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Secession, Right to Decide and the Constitutional Model of Militant Democracy

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ABSTRACT: Advocating democracy and the right to decide over forceful union in the Spanish and European contexts, this paper makes modest theoretical proposals to protect the right to decide and to self-government of sub-state nations or peoples. The peaceful solution of conflicts involving contested claims over territory and national sovereignty calls for a pluralist concept of democracy, recovering the centrality of self-determination as the self-assertion of a people, a political community that has been systematically denied the freedom to decide on its own political status and aspiration. Constitutional law based on popular sovereignty often neglects the question of the definition of the demos as the prefigured and axiomatic constituency. If the Constitution is further interpreted as precluding any claim to self-determination by a constituency, and any debate about that claim then an undemocratic model of militant constitutionalism ensues. That militant scheme is not so much about protecting democracy as it is about imposing a national model, a pre-defined *demos*. This contribution seeks to revisit the claim of sovereignty of the Catalan process and the constitutional doctrine of the Spanish judiciary precluding the Catalan Parliament from engaging in political debates on the right to decide, in relation to the issue of the militant democracy model

KEYWORDS: self-government, self-determination, militant democracy model, right to decide, forceful unión, European integration and Sub-state Nations, Multilevel Governance, Catalan sovereignty process

INTRODUCTION

Self-determination, the right to decide and secession have become hotly debated topics in the last decades, after the waves of decolonization and independence of previous colonies and protectorates consolidated the sovereign (national) State as the dominant political form for the territorial governance of peoples. The United Nations and the international community reflect the paramount character of the State over any other political form. Secession is normally understood as the separation and independence of a people in a given territory from a State of which they are a part, in order to create a new sovereign State. In that sense, secession reaffirms the centrality of Statehood[1]. Access to statehood through secession need not, but normally will follow the exercise of the right of a people to self-determination and a referendum on independence where that people expresses its sovereign choice. The four concepts – self-determination, referendum, secession and new state - are related in a sovereignty sequence.

But these relations are contingent, not necessary. A referendum is not a necessary feature of secession, which can obtain through other, peaceful or violent, processes. A number of the Member States that acceded to the EU in the enlargement to the East did not celebrate referenda to secede from larger Unions – Yugoslavia, Czechoslovakia, USSR - and gain statehood, Slovenia, Croatia, Czech Republic, Slovakia, Estonia, Latvia or Lithuania. The German Democratic Republic was a special case of self-determination, not for secession but for reunification. One in every four Member States of the current EU underwent a process of self-determination following the Soviet Union's processes of *glasnost* and *perestroika*, which put a gradual end to the cold war Eurocentric division of the world between East and West. The former soviet block was undergoing a complete overhaul in the 1990s, and self-determination was the banner. The Western block was, wrongly, presented as stable and consolidated, and any understanding of self-determination was in relation to the cession of sovereign powers to the European Union, a federalist debate that would present itself again to the new Eastern European Member States two decades later.

Secession and Self-determination as Process

A referendum, or an equivalent plebiscitary formula based on a census, is, normally seen as a defining feature of democratic self-determination, but they are not a necessary condition, as the above examples show. Like self-determination, secession is not a *status*

[1] Costanza Margiotta, *L'ultimo diritto. Profili storici e teorici della secessione*, Il Mulino, Bologna, 2005.

but a *process*[2]. In secession there is a constitutional moment whereby a change of status takes place. The difference between secession and self-determination is precisely the change of status: in self-determination there is also a process of decision or expression of the will – determination - but not necessarily a change of status: the two Quebec referenda and the Scottish referendum of September 2014[3] were exercises in self-determination, although not conceived in those terms. But with secession, there is always a change of status; otherwise there is no secession. Secession can, but need not be a consequence of self-determination, better understood as a process of *decision-making* concerning political status. The key to self-determination is a people *deciding* on its political status. Hence, modern discourses on "the right to *decide"* as the right to self-determination pertaining to a people or the political right of its individual members.

The outcome of secession, change of status, is normally, but need not be, framed in terms of independence. Although an independent state is the normal consequence of secession, independence and secession are conceptually different[4]. Secession could also take place in order to join another state or a Union of states, as the hard case of Crimea seceding from Ukraine and "joining" the Russian Federation would show; but secession always involves separation of one community or people from a larger entity or polity, constituted as a State. The result of the Russian annexation was the Republic of Crimea and the federal city of Sevastopol. The United Nations General Assembly rejected the referendum and annexation, adopting a resolution affirming the "territorial integrity of Ukraine within its internationally recognized borders". The UN resolution underscores that the invalid referendum cannot form the basis for any alteration of Crimea's status and called upon all states and international organizations not to recognize Russia's annexation[5]. In 2016, the UN General Assembly reaffirmed non-recognition of the annexation and condemned "the temporary occupation of part of the territory of Ukraine—the Autonomous Republic of Crimea and the city of Sevastopol"[6]. President Putin claims that the referendum complies with the principle of self-determination of peoples. Different theories of international law will offer contending visions of the legality of the Crimean process and with time, the validity of the process (*Geltung*) is likely to merge with the factual geopolitical framework (*Faktizität*)[7], underscoring conventionalist, institutional, critical and realist theories of international law[8]. Whatever might happen to the Eastern part of Ukraine (Donbas, Donetsk) attacked and invaded by Russia since 24th February 2022, is open to speculation, as the war goes on at the time of writing this piece.

Leaving, separating or seceding is always a serious and drastic decision. The consequences of a decision to secede affect large numbers of persons and people; some who did, and some who did not take part in the process or in the deliberations, some who wanted secession, and some who did not, and if the proportions are even, extreme care is necessary to preserve societal cohesion before and after a referendum. Secession can also affect supranational structures of cooperation, as in the case of independence from a Member State of the EU. Therefore, no-change, momentum, stability, status quo, are systematically favored default positions over change of status, and the *onus probandi*, the need for normative justification, is usually on the claim for secession. Democratic legitimacy has to be supported by legal soundness, cogency and coherence and by practical viability, sustainability and recognition. Especially powerful arguments are called for, in order to engage in such a momentous and impactful process.

Secession is always a critical and tragic constitutional process of rupture: the state of things, relations between a people and the polity within which it is embedded, the matrix, or parent State have to get to a very difficult and critical point, and for quite some time, for secession to be envisaged, and therefore it can be defended more coherently, as a matter of principle in practical philosophy, when its agenda seeks negotiation, reconciliation, cooperation and sharing systems of governance rather than full-blown rupture and going-it-alone situations. That would be a powerful reason to support, for any polity, the status of a federated entity within a larger supranational federation. Secession of a region from an existing Member State of the EU could then be seen as a purely transitional and provisional measure towards greater European integration in a sort of *Staatenverbund* or Confederation. The

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[2] I have developed the notion of secession as a discursive process elsewhere, Joxerramon Bengoetxea, "Secession v Forceful Union. A provisional enquiry into the right to decide to sucede and the obligation to belong", in C. Closa, C. Margiotta and G. Martinico (eds), *Between Democracy and Law*, Routledge, London 2020, 29-48.

[3] Costanza Margiotta, "An Update on Secession as the 'ultimate right': For a Liminal Legality", in C. Closa, C. Margiotta and G. Martinico (eds), *Between Democracy and Law*, Routledge, London 2020, 17: 'The history of modern states, and recently Brexit, has proven how the constitutionalisation of secession (the attempt to neutralise a possible conflict), can end, at a given moment, encouraging it, while the lack of constitutionalisation, which would make the process much more complex, even after a possible declaration of independence, may discourage secession or at least discourage the separatists' enthusiasm when a referendum is called (consider the results of the referendums in Québec and Scotland). It is for these reasons that the right to secede has not found an easy place in constitutional orders'.

[4] Susanna Mancini, 'Secession and Self-Determination', in Michel Rosenfeld and Andras Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (OUP, 2012) 481, at 48.

[5] United Nations A/RES/68/262 General Assembly, 1 April 2014.

[6] A/RES/71/205

[7] The reference is to Jürgen Habermas' *Between Facts and Norms* (MIT, 1999: 444).

[8] Richard H. Steinberg, "Overview: Realism in International Law" in 96 *Proceedings of the ASIL Annual Meeting, The Promise of International Law*, 2002, 260-62

seceding region would then appeal to the larger unit, the Federation, to engage in the multilevel debate concerning its component units.

Perhaps we are not there yet, but this is my take on the pledge by the Scots and the Catalans, and to a lesser extent, other nations of Europe without a state of their own to all fellow Europeans, and not only to the British or to the Spaniards, to engage in a conversation on the "ever closer union among the peoples of Europe". Brexit has short-circuited that debate for Scotland, at least for the time being, but the debate may well re-emerge in Northern Ireland. The multiple levels of government at which groups or peoples can cooperate – local, regional, state-national, supranational, international, transnational – and the new concepts of governance and diplomacy, make secession and self-determination – whatever its outcome - even more complex. This may be a practical argument in favor of gradual processes, *consociational* formulae going well beyond absolute, "all or nothing" formulae, of sovereignty v dependence[9].

As a matter of fact, it is possible to have secession, or annexation to another state without a formal process of self-determination[10]. It is also possible to have a (factual) process of self-determination with a referendum, where secession and independence is the option preferred by a large majority of the population and yet no change of status occurs. The September 2017 referendum in the Iraq part of Kurdistan, arguably, has not so far produced actual change of status, the reference state being considered somewhat "failed". We could therefore ask whether the Catalan process of 2017 should be considered as an attempt to exercise self-determination and secession unilaterally, with no consequences regarding its political status. A referendum was held on October 1, but Spain (Constitutional Court) considered it illegal and unconstitutional, and the international community did not recognize it. In fact, the immediate consequences led to a worse-off scenario: its self-government – autonomous home rule - status was temporarily suspended, direct rule from Madrid was imposed, most of the leaders of the sovereignty process were condemned to long prison sentences, others going to a form of "exile" in different parts of Europe to avoid prosecution by the Supreme Court (Criminal Chamber), and most crucially, it can be argued that all attempts to claim, even debate, self-determination have been abruptly foreclosed, as we shall see below.

The claim of sovereignty of the Catalan process has clashed with the doctrine of the Spanish Constitutional Court precluding the Catalan *Parliament* from even engaging in political debates on self-determination and the right to decide, other than to propose a reform of the Constitution, which raises the issue whether Spanish constitutionalism may be drifting toward a model of militant democracy and compromising is own democratic ethos.

Claims of sovereignty and the right to decide

Secession is, like self-determination, normatively[11], analyzed in terms of a "right" assisting a people but, more precisely, ¿Is it a right of a people simply to *decide* on status, as a matter of principle, or does it also encompass a right to actually sever bonds of statehood with the larger state and proclaim independence? We have two separate questions here: one concerns secession and independence, the other concerns self-determination and the right to decide on political status. Both questions are linked by the common subjects involved in the two processes, secession and self-determination: the people making a normative claim is the active subject, the state to which the claim is made is the passive subject, and the international community is the audience. Normally, the people engaged in secession and self-determination belongs, or is embedded in a larger state constituency. It may be part of that compound along with other peoples, as in multinational confederal models, even if those other peoples make no special rights-claims to secession or to self-determination and are happy parts of the compound (this can, perhaps, be the case in Spain or in the UK for nations other than Catalonia, Euskadi, or Scotland and Northern Ireland). In those compounds, the established state will tend to deny or refuse the right-claim of the component nation to self-determination as a people, a fortiori the claim to secession and independence. This nation's status as a people, a *demos*, is usually controversial and will be hotly debated.

Of course, the question who is a people, and under what conditions can the people be considered a *demos*, is decisive, but cannot be approached with a minimum degree of objectivity or decidability. It is a matter of pure authority and of international recognition. It is not possible to decide on the constituent body in an objective, scientific manner. The normative discussion splits depending, not

[9] N. Cornago, 'Beyond self-determination: norms contestation, constituent diplomacies and the co-production of sovereignty' (2017) 2 *Global Constitutionalism*. 327

[10] The Western Sahara has not yet exercised its right to Self-Determination called for by a UN Resolution. Instead it was dis-occupied or decolonized by Spain and occupied by Morocco, which claims the territory for itself. In its Advisory Opinion on Western Sahara, the International Court of Justice (I.C.J. Reports 1975, p. 12) identified three options for the exercise of self-determination in a colonial context: a referendum; a decision of a body representing the population; or a decision of an appropriate UN body. The population that had a right to determine itself when the UN resolution was passed in 1975 was never franchised in a census, and in the meantime, the affected population has changed, is in exile or in refugee camps. Factual annexation by Morocco with connivance from some members of the Security Council (USA, France) is a geopolitical likelihood.

[11] Although our normative approach engages with practical philosophy, the empirical study of secession can give some guidance on the normative debates, especially as regards the self-constitution of the demos, see in this sense, Matt Qvortrup, *Referendums and Ethnic Conflict* (University of Pennsylvania Press, 2014); Philip G. Roeder, *National Secession, Persuasion and Violence in Independence Campaigns* (Cornell University Press, 2018). Roeder (n 2).

so much on the subjective elements but on the object of the dispute: whether it is the claim of self-determination, the exercise of self-determination, the option for secession and the materialization of secession with independence and change of political status.

A conversation on secession

We start with the most drastic option: secession and independence. When it comes to the normative, practical philosophical debate, a claim of sovereign right and the democratic will of the people are the most recurrent arguments for supporting secession and independence; whereas defense of the *statu quo* of the affected polity, the sovereignty and territorial integrity of the state, are the most recurrent commonplace arguments against secession and independence. However, neither of them – the claim or its rejection – is a rational argument. This does not make them irrational, in spite of their emotional and volitional aspects, but rather a matter of persuasion and authority. In my opinion, there can still be a meaningful conversation about these questions, the lines of which I explore in the following paragraphs.

A normative preference for *statu quo* tranquility, continuity or stability is the starting point and endpoint. International relations and international law have a clear preference for continuity and status quo. However this presumption is not absolute, it is only *prima facie*. In other words, *statu quo* normally defeats other considerations for change of status, but this indefeasibility is not absolute, it is only relative and can be overturned. This normally means that any claim of right that would involve change of sovereignty status and change in the status quo would have to be justified beyond a threshold of argumentation and legitimacy that protects *statu quo* by way of presumption. The *onus probandi* is on the claim to secede from an existing state, the presumption of right is on stability.

International law has come up with some generally recognized criteria that justify claims to self-determination and we can apply them to secession as well. They place the burden of argument on the state resisting and containing secession and calls for independence: when the people concerned are under colonial or analogous rule by an outside colonial power (decolonization), or when the people are denied any chance to participate in the system of government to which they are subjected in the incumbent state (remedial self-determination). Beyond those clear cases one can find hard cases where pragmatic and principle-based criteria intertwine (ICJ opinion on Kosovo, Canadian SC Opinion Re Quebec).

When the challenge to status quo is accepted and satisfied, beyond reasonable doubt, and the presumption is overturned, as would be the case for remedial secession or decolonization, the burden shifts to the State opposing secession and independence. It can no longer stick to the presumption nor claim an indefeasible *statu quo*. The established state clinging absolutely to *statu quo* then has the onus of justification to deny claims to secession made by a people of that State in a territory of the State; in other words, that State cannot force a people to be permanently locked within that State as a colony or denied any participation in its own governance. This would clearly infringe international law.

As regards non-colonial or non-remedial situations the matter is much more complicated and a negotiation is called for[12], the parameters of which were hinted at by the Canadian Supreme Court in Re Quebec 1998 and the International Court of Justice opinion on *Kosovo* 2010. They adopt the line of thinking here advocated but do not carry it further: no unilateral right of Quebec to secede based on democracy alone, but no right of the Provinces and the Federal Government to force union *based on rule of law alone*; rather a process of political negotiation would have to take place, and normative considerations should take into account the four foundational principles of the Canadian Federation: democracy, federalism, constitutionalism with rule of law and protection of the rights of minorities. Likewise, the Kosovo Unilateral Declaration of Independence is not incompatible with International Law, since no rule or principle in that legal order prohibits such unilateral declarations, and the principle of territorial integrity is confined to the sphere of relations between states in international law, but does not apply within them, as this is a matter for domestic constitutional law. In both cases there seems to be a dialectical structure or system. The scheme does not look only at the right of a people to secede, but also at the right of a state to impose union on that people.

A Conversation on Self-Determination

The debate on self-determination is much more convoluted and subtle. A people claiming the right will first need to establish its subjective status as a people, with sufficient entity to become a holder of the right. The will and self-identification of its members will be a major argument, and this subjective criterion is not capricious or arbitrary; it will normally be based on some externally observable facts, interpreted collectively, like language, religion, political orientation, ethnicity, geography, history, folklore and popular culture, amongst others. The will of a majority of the people can be measured through polls, electoral processes, surveys, manifestations and demonstrations.

The topical argument to oppose it in concrete cases is the incumbent state's denial of the people's status as a constituent people, a *demos*, in other words, denying the condition of the people as a subject of the right to self-determination: since the people are not a colony or subjugated to dictatorship, it will form an inseparable and indissoluble part of the people, the nation or demos of the incumbent state. Thus, the most recurrent, almost automatic, response is to deny that there is any such people or any such constituent part of the State, and to hold that the State is a nation-state, necessarily constituted by one single people, single indivisible nation.

[12] Jan Wouters and Linda Hamid, 'We the People: Self-Determination v. Sovereignty in the Case of De Facto States' (2016) 1 *Inter Gentes* 53.

This is the single-demos thesis. It is a circular dogma: the demos constitutes the State and the State pre-defines the demos in its Constitution, as I have argued in a previous article[13].

The *demos* becomes self-referential and self-constitutive. There is no need to look at the historical or political formation of states to argue that the current state is the fusion of peoples into a single *demos*. In fact, the existence of a nation is no longer an empirical or conceptual disagreement, but a normative decision. It cannot be confirmed or rejected by looking at "objective" facts, but rather becomes a matter of authority: it is so because the Constitution, as interpreted by the Constitutional Court, says so[14]: "the 'rule of the Constitution as the supreme norm', expressly declared by its Article 9.1, is founded on the fact that the Constitution itself is the result of the determination of the sovereign nation through a unitary subject, the Spanish people, wherein that sovereignty resides and from which emanate, therefore, the powers of a State (Article 1.2)".

Once the nation-state constituted, the *demos* needs no foundation. The *demos* is a sort of *Grundnorm* behind the Constitution. Since the nation cannot be questioned, the will of the people does not really come into play, it is either presumed or irrelevant. And the existence of the nation substitutes the will of the people. But if the will of the people is irrelevant, then the democratic credentials of the nation are missing and the nation is pre-democratic: its members have no choice to reject the nation without relinquishing their nationality. If a people cannot claim is status and identity as a people, then it can be argued that it is forced and locked into a political union. As the Spanish Supreme Court blatantly expressed in its judgment of the Catalan sovereignty process: "Our legal system does not tolerate the fragmentation of the constituent power" (STS 459/2029 FJ 17.1.5.2.). When the very possibility of discussing the existence of the *demos* is denied, then the democratic nature of the process withers, and at this point it may be argued that discussion of a remedial right to self-determination cannot altogether be ruled out as unjustified.

The Constitutional preclusion of politics and the militancy model

It could be argued that this predicament of a reduced democratic quality is the current state of play as regards the Catalan sovereignty process. On 14 October 2019, the Spanish Supreme Court sentenced the leaders of the process to severe prison sentences between 9 and 13 years for the crime of sedition, disobedience and mismanaging public funds (STS 459/2019). Following this judgment, the Catalan High Court of Justice (TSJC) sentenced four former members of the Catalan Parliament Bureau [15] to 20 months incapacitation from holding office and 30.000€ for disobedience to the Constitutional Court[16], in pushing forward to pass the bills calling for the celebration of the secession referendum of 1 October 2017. In spite of these judgments and successive orders of the Constitutional Court, the Catalan Parliament continued to make further statements and pass motions supporting the right to self-determination of the Catalan people and calling for the abolition of the monarchy in Spain.

Again, in 2020, the Spanish prosecution brought charges before the TSJC against President Torrent (Speaker) and two other members of the Catalan Parliament's Bureau for including in the order of sessions, and proceeding to take a vote on, motions reasserting the right to self-determination in 2019. On 3rd March 2021 three parliamentary groups – CUP, ERC and Junts – presented a proposal for a Parliament resolution to enable debate on self-determination, the right to decide and the monarchy, criticizing the repeated interferences by the Spanish Constitutional Court[17] that curtail the democratic debate, jeopardize the sovereignty and immunities of Parliament and breach the rights of Members of Parliament to debate and vote on political motions concerning those issues.

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[13] I have developed this thesis in Joxerramon Bengoetxea, (2020), "El demos como Grundnorm. Autodeterminación, derecho a decidir y constitución democrática", 19 *Eunomía. Revista en Cultura de la Legalidad*, pp. 459-471.

[14] STC 259/2015, FJ 4 a)

[15] Judgement of 19 October 2020, condemning Anna Simó (ERC), Ramona Barrufet, Lluís Corominas and Lluís Guinó (PDECat), all members of the Catalan Parliament Bureau. Speaker Carme Forcadell had been condemned by the Spanish Supreme Court to 11 and a half years, which, controversially, attracted jurisdiction from the TSJC in order to prosecute, collectively, the leaders of the sovereignty process, including Speaker Forcadell. The Catalan High Court of Justice noted the obstinacy of the accused, "their stubbornness in the face of the prescriptions, requirements and warnings that the Constitutional Court directed them in the scope of their powers throughout the entire legislature".

[16] The Supreme Court concluded that Forcadell and the Board facilitated the debate and approval of the laws leading to the referendum "in stubborn opposition to all the requirements formulated by the Constitutional Court," which had forewarned them not to proceed. The Court discarded the main allegation of the accused that the members of the Parliament Bureau were protected by parliamentary privileges, the immunity of the Members of Parliament from prosecution for their acts as representatives of the citizens. The Court dismissed the objection arguing that MPs are protected by inviolability in the issuance of opinions and votes, but not in the processing of parliamentary initiatives. On the basis of the Supreme Court's distinction TSJC appreciates the disobedience of the defendants who moved forward several resolutions related to the sovereign process, including the so-called 'disconnection laws', despite the writs of the Constitutionalist not to proceed.

[17] As an instance of such interferences we can quote the Order ATC 123/2017, of 19 September (BOE 229, of 22-09-2017), discussed below. For a comparative analysis of the Court's legal culture and jurisprudential approach, see the excellent study by Marian Ahumada Ruiz, "The Spanish Constitutional Court", in Andras Jakab, Arthur Dyevre and Giulio Itzcovich (eds), *Comparative Constitutional Reasoning*, Cambridge University Press, 2017, 604-640

Secession, Right to Decide and the Constitutional Model of Militant Democracy

In her order deciding to open the Torrent prosecution trial, judge Alegret (TSJC) considered the Parliament's decision to vote on the motions was an affront to the Spanish Constitutional Court, which had previously suspended similar motions, and was contrary to the Constitutional status of the King. Replying to the objections of the defence, Judge Alegret framed the legal issue as one of disobedience or contempt of court, rather than of the limits to what can be debated in Parliament: "(...) In no charter of fundamental rights of the democracies of our environment or in the legal norms that judges have to apply have we found a right of the public powers to disobey the mandates of the high courts due to discrepancies with the legal norm, democratically agreed upon, that they apply and interpret". The judge underlines the fact that, at the time, the chief law clerk of the Parliament had warned the Parliament Bureau of the "possible contradiction" of the proposed motions with the Constitutional Court's previous decisions. Instructing Judge Alegret considers the accused were aware of the illegality of the action given the maneuvers carried out by Parliament Speaker Torrent, advancing a few hours the plenary session of 12 November 2019 that was voting on the motion, in order to circumvent the foreseeable arrival of the Order of the Constitutional Court suspending it.

The actual motion expressed the intention of the Parliament to exercise in a concrete manner the right to self-determination and to respect the will of the Catalan people, and "reiterates, as often as it deems it proper, to rebuke the monarchy, to defend the right to self-determination and to claim Catalonia's sovereign right to decide on its political future". Three other parliamentary groupings – Ciudadanos, PSC and PP – requested the Speaker and the Bureau to reconsider its decision to have the motion voted and withdraw it, but this was rejected by the majority of the Catalan Parliament.

The major issue raised by such prosecutions concerns the scope of the democratic right to engage in a parliamentary debate on self-determination, even if no concrete normative instrument is adopted in order to materialise such right. As is well known, the parliamentary and executive action leading to the independence referendum of October 1st 2017 was an entirely different matter, for it was a unilateral process, provoked, no doubt, by the total absence of alternative ways to engage, within the Spanish constitutional system, in any meaningful debate on the claims made by the majority of the Catalans to decide on their political status, a will expressed in repeated elections since 2010 and through resolutions of the Parliament calling for political negotiation with the Spanish Government in order to facilitate a lawful referendum, or at least a consultation (plebiscite). The unilateral steps adopted by the Catalan sovereignty leaders are a different matter, which has been addressed by the Spanish Supreme Court and Constitutional Court, and which may be the subject of a judgment by the European Court of Human Rights, in due course. This aspect of the sovereignty process is not discussed in this contribution. Nor is the legality of the Amnesty Bill passed by the Lower Chamber of the Spanish Cortes, at the time of writing (13 March 2024) to benefit all those sentenced or pending trial in relation to the Catalan sovereignty process. The Constitutional Court has repeatedly stated that the Autonomous Community of Catalonia lacks the competence to convene and hold consultations (even those falling short of referendum) that deal with issues that affect the constituted order and the very foundation of the constitutional order (SSTC 31/2015, 32/2015, 138/2015 and 259/2015). Even from the democratic legitimacy perspective there can be genuine doubts as to the correctness of the unilateral initiatives, especially considering their divisive effect on Catalan society.

That the Catalan Parliament cannot, constitutionally, adopt any act, resolution or instrument implying a unilateral process toward sovereignty (self-determination referendum, bills of secession) is no longer a moot issue. But what can the Parliament legitimately and legally debate concerning the on-going claims of the Catalan people to self-determination, the right to decide and the claim of independence? Is Parliament foreclosed and precluded from any discussion of the issue, as the Torrent prosecution case and the Order of Judge Alegret seem to imply?

The doctrine of the Spanish Constitutional Court can be reconstructed as drawing a line between three different constitutional moments: (i) pure political deliberation on the right to decide, whether it exists and under what conditions, (ii) expressing or proclaiming that the Catalan people are the holders of such right and (iii) acting upon any claim to self-determination by adopting acts to exercise the right. This threefold distinction follows, in my view, from the Court's jurisprudence (SSTC 42/2014, FJ 4, and 259/2015, FJ 7 and AATC 141/2016, FJ 5, and 170 / 2016, FJ 7), which can be summarised in the following manner, using its own words: the *public debate* in the legislative Assemblies on political projects that seek to modify the very foundation of the constitutional order enjoys, precisely under the protection of the same Constitution, an unrestricted freedom (i); provided that it is not articulated or defended through *an activity* that violates democratic principles, fundamental rights or the rest of the constitutional mandates (iii) and that the attempt to effectively achieve it is carried out within the constitutional framework, which excludes *conversion of those political projects in norms* (iii) or in *other determinations of the public power in a unilateral way*, disregarding the constitutional reform procedure (ii).

The most difficult point concerns moment (ii), solemn proclamations or pledges of sovereignty, or *other determinations* of a public power (e.g. the *Parliament*) in a unilateral way, but with no legal effect. If this possibility is denied, then perhaps the constitutional doctrine can be said to have moved towards embracing a militant model, even though the Court denies that the Constitution embraces any militant democracy model. The focus of our attention now turns to this question, by examining the Constitutional Court's doctrine, notably its Order ATC 123/2017 (FJ 8).

In this Order, the Constitutional Court observes that the Catalan Parliament has the duty to prevent any initiative that involves unilaterally altering the constitutional framework or breaching the Court's resolutions (AATC 141/2016, FJ 7, 170/2016, FJ 7, and

24/2017, FJ 9). The Court adds that such admonition does not imply in any way an illegitimate restriction of parliamentary autonomy nor does it compromise the exercise of the right of participation of political representatives guaranteed by Article 23 of the Constitution; it is rather the consequence of the rule of law, the submission of all public powers to the Constitution (Article 9.1). The fact that the Court asserts that parliamentary autonomy and the right of participation are not compromised needs to be nuanced given that, according to the Court, the rule of law unconditionally takes primacy over democracy and the Constitution marks the contours of what can be considered legitimate, even at the level of political discourse: "the legal system, with the Constitution at its apex, in no case can be considered as a limit of democracy, but as its guarantee itself " (STC 259/2015, FJ 5 c). In other words, there is no political life, no possible discussion, outside the Constitution.

According to the Court, this qualified compliance of all public powers with the Constitution is not based on a necessary ideological adherence to its total content, but on the commitment to carry out their [public powers'] functions in accordance with it and in respect of the rest of the legal system. In the constitutional State, the democratic principle cannot be separated from the rule of law and the unconditional primacy of the Constitution, which "requires that *every decision* of a public power be, without exception, subject to the Constitution, without there being any or areas of immunity against the Constitution" (STC 42/2014, FJ 4 c, emphasis added). This reference of the Court in italics is rather vague: one should think it only covers decisions creating effects in law; otherwise, if it covers also political decisions of the Catalan Parliament or Government that question the unity of the Spanish state by purely proclaiming the right of the Catalan people to decide on their status, something the Constitution clearly does not contemplate, it would be contradicting itself by requiring ideological adherence, thus embracing a militant and substantive model of constitutionalism. The Court would be implicitly overturning its own doctrine, according to which: «In our constitutional order there is no place for a model of 'militant democracy', that is, 'a model where not only respect is imposed, but positive adherence to the order and, first of all, to the Constitution' (STC 48/2003, FJ 7; doctrine reiterated, among others, in SSTC 5/2004, of January 16, FJ 17; 235/2007, FJ 4; 12/2008, FJ 6, and 31/2009, of 29 January, FJ 13). This Court has recognized that there is room in our constitutional system for any ideas that happen to be defended and that 'there is no normative nucleus inaccessible to constitutional reform procedures'»[STC 42/2014, of March 25, FJ 4 c)].

The Constitutional Court may be confusing a constitutional model of militant democracy with the so-called *eternity clause*, that there are some norms in the Constitution that can never be suppressed or derogated. Formally, there are no such norms in the Constitution, since, theoretically all of its provisions can be the subject of amendment or revision, although in practice, total revision of the Constitution or revision of its Preliminary Title (including Article 2, which consecrates the indivisible and inseparable unity of the Spanish nation), its Fundamental Rights or the Monarchy is highly unlikely, given the procedural hurdles – dissolving the Cortes, calling for new elections, holding a referendum, no revision during emergencies - and five different protected majority votes and cooling off clauses foreseen in Article 168: two-thirds majority of each Chamber of Parliament in favour of revision, dissolution of the Cortes and new elections, ratification by the new Cortes of the decision to revise and discussion of the new Constitutional text, approval of the revised Constitution by a two- thirds majority of both Chambers, and ratification by referendum. Leaving aside the possibility that the requirements for constitutional revision of the Constitution could be themselves amended by a less cumbersome procedure (Article 167, i.e. absolute majority in the Senate and 2/3 majority in Congress), the impression is certainly one of a militant Constitution[18] that strives to be untouchable as regards its core, its nationalist, monarchic ethos and the fundamental rights.

The connection between eternity clauses and militant democracy is commonplace, but not a conceptual necessity. The two ideas conflate in some constitutions based on the 'never again' narrative, like the German *Grund Gesetz* (Article 79,3), which protects federalism and Fundamental Rights (GG:1) and the *sozialer Rechsstaat* (GG: 20) from constitutional revision. Militant democracy was meant to protect the democratic system from the use of its own procedures in order to overturn it, as the Nazis did with the Weimar Republic, which explains why its most controversial instrument is the banning of antidemocratic political parties[19], especially of those that are not engaged in violent criminal acts[20].

CONCLUSION: Is the Constitutional Court imposing a model of militant constitutionalism?

Gutman and Voigt (2021) distinguish militant democracy and militant constitutionalism: "The two concepts share the aim of preserving elements of the political order, namely democracy and the rule of law, respectively. However, they differ from one another in a number of important aspects, such as their timing (militant democracy tries to prevent non-democrats from acquiring

[18] Gutmann, J., Voigt, S. "Militant constitutionalism: a promising concept to make constitutional backsliding less likely?", *Public Choice* (2021). https://doi.org/10.1007/s11127-021-00874-1

[19] The idea that democracy is not a suicide pact and must be able to defend itself against its enemies is credited to Loewenstein, K. (1937a), "Militant democracy and fundamental rights, I". *31*(3), *American Political Science Review*, 417–432, at 432, who did not, however, offer a credible normative justification, other than exceptionalism

[20] Bastiaan Rijpkema, *Militant Democracy. The Limits of Democratic Tolerance*, Routledge, 2021, (I,3). The banning of political parties engagaing in violence is not a democratic problem as the banning of these is due to their acts, not their ideas.

power, whereas militant constitutionalism tries to contain the damage even if enemies of the rule of law have acquired political power), the actors charged with their implementation (the government versus actors well beyond the government), and the means employed to reach their goal (bans on extreme parties, media accountability, as well as limits on the freedom of assembly [versus] protecting the constitution from self-serving amendments)".

As mentioned above, the Constitutional Court has repeatedly held that the model of militant democracy does not apply in Spain (STC 48/2003, STC 136/1999, STC 159/1986), and this has been in the context of the banning of political parties connected to terrorist organizations or in the context of free speech, but the issue has also come up in relation to the Catalan sovereignty process in the justification provided by the Supreme Court, referring to the Constitutional Court doctrine (STS 459/2019: FJ 17.1.5). Are pro-independence parties a threat to democracy? It is worth noting that pro-secession or pro-independence parties do not imply any attempt to subvert the democratic principles enshrined in the Constitution; they are not antidemocratic. They are claiming secession and purporting to leave Spain's constitution intact, but for the territorial extent of its sovereignty. They do not pose the type of threat, risk or challenge to democracy for which militant democracy was proposed. In other words, it can be argued that if Spain is not a militant democracy, as regards the pro-independence parties of Catalonia and the Basque Country, this is precisely because it does not need to be militant[21]. The indissoluble unity of the sovereign Spanish nation proclaimed in Article 2 (part of the especially protected Preliminary Title) is sufficient to block and neutralize the claims made by these groups: they will never succeed unless they can convince the whole of Spain that they should be allowed to exercise their self-determination in a referendum. Spain may have no model of militant democracy, according to its Constitutional Court, but arguably, it embraces a militant, essentialist constitution[22].

As Arzoz and Suksi have argued[23], the Supreme Court of Canada in Re Quebec defined the duty to negotiate on the claims to self-determination in a rather loose manner. If the Opinion synthesizes the contemporary understanding of the constituent power, requiring a weighing and balancing of the fundamental normative principles involved in the legal and political conflict i.e. federalism, democracy, constitutionalism with rule of law and respect for minorities, the duty to negotiate is more political than legal. The political culture in Canada may be prone to follow its Supreme Court's sound advice and pay heed to the morality of the Constitution, because neglecting it would undermine the legitimacy of any actor. But the *Re Quebec* Opinion's legal teeth do not bite deep, because the problem is ultimately political, not legal.

The Spanish Constitutional Court, for once, was honest enough to admit that the matter should be settled in the political forum, in Parliament: the duty of constitutional loyalty and the principle of institutional cooperation imply that if the Legislative Assembly of an Autonomous Community, which is entitled under the Constitution to apply for constitutional reform, were to make a proposal to this effect, 'the Spanish Parliament would have to consider it' (STC 42/2014 FJ 4). Any discussion of a claim to self-determination or the right to decide, any proposal for constitutional reform has to follow the requisite constitutional revision and the Cortes will have to consider it; which is like saying "here you have the proper legal procedure to suggest any constitutional change, good luck!" but knowing it will never get anywhere because the Catalan – or Basque - sovereignty movement will always be a minority, locked into the unitary and indissoluble Spanish nation. The sort of problems arising when a particular territory wishes to change its legal status cannot be solved by the Constitutional court, they are political issues[24]. This is the closest the Spanish Constitutional Court has got to the *Re Québec* Opinion, a fine example of judicial dialogue[25]. Ulterior judgments and orders of the Constitutional Court, as analysed above, have been much less understanding and have even precluded the possibility of debating motions on self-determination and the monarchy in the Catalan Parliament, moving towards a model of militant Spanish constitutionalist nationalism. Instead of striking a fine balance between the four "equivalent" fundamental principles identified by the Canadian Supreme Court i.e. democracy, federalism, constitution with rule of law and protection of minorities, the Spanish Constitutional Court has placed the rule of law above the rest, above autonomy, above the democratic principle and above the protection of minorities. After all, as

[21] Interestingly there is at least one political party in Spain (Vox) that advocates militant democracy in order to ban pro-independence parties, to dismantle the system of Autonomous Communities and the co-official status of regional languages, norms recognised in the especially protected Preliminary title of the Constitution. It could be argued that mechanisms of militant democracy would make more sense precisely to protect the Constitution aginst the parties calling for such militant measures, which, following Löwenstein, we could 'Trojan horses'. The difficulty and circularity of the enterprise shows the self-defeating nature of militant democracy theory, because of its arbitrariness. See, in this sense, the critique of neo-militant democracy by Anthoula Malkopoulou and Ludwig Norman, "Three Models of Democratic Self-Defence" in Anthoula Malkopoulou and Alexander Kirschner (eds) *Militant Democracy and its Critics, Populism, Parties, Extremism*, Edinburgh 2019, Ch 5).

[22] In her article "El esencialismo constitucional: la Constitución Española al servicio de la Unidad Nacional", 6 (3) *Oñati Socio-legal Series*, 2016, 726-48, Lucia Payero speaks of constitutional essentialism or even fundamentalism.

[23] Xabier Arzoz and Markku Suksi, "Comparing constitutional adjudication of self-determination claims", 25 (4) *Maastricht Journal of European and Comparative Law*, 2018, 452-475.

[24] Giuseppe Martinico, "Courts and Identity Conflicts in Federal and Regional Systems", *Sant'Anna Legal Studies, STALS, Research Paper* 3/2016.

[25] On judicial dialogue, see my own *Diálogos Judiciales y Autogobierno,* IVAP, Oñati 2022.

Secession, Right to Decide and the Constitutional Model of Militant Democracy

Lowenstein conceded, the best antidote against authoritarian twists, or involutions towards totalitarianism is not so much to be found in legality and the rule of law or even the battery of measures that Lowenstein himself listed in 1937[26], as in a strong democratic culture, and the essence of this tradition is democratic tolerance, an Enlightenment principle that does not shy away from pluralism, conflict and dissent.

REFERENCES

1) Arzoz, Xabier and Markku Suksi, "Comparing constitutional adjudication of self-determination claims", 25 (4) *Maastricht Journal of European and Comparative Law*, 2018, 452-475.
2) Bengoetxea, Joxerramon, *Diálogos Judiciales y Autogobierno*, IVAP, Oñati 2022.
3) Bengoetxea, Joxerramon, "El demos como Grundnorm. Autodeterminación, derecho a decidir y constitución democrática", 19 *Eunomía. Revista en Cultura de la Legalidad*, 2020: 459-471.
4) Bengoetxea, Joxerramon, "Secession v Forceful Union. A provisional enquiry into the right to decide to sucede and the obligation to belong", in C. Closa, C. Margiotta and G. Martinico (eds), *Between Democracy and Law*, Routledge, London, 2020, 29-48.
5) Capoccia, G. "Militant democracy: The institutional bases of democratic self-preservation". 9 *Annual Review of Law and Social Science, 2013,* 207–226.
6) Cornago, Noé, 'Beyond self-determination: norms contestation, constituent diplomacies and the co-production of sovereignty', 2 *Global Constitutionalism*, 2017, 327.
7) Gutmann, J. and S. Voigt, "Militant constitutionalism: a promising concept to make constitutional backsliding less likely?", *Public Choice* , 2021.
8) Habermas, Jürgen, *Between Facts and Norms*, MIT, Boston, 1999.
9) Loewenstein, Karl L., "Militant democracy and fundamental rights, I", *31*(3) *American Political Science Review*, 1937, 417–432.
10) Malkopoulou, Anthoula and Ludwig Norman, "Three Models of Democratic Self-Defence" in Anthoula Malkopoulou and Alexander Kirschner (eds), *Militant Democracy and its Critics, Populism, Parties, Extremism*, Edinburgh, 2019, Ch 5).
11) Mancini, Susana, 'Secession and Self-Determination', in Michel Rosenfeld and Andras Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford UP, 2012, 481.
12) Margiotta, Costanza, *L'ultimo diritto. Profili storici e teorici della secessione*, Il Mulino, Bologna, 2005.
13) Margiotta, Costanza, "An Update on Secession as the 'ultimate right': For a Liminal Legality", in C. Closa, C. Margiotta and G. Martinico (eds), *Between Democracy and Law*, Routledge, London 2020, 9-28.
14) Martinico, Giuseppe, "Courts and Identity Conflicts in Federal and Regional Systems", *Sant'Anna Legal Studies, STALS, Research Paper* 3/2016.
15) Payero, Lucía, "El esencialismo constitucional: la Constitución Española al servicio de la Unidad Nacional", 6 (3) *Oñati Socio-legal Series*, 2016, 726-48.
16) Qvortrup, Matt, *Referendums and Ethnic Conflict*, University of Pennsylvania Press, 2014.
17) Rijpkema, Bastiaan, *Militant Democracy. The Limits of Democratic Tolerance*, Routledge, London, 2021.
18) Roeder, Philip, *National Secession, Persuasion and Violence in Independence Campaigns*, Cornell UP, 2018.
19) Ruiz, Marian Ahumada, "The Spanish Constitutional Court", in Andras Jakab, Arthur Dyevre and Giulio Itzcovich (eds), *Comparative Constitutional Reasoning*, Cambridge UP, 2017, 604-640.
20) Steinberg, Richard, "Overview: Realism in International Law" in 96 *Proceedings of the ASIL Annual Meeting, The Promise of International Law*, 2002, 260-62.
21) Wouters, Jan and Linda Hamid, 'We the People: Self-Determination v. Sovereignty in the Case of De Facto States', 1 *Inter Gentes*, 2016, 53.

[26] Besides the banning of antidemocratic parties and limiting the freedom of assembly, he mentioned measures such as bans on the formation of para-military units, precautions against the illicit use of firearms and other weapons, making editors of newspapers responsible for reports deemed to be "seditious propaganda", measures against incitement to violence or hatred against population groups, the exclusion of people with extremist leanings from public administration, and the creation of a political police that is to control anti-democratic and anti-constitutional activities. For a modern update and systematization of the measures see, G. Capoccia, "Militant democracy: The institutional bases of democratic self-preservation". 9 *Annual Review of Law and Social Science, 2013,* 207–226, who counts three strategies underlying the various proposals: (a) concentrate power in the executive, (b) distinguish emergency powers from powers granted in normal times, and (c) pass ad hoc legislation to restrict rights of expression, participation, and assembly.