expression of an unenforceable right of the people to self-determination.[2]

A preliminary consideration of how democratic States address secessionist tensions allows me to establish various potential models of response, or political and legal options: holding an independence referendum, action by the supreme or constitutional courts, or proposing significant constitutional reforms.[3]

With respect to the first possibility, I must point out that independence referendums are extremely rare in democratic States, as we are not faced with the situations of colonial domination or foreign occupation referred to by the right of the people to self-determination, nor are there serious violations of human rights or denial of the internal dimension of self-

[1] See A. López Basaguren, "Estado democrático y secesión de territorios. Un análisis comparado sobre el tratamiento democrático de las reclamaciones secesionistas", in *La secesión en España. Bases para un debate desde el País Vasco* (ed. Tecnos, 2014), particularly pp. 40-42.

[2] Conclusion confirmed in *Self-determination and secession in Constitutional Law*, report adopted by the Venice Commission (10-11 December 1999), Document CDL-INF(2000)2, p. 13.

[3] See X. Pons Rafols, *Cataluña: derecho a decidir y derecho internacional* (ed. Reus, Madrid 2015), particularly chapters IV and VI.

determination.[4] This perspective is particularly relevant in the Spanish context and in relation to the political crisis resulting from independence tensions in Catalonia.[5] In this respect, and in recent times and established democracies, only Quebec and Scotland have resorted to the formula of consulting the people in a referendum on independence, although some other democratic States have proposed various referendums, with full constitutional normality, to strengthen autonomy or regional decentralisation that could possibly lead to a future independence process.[6]

Two referendums on secession have been held in the Canadian province of Quebec during various periods when the Quebec Party (*Parti Québécois*, PQ) has held power in the provincial government. The first was held in 1980, with a proposal of "Sovereignty-Association" that was rejected by 59.6% of the electorate; the second, in 1995 and asking another complex question related to a situation that could lead to a unilateral declaration of independence, was about to succeed as it gained the backing of 49.42% of the electorate, some 50,000 votes less than the "no" camp. The narrow margin led the federal Government of Canada to increase political and legal activity to reduce separatist feelings in Quebec, and an element of this was to request the Supreme Court of Canada, by the "Reference" process, for a judicial decision on such a particularly significant political question as Quebec's potential unilateral secession. The "Reference re Secession", adopted in 1998 by the Supreme Court of Canada,[7] has become a genuine international benchmark in this field, and it was even invoked

4 As M. Keating indicates, the Scottish referendum "was a highly unusual event, an agreed popular vote on secession in an advanced industrial democracy" (M. Keating, "The Scottish Independence Referendum and After", *Revista d'Estudis Autonòmics i Federals*, no. 21, 2015, p. 73).

5 This is noted by Castellà Andreu, for example, who points out that very few countries vote on the secession of part of the country, but "secessionist media insist that not being able to vote on secession is antidemocratic and demonstrates the low quality of Spanish democracy" [J.M. Castellà Andreu, "La secesión catalana, entre la política y el derecho", *Anuario de la Facultad de Derecho de la Universidad de Alcalá*, Vol. VII (2014), p. 234].

6 This is the case in Greenland, for example, whose integration into Denmark, an exercise of self-determination of the people, was recognised by United Nations General Assembly Resolution 849 (IX), of 22 November 1954. Although the people's right to self-determination had therefore been exercised and exhausted, this was no barrier to a more substantial autonomy being negotiated with the passage of time and in agreement with the Danish authorities. Therefore, after the referendum held on 25 November 2008 and the new Act on Greenland Self-Government (*Home Rule Act*) of 12 June 2009, Greenland's increased autonomy may actually strengthen further over the next few years (although with many practical difficulties arising from its geographical and social conditions) towards an agreed process of independence from Denmark, as this would not be an exercise of the people's right to self-determination in its external dimension but, in this case, it could be an agreed secession [see K. Göcke, "The 2008 Referendum on Greenland's Autonomy and What It Means for Greenland's Future", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, no. 69 (2009), pp. 103-121].

7 See *Reference Re Secession of Quebec*, 20 August 1998, 161 D.L.R. [Dominion Law Reports] (4th) 385. For *Reference Re Secession*, see (amongst many such studies), analysis by P. Dumberry, "Lessons learned from the Quebec Secession Reference before the Supreme Court of Canada", in M.G. Kohen, *Secession. International Law Perspectives* (Cambridge University Press, Cambridge 2006), pp. 416-452.

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by Spain's Constitutional Court in its *Sentencia* 42/2014, of 25 March, on the people of Catalonia's Declaration of Sovereignty and the Right to Decide.[8] The Reference re Secession was followed by the "Clarity Act", adopted by the federal Parliament of Canada in 2000,[9] which regulates the three successive moments at which the Federation should intervene when faced with a secessionist proposal by a Canadian province: to grant *a priori* approval to the proposed question (its clarity); to evaluate, *a posteriori*, the results obtained (also assessing their clarity); and finally, to establish the requirements for the proposed constitutional reform, if applicable.

In Scotland, and beyond the provisions of the Acts of Union between Scotland and England,[10] the devolution of powers to Scotland resulted in the creation of a government and single-chamber parliament in Scotland, and the first elections to the new Scottish Parliament took place in 1999. In the third elections in 2007, the Scottish National Party (SNP) gained a significant electoral victory that enabled them to govern as a minority for a whole term, during which they drove forward the political proposition for a future referendum on Scottish independence. It was only after the 2011 Scottish elections, when the SNP gained an absolute parliamentary majority in the Holyrood parliament, with 69 of the 129 seats, that they could use their complete democratic legitimacy to propose negotiations with the British Government to enable a referendum on Scottish independence to take place. The complex negotiations culminated in the Edinburgh Agreement of 15 October 2012, which committed to a binding referendum on 18 September 2014, with a binary-type question. The result of the referendum, which enjoyed a very high turnout of 84.6% of the electorate, was 44.7% in favour and 55.3% against.

Another possibility proposed in liberal democracies has been that their constitutional courts should act to redirected secessionist tensions within the framework of their respective constitutions.[11] I am not going to discuss historical scenarios here,[12] but I will simply

[8] For information on this Sentence, see X. Pons Rafols, "Sentencia del Tribunal Constitucional (Pleno) 42/2014, of 25 March 2014", *Revista Española de Derecho Internacional* (2014) 206-210.

[9] With the title, *An Act to Give Effect to the Requirement for Clarity as Set out in the Opinion of the Supreme Court of Canada in the Quebec Secession Reference*, of 15 March 2000, S.C. 2000, c. 26

[10] The Act of Union of 1707, which implemented the Treaty of Union of 1706, stated that "The two kingdoms of Scotland and England shall upon the first day of May next ensuring the date hereof and forever after be united into one kingdom by the name of Great Britain".

[11] See analysis by J.A. Montilla Martos, "El referéndum de secesión en Europa", *Revista de Derecho Constitucional Europeo*, no. 26 (2016) and his distinction between the situation in a flexible constitutional framework (United Kingdom) and the others (Italy, Germany and Spain).

[12] For example, and because it is a classic, I will highlight the decision of the Supreme Court of the United States when, in the *Texas v. White Case*, arising from the civil war, it was clearly established that the Constitution of the United States "in all its provisions, looks to an indestructible Union, composed of indestructible States. When, therefore, Texas became one of the Unites States, she entered into an indissoluble

highlight two recent sentences in constitutional courts in democratic States that have indisputably redirected secessionist tensions. In Italy, the Legislative Assembly of the Region of Veneto approved a law in 2014 (Regional Law 16/2014, of 12 June 2014) to hold a consultative referendum on independence for Veneto[13] that was disputed by the Italian government in the Constitutional Court. The Court issued its judgement on 25 June 2015, reiterating previous decisions and stating that the regional law was "radically incompatible with the fundamental principles of unity and indivisibility of the Republic". It considered that a "referendum initiative that, like the one considered here, is at odds with the unity of the Republic, can never become a legitimate exercise of power by the regional institutions and, therefore, is found to be *extra ordinem*".[14] The legal and political situation was finally turned around with a legal referendum of a consultative nature on autonomy for Veneto that was held on 22 October 2017, with 98% voting in favour of specific conditions and greater autonomy.

In Germany, the Federal Constitutional Court issued a ruling on 16 December 2016, stating that "in the Federal Republic of Germany, a nation-state based on the constituent power of the German people, the *Länder* [the sixteen German states] are not masters of the constitution" (*Herren des grundgesetzes*) and, therefore, they are not authorised to hold an independence referendum, as there is no room in the constitution for secessionist aspirations, which the Court considers violate constitutional order.[15] The ruling responded to an individual case against the Bavarian government's refusal to hold a referendum on Bavarian independence. The Constitutional Court confined itself to rejecting the appeal, as the Basic Law of Bonn makes no provision for any secessionist aspirations, so these fall outside the

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relation. All the obligations of perpetual union, and all the guaranties of republican government in the Union, attached at once to the State. The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration, or revocation, except through revolution, or through consent of the States" [Texas v. White (1869) 74 US (7 Wallace) 700, 72 (1868), at 726].

[13] The question that was intended to be asked in the referendum was "Vuoi che il Veneto diventi una Repubblica indipendente e sovrana? Si o No?" [Would you like Veneto to become an independent and sovereign Republic. Yes or No?] (see M. Nicolini, "La Asamblea Legislativa de la Región del Véneto aprueba la ley sobre convocatoria del referéndum para la independencia", in *Blog de la Revista Catalana de Dret Públic*, 25 June 2014). It should be noted that an informal consultation on independence was also held in the region between 16 and 21 March 2014, with the participation of over 2.3 million people, with 89.1% in favour of independence.

[14] Para. 7.2 of Judgement 118/2015 of 24 April 2015, of the Italian Constitutional Court.

[15] Decision 2 BvR 349/16 of 16 December 2016, of the Constitutional Court of Germany. For more on this ruling, see F. Sosa Wagner, "Bávaros y referéndum por la independencia", *Revista de Administración Pública*, no. 202, 2017, pp. 157-167, and S. Ragone, "Los *Länder* no son 'Señores de la Constitución': el Tribunal Constitucional federal alemán sobre el referéndum separatista bávaro", *Teoría y Realidad Constitucional*, no. 41, 2018, pp. 407-418.

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constitutional system. It is true that this was an individual case and that the Bavaria Party (*Bayernpartei*), who hold aspirations to independence, have very little electoral support, but the ruling was uncompromising in its assertion that constitutional power lies with the German people. Obviously, no German regional power has attempted to push through their secessionist intentions or proposals for an independence referendum.

Another possible option or model to address secessionist tensions in liberal democracies is through constitutional reform, even continued constitutional reform. The most obvious example of this situation is the case of Belgium, where secessionist tensions led to federalisation of the State from 1993 onwards, through various constitutional reforms. More recently, the constitutional reforms of 2012 and 2014 could lead to a model of confederation, with a progressive, constitutional reduction in the competences of the State. [16] This is, therefore, a model which could potentially dismantle the Belgian legal and constitutional system, but which is also perfectly possible and plausible within democratic and constitutional parameters.

In light of these various potential judicial and political models and options, I feel I should highlight the total contrast with the "non-model" of the secessionist tensions in Catalonia. There has been repeated defiance of Constitutional Court rulings by the autonomous authorities in this non-model; defiance when a referendum was declared illegal, but still held on 1 October 2017, and when a participatory process was also suspended but carried out regardless on 9 November 2014. Laws which clearly threaten and violate the Constitution and the Statute of Autonomy have been adopted; disproportionate violence broke out on the calamitous day of 1 October; an exclusively judicial approach has been taken to tackle the political problem; over two million hopeful people continue to mobilise; a veritable roller-coaster of political events and comings-and-goings has unrolled, with many theatrical moments, but also times of great unease with the impossibility of finding a political solution to the impasse. In this non-model, there has been all of this, certainly, and more, but what has made the Catalan case stand out from the other possible models mentioned, is the immense and absolute failure of "politics". It has been absent throughout and, as of April 2018, it is not expected any time soon.

(2) Human rights, democracy and the rule of law in International Law

In my initial approach, I found myself of a mind to formulate connections and examples related to particular situations in domestic law (including Spanish), but my focus is on

[16] With respect to Belgium, see A. Mastromarino, "Evaporazione vs. solidificazione: la sfida belga", *Istituzioni del Federalismo. Rivista di studi guiridici e politici*, no. 4, pp. 909-936, and by the same author, "Modificaciones constitucionales en Bélgida. *La sixième réforme de l'État:* un proceso en marcha", *Revista d'Estudis Autonòmics i Federals*, no. 22, October 2015, pp. 64-93.

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International Law and its essential principles relevant to secessionist tensions in democratic States. Therefore, having considered various potential options to channel and provide a legal and political outlet for secessionist tensions in democratic States like Spain, I should now describe, from the International Law perspective, the foundations of a democratic State that respects human rights, and discuss the legal provisions for the concept of the rule of law. As I understand it, we are faced with three concepts that are particularly relevant to secessionist tension because, although there is no doubt about the significant role of the will of the people in the configuration and decisions taken by the public authorities, there is also no doubt that this popular will should be channelled democratically, even if it is seeking independence for a territory belonging to a democratic State. It should, therefore, be addressed politically and conform to the legal mechanisms provided under the rule of law. In this respect, secessionist political forces in Catalonia have put forward an allegedly democratic proposal, which it also endeavours to base on International Law. However, by attempting to formulate the proposal independently of other fundamental democratic principles (both of Constitutional and International Law), they have overlooked the central principle of respect for legality and the rule of law, which can today also be considered an emerging principle of International Law.

The vision that I present not only corresponds to the approaches considered by the various constitutional systems of democratic States, but it also, for my purposes, arises from the recent development of International Law, which has indissolubly linked the concepts of human rights, democracy and the rule of law. A quick summary of this perspective should start with the Universal Declaration of Human Rights (UDHR)[17] and should especially refer to the rapid development of International Law in this area after the end of the cold war. In my opinion, it could be argued that, despite its many flaws and weaknesses, current International Law promotes and protects human rights as a fundamental principle, and binds it to democracy and the rule of law.

This is confirmed, in general, by the many international norms in existence, and the international practices of States and international organisations. The Charter of the United Nations itself stated in 1945 that one of its intentions was "to achieve international cooperation [...] in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion",[18] although it did not actually draw up a catalogue of human rights. The Preamble to the Charter also states that "We the peoples of the United Nations determined [...] to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women [...]", among other principles.

[17] General Assembly Resolution 217 A (III), of 10 December 1948.

[18] Art. 1.3 of the Charter.

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Expressing the interaction between human rights, democracy and the rule of law more clearly, the Preamble to the UDHR emphasises that "it is essential [...] that human rights should be protected by the rule of law". This text, as we know, includes a programmatic wording of the fundamental human rights: civil, political, economic, social and cultural. It clearly describes the concept of democracy, by establishing that "the will of the people shall be the basis of the authority of government" in article 21,[19] along with other aspects of the right to political participation. In other words, the first international statement on human rights (with clear virtuality and absolute relevance today) already highlighted the close relationship between the rights that it proclaimed and the principle of democracy, and the requirement for a legal system to protect those rights. There is no doubt that the rule of law referred to in the Preamble to the Declaration must consist of an internal legal system providing the appropriate judicial and procedural safeguards to enable and guarantee the effectiveness of the human rights proclaimed in the Declaration.

As we also know, there has been a wide range of regulatory developments in International Law since the UDHR, with many international treaties on human rights, either in general terms, such as the International Covenant on Civil and Political Rights (CCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR),[20] or related to specific rights or protection of particularly vulnerable sectors of the community. For my current purposes, it is enough to indicate that various articles in these two fundamental international covenants allow some restrictions or exceptions with respect to certain rights, as long as these are "provided for by law" and are necessary "in a democratic society". So we are faced with a formulation of human rights in International Law that is undoubtedly linked to democratic regimes and the rule of law, and should lead to them. Article 25 of the CCPR, which I will discuss in more detail later, also sets down the right to political participation and defines it as an essential right of democratic governance.

This development in the international field of human rights reached full swing after the cold war and changes in the international political scene in the 1990s. One of the fundamental milestones in this approach is the Vienna Declaration and Programme of Action, adopted as the culmination of the World Conference on Human Rights held in 1993. As established in the preamble to the Programme of Action, it contemplated the "major changes taking place on the international scene" and highlighted the fundamental principles enshrined in the Charter of the United Nations, with particular reference to "promoting and encouraging

[19] Commentary on article 21 can be found in A. Rosas, "Article 21", in A. Eide *et al.* (ed.), *The Universal Declaration of Human Rights: A Commentary* (Scandinavian University Press, Oslo 1992); and in J.M. Castellá Andreu, "Artículo 21", in X. Pons Rafols (coord.), *La Declaración Universal de Derechos Humanos. Comentario artículo por artículo* (ed. Icaria/ANUE, Barcelona 1998), pp. 349-365.

[20] General Assembly Resolution 2200 (XXI), of 16 December 1966.

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respect for human rights and fundamental freedoms for all and respect for the principle of equal rights and self-determination of peoples, peace, democracy, justice, equality, rule of law, pluralism, development, better standards of living and solidarity".[21]

From then on, the task of promoting, protecting and safeguarding human rights, and their connection to democracy and the rule of law, especially in the actions of the United Nations itself, has developed even more widely and in a multitude of spheres. In the Millennium Declaration, adopted by the General Assembly in the year 2000, and which would subsequently give rise to the Millennium Development Goals (MDGs), the Heads of State and Government affirmed that "We will spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms, including the right to development".[22] In my opinion, and without a shadow of a doubt, at the dawn of the twenty-first century, the States were clearly highlighting (in the sphere of International Law, that is) this undeniable conceptual interaction and the indissoluble nature of human rights, democracy and the rule of law.

Anyway, I believe that the most important text is the 2005 *World Summit Outcome*[23] which, for our purposes, affirmed in a section specifically dedicated to "Human rights and the rule of law", that "We recommit ourselves to actively protecting and promoting all human rights, the rule of law and democracy and recognize that they are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations".[24] Having affirmed these basic propositions, the *World Summit Outcome* also recognised "the need for universal adherence to and implementation of the rule of law at both the national and international levels" and affirmed that "democracy is a universal value based on the freely expressed will of people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives".[25]

The fragments of the Vienna Declaration and Programme of Action and 2005 World Summit Outcome that I have reproduced clearly express an idea that underlies the UDHR itself, is at the heart of my argument, and had previously been highlighted in the doctrine of International Law: this indissoluble connection between human rights, democracy and the rule of law. Protecting human rights is inconceivable without democratic safeguards, democracy is inconceivable without respect for human rights, and human rights and democracy are inconceivable without the rule of law, which becomes the concept and

[21] Para. 9 of the preamble to the Vienna Declaration and Programme of Action, Document A/CONF.157/23.
[22] Millennium Declaration, General Assembly Resolution 55/2, of 8 September 2000, para. 24.
[23] 2005 World Summit Outcome, General Assembly Resolution 60/1, of 16 September 2005.
[24] *Ibid.*, para. 119.
[25] *Ibid.*, para. 134 and 135.

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cornerstone by establishing legal and judicial safeguards for all.[26] As Victoria Abellán indicated over thirty years ago, the rule of law and democratic society constitute the internal safeguards to protect human rights and are the "prerequisites" for international protection of these rights.[27]

In this respect, I think the emergence in International Law of the universal value of democracy and the rule of law can be confirmed, along with some universal and indivisible human rights, and maybe even an emerging right to democratic governance and the rule of law.[28] However, I understand that we are faced with a concept (that seems to me to be crucial and that expresses the possibilities and limitations of the current international situation) in which International Law recognises that democracy should be encouraged and that it is probably the best political model to protect human rights, but the right for each sovereign State to freely determine its political, economic and social development continues to be firmly rooted in International Law, therefore there is not necessarily a single political model that is suitable for all States.

This tension was expressed clearly in the 2005 World Summit Outcome which, as well as the references to human rights and the rule of law which I have already mentioned, stated that "while democracies share common features, there is no single model of democracy, that it does not belong to any country or region, and [we] reaffirm the necessity of due respect for sovereignty and the right to self-determination".[29] Also, in the "Declaration on the rule of law at the national and international levels" of 2012,[30] the General Assembly stated that "all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law",[31] although "a broad diversity of national experiences in the area of the rule of law" was also recognised,[32] as occurs with democracy.

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[26] Jacques-Yvan Morin stated that "ni les droits et libertés de la personne ni la démocratisation des sociétés ne sont possibles si le pouvoir politique n'est pas soumis à des règles, c'est-à-dire si l'Etat ne pas 'de droit'" (J.Y. Morin, "L'État de droit: émergence d'un principe du Droit International", *Recueil des Cours*, vol. 254, 1995, p. 447).

[27] See V. Abellán Honrubia, "La protección internacional de los derechos humanos: métodos internacionales y garantías internas", in *Pensamiento jurídico y sociedad internacional. Estudios en honor del profesor Antonio Truyol Serra* (Centro de Estudios Constitucionales, Universidad Complutense, Madrid 1986), pp. 29-58, particularly pp. 31-32.

[28] Th. Franck, "The Emerging Right to Democratic Governance", *American Journal of International Law*, vol. 86, 1992.1, pp. 46-91 can be cited with respect to this concept.

[29] 2005 World Summit Outcome, para. 135.

[30] Adopted by the high-level meeting of the General Assembly on the rule of law at the national and international levels, General Assembly Resolution 67/1, of 24 September 2012.

[31] *Ibid.*, para. 2.

[32] *Ibid.*, para. 10.

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In other words, International Law gathers together some fundamental principles on the subject of human rights, democracy and the rule of law, but it does not endorse or recommend any particular organisational or political model, as this is something that States must determine in their relevant domestic legislation. From the perspective of International Law, a representative democracy is as valid as a more participatory or direct democracy; a legal and constitutional system that enables consultations or referendums is as valid as a system that only provides for periodic elections and no referendums; and a proportional electoral system is as valid as a majority electoral system, to mention only some of the different potential legal and political options related to democracy and the right to political participation. Determining all of these factors, within the framework of the parameters of international human rights law, is strictly a matter for the State's domestic legislation.

Ultimately, I believe that the general principle of International Law (already postulated in the UDHR) that public authorities obtain their legitimacy by the will of the people can be confirmed. This will is the source of democratic legitimacy and can also be expressed in a variety of ways, through elections, or by referendums or consultations. There is also no doubt that the latter is a method that can be particularly appropriate, and the Spanish and Catalan legal systems, for example, provide regulations for referendums and public consultations. It is therefore possible to advance towards a more participatory, direct and inclusive democratic system, but there is nothing in current Spanish legislation or its democratic system that contradicts the provisions of International Law on human rights, democracy and the rule of law.

(B) THE RIGHT TO POLITICAL PARTICIPATION IN INTERNATIONAL LAW

As part of the general approach that I have described, I will now discuss the right to political participation in International Law, and I shall do this by systematically addressing two aspects: the formulation of this right in various international instruments (1) and their content, scope and interaction with other fundamental human rights (2).

(1) Formulation of the right to political participation

As I have already mentioned, the UDHR described the fundamental human rights for the first time in an international text, and these include the right to political participation and the essence of the democratic principle, which is covered in article 21. Specifically, this article proclaimed that

> "1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
> 2) Everyone has the right of equal access to public service in his country.

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> 3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures".

Article 25 of the CCPR, which is a legally binding text, develops and consolidates this wording, stating:

> "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
> (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
> (c) To have access, on general terms of equality, to public service in his country."

A similar text defining these rights to political participation has also been incorporated into other regional human rights instruments. Article 23 ("Right to Participate in Government") of the American Convention on Human Rights, of 22 November 1969,[33] establishes that

> "1. Every citizen shall enjoy the following rights and opportunities: a. to take part in the conduct of public affairs, directly or through freely chosen representatives; b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and c. to have access, under general conditions of equality, to the public service of his country.
> 2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings."

Article 13 of the African Charter on Human and Peoples' Rights, of 1 June 1981,[34] provides that

> "1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.
> 2. Every citizen shall have the right of equal access to the public service of his country.
> 3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law."

I should also mention that the High Contracting Parties to the European Convention on Human Rights, adopted by the Council of Europe in 1950 and directly inspired by the UDHR, which was approved a mere two years before,[35] reaffirmed their profound belief in

[33] Available here.

[34] Available here.

[35] Convention for the Protection of Human Rights and Fundamental Freedoms, of 4 November 1950. The UDHR is mentioned three times in the Preamble to the Convention.

human rights and fundamental freedoms, which they considered "are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend".[36] However, it was not until 1952 that Additional Protocol No. 1 to the European Convention[37] was adopted. For our purposes, this is particularly relevant as it includes the right to political participation that was not covered by the original text of the European Convention, specifically, the right to free elections. Article 3 of Additional Protocol No. 1 states that

> "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

My first and most significant observation therefore addresses the limited reference to the right to political participation in the European Convention in relation to the norms established by the universal instruments. This has obviously not prevented the values of democracy and the rule of law, which constitute their statutory and guiding principles, from being fully integrated into the framework of the Council of Europe and its legal and institutional system. These values are now considered a common European legacy, and this idea has been spreading to the rest of the world, making Europe a model to be emulated in the fields of welfare, and development and respect for human rights. From this perspective, I believe that becoming established as a democratic State has become a clearly defined, collective obligation for European States.

Anyway, some essential ideas can be inferred from all of these standard texts for the purposes that I would like to highlight.[38] Firstly, not all dimensions of the right to political participation are attributable to all people, as they are exercised in the scope of domestic legal and constitutional systems, so some of these rights and opportunities may only correspond to the "citizens" or nationals of a particular State, and foreigners living in that State may be deprived of these rights. But, as established by some of these instruments, and stated by the Human Rights Committee in their General Comment No. 25, distinguishing between "citizens in the enjoyment of these rights on the grounds of race, colour, sex, language,

[36] Paragraph 5 of the Preamble to the European Convention.

[37] Protocol of 20 March 1952.

[38] See an analysis of these treaty provisions in G.H. Fox, "The Right to Political Participation in International Law", *Yale Journal of International Law*, vol. 17.2 (1992), particularly pp. 552-570; and E. Bernales Ballesteros, "El derecho humano a la participación política", *Derecho PUCP. Revista de la Facultad de Derecho*, no. 59 (2006), pp. 9-32.

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religion, political or other opinion, national or social origin, property, birth or other status"[39] is expressly prohibited.

On the other hand, these rights to political participation can basically be structured into three dimensions or rights. Firstly, the right to participate in public affairs, which can be exercised directly, via mechanisms of direct participation, or by acting as an elected representative or holder of public office. This right can also be exercised indirectly, through freely elected representatives. Secondly, the right to vote and be elected in periodic, genuine elections held by secret ballot and universal suffrage, which constitutes a partial manifestation of the first dimension, by including the election of representatives and the ability to be freely elected as a representative of the people. Thirdly, the right of equal access to public service also forms part of these rights to political participation. This includes holding public or judicial office or, more generally, working as a public sector employee in the service and the interest of the public.

Lastly, I understand that these provisions also clearly indicate that these rights to political participation should be established by the constitution or in accordance with the provisions of the law, as they come within the scope of domestic legislation. In this respect, the Human Rights Committee has insisted that these rights should be protected by law, as it considers that "the means by which individual citizens exercise the right to participate in the conduct of public affairs protected by article 25 should be established by the constitution and other laws", and that all those rights and obligations, including the electoral processes to bring them into effect, should ultimately be guaranteed by law.[40] In other words, International Law certainly promotes democracy, and all the precepts that I have mentioned inspire and stimulate greater democratisation in decision-making processes, but it is the responsibility of domestic legislation to recognise and safeguard those rights. This fact undoubtedly also highlights the restrictions that international political circumstances impose when defining the substantive content of democracy and the rule of law.

(2) Content and scope of the right to political participation

As I have already mentioned, and according to the wording in article 25 of the CCPR (and other reference legal instruments), the right to political participation can be exercised through "representative democracies" or by "mechanisms of direct participation", although the CCPR does not favour one over the other. Article 25 of the CCPR therefore covers any potential domestic legal and constitutional formula that incorporates this fundamental right to political participation. In this respect, and for my purposes, the right to political participation in

[39] General Comment No. 25 adopted by the Human Rights Committee on 12 July 1996, Document CCPR/C/21/Rev.1/Add.7, para. 3.

[40] *Ibid.*, para. 5 and 9.

International Law can therefore involve mechanisms of direct participation, such as referendums and consultations on questions that are in the public interest, or the right to vote, either for representatives or in referendums. I would like to reiterate the fact that, in the same way as they cover various potential legal and political formulas, international standards "do not impose" any specific democratic political or electoral system, nor do they establish any requirement for direct participation through referendums or consultations. As discussed before, International Law defers to domestic legislation, which should safeguard the rights and obligations established internationally.

For further information on the possibility of mechanisms for direct participation, I should also mention that the Human Rights Committee insisted on two fundamental facts in their General Comment. One of these was that article 25 of the CCPR stated that citizens can participate directly "when they choose or change their constitution or decide public issues through a referendum or other electoral process" and also "by taking part in popular assemblies which have the power to make decisions about local issues or about the affairs of a particular community and in bodies established to represent citizens in consultation with government", so the Committee limited itself to illustrating some potential formulas for direct participation.[41] In any event, the Committee insisted that there should be no distinction between citizens nor should excessive restrictions be imposed in situations where a form of direct citizen participation has been established. The second was that the Committee also reiterated the idea that the right to vote in elections and referendums (if any) should be established by law, so referendums and consultations are effectively opportunities to directly exercise the right to political participation. However, if they are anticipated, they should be established legally and without any type of discrimination in the domestic legislation of the State.

The jurisprudence of the European Court of Human Rights (ECHR) over article 3 of Additional Protocol No. 1 requires that the right to free elections is both a subjective right and an obligation of the State, and that elections should be held freely, by secret ballot and at regular intervals to choose the legislature, as the Protocol expressly states. This last aspect, in an interpretation that is possibly overly literal of article 3 of the Protocol, has led the ECHR to consider that the right recognised in this provision is not applicable to all electoral processes, and elections to local and regional bodies with no legislative powers are excluded from its scope. In the same way, referendum processes are also excluded, as the Convention does not establish any obligation for the State to consult its population. The State is therefore obliged to hold periodic elections to choose the legislature, but there is no obligation to hold referendums or consultations, not does article 3 of the Protocol provide

[41] *Ibid.*, para. 6.

citizens with any subjective rights in this respect, so the European Convention does not safeguard any general right for the population to be consulted.

Although this consideration could be regarded as controversial, the European Commission on Human Rights already held this opinion in 1975, stating that the British referendum on membership of the European Community "was not an election concerning the choice of legislature" but "was of a purely consultative character and there was no legal obligation to organise such a referendum", with no right to participate in the referendum arising from Article 3 of the Protocol.[42] In the same vein, the ECHR established more recently that the complaint by some Scottish prisoners that they couldn't vote in the Scottish independence referendum was incompatible *ratione materiae* with the provisions of the Convention and its Protocols and must be rejected.[43] Equally, when a complaint was brought before the ECHR regarding the validity of the constitutional referendum held in Turkey on 17 April 2017, the Court held that "it cannot be inferred from the ordinary meaning of the term "elections" in Article 3 that a "referendum" would come within the scope of that provision" and, therefore, this provision does not apply to referendums.[44]

Ultimately, the provisions of International Law and the doctrine of international bodies on human rights have caused, in my opinion, the lack in International Law of any obligation to establish mechanisms of direct participation to exercise the right of political participation or any subjective right of a State's citizens to be called to referendums or consultations in general. In this, as in other related subjects, International Law remits and grants a wide margin of availability to domestic legislation to establish its own provisions and mechanisms.[45] These can also establish reasonable and objective conditions that should not be excessive and should be used for legitimate purposes.[46] The central concept in of all this, I believe, is that the right to political participation should be safeguarded, and domestic legislation should be responsible for implementing this. As the Human Rights Committee indicates in its General Comment, "Whatever form of constitution or government is in force, the Covenant requires States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects".[47]

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[42] See Comm. 7096/75, *X v. United Kingdom*, decision of 3 October 1975 [also see J. De Meyer, "Electoral Rights", in R. St. J. Macdonald *et al.* (ed.), *The European System for the Protection of Human Rights* (Martinus Nijhoff Publishers, Dordrecht 1993), p. 556].

[43] See *Moohan v. the United Kingdom*, and *Gillon v. the United Kingdom*, Decision of 13 June 2017.

[44] See *Cumhuriyet Halk Partisi v. Turkey*, Decision of 21 November 2017.

[45] Provisions and mechanisms that are, by definition, diverse and varied. See the Venice Commission report, *Referendums in Europe – An analysis of the legal rules in European States*, study no. 287/2004, CDL-AD (2005)034, of 2 November 2005.

[46] *General Comment*, para. 4, 6, 10, and 14 to 17.

[47] *Ibid.*, para. 1.

By the same token, it should be noted that the right to political participation is closely linked to other fundamental human rights. The wording of the right to political participation clearly indicates that this right is directly linked to the right to equality and freedom from discrimination and, naturally, to fundamental freedoms in a democratic system, such as freedom of expression, of information, opinion, thought, assembly and association.[48] The right to political participation comprises the core of democratic government by the consent of the people, so it is also closely related to (although distinct from) the people's right of self-determination, as this involves the right of the people to freely choose their political status (that is, the form of their constitution or government) and their economic, social and cultural development, as established by article 1.1 of the two International Covenants of 1966.

In this respect, both International Covenants establish a close conceptual and systematic relationship between people's right to self-determination, and human rights.[49] This connection undoubtedly subjectively and conceptually broadens the right to self-determination that extends to all peoples and goes further than the strictly colonial environment, as the relevance of this connection is that the self-determination of peoples is established as a collective human right. As the Human Rights Committee itself recognised when it referred to this article 1.1, the right that this article establishes "is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights".[50] In other words, this provision inspired what has come to be known in the doctrine as the internal dimension of the principle of self-determination, closely linked to democracy.[51] Self-determination is exercised inside the State in this internal dimension, so is therefore different from the external dimension, as the latter considers independence to be a potential result of self-determination. As indicated by Javier Roldán, understood "in its democratic

[48] Article 25 makes no mention of it, but I understand that it also incorporates political pluralism, and therefore requires a multiparty system and multiparty elections. Although, as J. Vidmar indicates, "It is far from settled in international law that the right to political participation, either under Article 25 of the ICCPR or under customary international law, requires multiparty elections. Therefore the interdependence between this right and the right of self-determination cannot result in an obligation to hold multiparty elections" [J. Vidmar, "The Right of Self-Determination and Multiparty Democracy: Two Sides of the Same Coin", *Human Rights Law Review*, vol. 10:2 (2010), p. 267].

[49] See P. Andrés Sáenz de Santa María, "La libre determinación de los pueblos en la nueva sociedad internacional", *Cursos Euromediterráneos Bancaja de Derecho Internacional*, vol. I, 1997, pp. 129 ff., and pp. 167-169.

[50] See *General Comment* No. 12, adopted in 1984 by the Human Rights Committee, para. 1, reproduced in Document HRI/GEN/1/Rev.9 (Vol. I). A discussion on this General Comment in P. Thornberry, "The democratic or internal aspect of self-determination with some remarks on federalism", in C. Tomuschat, *Modern Law of Self-Determination* (Martinus Nijhoff Publishers, Dordrecht 1993), pp. 111-113.

[51] See the extensive discussion on this subject in T. Christakis, *Le droit à l'autodétermination en dehors des situations de décolonisation* (La Documentation Française, París 1999), pp. 335 ff.

connotations, the right of peoples to determine themselves is a continuing principle, a continuous, permanent process of self-government that confers popular legitimacy on the rule of the sovereignty of the State."[52]

Finally, and applying the right to political participation as an essential democratic principle to a comparative law perspective, I should also mention that the democratic principle is neither unique nor isolated, and should be linked to other fundamental principles. In this respect, although the Supreme Court of Canada rejected the pertinence of the principle of people's self-determination in the Reference re Secession, it did establish that the legal basis for a hypothetical secession could be founded on four fundamental constitutional principles of domestic law that should be duly articulated and that form the background and boundaries of the judicial approach: federalism, democracy, constitutionalism and the rule of law and, finally, respect for minorities. None of these principles, not even the democratic principle, should be imposed on the others as an absolute value.[53] Similarly, the Spanish Constitutional Court's aforementioned ruling on the Declaration of Sovereignty and the Right to Decide stated that the so-called right to decide could be interpreted in accordance with the Constitution if it was understood "as a political aspiration that can only be achieved through a process that is constitutionally legal with respect to the principles of 'democratic legitimacy', 'pluralism', and 'legality'", values that are superior in our legal system.[54]

(c) Independence referendums and good international practice

I will now discuss the application of international standards and good practice for elections and referendums to independence referendums. Firstly, I will address the adoption of these good practices and their legal nature (1), then the main principles and democratic safeguards for referendums, with reference to established practice and the human rights doctrine of international bodies (2).

(1) Adopting good international practice on elections and referendums

As I have already mentioned, there is a wide discretionary range in how domestic legislation implements democratic principles and the rule of law, and in the subject that we are currently addressing: the right to political participation. I have already pointed out that International

[52] See J. Roldán Barbero, *Democracia y Derecho Internacional* (ed. Civitas, Madrid 1994), p. 164.

[53] *Reference re Secession*, para. 32 and 90. López Basaguren considers that the Reference re Secession establishes a "new constitutional paradigm", based on the constitutional principles that underlie constitutionally democratic federal systems or systems that include territorial autonomy [see A. López Basaguren, "La secesión de territorios en la Constitución española", *Revista de Derecho de la Unión Europea*, no. 25 (2013), pp. 87-106 and, by the same author, "Estado democrático y secesión de territorios [...]", *op. cit.*, particularly pp. 52 ff.].

[54] Legal basis FJ 3 of judgement STC 42/2014.

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Law does not favour any particular legal and democratic model and, although current international standards consider the possibility of mechanisms of direct participation, they do not specifically establish any process nor include the right to be called to referendum or to be consulted generally on issues of public interest, as the existence and scope of these mechanisms are the responsibility of domestic legislation.

In recent decades, this wide margin of State activity with respect to their democratic legislation and electoral procedures (and referendum processes, where applicable) has been influenced by the emergence of international procedures for assistance and election observation, which have started to generate a considerable body of international standards and criteria for electoral processes and observation of them, including referendum processes.[55] A collection of indicators and standards for observing elections and referendums have therefore arisen, and a substantial body of good international practice soft law has been developed. Some criteria and standards of observation are of a more methodological nature, but others include substantive elements that have inspired electoral legislation and procedures in States that have moved towards democracy or that have come out of conflict situations, which enables us to identify what International Law understands by a democracy ever more clearly. Ultimately, international election observation has great potential to enhance the integrity of election processes by deterring and exposing irregularities and fraud, and by providing recommendations to improve the integrity and effectiveness of electoral and related processes.

Various texts on the subject have been adopted by international organisations, private entities and non-governmental organisations. To highlight just a few, in October 2005, the Secretary General of the United Nations signed a *Declaration of Principles for International Election Observation* and a *Code of Conduct for International Election Observers*, both of which have been adopted by numerous international and non-governmental organisations with authority and activity in this area, and which aim to harmonise the methods and standards of these organisations that observe elections.[56] I should also mention the *International Legal Standards. Guidelines for reviewing the legal framework of elections*, adopted by the

[55] For international observation in general, see Y. Beigbeder, *International monitoring of plebiscites, referenda and national elections: self-determination and transition to democracy* (ed. Martinus Nijhoff Publishers, Dordrecht 1994); A. Badia Martí, *La participación de la ONU en procesos electorales* (ed. McGraw Hill, Madrid 1998); and G.H. Fox, "The Right to Political Participation [...]", *op. cit.*, pp. 570-596.

[56] See the Secretary General's report on *Strengthening the role of the United Nations in enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization*, Document A/62/293, para. 15. The General Assembly has also repeatedly expressed their appreciation for both declarations (on the last occasion, via General Assembly Resolution 72/164, of 19 December 2017), and both declarations have also been adopted by the Council of Europe and the Venice Commission in Document CDL-AD(2005)036, of 2 November 2005.

Organization for Security and Cooperation in Europe (OSCE) Office for Democratic Institutions and Human Rights (ODIHR) and the International Institute for Democracy and Electoral Assistance (IDEA).[57] The many documents adopted by the Inter-Parliamentary Union (IPU) (the organisation that brings together parliamentary institutions around the world), including the *Universal Declaration on Democracy* and *Declaration on Criteria for Free and Fair Elections*, are also worth mentioning.[58] The European Union itself has published a *Compendium of International Standards for Elections*, which aims to help the EU Election Observation Missions and other interested stakeholders to clearly identify the international standards to use when assessing the conduct of elections.[59]

In this same vein, the Council of Europe and its attendance at the events that occurred in Central and Eastern Europe at the end of the cold war should be highlighted. The assistance given these countries to encourage democratisation and respect for the human rights recognised by the European Convention has led in particular to constitutional legislation, elections and referendums, through the work of the European Commission for Democracy through Law, known as the Venice Commission. This Commission was created by the Committee of Ministers of the Council of Europe in 1990[60] as a consultative body made up of independent experts whose "own specific field of action shall be the guarantees offered by law in the service of democracy".[61] Their objective is essentially to broadcast democratic principles and offer assistance in creating coherent constitutional systems, and institutions and mechanisms that allow confidence in justice and the rule of law to be re-established.[62] Its role as a forum for debate and a source of legal assistance has extended outside Europe[63] and has generated a considerable body of reports and decisions on the situation, elections or legal and constitutional changes in many States in the past few years, and codes of conduct and instruments of soft law with general principles of democracy, the rule of law, and election and referendum processes.

The Venice Commission has adopted a range of texts, including *Guidelines for Constitutional Referendums at National Level*,[64] but I would like to discuss two texts in

[57] Originally adopted in 2001, with subsequent complementary developments, and available here.

[58] See their website here.

[59] Fourth edition available here.

[60] By Committee of Ministers' Resolution (90) 6, of 10 May 1990.

[61] Article 1 of Resolution (90) 6.

[62] For general information on the origin and legal nature of the Venice Commission, see S. Salinas Alcega, *La Comisión para la Democracia a través del Derecho (Comisión de Venecia)* (Real Instituto de Estudios Europeos, Zaragoza 1999).

[63] The Council of Europe has 47 Member States, and 61 States participate in the Venice Commission.

[64] *Guidelines for Constitutional Referendums at National Level*, adopted at its 47th Plenary Session on 6-7 July 2001, Document CDL-INF (2001) 10.

particular: the first is the *Code of Good Practice in Electoral Matters*, produced by the Venice Commission in July 2002,[65] and the second, and later, document was also produced by the Commission and is the *Code of Good Practice on Referendums*, which is based on the work of the Council of Europe Parliamentary Assembly[66] itself and contains some guiding principles and an explanatory memorandum.[67] To establish these European standards on referendums, the body of referendum legislation in the European States was also analysed in its entirety, enabling the common principles[68] to be determined. Once the *Code of Good Practice* was approved, the Parliamentary Assembly considered that it could enable the Member States to re-evaluate and, if necessary, revise, their legislation and practice in this area.[69] The Parliamentary Assembly also highlighted that referendums are an "instrument of direct democracy which belong to the European electoral heritage" and they considered them to be "a positive means to enable citizens to participate in the political decision-making process and to bridge the distance between them and the decision makers".[70]

Finally, in addition to all of the above, there is the work of the Venice Commission itself, with its decisions and reports on various referendum processes that clearly make up a statement of European and international standards in the field.[71]

(2) The main principles and democratic safeguards

I believe that the Venice Commission's codes of conduct, reports and decisions, the ECHR's jurisprudence, the Human Rights Committee's doctrine, and international practices themselves give rise to the main principles and democratic safeguards for independence referendums. Therefore, I will briefly address what I consider to be the seven basic principles and democratic safeguards from an international perspective.[72]

The first of the principles and safeguards that I would like to highlight is the principle of legality: International Law does not recognise any general right to be consulted, so

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[65] *Code of Good Practice in Electoral Matters*. The guidelines were approved at the 51st Plenary Session of the Venice Commission on 5-6 July 2002, and the Explanatory Report was approved at the 52nd Plenary Session on 18-19 October 2002. See *Opinion no. 190/2002*, Document CDL-AD (2002) 23 rev.

[66] See Council of Europe Parliamentary Assembly Recommendation 1704 (2005), of 29 April 2005.

[67] *Code of Good Practice on Referendums*. The Code was adopted by the Venice Commission at their 70th Plenary Session on 16-17 March 2007. See *Study no. 371/2006*, Document CDL-AD(2007)008 rev.

[68] See the aforementioned *Referendums in Europe – An Analysis of the Legal Rules in European States*, Document CDL-AD (2005)034.

[69] Resolution 1592 (2007), of 23 November 2007.

[70] *Ibid*., para. 1 and 2.

[71] See *Compilation of Venice Commission opinions and reports concerning referendums*, Document CDL-AD(2017)002, of 10 March 2017.

[72] I have excluded any particular reference to the events in Catalonia on 9 November 2014 and 1 October 2017. I refer to X. Pons Rafols, *Cataluña: derecho a decidir y* [...], *op. cit.*, particularly chapters 1, 2 and 6 throughout.

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referendums should comply with domestic legislation and be established in the constitution or by legislation.[73] As I mentioned previously, a legal and constitutional system that never, or only exceptionally, provides for referendums is as democratic as one that does provide for them. Referendums are a matter of domestic legal and constitutional tradition that corresponds to the margin of State appreciation. It is even possible, and perfectly plausible for democratic States, to adopt constitutional reforms without holding any constitutional referendum at all.[74] However, the existence of a legal framework is the only mechanism to avoid delegitimising any potential referendum and to ensure that all parties and positions involved have full confidence in how it is held and its results.

A clear expression of the imperative for this principle of legality can be found in the Venice Commission Opinion on the independence referendum held in Crimea on 16 February 2014.[75] The Commission considered that the Autonomous Republic of Crimea did not have the authority to call a referendum, which was also affirmed by the Constitutional Court of Ukraine, therefore a referendum would contravene European standards. The Commission also indicated that the Constitution of Ukraine allows referendums, but not of secession, as Ukraine exists as a unitary State. It would therefore have been necessary to reform the Constitution and, although the Constitution limits the amendments that affect the territorial integrity of the States, the Commission considered that this did not contravene European democratic standards.

The second of the relevant principles or safeguards is that of the legal certainty in respect of the stability and predictability of referendum legislation. The *Code of Good Practice* specifically demands this stability in relation to the existence and composition of the electoral commission or board, and states that fundamental aspects of referendum law cannot be amended less than one year before a referendum is held.[76] This means that referendum legislation should never be adopted expressly for a particular referendum. This is also particularly relevant to election administration and electoral fairness, which are fundamental factors that guarantee referendum credibility. This credibility absolutely must be backed by

[73] As established by Guideline III.1 of the Code of Good Practice on Referendums, "The use of referendums must comply with the legal system as a whole, and especially the procedural rules. In particular, referendums cannot be held if the Constitution or a statute in conformity with the Constitution does not provide for them, for example where the text submitted to a referendum is a matter for Parliament's exclusive jurisdiction".

[74] For example, Czechoslovakia separated into two States (the Czech Republic and Slovakia) without any kind of referendum.

[75] See *Opinion on "Whether the decision taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to organize a referendum on becoming a constituent territory of the Russian Federation or restoring Crimea's 1992 Constitution is compatible with constitutional principles"*, Document CDL-AD(2014)002, of 21 March 2014.

[76] *Code of Good Practice*, Guideline II.2.

an impartial, independent, established and permanent electoral commission or board.[77] The *Code of Good Practice* therefore provides for this demand for legal certainty and a period of stability in referendum legislation. In the case of Crimea, the Venice Commission considered that the extremely short period of 10 days between calling the referendum and holding it, and other circumstance of the case, clearly contravened European democratic standards.[78]

The third factor or democratic guarantee in a referendum process, although it may seem obvious, is the existence of an established electoral roll or register, which is constantly updated, can be challenged and amended, and is under judicial control. This does not mean that the right to vote is absolute, [79] as the State is responsible for establishing the conditions for the right to vote in their domestic legislation. Therefore, there should be a voter register, although restrictions and conditions can be applied, as long as they are based on reasonable and objective criteria[80] which are proportionate and have a legitimate purpose. In this respect, it is perfectly compatible with international standards to restrict the vote to nationals, set a minimum voting age,[81] establish restrictions for people held in prisons, or set prerequisites for residence. On this last point, the Venice Commission *Code of Good Practice* recommends, in general, a minimum residence of six months in order to have the right to vote.[82]

With respect to these considerations on the requirement for prior residence, the complex case of New Caledonia, which has been the subject of various declarations from the Human Rights Committee and the ECHR, can be used as an example. The Nouméa Accord of 1998 provided for a first consultation in that same year (when residence of 10 years in New Caledonia was required) and a future referendum, to be held between 2014 and 2018, which is eventually expected to take place on 4 November 2018 and which will demand (among other alternatives) residence of 20 years. The Human Rights Committee considered that the right to vote "is not an absolute right and that restrictions may be imposed on it provided they are not discriminatory or unreasonable," therefore not all differentiation constitutes discrimination if it is based on objective and reasonable criteria and the purpose sought is legitimate under the Covenant. This was the case for New Caledonia, when adequate links to the territory were demanded for a referendum of self-determination.[83] Equally, the ECHR considered that the rights in article 3 of Protocol 1 are not absolute, but may be subject to

77 *Ibid.*, Guideline II.3.

78 *Loc. cit.*

79 As mentioned in the *Code of Good Practice* Guideline I.1, on the right to vote, "This right may, however, and indeed should, be subject to certain conditions".

80 *General Comment* on article 25, para. 10.

81 This age was set at 16 years old for the Scottish referendum.

82 *Code of Good Practice*, Guideline I.1.

83 See Communication no. 932/2000, *Ms. Marie-Hélène Gillot et al. v. France*, Views of 15 July 2002, Document CCPR/C/75/D/932/2000.

limitations. Therefore, the State has a wide (although not unlimited) margin of appreciation, and particular requirements for residence could be considered to pursue a legitimate purpose in the case of New Caledonia, and those requirements complied with the European Convention.[84]

A fourth and fundamental democratic safeguard is neutrality of the public authorities and equality of opportunity for the supporters and opponents of the proposal to be put to the vote. In this respect, the *Code of Good Practice* establishes that the authorities should provide objective information on the proposals to be submitted to the referendum and they should not influence the result of the vote by excessive and biased campaigns.[85] This neutrality of the public authorities should be demonstrated in the referendum campaign, media coverage, public funding of the campaign and its actors, propaganda and advertising and, finally, in the right to demonstrate on public thoroughfares. In this respect, the impeccable British mechanism that runs an independent Electoral Commission and enables the appointment of registered organisations or multiparty platforms for each of the positions in dispute in a referendum and restricts government propaganda, excluding it entirely in the 28 days immediately before the referendum, should be particularly highlighted.[86]

The fifth significant principle refers to the clarity of the question. The *Code of Good Practice* states that the question must be worded clearly and without ambiguity, it must not be an open question and it must not mislead, or suggest an answer.[87] The question is particularly important: in the Scottish referendum, for example, the Electoral Commission considered that the question that was originally proposed ("Do you agree that Scotland should be an independent country?") was not sufficiently neutral and changed it to "Should Scotland be an independent country?" In the case of Quebec, neither of the two questions asked in the referendums of 1980 and 1995 would pass this international test of clarity today, and this test is also now incorporated into the Canadian Clarity Act.[88]

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[84] Case *of Py v. France*, Judgement of 11 January 2005.

[85] *Code of Good Practice*, Guidelines I.2 and I.3.

[86] The Electoral Commission supervised the Scottish referendum and published a complete report on it: see the *Scottish Independence Referendum. Report on the referendum held on 18 September 2014*.

[87] *Code of Good Practice*, Guideline I.3, para. 1.c.

[88] The question in 1980 was "The Government of Quebec has made public its proposal to negotiate a new agreement with the rest of Canada, based on the equality of nations; this agreement would enable Quebec to acquire the exclusive power to make its laws, levy its taxes and establish relations abroad - in other words, sovereignty - and at the same time to maintain with Canada an economic association including a common currency; any change in political status resulting from these negotiations will only be implemented with popular approval through another referendum; on these terms, do you give the Government of Quebec the mandate to negotiate the proposed agreement between Quebec and Canada?"; and the question in the 1995 referendum was "Do you agree that Quebec should become sovereign after having made a formal offer to Canada for a new

A sixth consideration should be formulated in relation to the majorities required, both in participation in the referendum and with respect to the results for these to be considered valid. I should point out here that there is a wide range of minimum participation in domestic provisions for referendums. The Venice Commission in particular recommends that there should be no minimum participation quorum, as this makes opponents abstain instead of voting no; and that there should be no minimum approval quorum either as, if this is not reached but there is a significant majority, it can be very complicated to manage the results of the referendum.[89] The Venice Commission's *Guidelines for Constitutional Referendums at National Level* do recommend a minimum participation by the electorate in constitutional referendums, which seems to indicate that it becomes logical to demand a minimum threshold of participation in important and transcendental matters, thereby creating an exception to the general standard set by the Commission itself.[90] However, it should be noted that the Edinburgh Agreement did not set any minimum level for participation or results in the Scottish independence referendum.

With respect to these considerations, the most relevant case is the Montenegrin independence referendum of 2006. During the referendum process, the Venice Commission proposed certain conditions for the referendum and its results to be valid. These conditions were then accepted by the Council of Europe and the European Union and, obviously, by the Montenegrin authorities, with the backing of the Serbian authorities. In order for the separation to be accepted internationally (a question that was foreseen and regulated specifically by the constitutional regulations of the State of Serbia-Montenegro),[91] it was agreed that the referendum should be governed by a minimum threshold participation of 50% of the electorate and a majority of 55% of voters in favour of independence. Although a very high number voted, reaching 86.6% participation, the minimum threshold of votes in favour was reached by only a few tenths of a point, at 55.6%.[92] For some authors, taking into account

economic and political partnership within the scope of the bill respecting the future of Quebec and of the agreement signed on June 12, 1995?".

[89] *Code of Good Practice*, Guideline III.7.

[90] See analysis by J.M. Castellà Andreu, "Sobre el encaje constitucional del pretendido referéndum de secesión en Cataluña", in E. Sáenz Royo; C. Garrido López (coords.), *La funcionalidad del referéndum en la democracia representativa* (ed. Tirant lo Blanch, Valencia 2017), pp. 129-153, particularly pp. 148-149.

[91] The 2003 Constitution of Serbia-Montenegro enabled the question of separation to be proposed in a referendum whose regulation "shall be passed by a member state bearing in mind the internationally recognized democratic standards", three years after it came into force.

[92] The requirement for a minimum participation had already been foreseen in Montenegrin domestic legislation on referendums (as has occurred in other European countries for referendums to be valid) and the Venice Commission considered that a greater majority than a simple majority of positive votes was necessary to ensure full legitimacy of the result. This was covered in general under Montenegrin law [see *Venice Commission.*

that in other cases in the former Yugoslavia, majorities in favour of independence where overwhelming (80% and 90% of voters), the case of Montenegro was still symptomatic.[93] However, I believe that the relevant point is that the legitimacy of the results was never called into question because the referendum rules had already been established and agreed by all interested parties.

Connected to this, I have already mentioned that the Clarity Act in Canada regulates the three successive moments in which the Federation should intervene when faced by a secessionist proposal by a province: to grant *a priori* approval to the proposed question; evaluate, *a posteriori*, the clarity of the results obtained; and finally, to establish the requirements for the proposed constitutional reform, if applicable. So, with respect to the majorities required to evaluate the clarity of the results, it is the Federal Parliament's responsibility to decide (when the referendum for independence has been held) if there has been a clear majority who wish to separate from Canada, taking into account the majority in favour of secession and the percentage participation in the referendum. The evaluation should be expressed in "qualitative" rather than "quantitative" terms, as indicated by the Supreme Court itself in the Reference re Secession.[94]

Finally, for my seventh point, I must refer to the effects of the referendum, and whether these are binding or purely consultative, which should be clearly stated in the constitution or the legislation.[95] A consultative referendum on independence which had a positive result would probably have enough political weight to lead towards independence. Anyway, with regard to international practice, I believe that an independence referendum can never been taken as an automatic mechanism if the result is positive, as negotiations would have to be started, and these would have their formulas and deadlines. As in all negotiations, compromises would be required, so there would be no predetermined outcome.

In this respect, the Supreme Court of Canada established in the Reference re Secession that, if the population of Quebec was asked a clear question and a large majority of the population responded positively to a new independence project, there would be a legal and constitutional obligation for the federal and Quebec authorities to negotiate constitutional changes to the federal agreement. It is not so much that there would be an obligation to

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Opinion on the Compatibility of the Existing Legislation in Montenegro concerning the Organisation of Referendums with Applicable International Standards, Document CDL-AD (2005)041, para. 19-42].

[93] On this subject, and the case of Montenegro and the work of the Venice Commission, see N. Hajjami, "La Commission de Venise et la construction d'Etat: l'exemple du Montenegro", in *L'État de droit en droit international. Colloque de Bruxelles Société française pour le droit ingernationale* (ed. Pedone, París, 2009), particularly pp. 211-212.

[94] It was not in vain that the Supreme Court, in the Reference re Secession, referred to the need for "a 'clear' majority as a qualitative evaluation" (para. 87).

[95] *Code of Good Practice*, Guideline III.8

unequivocally respect the will of the Quebec people and automatically proclaim or establish independence, but rather that there would be an obligation to negotiate the political scope of the decision, and the conditions, wordings and deadlines for this will to come into effect, if appropriate.[96] The Supreme Court of Canada itself recognised that these negotiations "would undoubtedly be difficult" and "no one can predict" their results, as they "would inevitably address a wide range of issues", so the "possibility that they might not lead to an agreement amongst the parties must be recognized".[97] In my opinion, this clearly excludes the legitimation of any unilateral action, so if there is a clear majority responding to a clear question, there would be an obligation for all parties to negotiate, and a breach of this obligation could have significant repercussions on an international scale, eroding the international legitimacy of the party that breached the obligation and did not act in good faith. What is more, the Supreme Court considered that "Refusal of a party to conduct negotiations in a manner consistent with constitutional principles and values would seriously put at risk the legitimacy of that party's assertion of its rights, and perhaps the negotiation process as a whole".[98]

(D) FINAL REMARKS

In conclusion, I believe that some essential ideas in my argument can be highlighted in relation to secessionist tensions in democratic States, the right to political participation in International Law, and the international standards and good practice applicable to independence referendums.

Firstly, I should reiterate that there is no doubt that democratic States should seek democratic legal and political solutions for potential secessionist tensions, addressing them in a constitutional domestic system and channelling the will of the people democratically. It is clearly a political problem and an issue for domestic law and, as such, should be tackled from a political standpoint and be the responsibility of domestic public authorities, with institutional loyalty and domestic legal and constitutional mechanisms, something which has been seriously lacking in Spain in recent years. In my opinion, International Law never protects (but also never stops protecting) these secessionist tensions, because it understands secession as a pre-juridical phenomenon that is a fact for this legal system. Only in the event of an extreme case of denial of internal self-determination (a situation that is obviously incompatible with a democratic State, where it is unlikely to arise) could an exception be

[96] Because, as the Supreme Court stated, "The continued existence and operation of the Canadian constitutional order cannot remain indifferent to the clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada" (Reference re Secession, para. 92).

[97] *Ibid.*, para. 96 and 97.

[98] *Ibid.*, para. 95.

made and the right to unilateral secession perhaps be justified as a remedy in International Law. Beyond these considerations, there is no right of secession for one part of a State's territory under International Law, and the only legal system that applies is domestic law.

Secondly, I should highlight the fact that democracy and the rule of law are emerging principles in International Law, and it has also recognised the existence of the fundamental human right to political participation that, among its various expressions, can enable direct participation in public issues. So International Law can allow mechanisms of direct political participation, such as referendums, consultations and other means of participation, to be established in domestic legislation. In any event, it is clear from the points I have discussed here that a direct democracy, or one with a high level of participation, is not an obligation or an alternative to representative democracy, as both are admissible under International Law and can be complementary where applicable. This is because their implementation is a matter for domestic legislation, and International Law does not favour one or the other. In my opinion, it is also clear that there is no fundamental human right in International Law to be called to referendum or to be consulted in general, even on constitutional reform or on proposed independence of a part of the territory of a democratic State.

Thirdly, it should be noted that International Law has developed international standards and good practice in elections and referendums over the past few decades, in the form of soft laws that can guide domestic legislation or at least serve as substantive indicators of the democratic quality of these processes. In this respect, in an international system where it is recognised that there is no single model of democracy and that there are diverse practices in the rule of law, these international good practices help configure and implement, for the purposes that I would like to highlight, the main principles and democratic safeguards in referendums, especially independence referendums. These principles and safeguards, which I have organised and summarised (starting with the legal provisions in domestic legislation), have not been taken sufficiently into account during the various events that have taken place in Catalonia recently.

Ultimately, referendums, as mechanisms of direct citizen participation, can be useful to determine the opinion of the people or particularly, in my understanding, to validate certain agreements or political decisions. However, independence referendums are, by definition, asymmetrical (a positive result can become irreversible, but the same does not occur for a negative). In a polarised political situation with a certain degree of social division and an infinite political deadlock, as is the case in Catalonia, they can also be deeply divisive. Rather than a strictly decisive concept, it seems to me that, in many cases (and in the case of Catalonia in particular) it is more useful and necessary to take a more inclusive approach that attempts to achieve more of a majority, wider consensus which should finally be put to a

referendum. In my opinion, and from a political perspective, it would be useful to apply rational and well-founded political and legal criteria, and to act with extreme political prudence and with a high level of responsibility and vision, all qualities which have been too absent, for too long, in Spain.

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