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# MINORITY AUTONOMY AND THE INTERNAL ASPECTS OF SELF-DETERMINATION IN THE EU: BRIEF COMPARATIVE APPROACH FROM THE BASQUE COUNTRY

## 1 Introduction

The aim of this paper is to try to establish a certain general and comparative approach towards autonomy and self-determination within the general scope of the EU and to reflect also the peculiar example and position of the Basque Country within the Spanish system.

Nowadays, the concept of self-determination is linked with the so-called right to decide in its more recent political approach in various nations with different levels of autonomy. The political claims of Catalonia, Basque Country, Scotland,[1] Québec[2] or Flanders, *inter alia*, are significant in order to understand the concept of self-determination within complex debates on the linkages between autonomy and the will of sovereignty.[3]

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[1] In particular with the self-determination referendum negotiated with the UK celebrated on 18 September 2014. Keating, Michael: *The independence of Scotland*, Oxford University Press, 2009.

[2] Québec celebrated a negotiated referendum for self-determination on 30 October 1995. Vid. Gagnon, Alain: Constitutional referendums and the democratic challenges: Canada as a role model?, in *Naciones y Estados en el siglo XXI: democracia y derecho a decidir, Revista Internacional de Estudios Vascos*, Cuadernos 11, 2015.

[3] Vid. Carrillo, José Antonio: Sobre el pretendido "derecho a decidir" In: Derecho Internacional contemporáneo. *El Cronista del Estado social y democrático de Derecho 33,* 2012. See also, VV.AA, Turp, Daniel - Sanjaume Calvet, Marc (eds.): *The emergence of a democratic right to self determination in Europe.* Brussels: Centre Maurice Coppieters, 2016. Ruiz Vieytez, Eduardo: Regulando el derecho a decidir: una propuesta, en Naciones y Estados en el siglo XXI, *Cuadernos RIEV 11, Eusko Ikaskuntza,* 2015, 226.

In this sense, the right of self-determination has a historical and political origin which tends to be recognised and updated either in the international or domestic frameworks.[4]

## 2 Theoretical approach to self-determination

Before the 1966 International Covenant on Civil and Political Rights, the 1945 United Nations Charter quoted the right to self-determination in its articles 1.2 and 55. Indeed, international law holds that a State can exist without being recognised by others in its declarative theory of statehood,[5] mainly through recognition of new international realities.[6] Verdross, for example, maintains this idea clearly and did so before 1966.[7]

Meanwhile Mancini states the considerable importance of domestic constitutional law: "Constitutional law has an important role to play in secessionist disputes: without intruding in the political process, it can set the rules to channel an inevitably conflicting-provoking process, often loaded with emotion and irrationality, to rules of democratic logic".[8]

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[4] Vid. Guimón, Julen: *El derecho de autodeterminación. El territorio y sus habitantes*, Bilbao: Universidad de Deusto. 1995. He recalls that Karl Marx quoted this right in 1848 referring to Poland and Ireland. There is another important reference to the Declaration of President Wilson to the U. S. Congress after the First World War, 8 January 1918. http://avalon.law.yale.edu/20th_century/wilson14.asp
The Declaration of Independence of the United States (4 July 1776) furthermore assumed the inspiring principles of self-determination and the other principles of the French Revolution movement. Vid. Thurer, Daniel - Burri, Thomas: "Self Determination", Max Planck of Public International Law, University of Oxford, 2008. http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e873

[5] According to UN data there is a very remarkable evolution of the recognition of new States at the UN system. In 1945 the UN had 51 members; 1950: 60 members; 1960: 99; 1970: 127; 1980: 154; 1990: 159; 2000: 189; 2011: 193. https://www.un.org/en/sections/member-states/growth-united-nations-membership-1945-present/index.html

[6] Verdross, Alfred: *Derecho Internacional Público*. Madrid: Aguilar. 1957, 88.

[7] *Ibid*., 94.

[8] Mancini, Sussana: Secession and self-determination. In: Rosenfeld, Michel - Sajó

The 1966 International Covenant on Civil and Political Rights (ICCPR) and the role of the UN High Commissioner on Human Rights are very relevant for the development of the right to self-determination. In fact, the UN High Commissioner is entitled to control and foster the fulfilment of the ICCPR, whose first article assumed recognition of the right to self-determination in current international law. Moreover, article 21.3 of the 1948 Universal Declaration on Human Rights recognises the right of the people to decide their political status within democratic freedoms.[9]

The High Commissioner directly relies on the UN Secretary-General and its mandate is driven by articles 1, 13 and 55 of the UN Charter and the Vienna Declaration and Programme of Action of 20 December 1993 (48/141) establishing the office of the UN High Commissioner for Human Rights (OHCHR).[10] The OHCHR and the Centre for Human Rights have been a single body since 15 September 1997. These formal considerations underline the linkage of self-determination and the adequate exercise and respect of Human Rights.[11]

This linkage is also highlighted by Resolution 2625 (XXV) of the General Assembly of the United Nations about "The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States", which proclaims under the subchapter on "the principle of equal rights and self-determination of peoples" that

András (eds.), *Oxford Handbook of Comparative Constitutional Law*. Oxford: Oxford University Press. 2012, 500.

[9] Article 21.3, 1948 Universal Declaration on Human Rights: "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".

[10] A/51/950, 79.

[11] Vid. Kymlicka, William: Linking self-determination and Human Rights: comments on Peter Jones (2015).,In: Etinson, Adam (ed.): *Human Rights; moral or political?* Oxford: Oxford University Press, 2016. Seymour, Michel: Secession as a remedial righ. In: *Inquiry: An interdisciplinary Journal of Philosophy* 50, 2007. Hannum, Hurst: Autonomy, sovereignty and self-determination. The accommodation of conflicting rights. Pennsylvania: University of Pennsylvania Press, 1990; and Rethinking self-determination. In: *Virginia Journal of International Law,* Vol. 34, 1, 1993.

> "...every state has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter" .... and that "....every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence."

The assertion that the right to self-determination is indeed a positive right[12] linked with the rest of Human Rights[13] was clearly reaffirmed in paragraph 1 of CCPR General Comment No. 12 of the UN Human Rights Committee (adopted on its 21st session on 13 March 1984), and later on by the International Court of Justice in its case-law about self-determination for Eastern Timor:

> "1. In accordance with the purposes and principles of the Charter of the United Nations, article 1 of the International Covenant on Civil and Political Rights recognizes that all peoples have the right of self-determination. The right of self-determination 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. It is for that reason that States set forth the right of self-determination in a provision of positive law in both Covenants and placed this provision as article 1 apart from and before all of the other rights in the two Covenants".[14]

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[12] Vidmar, Jure: Remedial secession in International Law: Theory and (Lack of) practice. In: *St. Antony´s International Review nº6-1*. Oxford, 2010.

[13] Keating, Michael: Self-determination, multinational states and the transnational order. In: Walt van Praag, Michael C. van (ed.): *The Implementation of the Right to Self-determination as a Contribution to Conflict Resolution*. Barcelona: UNESCO Catalunya, 1998.

[14] UN Human Rights Committee: *CCPR General Comment No. 12: Article 1, The Right to Self-determination of Peoples*, Paragraph nr. 1. Adopted: 13 March 1984, available at: https://www.refworld.org/docid/453883f822.html, accessed 19 November 2020.

This a crucial question because it links the right to self-determination with situations and events characterised by failure to comply with International Human Rights.[15] Ruiz Vieytez underlines that the right to self-determination is not only a Human Right,[16] but also a useful legal tool to avoid conflicts and to foster democracy.[17]

Therefore, current international law begins to assume the right to self-determination not necessarily with the colonial condition of a territory, but indeed with the identity and autonomy democratic will of a determined political society.[18]

The direct relationship between the right to self-determination, freedom and autonomy was further underlined by MacCormick in its individual and collective view:

> "So self-determination is after all a vital part of any acceptable conception of liberty as autonomy, self-determination in a dual sense, meaning that there has to be scope both for individual

[15] Ruiz Vieytez, Eduardo: Réflexions sur la nature de l´autodétermination de la perspective des droits de l´homme. In: *Les Cahiers du Centre de Recherche Interdisciplinaire sur la Diversité num. 3*. Montréal (Québec): CRIDAQ, 2012.

[16] *Ibid*., 35.

[17] Some of the ECHR case law with regard to Basque issues and Human Rights:
- European Court of Human Rights (ECHR), 2010. *Affaire San Argimiro Isasa v. Espagne (Requête no 2507/07), Arrêt 28 septembre 2010* [online]. Available from: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100676
- ECHR, 2012a. *Otamendi Egiguren v. Spain, Judgment of 16 October 2012 (47303/08)* [online]. Available from: http://hudoc.echr.coe.int/webservices/content/pdf/001-113820?TID=nnyscnvaqh
- ECHR, 2012b. *Case of del Rio Prada v. Spain (Application no. 42750/09) 10 July 2012* [online]. Available from: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112108

Judgment of the ECHR Grand Chamber of 21 October 2013.
- ECHR, Judgment of 8 October 2013, Román Zurdo y otros v. Spain. ECHR, Judgment of 8-10-2013, Nieto Macero v. Spain. ECHR, Judgment of 12-11-2013, Sainz Casla v. Spain. ECHR, Judgment of 5 March 2013, Varela Geis v. Spain. ECHR, Judgment of 19-2-2013, García Mateos v. Spain.
- Vid. Judgment ECHR of 31 May 2016, Beortegui v. Spain, (Application num. 36286/14).

[18] The cases of Québec and Scotland are clear. We can also mention the process of self-determination of the USSR, Yugoslavia and Czechoslovakia. A different example would be the reunification of Germany.

> self-determination inside a political community and for the collective self-determination of the community without external domination".[19]

Michalska also refers to the direct link between the right to self-determination and the international concept of Human Rights: "The obligation of international law to safeguard rights and liberties in internal relations is imposed in status by the treaties concerning human rights".[20]

Bengoetxea states the connection of self-determination with individual and democratic freedom within the scope of collective political identities:

> "How, then would I support the moral-political right to self-determination? Self-determination is a democratic principle which extends the principle of personal moral autonomy to a collective level. Just as the individual is sovereign to decide on moral beliefs and moral conduct, so are the communities free and sovereign to decide how they organise themselves".[21, 22]

The contribution of Bengoetxea is relevant because he includes the portrait of the right to self-determination with important particularities in the EU if we consider the decisions adopted by Member States in order to share sovereignty and Human Rights in European Law, together with the roles of the Court of Justice of the EU (CJEU) and the European Court of Human Rights (ECHR): "An even more significant factor has

[19] MacCormick, Neil: Is nationalism philosophically credible? In: Twining, William (ed.): Issues of Self-Determination, Enlightment, rights and revolution series. Aberdeen: Aberdeen University Press. 1991, 15.

[20] Michalska, Anna: Rights of peoples to self-determination in international law. In: *Ibid*, 86.

[21] Gregg, Benjamin: A socially constructed Human Right to self-determination of indigenous peoples. In: *Deusto Journal of Human Rights 1,* Bilbao: Pedro Arrupe Human Rights Institute, 2016.

[22] Bengoetxea, Joxerramon: Nationalism and self-determination: the Basque case. In: *Twining 1991 op. cit.,* 138.

been Jean Monnet´s revolutionary idea of living up certain spheres of traditional state sovereignty to larger institutional arrangements of an inter-state nature (namely to the European Communities). This idea of jointly pooling our State competences and resources into larger institutions is contributing to the recognition that sovereignty is a matter of degree, that it can be shared."[23]

## 3 Autonomy and Self-determination in the EU

The relation of autonomy and the right to self-determination is even more complicated in the EU. The historical, institutional and legal framework we could analyse from just the constitutional perspective is even wider with EU law and its assumption of competencies in a new scope of co-sovereignty.

The matter is particularly important if we consider that the EU does not have its own official administration and is obliged to use the administrations of the Member States to enforce EU rules and policies within each State. This aspect, while frequently overlooked, makes the situation more complicated for the practical and real enforcement of EU law.[24]

Nevertheless, we must underline that at least at the EU level, we are still watching a substantial modification in the classic concept of sovereignty, leading towards a supra-national body with specific law, with direct and prior force and *ad hoc* jurisdictional control similar in the case of the CJEU to any constitutional domestic court whose role is the due control of the legal grounds of public regulations and actions within the rule of law.

While this gradual change towards EU levels is clear, it is difficult to see the same process towards Sub-State bodies, regions or autonomous

[23] *Ibid*., 142.

[24] Vid. Conversi, Daniele - Ezeizabarrena, Xabier: "Autonomous Communities and Environmental Law: the Basque Case", in *Minority self-government in Europe and the middle East, Studies in International Minority and Group Rights,* Brill-Nijhoff, Leiden-Boston, 2019.

communities with different levels of autonomy. This practical challenge comes particularly well to the fore in countries, such as Spain, which – while being decentralised – did not introduce any domestic mechanisms to allow for the direct participation of sub-state governments in EU decision-making.[25] This dilemma focuses on the myth of sovereignty that is still showing new shapes in the EU context, even though there have been indeed important developments within this field.[26] It is therefore crucial to ease the path towards facilitating sub-state participation at the EU level.

This is also relevant in the Basque context considering the scope of action of Historical Rights at domestic level, in peculiar issues that do not fall under the remit of the State. It is necessary to explore these matters even though the classic sovereignty of the State has virtually disappeared, to leave legal space for the Sub-State entities in order to defend the constitutional reality present in the concept of Historical Rights. Some of these considerations and contradictions within the EU system have been mentioned by Járegui, regarding lack at the basic institutional level when the EU policies may interfere with Basque competencies arising from Historical Rights, likewise the ones concerning the tax system.[27]

All these emerging factors have fostered substantial amendments in the classic concept of sovereignty, either in the external scope or in the domestic one of the EU. Meanwhile, at the State level, the view is totally different regarding the domestic purposes towards their sub-national entities, especially within the Spanish context.

The new EU sovereignty is therefore shared among Member States and domestic-level sovereignty is shared within every decentralised Member State. We can highlight the relevant cases of Austria, Belgium

[25] Nevertheless, the Spanish Act 25/2014, on treaties and other international agreements (Ley 25/2014, de Tratados y otros acuerdos internacionales) must be considered a step forward towards claiming practical enforcement.

[26] Despite the dilution of sovereignty, the institutional framework mainly considers economic and market aspects in the EU.

[27] Jauregi, Gurutz: La globalización y sus efectos en el principio de soberanía, In: Castells, José Manuel - Iriondo, Xabier (eds.): *La institucionalización jurídica y política de Vasconia*. Eusko Ikaskuntza, Colección Lankidetzan, 1997, 47.

and Germany with their constitutional amendments to resolve the problem of sub-state participation at the EU, while Spain has so far not managed to resolve the issue leaving it for the EU s or even the CJEU in certain cases such as those affected by Basque Historical Rights.[28]

Another important question of the above process is linked with the negative approach of the States to the right to self-determination. This is particularly true within the EU where the concept of statehood has been somehow softened. The negative approach towards self-determination is not only in contradiction with some EU developments, it furthermore explains the deficiencies and dysfunctions of the EU and the international system. On the other hand, however, as Herrero de Miñón reminds, a linkage with the Historical Rights for the Basque Country was recognised in the 1978 Spanish Constitution.[29] In this sense it is important to underline here that during 2004 the Proposal for a new Political Statute for the Basque Country was enacted by the Basque Parliament (30-12-2004),[30] assuming the right to self-determination through historical rights and bilateral negotiation with the Spanish Government.[31]

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[28] It is clear for the future that if EU Law does not adopt the necessary measures to assume the legitimation of Sub-State bodies before EU institutions with regard to eventual disputes affecting regional legislative competencies and possibly in breach of EU Law, we will have many and different jurisdictional conflicts to be solved before the CJEU and the respective constitutional courts of the Member States. Vid., Ezeizabarrena, Xabier: "Scottish Devolution and Basque Historical titles: two legal paths towards co-sovereignty", Scottish Affairs 80, summer 2012.

[29] Vid. Herrero de Miñón, Miguel: *Derechos Históricos y Constitución*, Taurus, 2000, 259-281.

[30] The so called "Ibarretxe Plan", leaded by the former Basque Premier (Basque National Party) during 2004. The Spanish Parliament previously enacted an amendment of the Criminal Code in order to prosecute any public authority organising any consultation or referendum about sovereignty: Ley Orgánica 20/2003, BOE number 309 (Spanish Official Gazette), 26-12-2003.

[31] Afterwards the new Political Statute was refused by the Spanish Parliament (1-2-2005), and during 2008 the Basque Parliament enacted an Act regulating public consults in this regard (Ley 9/2008, of the Basque Parliament), and the consultation organised thereby for the 25-10-2008 was banned by the Judgment of the Spanish Constitutional Court 103/2008 (STC 103/2008) against the consultation and the Act itself.

Herrero de Miñón links the enforcement of the right to self-determination not with the nature of a colonial territory, but with the existence of an identity and a positive will for political autonomy which is clearly noticed in the Basque-Spanish case[32] by Historical Rights[33]:

1. The right to self-determination does not depend on the colonial condition of a territory. It is a matter of the democratic will of a determined society.[34, 35, 36]
2. Historical Rights are justified within the Marx and Hegel concepts of "nations with history".[37]
3. The Historical Rights of each nation with history are the ones opening the possibility towards self-determination. This right is the sense of the Additional Clause of the Basque Act of Autonomy as well as for the first additional clause of the Navarre Act of Autonomy, with their respective linkages with Historical Rights of Basque people.[38]

[32] The question is different in the Basque-French case due to the absence of a constitutional clause thereon for their territories and their, if any, Historical Rights. However, certain rights and notes of self-organisation close to the "foral" system in the Southern Pyrenees were quoted by Lafourcade, Maite: in *Las instituciones tradicionales y públicas de la Vasconia continental*, Euskonews & Media num. 38, http://www.euskonews.com, accessed: 2020.11.18.

[33] Herrero de Miñón, 2000, *op. cit.* 270-271.

[34] This interpretation agrees with article 3.1 of the Spanish Civil Code, regarding the obligation to interpret rules in agreement with the context and social reality. Otherwise, the right to self-determination would only be applicable in colonial contexts. This, indeed, does not follow the reality of previous decades in the international legal and comparative practice of the Supreme Court of Canada Ruling (20August 1998) for the case of Quebec, as well as in Scotland (2014 referendum), Northern Ireland, the Czech Republic, Slovakia, Estonia, Lithuania, Latvia or Timor.

[35] The mentioned relevant body is, in fact, the first Additional Clause of the Spanish Constitution. Nevertheless, in the EU context, the EU itself might be able to assume this role provided that there are two EU members involved in the Basque case. A similar approach was arranged by the EU without any provision on Historical Rights for the cases of Northern Ireland, the Czech Republic and Serbia.

[36] Herrero de Miñón, 2000, *op. cit.* 270.

[37] *Ibid*., 270-271.

[38] *Ibid*., 271.

4. The elements of self-determination, therefore, can only be defined by means of an objective social reality and previously existing political body.[39]
5. Furthermore, and as a consequence, Basque Historical Rights or Titles should become an adequate legal or constitutional framework in order to define how we shall enforce the right to self-determination.[40]
6. Finally, Herrero de Miñón goes further with two main conclusions deriving from the previously mentioned: Historical Rights support, as previous objective reality, the national community that may, eventually foster its democratic will. For the Basque case that is clearly included in the first additional provision of the 1978 Constitution and in the additional provision of the 1979 Basque Act of Autonomy.[41, 42, 43]

The thesis of Herrero de Miñón is not without difficulties for resolving the concepts of "constitutional unity"[44] or those of "constitutional framework"[45]. Nevertheless, this thesis could also be adaptable in most of the EU Sub-State autonomies on an interpretative

[39] *Ibid*., 271-272.

[40] *Ibid*., 272.

[41] I would include also as a current updated example on the matter, the provisions of the First Additional clause of the 1982 Navarre Act of Autonomy.

[42] Herrero de Miñón 2000 *op. cit*,. 280.

[43] As I will explain here, my interpretation is similar but pointing out furthermore, that Historical Rights may serve to avoid the limits of the VIII Title of the Constitution, while they shall be entitled to claim the constitutional reform in order to overcome its framework, but never disregarding fundamental rights or assuming those competencies that are even forbidden to the Spanish Parliament through EU Law. Vid. Loperena, Demetrio: "Unidad constitucional y actualizaciones generales y parciales de los Derechos Históricos", in *Jornadas de Estudio sobre la actualización de los Derechos Históricos vascos, UPV/EHU*, 1985, p. 316 and ss.; even though the Judgment of the Spanish Constitutional Court (12 October 2000) assumed the possibility to avoid fundamental rights (in this case, article 14 of the Constitution) by means of the Historical Rights regime of Navarre to legislate Civil Law.

[44] "Constitutional unity" was the limit for the Act of 25 October 1839.

[45] "Constitutional framework" is the current limit for the First Additional Clause of the Spanish Constitution. But obviously, the constitutional framework has been radically modified by the EU treaties.

basis. Thus, the Basque model could be utilised as a source of inspiration to avoid the above-mentioned new sovereignty-issues within the complex legal system of the EU. Put differently, the Historical Rights shall be enforced by the State as the entity that recognised them at domestic constitutional level, but also before the EU, if we consider that this recognition took place in the framework of EU membership.

## 4 Autonomy and New Sovereignty in the EU

The existence of original constitutional agreements in force with Sub-State entities should be useful for avoiding the problems mentioned either at domestic level or at the EU level within a context of co-sovereignty.[46]

The EU pretension for integration and identity could become a solution for diverse nations or peoples within the constitutional framework demanding a direct recognition from the state´s governments and, specially, within its linkages at the EU.

However, in order to reach a peaceful institutional agreement on all the aforementioned, problems arise when we talk about the EU as a fruit of an international treaty, and therefore, through a concept that avoids Sub-State entities from taking part directly in EU decision-making. However, there are tools available within the Treaty of the European Community (hereinafter TEC) as well as in the Treaty of the EU (hereinafter TEU) in order to assume those considerations.

The first important issue is the distinction of terms in the case of article 1 of the TEU, ahead of articles 1 and 2 of the TEC. While the first seems to assume the notion or concept of "peoples", the second ones follow the concept of "Contracting parties" and "Member States". One might think that these notions represent a kind of concept ambiguity or a rhetorical recognition of the EU peoples, regardless of the positive approach within the legal framework. But both treaties design an organisation of special nature with a genuine will for political

[46] MacCormick 2001, *op. cit*.

integration, which is a differentiating feature compared to several other treaties and international instruments that do not support such a strong integration process.

We can, therefore, talk of the EU as a real fruit of an international treaty. However, it has a clear will for integration and this also requires dealing with Sub-State participation at all levels. This means that as an international organisation looking for integration, the Sub-State approach recognised at domestic levels should become a part of the EU framework, in the same way that happens with national constitutional laws. In order to assume this task, the adoption of a single international treaty should not be an obstacle or difficulty as the integration of the political wills of every single body in the Member States should also include the level of Sub-State nations. In fact, the essential characteristic of the EU is to operate a real transnational integration of the democratic principles in force in all Member States.

This also demands more attention for those cases which in reality show a constitutional background for decentralisation of political power in different organisations and legislative powers. In my view, the EC and EU Treaties clearly allow this interpretation.[47]

a) Article 4.2 of the TEU: Respect for national identities of the Member States

   This provision not only demands maintaining the domestic particularities of every State within the EU, but also the real recognition of Sub-State particularities within several Member States. Some of them are the different autonomy systems in force.

b) Articles 2 & 3 of the TEC as limits for a global and integrated system.

[47] Other authors, in a different sense, do follow the classic approach of the TEC and the TEU as international treaties that would not open Sub-State entities' capacity for participation. In this regard States normally agree on their own particular views of the scope of their constitution and its external approach before the EU. Nevertheless, my interpretation follows the idea of considering Sub-State entities as integrated parts of the States before the EU.

If the above mentioned sub-national autonomy does not contradict these provisions, then there would be no legal obstacles for the EU and its bodies to allow for the direct participation of Sub-State entities in the decision-making processes of the EU. Moreover, the principle of subsidiarity requires this, and so does the peaceful enforcement of the rules and provisions for the whole system. Therefore, the problems are not really within the legal provisions of treaties nor in the EU will, but in the political approach made by Member States generally.

The consideration of the EU system as a global sum of diverse States on a path towards integration whose domestic particularities are present in their respective constitutions may be suitable, in my view, to producing the assumption of direct participation of sub-state entities in EU decision-making.

In order to enforce this and assume its real dimension we may use the institution of Human Rights as an example.[48] They are an inherent requirement for belonging to the EU system and characteristic of every Member State. Article 6 of the TEU is clear, therefore. This is an essential matter because the EU assumes *ab initio* that the essential part of its legal regime is not going to be controlled by the EU, but through the common constitutional traditions of the Member States. This is indeed directly linked with sovereignty and the rights of individuals who are entitled to claim before any administrative or jurisdictional bodies of member states.

So, the real existence of a sum of constitutional agreements seems to be a suitable procedure to recognise the same agreements at the EU level. Therefore, there is a principle of mutual trust for the protection of Human Rights at each domestic level of EU member states. There should, therefore, be a similar principle of mutual trust in order to recognise and assume the participation of Sub-State entities within the whole process, especially in the case of those with legislative and enforcement powers or even collective Historical Rights. This process happened without relevant problems with regards to the protection

[48] Vid. Pentassuglia, Gaetano: Assessing the consistency of Kurdish democratic autonomy with International Human Rights Law. In: *Nordic Journal of International Law* 89. 2020.

of Human Rights, whereas previously there was a huge distance among the different systems for protection within each Member State. Nowadays, in fact, there is a growing mutual impact in this regard through the enforcement of the general principles of law and the case-law of the ECHR.

This has not been an obstacle for the EU to develop certain frameworks for the protection of Human Rights in those matters directly linked with the principles and objectives of European Law. Thus, Human Rights continue to be a relevant part of the EU tradition as a central point with at least three sources of recognition:

a) The EU law with the mentioned limits.
b) International law, especially trough the ECHR.
c) The domestic law of each Member State.

It was actually the existence of a common constitutional tradition that substantially helped the recognition of the protection of Human Rights at the level of the EU. This may also serve to reach similar approaches in those cases where Historical Rights of Sub-State entities have direct constitutional recognition in a given member state, even though there is currently no real consideration to recognise such a role for these Historical Rights. Relative to Spain, good examples can be found in Germany, Belgium or Austria who dealt with the situation differently, and according to the peculiar nature of the European treaties as a sum of constitutional treaties that assume EU objectives and principles.

Finally, the implementation in the EU of the constitutional reality within each Member State's social, territorial and legal scope demands that the existence of these Sub-State complexities – not easily defined under the general concept of "Regions" – be distinguished. Sub-state entities may require peculiar methods to implement their constitutionally recognised competencies in order to achieve efficient enforcement at the EU level. This is seen particularly for those entities with legislative powers, such as the cases of the Basque Country according to their Historical Rights and competencies.[49]

[49] It is necessary to distinguish the situations for German or Austrian *Länder*, the

The case of Bavaria[50] and Germany[51] is indeed relevant in terms of granting Sub-State participation in the EU. The importance of the German approach therefore stands on similar grounds with the First Additional Clause of the Spanish Constitution for the case of Basque Historical Rights. There is indeed, likewise in the Basque case, a constitutional guarantee to respect a territorial, institutional and political reality that is clearly distinguished from others and that became part of the State under respect of those guarantees, so as together to take part in the whole process in terms of co-sovereignty.[52]

It seems to me that this approach is also present within the context of the Bavarian Constitution assuming previous rights of the Bavarian people that are also perfectly assumed within the German Constitution. Hence, according to article 178 of the Bavarian Constitution, "Bavaria shall accede to a future democratic federal state. This shall be based on a voluntary federation of individual German states whose separate State existence is to be guaranteed". The concept of historical titles and voluntary co-sovereignty is clearly seen here. As I quoted before, the German legislation developed those provisions by means of the

Belgium Regions, Catalonia, Scotland, Wales, Basque Country and Navarre, and some other cases as the French Departments or the British counties. The case of Basque Historical Rights demands, at least, three main approaches:

a) More participation of the Basque and Navarre Parliaments in the EU;
b) Participation of both delegations within the EU Council of Ministers;
c) Direct standing to claim of both entities before the CJEU in matters of their respective competences.

[50] Vid. Nagel, Klaus: Bavaria., In: Turp et al. 2016 *op. cit.*.

[51] Schefold, Dian: "La participación de los Länder alemanes en el proceso de adopción de decisiones de la Unión Europea", in *La acción exterior y comunitaria de los Länder, Regiones, Cantones y Comunidades Autónomas*, Vol. I, IVAP, 1994, 142.

[52] Ibid.

- Art. 79. 3 of the German Constitution: *"Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible". Article 1 is referred to protection of human dignity, while article 20 regards to the basic principles of the German Constitution.*
- First Additional clause of the Spanish Constitution: *"The Constitution protects and respects the Historical Rights of the "foral" territories (Basque Country and Navarre). The general updating of the aforementioned regime shall be arranged within the scope of the Constitution and the Statutes of Autonomy".*

Act of 12 March 1993, on cooperation between the Federation and the *Länder* on EU matters. In this regard there is also an Agreement of 29 October 1993 signed by the Federal Government and the *Länder* about cooperation on EU matters.

Regarding the case of Austria, there is formal constitutional recognition of the Sub-State EU scope through the Austrian Constitution in order to defend the *Länder´*s interests at the EU. Nevertheless, and following the Austrian Constitution, it is easy to quote some similarities with the German case.[53] The first constitutional reference on these aspects is article 16.1 of the Austrian Constitution, according to which the *Länder* within their competencies may conclude international treaties with States nearby Austria or with their federal entities.[54] The direct participation of the Austrian *Länder* in EU decision-making is therefore constitutionally provided by article 23. D. 3 of the Constitution, according to which if an EU project affects matters within the legislative powers of the *Länder*, the Federal Government may transfer to a representative of the *Länder* the participation within the European Council. This faculty shall be granted through co-participation of the relevant member from the Federal Government in mutual cooperation. The second paragraph is also applied to the *Länder* representative, and the latter, according to article 142, will answer before the National Council for those matters corresponding to the Federation; and before the *Länder* Parliaments for those matters under their legislative powers.[55]

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[53] Vid. Seidl-Hohenveldern, Ignaz: Los Länder austríacos y la Unión Europea. In: *La acción exterior y comunitaria de los Länder, Regiones, Cantones y Comunidades Autónomas*, *Vol. I, IVAP*, 1994, 173-200.

[54] Código Comparado, IVAP-Gobierno Vasco, 1996, "La acción exterior y comunitaria de los Länder, Regiones, Cantones y Comunidades Autónomas", Vol. II, p. 58. This constitutional provision was introduced by an Act of constitutional amendment of 29 November 1988, BGBl nº 53, 20 December 1988.

[55] Ibid. The *Länder* representative deals with this position due to its constitutional recognition. The important point relies in the position of this representative who will respond for the negotiation management before the Federal Council whenever those were on behalf of federal competencies, whereas his responsibility is requested before the *Länder´*s Parliaments when he acts on behalf of the legislative powers of the *Länder*.

The situation of Belgium in this field is also remarkable for the case of Wallonia[56] and Flanders[57]. The Belgium regime has a wide reference to the regional question regarding EU law, either in the Constitution or in the successive amendments thereon, as well as within the new rules and intergovernmental agreements approved to regulate the process.

- Arts. 127, 128 & 130 of the Belgium Constitution: Treaty making power and international cooperation of the Governments of Wallonia and Flanders.
- Art. 167: King´s competencies on international relations, notwithstanding the competencies of Wallonia and Flanders for treaty making power and international cooperation within certain competencies, with the regulatory scheme thereon. This provision constitutionally recognises a real and practical example of co-sovereignty.
- Art. 168: duty of direct information to the Regional and Community Councils on any negotiation or amendment of the EC-EU treaties. Pursuant to the extension made by article 1.1 of the Special Act of 5-5-1993.
- Art. 169: constitutional mechanism for substitution of Regions or Communities failing to comply with EU and/or international obligations, even during procedures before the CJEU. This means clearly that Sub-State entities in Belgium do have a certain position mainly as defendants at the CJEU, and within another practical example of real co-sovereignty.[58]

[56] Vid. Berhoumi, Mathias: Wallonia. In: Turp et al. 2016 *op. cit.*

[57] Vid. Maddens, Bart: Flanders. In: Turp et al. 2016 *op. cit*.

[58] Van Boxstael, Jean Louis: La participación de las Comunidades y Regiones belgas en la elaboración y ejecución de decisiones de la Unión Europea. In: *La acción exterior y comunitaria de los Länder, Regiones, Cantones y Comunidades Autónomas*, Vol. I, IVAP, 1994.

## 5 The International Court of Justice (ICJ) recognises the right to self-determination[59]

The ICJ Judgment on Eastern Timor, 30 June 1995 (Portugal v. Australia) is worth noting, where the right is considered *erga omnes* with an interesting historical evolution as one of the main principles of modern international law (legal ground 29).[60] In this judgment there is a remarkable dissenting opinion signed by Judge Weeramantry who underlines the recent and constant evolution of the right to self-determination.[61]

Weeramantry underlines the pivotal nature of this right for international law and its assumption by all sources of law including customary law, the general principles of law and the case-law. He also believes that it is located at the central point of the UN Charter as one of the main principles of the Charter and the relations among nations with regard to article 55 of the UN Charter.[62] In a similar sense for the different opinions of State´s representatives at the UN on the Declaration on peaceful relations between nations.[63]

Another interesting opinion on the ICJ Judgment on Timor was made by Judge Vereshchetin. He assumed the necessity to give a voice and vote to the peoples of Timor on their situation because that is indeed the essence of the right to self-determination.[64] The judge is not suggesting that citizens may have a similar legitimation than the one of the State but he affirms that in order to get a fair knowledge of the

[59] Vid., on Western Sahara, the ICJ Consultative Opinion of 16 October 1975 and Soroeta, Juan: "El conflicto del Sahara Occidental, reflejo de las contradicciones y carencias del Derecho Internacional", UPV/EHU, 2001.

[60] Vid., two diverging opinions: Weinstock, Daniel: Constitutionalizing the Right to Secede. In: *Journal of Political Philosophy num. 9-2*, 2001; and Sunstein, Cass: Debate: Should Constitutions Protect the Right to Secede? A reply to Weinstock. In: *Journal of Political Philosophy num. 9-3,* 2001.

[61] ICJ judgment on Eastern Timor, 30 June 1995 (Portugal v. Australia) at page 192.

[62] *Ibid,* 194.

[63] *Ibid*, 196-197.

[64] *Ibid*, 135.

case, the court would need to know to what extent the population of Timor agrees with the demands of Portugal:[65]

> "in the concrete situation it must be looked at to see whether the interests of an administering power (if as is usual, it is still in effective control), or any other power, really coincide with those of the people".[66]

According to Vereshchetin there is a clear evolution of the right to self-determination and there is a need to consult the affected society:[67]

> "The United Nations Charter, having been adopted at the very outset of the process of decolonization, could not explicitly impose on the administering Power the obligation to consult the people of a non-self-governing territory when the matter at issue directly concerned that people. This does not mean, however, that such a duty has no place at all in international law at the present stage of its development and in the contemporary setting of the decolonization process, after the adoption of the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV)).

In the Western Sahara Advisory Opinion, the Court states that:

> "in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory" (I.C.J. Reports 1975, p. 25, para. 59; emphasis added). By implication, it means that, as a rule, the requirement to consult does exist and only "in certain cases" may it be dispensed with. The exceptions to this rule are stated in the same dictum of the court and, as has been shown above, they could not be held to apply

[65] *Ibid, 135.*

[66] *Ibid*., 136.

[67] *Ibid*., 138.

> in the present case. I believe that nowadays the mere denomination of a State as administering Power may not be interpreted as automatically conferring upon that State general power to take action on behalf of the people concerned, irrespective of any concrete circumstances".

Another remarkable opinion was given by Judge Skubieszewski:

> "134. The Court states that the principle of self-determination "is one of the essential principles of contemporary international law". The right of peoples to self-determination "has an erga omnes character". The Court describes the relevant assertion of Portugal as "irreproachable" (Judgment, para. 29). The Court also recalls that "it has taken note in the present Judgment (para. 31) that, for the two Parties, ... [the] people [of East Timor] has the right to self-determination" (para. 37). It is a matter of regret that these important statements have not been repeated in the operative clause of the Judgment.
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> 135. In the opinion of Judge Bedjaoui, President of the Court, self- determination has, in the course of time, become "a primary principle from which other principles governing international society follow" (un principe primaire, d'où découlent les autres principes qui régissent la société internationale). It is part of jus cogens; consequently, the "international community could not remain indifferent to its respect" ("la communauté internationale ne pouvait pas rester indifférente à son respect"). States, both "individually and collectively", have the duty to contribute to decolonization which has become a "matter for all" ("une affaire de tous").[68] According to Judge Ranjeva "[t]he inalienability of the rights of peoples means that they have an imperative and absolute character that the whole international order must

[68] Bedjaoui, Mohhamed : In: J. P. Cot and A. Pellet (eds.), *La Charte des Nations Unies*, 2nd ed. Paris: Economica. 1991, 1082-1083.

> observe".[69] Judge Mbaye interprets self-determination in conjunction with "the principle of inviolability of borders".[70] That link additionally emphasizes the incompatibility of the forcible incorporation of a non-self-governing territory with the requirement of self- determination.
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> 138. The Friendly Relations Declaration provides as follows: Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle ..."
>
> Self-determination creates a responsibility not only for those who are directly concerned".[71]

Therefore, within the transition from autonomy towards self-determination we could observe the following characters of the right to self-determination:

a) It is an individual and collective right;
b) Its guarantee is required in order to comply with the rest of Human Rights in force;
c) In order to exercise this right, there is also a need to comply with the rest of Human Rights as a central requirement linked with point f);

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[69] Ranjeva, Raymond: "Peoples and National Liberation Movements", in: M. Bedjaoui (ed.), *International Law: Achievements and Prospects*, Unesco-Nijhoff, Paris and Dordrecht, 1991, 105, para. 16.

[70] Mbaye, Keba: Introduction [to Part Four, Human Rights and Rights of Peoples], in: M. Bedjaoui (ed.), *International Law: Achievements and Prospects*, Paris and Dordrecht: Unesco-Nijhoff. 1991, 1055, para. 62.

[71] Vid. paragraphs 79, 81 y 84 of the ICJ Consultative Opinion on the Independence of Kosovo, 22-7-2010. Christakis, Theodore opinion diverges from the Consultative Opinion, "The ICJ Advisory opinion on Kosovo: has international Law something to say about secession?", Leiden *Journal of International Law,* 24. I, 2011.

d) It is in force according to International Law and its objective is the political determination of a political community;
e) the procedure therefore requires the positive determination of the territory and community affected;
f) the real recognition of its international effects requires political negotiation likewise it happened in the remarkable cases of the referendums celebrated in Scotland and Québec, and effective recognition by International Law or third parties.[72]

## 6 Conclusions

The point of reference of "constitutional unity" as a limit of autonomy and, eventually, self-determination, should be analysed within the binding legal regime of the international protection of Human Rights, and by extension as a tool for the enjoyment of Human Rights for all individuals, and not within the classic concept of a State´s sovereignty. The role of international law and European Law therefore is a key point for studying autonomy and self-determination in the EU.

There is a series of emerging factors within the EU that are generating shifts in the concept of sovereignty. This perspective, however, seems to be different at the domestic level in the decentralised States towards their Sub-State entities. The new sovereignty in the EU is shared by the Member States, while sovereignty at domestic level is only relatively shared within decentralised Member States, even though federal

[72] For a comparative historical view on Scotland and Catalonia, Vid. Elliot, John: "Scots and Catalans", Yale University Press, 2018. Nevertheless, the political and legal approach made by the UK and Spain are extremely different: the Scottish referendum was negotiated and celebrated naturally, whereas in Catalonia it was forbidden by the Spanish government and courts and the Catalan political representatives were judged by the Supreme Criminal Court (Judgment 459/2019 of 14 October 2019) and sent to prison for periods of between 9 to 13 years. Moreover, another recent Judgment issued on 28 September 2020 by the Supreme Criminal Court (Appeal 203/2020) declared the legal disqualification of Catalonia´s Premier, Mr Torra, due to his decision not to comply with the order of the Spanish Electoral Board on removing certain symbols from the official venue of the Catalan Government. Therefore, it seems that new elections will be called soon in Catalunya.

countries, such as Austria, Belgium and Germany, exhibited useful examples on how to deal with this problem through constitutional amendments and domestic agreements. A similar approach could be applied for different European nations aspiring for internal or external forms of self-determination.

The EU framework is the fruit of an international treaty with all its main elements included. However, there is as well-founded demand for further integrating Sub-State entities by allowing their direct participation in the decision-making, enforcement and judicial implementation of EU law. Therefore, as an international organisation striving for more integration, the recognition of the right of Sub-State entities to take part directly in EU decision-making should follow by virtue of the recognition of these entities within the constitutions of EU member states.

Sub-State bodies are indeed active parts of the Member States, and by extension of the EU: if the legislation or administrative enforcement made by a Sub-State body does not comply with EU law, the State would become accountable thereon. This means that there is still a necessity for recognition of Sub-State bodies to take part in the decision-making, implementation and enforcement processes of EU law.

At the EU we are facing a global framework of interlinked States with mutual relations on the basis of a series of principles, objectives and systems for control and monitoring of administrative and judicial levels. This minimum common ground at the EU overcomes the classic competence on international relations, and demands direct participation of the rest of the entities composing States, in particular those ones with legislative powers, to take part in the whole system as key actors therein.

The consideration of the EU as a sum of wills coming from different States with domestic constitutional particularities, should produce an EU assumption of Sub-State participation that would somehow be the fruit of those democratic wills towards the domestic constitutional levels, but also towards the foreign scope of them, within the EU.

The EU sum of constitutional agreements proved to be a path for recognition of Human Rights at the European level. There is, therefore, a presumption of mutual trust in order to protect Human Rights at every domestic level. If that process has happened in such an important area of our legal systems, the same mutual confidence should be granted to the peculiarities of each domestic constitutional level, likewise legislative and executive decentralisation with autonomy or, eventually, a clear will towards the exercise of self-determination.

The existence of an adequate political will is enough to introduce the constitutional amendments required to let Sub-State nations directly participate and defend their competencies before the EU. That is not at all in breach of the sovereignty principle nor will it interfere with the general interests to be represented by the State´s central government.

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