


The self-determination of peoples vs human rights in liberal democracies: the case of Catalonia

Dr Helena Torroja | Senior Tenure Professor of Public International Law, University of Barcelona | @HTorroja 

Theme

The abusive interpretations of the international norm of the self-determination of peoples by secessionist groups in liberal democracies entail a violation of the fundamental human rights of the entire population of the state in question. This paper discusses the norm's abuse in reference to the people of Catalonia.

Summary

This paper focuses on two main questions. First, do Catalans have a right to self-determination? Some authors consider that the principle of the self-determination of peoples includes the right for a fraction of a state's population to separate from the state. But the conclusion they make is incorrect as it is built upon many common interpretation errors, including the failure to respect the general secondary rules of interpretation of custom and of norms of *ius cogens*. This analysis outlines four of the main errors of interpretation. The second question is what, in terms of the violation of human rights, are the implications when self-determination is invoked in a liberal democracy; that is, who are the real victims of human-rights violations in Catalonia?

Analysis

Starting with some facts, around two million members of the electorate in Catalonia (a part of Spain, an EU Member State) are convinced that they have the right to self-determination, and that such a right is recognised internationally. They are also convinced that when they voted in a referendum contrary to the Spanish Constitution, all they were doing was peacefully exercising their right to decide; because, after all, democracy is simply about voting. However, the rest of the Catalan electorate –slightly over two million– have a different view.

I shall not focus on the internal political problems behind these facts. Instead, I shall consider two basic questions of international law that are directly related to this belief:

- (a) Do the Catalans have a right to self-determination? In legal terms, does the principle of the self-determination of peoples include the right for a fraction of a state's population to separate from that very state?
- (b) If the answer is no, what are the implications when self-determination is invoked in a liberal democracy in terms of a violation of human rights? Who are the real victims of human-rights violations in Catalonia?

(1) Does the principle of self-determination of peoples include the right for a fraction of a state's population to separate from that very state?

Some authors claim that, one way or another, a fraction of a state has the right to secede. I take the opposite view. The norm does not include a right for a fraction of a state's population to separate from the state, either directly or indirectly –under the doctrine of remedial secession–.¹ Here I will focus on only several major points that I consider clear enough to support my thesis.²

(1.1) On scholars and correctly interpreting international norms

It is true that answering this question is currently a matter of academic debate; a complex matter, as described, for instance, by Special Rapporteur Tladi in his recent report on *ius cogens* norms.³ But complexity does not imply it is a puzzling topic on which we should hear opinions from all sides and give them equal validity, as if it were a debatable postmodern construct. This is not how the matter must be approached, simply because international law is a legal system: it has general secondary rules of interpretation of norms, among others.⁴

This means that we can define the objective –i.e., unbiased– content of a norm, since not all interpretations are valid. Additionally, the consent or consensus of the state is the essence of any norm. In no way are scholars the material source of international law.

What we are talking about is the interpretation of the content of a fundamental principle of international law, a *ius cogens* norm of general international law, which is a customary norm, as made clear by the International Court of Justice on various occasions. We are not talking about any operative norm whose content can easily be modified or repealed by any state.

¹ There is no international norm expressly granting a right to separation from the territorial state to a part of its people; the Supreme Court of Canada, in its decision on the secession of Quebec in 1988 was clear on this point (Supreme Court of Canada, *Reference re Secession of Quebec*, [1998] 2 S.C.R., para. 111). That is why secessionist groups will try to justify their actions invoking the international principle of the self-determination of peoples, not simply by invoking a political principle or moral value, but, I insist, an international norm.

² Please refer to the study I've recently published on this, which is in Spanish but is soon to be published in English as well: Torroja, H., "Libre determinación de los pueblos *versus* secesión": *Cursos de Derecho internacional y relaciones internacionales de Vitoria-Gasteiz 2018*, Thomson Reuters, 2019, pp. 237-388.

³ As has been described, among others, by Special rapporteur Tladi in his recent report on *ius cogens* norms: "... in the present report, the discussion above has not attempted to solve the more complex problem of what constitutes the right to self-determination, i.e., whether the right applies only in the context of decolonization and whether the circumstances in which the right applies would permit external self-determination (secession) and, if so, under what circumstances" (Fourth report on peremptory norms of general international law (*ius cogens*) by Dire Tladi, Special Rapporteur, A/CN.4/727, 31/1/2019, para. 115, p. 52).

⁴ Rules of recognition, change and adjudication of primary (and secondary) rules; among the rules of recognition there are those of *interpretation* and application of norms. Vid. Hart, H.L.A., *The Concept of Law*, 2nd. Ed. Oxford University Press, Oxford, 1994, pp. 61, 117; Bobbio, N., "Normas primarias y normas secundarias": *Contribución a la teoría del derecho*, Ed. A Ruiz Miguel, Madrid, 1990, p. 314-315. See also: Casanovas i la Rosa, O., "Unidad y pluralismo en Derecho internacional público": *Cursos Euromediterráneos Bancaja de Derecho Internacional*, Vol. II, 1998, p. 59-60.

(cont.)

Many widespread interpretation errors result from the failure to respect the general secondary rules of interpretation of custom and of *ius cogens* norms. The following sections outline some of these errors of interpretation.⁵

(1.2) *First interpretation error*

A first widespread interpretation mistake is the belief that the right to the self-determination of peoples consists of a colonial people's right to separate from the territory of the metropolitan state, as an exception to the principle of territorial integrity. It is simply not so.

What was established was that a state allowed its colonies to gain sovereignty and independence if they so wished. What the colonial power agreed to was to move away from the traditional viewpoint that colonies were territorial possessions, i.e., part of their territory.

That is the meaning of Resolution 2625 (XXV), 1970, para. 6:

'The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it...'

The doctrine behind this norm (a 'legally distinct condition' of colonised territories) benefited the colonial powers because their sovereignty was not greatly affected, there being no exception to the principle of territorial integrity.

And it was also to the benefit of the colonies' populations, as they were recognised as having a kind of virtual sovereignty, and their territorial integrity –taken from them by the hideous crime of colonialism– was returned to them.

As such, the colonies did not secede or separate from the territory because they were not a part of it. That is the consensus behind the norm.

(1.3) *Second interpretation error*

A second interpretation error is to mistakenly think the internal right to separation that some states might grant to a part of their population is based on an international norm that is above the principles of territorial unity and integrity.

⁵ By the way, I wish to add that I will not engage in the debate regarding who has the right to external self-determination, since I believe that issue has already been resolved: only people under colonial rule or military occupation have the right to self-determination, for example the Palestinians. If states had wanted to give ethnic, linguistic or cultural minorities the right to sovereignty and independence, there would now be some four or five hundred African countries, instead of the 52 or 53 there are. That is not what states wanted. Which is why they clearly established that the right was for colonized peoples – which could comprise various ethnicities and languages. And to guard against the possibility of infinite claims regarding sovereignty, they specified that the borders of the colonized territory be determined in accordance with the principle of *uti possidetis*.

If the UK or Canada –with their flexible constitutions– are able and want to allow a vote on separation for a part of their populations (Scotland and Quebec, respectively), so be it, they can do so at their own discretion. International law respects their right to do so, but it is not a universal model imposed by international law. In the same way, there is no internal notion on the link between democracy and the internal right to separation that can be imposed on any other states (see, for instance, the opinion of the Supreme Court of Canada in its decision on the secession of Quebec). In fact, not the slightest: the management of internal territory is a discretionary competence, protected by the principle of sovereignty and independence, a fundamental norm of international law.

There is no international duty to allow a vote on separation to a part of a state's population. Only in the case of colonial peoples is there an allowance for a democratic decision on independence or other forms of political sovereignty; in practical terms this means that self-determination is a *ius cogens* norm.

The right to self-determination has a specific 'international regime' –as described by Professor Marcelo Kohen⁶ and it should not be confused with the *transfer* of sovereignty or *devolution* –as used by Professor Crawford⁷, which a state may decide upon at its discretion.

(1.4) Third interpretation error

A third interpretation error is to ignore the fact that the self-determination norm sets limits, banning its use by secessionist groups that seek to fracture the territorial integrity of old or new states.

This is a very important point: states are not neutral regarding secession. The seventh paragraph of Resolution 2625 (XXV) is quite clear:

'Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States...'

With this paragraph, states limit the principle's scope for subjectivity, having extended it –in its internal dimension– to all peoples in Resolution 2625's (XV) opening paragraph, among other texts. It is clearly established that the right –in its external dimension– is not for the use of any part of a state's population.

Having reached this point, it may seem that the ICJ, in its Kosovo opinion, took a contrary position to the one I have just explained. It stated that international law was neutral regarding unilateral declarations of independence, and that the principle of territorial integrity did not apply internally, but rather only in relations between states.

⁶ A specific 'international regime' (M. Kohen, 2002, 'La création d'Etats en droit international contemporain', *Cursos Euromediterráneos Bancaja de Derecho Internacional*, Vol. VI, p. 571).

⁷ On the terms *transfer* of sovereignty or *devolution* see J. Crawford (2006), *The Creation of States in International Law*, Clarendon Press, Oxford, p. 330.

(cont.)

I cannot agree with such a statement. It should be borne in mind that the Court decided, surprisingly, to limit the scope of its arguments by not going so far as to study and take into account the *ius cogens* norm of self-determination.⁸ Naturally, as a result, there was no realisation of the fact that preventing secessions is exactly what the norm does and that the territorial integrity principle has an internal application.

Looking at the text carefully, it can be seen that what is forbidden is the use –let us say, the interpretation– of the self-determination norm to foster the dismemberment of a state's territory. States were so fearful about secession that they dared not even call it by its name. But, of course, they did want to prevent it.⁹

(1.5) Fourth interpretation error

A fourth interpretation error is the belief that, in that same paragraph, in the second and last sentence, states established a right to separation as an exception to the principle of territorial integrity in cases where there are discriminations or violations of human rights, the so-called right to remedial secession.

This error is what I would call an error of isolated literal interpretation. Because all doctrines that consider this –every single one of them– base their reasoning on the second and last sentence of this paragraph. Since professor Buchheit, one of the first to argue this in 1978, I have found no such arguments based on a different text.¹⁰

The paragraph could be read *literally* as saying that if a government is not representative, the part of the population who are discriminated against have the right to separate.¹¹

However, the general secondary rule of interpretation does not say 'there can be nothing but a literal interpretation of the text'. What it says is that the text should be taken in its context and in consideration of its object and purpose. And if the result is absurd, it is up to the will of the states behind the custom. And all of this has simply provided us with the *opinio juris cogentis*, which is reflected in the GA Resolutions and art. 1 of both

⁸ The ICJ decided not to answer the question of whether the right to self-determination allows a part of a state's population to separate (para. 83). Its decision not to address the question is both surprising and difficult to explain. See ICJ (2010), *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 22/VII/2010, paras. 59-56 and 82-83.

⁹ To be precise, it does not forbid them directly but rather indirectly or tacitly; secession is an internal affair, so it cannot prohibit it, just as international law does not prohibit coups d'état, or revolutions (A. Mangas Martín, 'El derecho internacional ¿fundamento de la secesión en Cataluña?', <https://aracelimangasmartin.com/derecho-internacional-fundamento-la-secesion-cataluna>). States knew this in their General Assembly debates of the 60s and were so fearful of secession that they did not even call it by its name. But of course, they wanted to prevent it.

¹⁰ L.C. Buchheit (1978), *Secession – The Legitimacy of Self-Determination*, Yale University Press, New Haven & London, p. 221-222.

¹¹ Para. 7 of Resolution 2625 (XXV), second and final line: 'Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour'.

(cont.)

international human rights covenants. State practices are still required in order to determine the content of the norm, and Katanga and Biafra clearly prove that there were no such practices. Bangladesh was a pure case of secession, achieved with the aid of the Indian army.

It should be borne in mind that, as we have seen, states were very reluctant to give even their colonies a right to separation; why would they make exceptions and give it to any minority in the almost last paragraph of the GA Resolution? To think this was their intention is simply absurd.

In fact, the final draft has been confirmed by Professor Cassese as having resulted from a last-minute change made unilaterally by the drafting committee.¹² And if we consider the previous debates in the GA we can see that the safeguard against discrimination (some consider it a democratic clause) was established to protect the victims of apartheid (as in the case of Southern Rhodesia and the Bantustans in South Africa).

In any case, the International Court of Justice has established the *lege ferenda* status of this 'remedial secession' doctrine (Kosovo Advisory Opinion), and so has the Supreme Court of Canada (Secession of Québec decision). And I shall reserve some criticism, as it may disguise a defence of ethnic cleansing.

Have events since 1989 changed the law? In Europe there have been a fair number of changes in sovereignty since then, in different legal circumstances. Some were consensual devolutions, and others were secessions, alterations in sovereignty against the will of the mother state. Have these secessions changed the norm? No. Events do not change the law, despite what one might hear from a certain doctrine or from certain special rapporteurs of the UN Council on Human Rights.¹³

In conclusion, it is very clear to me that the norm does not include any right to separate from the state; it was not attributed to colonial peoples or to any minority of any fraction of a state's population, or in any other circumstances.

(2) What are the implications when an inexistent right to external self-determination is invoked in a liberal democracy in terms of the violation of human rights?

The inventive and inaccurate interpretations I have mentioned have led some authors – and Catalan politicians– to argue that it is lawful to claim the right to self-determination in Catalonia. Since there is no colonial power or military occupation, a right to remedial secession can be claimed on the basis of human rights violations, they say, or on the basis of a right to democracy. Three ideas can be considered in this respect.

¹² Drafting Committee of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States of the UN General Assembly. See A. Cassese (1995), *Self-determination of Peoples. A Legal Reappraisal*, Cambridge University Press, Cambridge, p. 117 & 123.

¹³ Alfred Zayas in Note SG (2014), 'Interim report of the Independent Expert on the promotion of a democratic and equitable international order', A/69/272, 7/VIII/2014, paras. 28-29. Any change to a *jus cogens* norm must be brought about by another *jus cogens* norm. And, in any case, if a secession comes to pass through the creation of a new state, this does not retroactively attribute a right to separation to the part of the population seeking revolution at the beginning of the secessionist process.

(2.1) A contradiction in terms

First, it is a *contradiction in terms* to claim that a situation warranting this non-existent right to remedial secession can exist in a democratic EU member state such as Spain.

Is it really possible to compare the situations of Kosovo or failed states such as South Sudan and Eritrea with the position of the Catalan population in our contemporary political system? To do so would be dishonest.

(2.2) A violation of the fundamental right to internal self-determination of the state's population

Secondly, anyone making such a claim is threatening the right to internal self-determination of the state's population as a whole. Certainly, when the external self-determination norm was proclaimed by states in the three well-known international texts (in para. 2 of the 1514 (XV) General Assembly resolution, in common art. 1 of both human rights covenants of 1966, as well as in para. 1 of the 2625 (XXV) General Assembly resolution), they made it so that in each pre-existing state all the people had the collective right to decide their political future, including their territorial integrity.¹⁴

Hence, the Spanish people as a whole have a basic collective human right to decide the future of their territory, and that includes all the Catalans, even those who are against secession.

When one part of a state's population denies the rest its collective right through an unconstitutional referendum to decide on secession it is failing to comply with the international norm that attributes the right to internal self-determination to the entire Spanish people.

Does this right not matter? I cannot see why not.¹⁵

¹⁴ UN GA Resolution 2625 (XXV): '1. By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter'. It is a right of internal self-determination belonging to all the people in the state. This is in accordance with the definition of the term 'people' in the General Assembly's resolutions and in art. 1 of both the 1966 human rights pacts (text, context, object and purpose). Very clearly on this internal right and its relation to democracy, see P. Andrés Sáenz de Santa María (2018), 'A right of all peoples: the internal dimension of self-determination and its relationship with democracy', *SYBIL*, 22, p.159-173.

¹⁵ But this is not what some scholars see: for instance, M. Weller (2017), 'Secession and self-determination in Western Europe: the case of Catalonia', 18/X/2017, <https://www.ejiltalk.org/secession-and-self-determination-in-western-europe-the-case-of-catalonia/>; and N. Kirsh (2013), 'Catalonia's independence: a reply to Joseph Weiler', 18/I/2013, <https://www.ejiltalk.org/catalonias-independence-a-reply-to-joseph-weiler/>. In this regard, I do not understand how Professor Kirsh can defend that the process of violating the fundamental collective right to internal self-determination of all Spaniards can be considered '... a form of democratic self-government, born out of frustration with the processes of a larger entity that often enough ignore the wishes and concerns of minorities'... 'Wishes' versus violations of human rights! And some of the main mass media outlets do not seem to see it either.

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(2.3) The indissoluble link between the Constitution of a liberal democracy and human rights

Let's probe further, with a third idea. In a liberal democracy, the constitution protects all the population's basic human rights: everyone's. Basic human rights are inseparable from three other elements that are key to liberal democracies: the rule-of-law, democratic representation and the separation of powers. These four elements are inseparable in the Council of Europe and the EU.¹⁶ One can also talk of the three main principles of liberal democracy, as described by Professor Joseph Weiler: the rule of law, human rights and democracy.¹⁷

So 'democracy is not simply voting', despite the claim of secessionist Catalan politicians. Democracy without respect for the law is not democracy, nor does it respect human rights.¹⁸

Does the Spanish constitution hold no value whatsoever? What has happened in Catalonia is in every sense a secessionist process, a revolutionary act, as described by Professor Antonio Remiro: an act against the human rights protected by the Spanish constitution.¹⁹

In Catalonia, from my perspective, the problem is not that of an oppressive state, Spain, violating the basic rights of a part of its population in Catalonia. No. It is quite the opposite. The problem is that of a local state power –the Catalan government in a highly decentralised state– leading on a large part of its population with false legal premises – and I must insist on this point– to clash with another large part of its population and deny and violate their basic rights and, most certainly, their political rights.

And, as a result, we have a territory with a divided society; a division that is growing under the influence of hegemonic power in Catalonia, fostering the beginning of a sort of exclusive, ethnic nationalism, something we thought had been eradicated from both Western and Eastern Europe.

¹⁶ The 1949 Treaty of London that created the Council of Europe established this quite clearly in its preamble: 'Reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy'.

¹⁷ J. Weiler (2018), 'Who's afraid of a nation of nations?', *Actualidad Jurídica Uría Menéndez*, 50-2018, p. 11.

¹⁸ I agree with Professor Weiler when he says that 'Catalonian Independentists marvel again and again why the European Union, meant to be the guarantor of both human rights, democracy and the rule of law, has steadfastly refused to give any support to the Catalan independence project. They should not be surprised' (*ibid.*).

¹⁹ A. Remiro Brotóns (2017), 'La independencia como un hecho revolucionario', *REEI*, nr 34. So, if the secessionist process triumphs, the secession will be the result of a revolutionary process, which should not be supported or recognised by other states because it is incompatible with the principle of self-determination falsely argued by the secessionists, among other reasons.

Conclusions

The external right to self-determination does not apply to Catalonia or to any minority within a state other than colonial peoples or those under occupation. In no circumstances does the norm include a right to separation from the state; on the contrary, it protects the state's territorial integrity. Remedial secession is a doctrine with no legal basis, despite being defended as a *lege ferenda* by some authors.

When a part of the population of a liberal democracy, such as Spain, claims and demands the right to external self-determination against the constitution, this entails a violation of the fundamental human rights of the state's entire population, including those who do not want secession in the territory in question.

Anyone making such erroneous claims in an EU member state is failing to respect the rule of law, with major flaws in the scientific method used and under the influence – disinterested or not – of secessionist forces.

This is not merely an academic debate: it is far more serious. Peace, justice and human rights in our society are currently in jeopardy throughout Europe. There is a territory with a divided society in which both sides apparently claim the same right to self-determination and to democracy.²⁰

The reader can decide which of the two sides is upholding international law and the very notion of democracy and human rights as consolidated in liberal democracies (and in the EU and the Council of Europe) and which is not.

²⁰ Around 51%-50% of the population demand their right to democracy, respect for the constitution and for basic human rights, including their right to internal self-determination, violated by the laws on the referendum and for disconnection, approved on 6 and 7 September, respectively. Further, around 49%-50% of the population are demanding their *sui generis* right to democracy –against EU standards and principles– and their right to respect an inexistent international norm under the leadership of politicians who lied to them.