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DETERMINATION: A COMPARISON OF THE
ÅLAND ISLANDS, SOUTH TYROL,
THE KURDS IN IRAQ, AND CATALONIA**

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CASE STUDIES IN FORMS OF SELF-
DETERMINATION:
A COMPARISON OF THE ÅLAND ISLANDS,
SOUTH TYROL, THE KURDS IN IRAQ, AND
CATALONIA

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AGREEMENTS ON SELF-DETERMINATION

Self-determination can be understood in two different ways. One is external self-determination, which basically entails secession. The other is internal self-determination, which involves the establishment of various types of regional self-government within the territory of a given state. In this piece, we will describe four examples of the latter. In all of them, self-government was achieved as a result of different kinds of agreement that included relevant political actors. The lesson to be drawn from these cases is that the stability of the solutions reached depends on the depth and width of the underlying political compromises. Such compromises, of course, need to be implemented through the technically proper legal means.

Åland Islands: The Åland Islands are located between Finland and Sweden. Ninety-five percent of the population speaks Swedish, while 4 percent speaks Finnish. The islands were part of the Swedish kingdom until they were incorporated into Russia in 1809 as part of Finland. When Finland became independent from Russia in 1917, the Ålanders overwhelmingly

asked to be part of Sweden again, and Sweden and Finland submitted the case to the League of Nations. Two commissions of experts concluded that Åland did not have an international right to secede from Finland, as long as the latter protected national minorities. Finland had already passed an act to secure that protection by granting self-governance to the Åland Islands. Further legislation later implemented the “Åland Agreement” reached by Finland and Sweden. The League of Nations supported this solution, even if the Ålanders would have preferred to be part of Sweden.

South Tyrol: The province of South Tyrol is part of the Italian region of Trentino-Alto Adige, on Italy’s northern border with Austria. A large majority of its population speaks German. This mountainous territory became part of Italy after World War I. In 1946, following the end of World War II, Italy and Austria granted self-government to the Germanic community of South Tyrol through a treaty annexed to the 1947 multilateral peace treaty with Italy. The Italian Republic implemented the international obligations arising from the treaty by means of a statute of autonomy enacted as a constitutional act. A dispute arose between Italy and Austria, however, as to whether those international obligations were being fully complied with. The UN General Assembly intervened, and a new agreement (called “the Package”) was reached in 1969. It was accepted by the South Tyrolese and approved by the parliaments of both Italy and Austria. In 1971, the statute of autonomy of South Tyrol was revised accordingly.

Kurds in Iraq: Kurdistan is a large mountainous territory that is divided among Iran, Iraq, Syria, and Turkey. Historically, the Kurds have been conquered, divided, and ruled by neighboring empires. After World War I, with the fall of the Ottoman Empire, the Kurds had the opportunity to have their own state, but it soon vanished. The Kurds in Iraq later suffered mass violence under Saddam Hussein, who killed and relocated thousands of them and “Arabized” some Kurdish oil-rich cities.

The Kurds’ current autonomy dates back to the Transitional Administrative Law (TAL) adopted by the Coalition Provisional Authority (CPA) in 2004 under strong American influence. This provisional constitutional framework was the basis of the constitution of Iraq of 2005, article 1 of which establishes that “the Republic of Iraq is a single federal, independent and fully sovereign state in which the system of government is republican, representative, parliamentary, and democratic, and this Constitution is a guarantor of the unity of Iraq.” This provision must be read together with article 117.1, which

affirms that “this Constitution, upon coming into force, shall recognize the region of Kurdistan, along with its existing authorities, as a federal region.”

Catalonia: When General Francisco Franco died in 1975, a transition to democracy started in Spain, culminating in the enactment of a new constitution after democratic elections were held in 1977. The memory of the Spanish Civil War (1936–39) and a widespread social commitment to stabilize the new democracy led the leaders at the constitutional table to work out political solutions in a “spirit of compromise” (“*consenso*”). With regard to the “Catalan problem” (as well as the Basque problem), they made a basic decision to allow the creation of “autonomous communities” in different parts of Spain as units of self-government.

The constitution was submitted to a referendum in December 1978, and citizens all over Spain expressed their overwhelming support for it. On the basis of the new constitution, Catalans were given back the institutions of self-government they had already enjoyed during the Second Republic (1931–36).

The process of devolution that started with Catalans and Basques in 1979 was eventually extended to the rest of Spain. Originally, a distinction was drawn between two groups of communities, depending on the level of autonomy they were accorded. The constitution even referred, in article 2, to the existence of both “nationalities” and “regions.” The expression “nationality” was ambiguous. The main idea, however, was to indicate that even if Spain was a nation, some territories within it, such as Catalonia, had specific national identities based on culture, language, history, and politics, as well as a profound popular will for self-government.

With the passage of time, however, the difference between the two types of communities was reduced by means of a series of reforms. As a reaction, Catalonia (together with other territories that belonged to the first group, such as the Basque Country and Galicia) insisted on being granted additional powers to restore the original asymmetry. This was one reason for the enactment of a new statute of autonomy for Catalonia in 2006.

CONTENT OF AGREEMENTS

Åland Islands: Self-governance was granted to Åland, to be exercised by a local parliament. The Finnish law that secures such autonomy can only be

amended with that parliament's consent. This law has actually been revised several times to strengthen self-government. The consent of the Åland Parliament is necessary when the president of Finland appoints the highest official of the Finnish state in Åland. It was also required when Finland entered the European Union in 1995.

Swedish is recognized as the only official language in Åland. All public schools teach in Swedish, and fluency in it is required to become a regional citizen of Åland. In addition, while Swedish is an official language in Finland, Finnish is not an official language in Åland, and the Finnish public authorities use Swedish to communicate with those of Åland.

Finally, Åland is a demilitarized zone, in accordance with various international agreements to which Finland is a party.

South Tyrol: The first international treaty between Italy and Austria sought to secure for the German-speaking community "complete equality of rights with the Italian-speaking inhabitants, within the framework of special provisions to safeguard the ethnical character and the cultural and economic development of the German-speaking element." Legislative and executive powers were to be transferred to South Tyrol. The "package" that was agreed upon two decades later included 137 measures, 97 of which were implemented through a new constitutional act amending the regional statute of autonomy. One of the key changes was to enhance the autonomy of the provinces of Bolzano (South Tyrol) and Trento, to the detriment of the powers of the region of Trentino-Alto Adige. Both Italian and German are official languages in South Tyrol.

Kurds in Iraq: Kurdish leaders negotiated the 2005 federal constitution of Iraq with remarkable ability. The constitution formally recognized the region of Kurdistan, which already existed de facto, as a federal region.

The constitution stipulates that each region shall adopt its own constitution. With regard to the distribution of powers, it provides that federal law is supreme, but only with respect to the areas that fall within the exclusive powers of the federation, which are relatively limited. In contrast, regional law is supreme in the areas where powers are shared.

The distribution of powers has important consequences for the question of who controls oil resources. A clause was introduced in the constitution to

deal with the status of Kirkuk, an oil-rich city that is considered the Kurdish Jerusalem. The status was to be decided through a referendum to be held in Kirkuk, where the Kurds have a majority, in November 2007. The referendum was, however, delayed several times and has yet to take place.

Catalonia: The Spanish constitution of 1978 permits the establishment of autonomous communities to exercise regional self-governance. Each community is created by means of a statute of autonomy, which determines the powers it is entitled to exercise and regulates its basic political institutions, which include an executive branch and a parliamentary assembly. The judiciary, however, remains in the hands of the central state. Different statutes of autonomy can establish different levels of self-government. Catalonia (as well as the Basque Country, Galicia, and some other regions) enjoyed higher autonomy than other communities from the very beginning, in 1979. In the 1990s, a cycle of reforms sought to move toward “symmetry,” while later reforms (especially that of the Catalan statute of autonomy in 2006) reintroduced “asymmetry.” A statute of autonomy can only be amended with the consent of both the central and regional parliaments.

An important aspect of the political authority of the Catalan government concerns matters involving language and schools. Catalan is an official language in Catalonia, together with Spanish. Public schools use Catalan as a teaching language in almost all courses.

CONDITIONS THAT MADE THE AGREEMENTS POSSIBLE

Åland Islands: The Åland Agreement was possible because Sweden and the League of Nations took part in the dispute. The League supported Finnish sovereignty over the Åland Islands as long as an agreement was reached between Finland and Sweden to protect the collective identity of Åland. The League acted as a monitoring body.

South Tyrol: Self-governance was made possible by the international treaty between Italy and Austria that resulted from the Paris Peace Conference after World War II. In 1961, however, Austria complained about the situation in South Tyrol to the UN General Assembly, which resolved that a solution had to be worked out through an agreement between the parties (Resolution 1497 [XV] of 1960 and Resolution 1661 [XVI] of 1961). Thus, international pressures led Italy to satisfy South Tyrol’s rights to self-governance.

Kurds in Iraq: The CPA, under American influence, made possible a de facto autonomy for the Kurds after the Persian Gulf War. Afterward, the TAL provided the legal framework that gave rise to the federal constitution of 2005. Agreement was facilitated by the decision to defer to the future any discussions and compromises about disputed territories. Moreover, Kurd leaders understood the preamble of the constitution to give them a right to unilateral secession, to be exercised in the event the basic principles of the constitution were breached.

Catalonia: When the Spanish constitution was being written in 1977–78, finding a commonly accepted solution to the “Catalan problem” was generally considered crucial to guaranteeing the stability of the new regime. Because Franco’s dictatorship had violently banned the expression of Catalan language in public (in the media, the administration, the schools, and so on) agreement was widespread that the aspiration to establish a new institutional arrangement to preserve Catalan culture was a just one. It was not only the nationalist parties in Catalonia that were in favor of self-governance; the non-nationalist parties (especially on the left) were, as well.

PROVISIONS FOR JUDICIAL INTERPRETATION OF THE AGREEMENTS

Åland Islands: The distribution of powers between the Finnish and the Åland authorities is fixed in the Åland Autonomy Act. The so-called “Åland Delegation,” which comprises two representatives appointed by the state and two appointed by Åland, is in charge of observing the territorial division of powers. If the Delegation finds that legislation enacted by Åland does not observe the constitutional boundaries, the Supreme Court is empowered to intervene with an opinion. The president of Finland finally decides whether to veto that legislation, normally in accordance with the conclusion reached by the Court.

South Tyrol: The political autonomy of South Tyrol is secured by laws of constitutional rank, which gives the Italian Constitutional Court jurisdiction in the matter. In addition, because the agreement was annexed to the 1947 Treaty of Peace with Italy, any future dispute can be submitted to the arbitration mechanisms regulated in articles 86 and 87 of that treaty.

Kurds in Iraq: The federal Supreme Court is the highest court in the country. It has jurisdiction to determine the constitutionality of laws and regulations,

as well as to resolve disputes between the federation and the regions. Kurds have long requested the establishment of an international mechanism to ensure their autonomy.

Catalonia: Conflicts that may arise between the Catalan government and the Spanish central government are adjudicated by the Spanish Constitutional Court (as is true of any conflicts that may affect other regions). The members of the Court are appointed by the institutions of the central government (the Congress, the Senate, the executive, and the General Judicial Council). The Court, however, takes a very long time—usually years—to render its decisions. This reduces its practical importance as arbiter of the territorial conflicts.

As a guardian of the Spanish constitution, the Court is also empowered to check the validity of the statutes of autonomy, which are subordinate to the former. Thus, in 2010, the Court declared unconstitutional some parts of the new statute of autonomy for Catalonia that the Catalan and Spanish parliaments had enacted, and which the Catalan people had voted for in a referendum in 2006. That judicial decision generated lots of controversy. The secessionist political parties and social movements in Catalonia, which are now stronger than they were in the past, are very critical of the Court.

CONCLUSION

Åland Islands: The model of autonomy presented by the Åland Islands shows the advantages of having an international body that facilitates and monitors the agreement between the relevant parties. It also suggests it is important for the agreement to cover the key issues (such as language rights, citizenship, military matters, and so forth) and to condition any future change in basic matters on the consent of the local authorities. Also to be noted in explaining the success of this experience in self-government is that Sweden has served as an international supervisor, and that the Åland Islands are surrounded by liberal and democratic countries and organizations, including Finland, its neighbors, the Nordic Council, and the European Union.

South Tyrol: The case of South Tyrol illustrates the general tendency after World War II to realize the international principle of self-determination of peoples through internal home rule instead of secession. One of the lessons to be drawn from this experience is the importance of taking care

in defining the specific territory where institutions of self-governance are to exercise their functions. The minority whose cultural rights are to be protected should not be included in a larger group that outnumbers it. It also bears emphasizing that Austria served as an international supervisor of the devolution process.

Kurds in Iraq: The case of the Kurds in Iraq exemplifies, once more, the relevance of international forces in protecting regional autonomy. It also shows the key role regional leaders can play at the constitutional bargaining table, where they can make smart proposals. And it raises the question of whether it is advisable for the regional leaders to believe the constitution affords them a remedial right to secession, if the existing institutional arrangements to secure political autonomy are seriously undermined in the future.

Catalonia: The Spanish case shows the difficulty of developing a decentralized political system in a country made up of territories that aspire to different levels of self-government. This diversity is linked, in part, to the existence of strong local identities in some territories, such as Catalonia. Arguably, some form of asymmetry is advisable to make it possible for a territory like Catalonia to feel part of the larger Spanish polity without abandoning its own cultural or political identity.

ABOUT THE AUTHORS

Victor Ferreres Comella, professor of constitutional law, Pompeu Fabra University (Barcelona), obtained his JSD at Yale Law School, with a thesis on Judicial Review and Democracy (1996). His work has focused on constitutional courts, fundamental rights, European supranational structures, and arbitration. His most recent books are Constitutional Courts and Democratic Values: A European Perspective (Yale University Press, 2009), and The Constitution of Spain: A Contextual Analysis (Hart Publishing, 2013). He has also written two books in Spanish: Justicia constitucional y democracia (Centro de Estudios Políticos y Constitucionales, 1997), which won the "Francisco Tomás y Valiente" Prize, and El principio de taxatividad en material penal y el valor normativo de la jurisprudencia (Civitas, 2002). As a visiting professor, he has taught at New York University School of Law (2001, 2003, and 2007), and at the University of Texas School of Law (2005, 2009, 2010, 2011, 2012, 2013, 2014, and 2015). For ten years (2001–2011) he also taught at the Spanish Judicial School, where judges in Spain are trained. He is on the editorial board of I.CON, International Journal of Constitutional Law, and is a member of the organizing committee of SELA (Seminario en Latinoamérica de Teoría Constitucional y Política), an annual gathering at the Southern Cone that brings together scholars from the Yale Law School and from Latin American universities.

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