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ARTICLE

Spain as a Democratic State Governed by the Rule of Law and the Catalan Secessionist Process

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Abstract

This work begins by recalling the characteristic features of the political system and model of territorial division of power established in the 1978 Spanish Constitution after a complicated but successful process of transition to democracy. Spain was constituted as a politically decentralized, social and democratic state governed by the rule of law, a compromise solution between the centralist tradition and the demands of peripheral nationalisms. Although this original formula has been progressively deployed with clearly positive results, it has come under threat from the challenge posed by the secessionist forces in Catalonia and the Basque Country, seriously endangering coexistence. In this regard, the work first analyses the Ibarretxe Plan, the confederal proposal of the president of the Basque government approved in 2004 by the Basque Parliament and rejected by the lower house of the Spanish Parliament. It then examines the most relevant sequences of the secessionist process that has unfolded in Catalonia over the last decade and which culminated in October 2017 in an illegal referendum and the unilateral declaration of independence approved by the regional parliament. It also analyses the response of Spanish institutions to attempts at constitutional rupture and its possible impact on the democratic quality of Spain and its reputation as a state governed by the rule of law.

Keywords Rule of law · Democratic quality · Territorial division of power · Right to secession

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This paper is intended as a largely descriptive overview of the issue for non-Spanish readers. It approaches the events from a domestic perspective, as they are dealt with from the international perspective of secession and experiences that may be useful for comparative law purposes elsewhere in this issue. It explores not only the Catalan secessionist process but the Spanish constitutional system and the process of the construction of the "State of Autonomous Communities" with a view precisely to explaining this context and assessing the quality of the rule of law as a whole, above and beyond the episode of the *procés*.

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1 The 1978 Constitution as the Culmination of the Process of Transition to Democracy

Following the death of General Franco, the dictator who ruled Spain for 40 years (1936/39–1975), the monarchy was established in the figure of King Juan Carlos I, who, in his coronation speech, signalled his intention to establish a parliamentary monarchy (not an authoritarian one) and to be king of all Spaniards, without exclusions. Thereafter began a period—not without frights and enormous challenges—of democratic transition, one of the brightest chapters in the country's chequered constitutional history.

This was neither an unusual nor strictly original operation. It took place within a context of universal expansion of democracy, which had been gaining ground around the world in the last decades of the twentieth century, and it displayed some common features, such as the gradual delegitimization of the former authoritarian regime, which lacked respectability and had been isolated and stigmatized in the international order. However, in the case of Spain, certain specific factors meant that the process faced greater objective challenges than those in Greece or Portugal: the resurgence of various strains of terrorism, a deep economic crisis, and the ostensible hostility of most of the senior military officials. Such a starting point was not exactly grounds for optimism.

But the key players in this process (Prime Minister Adolfo Suárez, leader of the reformists from the Francoist regime, and the representatives of the democratic opposition) proved able to interpret the majority desire of Spanish society at that time—for whom the memory of a tragic civil war was still fresh—for a peaceful transition, devoid of trauma, score-settling and revanchism, that would not repeat the mistakes of the past. Thanks to the negotiating skills of those political leaders, a hybrid formula emerged, combining elements of reform, as the law was not broken, with elements of rupture, as the final outcome was unequivocally democratic, a system diametrically opposed to Francoism. That was the secret to its success.

Its originality lay in the procedure followed to overcome the reform/rupture dilemma. Ultimately, it was the mechanisms provided for in the Francoist regime's Fundamental Laws themselves that were used to amend them: the Law for Political Reform,[1] the "eighth fundamental law", was passed, doing away with the seven previous ones. It was necessary to reassure the regime politicians, guaranteeing an orderly, controlled evolution that would not demand accountability, while also convincing the leaders of the democratic opposition that this was the only viable solution. There was no alternative: the revolutionary rupture was an adventure, a leap of faith that the majority did not want, and there was a finite capacity to pressure and mobilize; there was no margin to oust the reformists from power, establish a provisional government, and wipe the slate clean. The cost of repression by the powers that be or a violent insurrection was too high. Both sides were aware that the only way out was compromise, consensus, that they had no choice but to reach an

[1] Ley 1/1977, de 4 de enero, para la Reforma Política (BOE, nº 4, de 05/01/1977).

understanding. And the political class rose to the historical occasion, displaying a remarkable degree of good sense, responsibility, and conciliatory goodwill.

The pact between the vast majority of political forces enabled, for the first time in Spain, a constitution for all, as opposed to one imposed by those then in power. This contributed decisively to Spain's transformation into a fully comparable democracy, integrated in Europe, and marked the start of the longest period of freedom and well-being in the country's history. The new constitution was approved by the overwhelming majority of the *Congreso de los Diputados* (the lower house of the Spanish parliament): 325 votes in favour (including those of *Convergència i Unió* [Convergence and Union, CiU], the main Catalan nationalist party), 6 against and 14 abstentions. On 6 December 1978, the Spanish people endorsed the constitutional text, with a vote of 88% in favour and fewer than 8% against. The abstention rate was 33% (somewhat higher in the Basque Country). In Catalonia, the percentage of votes in favour (90.5%) was even higher than the national average.

2 Spain as a Social and Democratic State Governed by the Rule of Law[2]

Under Article 1 of the Spanish Constitution [hereinafter, CE], "Spain is hereby established as a social and democratic State, subject to the rule of law, which advocates as the highest values of its legal order, liberty, justice, equality and political pluralism." Although these three elements are conceptually distinct (each descriptor has a specific meaning and its own history), they must be interpreted jointly, comprehensively, rather than in isolation, as they are not juxtaposed, but reciprocally condition and limit each other. Such a synthetic interpretation is not easy, as these concepts are controversial from the start, expressing aspirations that are difficult to reconcile, rife with tensions and mutual contradictions. Witness the dialectical tension between the rule of law and a democratic state: democracy cannot lead to despotism or the tyranny of the majority, but rather must respect the requirements of the rule of law.

2.1 The Rule of Law

The idea of the legal limitation of political power, of authorities subject to legal rules in the exercise of their competences, of a government of laws not of men, is reflected in Articles 1 and 9 CE, with Article 9.1 CE enshrining the subjection of public authorities and citizens to the Constitution and all other legal provisions. This supremacy of the law is guaranteed through the rigidity and control of the constitutionality of laws.

[2] This article will not examine the state's social dimension as such an analysis lies beyond the scope of its stated purpose.

Article 9.3 CE guarantees "the principle of legality, the hierarchy of legal provisions, the publicity of legal enactments, the non-retroactivity of punitive measures that are unfavourable to or restrict individual rights, the certainty that the rule of law will prevail, the accountability of the public authorities, and the prohibition against arbitrary action on the part of the latter".

Spain's definition as a state governed by the rule of law is also embodied in an institutional design that respects the principle of the separation of powers, with an independent judiciary, subject to the rule of law (Part VI), a Constitutional Court (Part IX) as the ultimate guarantor of the constitutionality of laws, and a public administration fully subject to justice and the law (Articles 103.1 and 106.1). Nor can we forget, of course, the full catalogue of effectively guaranteed rights and freedoms (Part I), which are the foundation of political order and social peace (Article 10.1) and operate as an unassailable limit on public and private power.

2.2 A Democratic State

This is another of the defining features of the form taken by the Spanish state. It is the backbone of the political system, the foundation of the entire legal-political order. In this regard, the 1978 Constitution, which put an end to 40 years of the exercise of undemocratic power and three years of transition, clearly sets itself apart from the authoritarian way of thinking that had prevailed throughout most of Spain's constitutional history.

This constitutional definition logically entails the assumption of a specific political philosophy, which can be summarized in two points: (1) a clear, defined criterion regarding the holder of sovereignty; and (2) a pluralist and participatory conception of the political process.

The first condition to classify a system as democratic is the recognition that sovereignty lies with the people. To this end, Article 1.2 CE provides, "National sovereignty is vested in the Spanish people, from whom emanate the powers of the State." The aim is to underscore the indivisibility of the sovereignty, which is predicable only of the Spanish nation as a whole, contrary to the proposals of the Basque and Catalan nationalist groups, which postulated a fragmented or shared sovereignty, of a confederal nature, to be vested in the various nationalities or peoples that make up Spain.

The Spanish people have the final say and, therefore, are masters of their destiny. It is they who hold the constituent power, which is a *de facto*, pre-juridical power. However, once the Constitution enters into force, the sovereignty is juridified: it is the constitutional democracy. The affirmation of popular sovereignty entails the recognition of universal suffrage in all types of elections (Article 68.5). When coupled with the fact that, in a parliamentary regime such as Spain's, the government is bound to Congress by a relationship of confidence, the democratic foundation of the three classic powers of the state is directly or indirectly guaranteed.

The democratic principle also has a subjective facet, which is enshrined in Article 23.1 CE: "Citizens have the right to participate in public affairs, directly or through

representatives freely elected in periodic elections by universal suffrage." Political participation is not only a principle; it is a true fundamental right.

Democracy is equivalent to self-government. The consent of the governed is the ultimate source of legitimacy of power and it is not presumed, but reliably verifiable through fair and competitive elections. Citizens are trusted to decide for themselves, without paternalistic tutelage. But democracy as a system of organization of political co-existence is not a matter solely of legitimacy of origin, not simply a means of deciding who will temporarily exercise power. That is a necessary, but insufficient condition. This legitimacy of origin must be coupled with legitimacy of exercise because democracy is also an answer to the question of "how" one governs (not just "who" governs).[3]

In a constitutional democracy such as Spain's, political power is divided and limited. Political leaders are accountable to those who have elected them. And that accountability is twofold. First, there is legal accountability. In a state governed by the rule of law, the exercise of power is subject to limits and controls; potential abuses can be reported to independent courts, which will impose, where appropriate, the established sanctions (there are no loopholes for the immunity of power). Second, there is political accountability, whereby leaders must obtain and periodically win anew the confidence of the governed, subjecting themselves to the electoral test and accepting the outcome. The Spanish constitutional system undeniably meets these parameters.

The second characteristic feature of a state that defines itself as democratic is a pluralistic conception of society. In contrast to authoritarian conceptions that consider diversity or dissidence incompatible with a political order built on seamless unity, on unanimous adherence, a pluralistic democracy views society as a network of groups with different goals. This pluralism of both ideology (beliefs, values or opinions) and interests is understood to be natural, consubstantial with an "open" free society (Popper). In addition to being a fact that one registers, it is an asset, something positive. Differences and nuances are a source of enrichment, not a hindrance or nuisance.

The Spanish constitutional text amply reflects this pluralistic approach. Not only does it accept criticism and the presence of adverse groups (not "enemies", as that is a different dialectic that leads to the elimination of those who dissent) as an inevitability, it recognizes the important role of the political opposition as an instrument of control conducive to the system's proper functioning and as an alternative (alteration being a sign of democratic health). In Spain's case, the Constitution outlines a very broad framework or boundary of play within which very different options can be legitimately advocated. The authors went to great pains to emphasize the inclusive nature of the text, so that everyone could feel comfortable and co-exist under the same rules.

What are the limits of the political pluralism enshrined in the Spanish Constitution? Here we must address the dilemma of "open" vs "defensive" or "militant" democracy, depending on the attitude taken towards those who declare themselves

[3] See: Sartori 2005.

avowed enemies of the democratic system (whether on the left or right) and whose victory could imperil the very existence of the democratic order. In a defensive democracy (*streitbare Demokratie*), undemocratic forces are excluded, considered beyond the law (as occurred, for example, in Germany in the 1950s). The Spanish Constitution opts not to proscribe goals or ideologies, but only to penalize certain unlawful conducts (such as support for a terrorist organization). And it is logical that this should be the case, as all of its provisions can be amended through the established procedures: Article 168 specifically provides for the Constitution's total amendment; there are no express "intangibility" clauses. Should any point of the Constitution need to be amended, there is thus nothing preventing any change, no matter how radical, from being peacefully advocated. Any political project has a place in the Spanish constitutional framework, provided it does not resort to violent methods.[4]

Nor is that pluralist vision limited to this strictly political aspect, to the recognition, for example, of the prominent role of political parties as fundamental instruments for participation (Article 6). In addition to generally enshrining freedom of association as a fundamental right (Article 22), the Spanish Constitution includes references to cultural and linguistic (Article 3), educational (Article 27) or religious (Article 16) pluralism, as well as to the role played by trade unions and employer associations (Article 7).

3 Spain: a Politically Decentralized State

Spain has been a nation for five centuries, but it has a serious (and as yet unresolved) structural problem, namely, its territorial organization. This unfinished piece of business has deep-rooted causes, some older, such as Spain's weak nationalization in the nineteenth century, and others more recent, such as the electoral success of the peripheral nationalist parties. In recent decades, the country has witnessed a rebirth of national consciousness in regions or *comunidades autónomas* [literally, autonomous or self-governing communities, the first-level administrative divisions into which Spain is divided] with a distinct personality, a resurgence of nationalist tensions. The strength of the nationalisms calling for their own state, in conjunction with various other arguments, has prompted a profound revision of the traditional models of territorial organization of power through different decentralization formulas.

In the case of Spain, the recognition of high levels of self-government for the autonomous communities is a response to a series of claims and historical conflicts

[4] Spain is not a defensive democracy because "it lacks the indispensable prerequisite of the existence of a core body of law that cannot be touched by the constitutional amendment procedures […]. The Spanish Constitution […] does not preclude the possibility of amending any of its precepts, nor does it subject the power of constitutional amendment to any express limits other than strictly formal or procedural ones" (Constitutional Court Judgment [hereinafter, STC] 48/2003, Legal Ground 7). See, among others: Álvarez 2023; De Miguel 2022.

intended to preserve and strengthen the unity of a constituently diverse and plural nation and to neutralize centrifugal tendencies.

The *Estado de las Autonomías* (State of Autonomous Communities) is a compromise formula, halfway between a unitary and a federal state, that hinges on the affirmation of a "nation", the Spanish one, as the holder of sovereignty, and a series of "nationalities and regions" with a recognized "right to autonomy". The aim is to make the political autonomy of the autonomous communities compatible with the principle of the unity of the state expressed in a single Constitution, which, in turn, is the expression of the constituent power vested in the Spanish people.

It is a unique model whose future development is wide open (a process was launched the final outcome of which is unknown).[5]

The recognized capacity for self-government of the autonomous communities, as substate entities, is not primary and sovereign, but secondary and limited, as it exists insofar as it is recognized by the Constitution, the foundation for and limit of all public powers in Spain. It is a power exercised in this framework and subject to limits such as those set forth in Article 149.1 CE, which lists the exclusive competences of the state, or the principles of solidarity (Articles 2, 138 or 158.2 CE), the basic equality of all Spaniards in the exercise of rights and fulfilment of duties (Article 149.1.i CE), freedom of movement and settlement of persons and goods (Article 138.2 CE) or market unity.

The essence of that self-government lies in the granting to these territorial entities of legislative power, of the ability to issue norms with the force of law that become part of the state legal system. The autonomous communities are not limited to assuming administrative management powers or exercising regulatory power. It is a qualitatively distinct form of self-government from that of municipalities and provinces due to its "political nature" (Constitutional Court Judgment [hereinafter, STC] 25/1981). For one thing, it includes recognition of the autonomous communities' capacity to endow themselves with their own institutions, their own parliament and government.

Unlike the member states of a federal state, which adopt their own constitutions through their own bodies, without the intervention of the central institutions, in Spain, the autonomous communities do not have their own constitutions as an expression of a sovereign power. At the top of each regional sub-system is a statute of autonomy, which is a state law passed by the *Cortes Generales* (the central Spanish Parliament, which represents the whole nation). Each statute of autonomy has the status of an organic law with the key particularity that the representatives of the respective autonomous community (whether in the process of being formed or already constituted) participate in its drafting and amendment. Between 1979 and 1983, and pursuant to the dispositive principle, the representatives of those territories that wished to become autonomous communities participated in the gestation and approval of such statutes, in accordance with the various procedures for accessing autonomy provided for in the Constitution.

[5] See: Aja 2007.

It is worth noting that the Spanish Constitution does not imperatively establish the regional map: it neither lists the autonomous communities, nor directly confers powers on them. It is the statute that creates the corresponding autonomous community. In accordance with this constitutive function, Article 147.2 CE establishes the minimum necessary content thereof: (a) the name of the community; (b) its territorial boundaries; (c) the name, organization and seat of its own autonomous institutions; and (d) the powers assumed within the framework established by the Constitution.

As for the amendment of these statutes, Article 147.3 CE provides that it shall be done in accordance with the "procedure established therein". The statutes of autonomy thus benefit from a special rigidity or stability. This rigidity, in turn, is a permanent guarantee of the autonomy, as the central powers cannot amend a statute of their own accord, unilaterally, without the consent of the community's representative body. All of the statutes provide that the initiative for reform lies with the corresponding regional parliament. But that proposal must be approved by the Spanish Parliament by means of an organic law (with the intervention in this stage, too, of the representatives of the autonomous community in question). And in some autonomous communities, the reform has to be ratified by referendum.

The statutes of autonomy are thus hierarchically subordinate to the Spanish Constitution and subject to the control of constitutionality, as expressly provided for under Article 27.2 of the Organic Law on the Constitutional Court [or LOTC from the Spanish].[6] From a formal point of view, there are clear differences with a federal model: the legal basis of the powers is different and the self-government and participation of the member states of a federation in the adoption of decisions by federal bodies is better guaranteed. Federated states have their own representation in a house of the federal parliament and are involved in the amendment of the federal constitution. That participation is much weaker in the case of Spain. The Senate, as the chamber for territorial representation, is still broken, and the autonomous communities do not participate as such in the Constitution's reform.

However, in practice, these differences are blurred, as what matters is their decision-making capacity. And in this regard, in many areas, the 17 Spanish autonomous communities exercise powers of more political importance and greater significance than the German Länder or US states. For this reason, the dilemma is relative. The differences are, rather, symbolic (albeit not, therefore, negligible) and can be explained by the circumstances of the constituent process (for many sectors at that time, the federal model was associated with the division or fracture of the state).

Certainly, the figures bear witness to the enormous magnitude of an unprecedented transfer of human and material resources, which, in short order, has positioned Spain high in the ranking of the most decentralized states in the world. Proof of the scale of this dizzying transformation can be found in the sheer breadth of powers assumed (healthcare, education, social work, urban planning and housing,

[6] Ley Orgánica 2/1979, de 3 de octubre, del Tribunal Constitucional (BOE nº 239, de 05/10/1979).

agriculture, the environment, transport, etc.),[7] the share of public spending that the autonomous communities administer, or the number of civil servants transferred. If governing is, first and foremost, deciding what to spend on, Spain is indisputably one of the countries with the most decentralized public spending. The autonomous communities are the main executors of public investment (ahead of both the central Spanish and local governments).

The competences of each autonomous community are as listed in its respective statute of autonomy, as the Constitution establishes only the competences of the state (Article 149 CE). The Spanish constitutional design is asymmetrical from the start: Article 2 CE refers to "nationalities and regions"; the document regulates two procedures for accessing autonomy; and it recognizes the historical rights of those territories with "fueros" (local charters) (First Additional Provision CE). This is because the desire for self-government and awareness of a distinct identity were likewise asymmetrical at the founding moment. But that pattern was broken with the 1980 referendum in Andalusia. Ever since, the trend has been towards the equalization of powers between slow-track and fast-track (Catalonia, the Basque Country, Galicia) autonomous communities. This equalization bothers the Basque and Catalan nationalists, who feel that their singularity has not been respected, that the putting of other autonomous communities on the same level has blurred that specificity, diluted the relationship that they want to be bilateral. They do not want to be simply another autonomous community, another seat at multilateral forums. The problem is how to recognize singularities without generating comparative grievances, because here no one wants to be "less than", and the driving force behind the construction of the State of Autonomous Communities has been emulation. The question is whether there is room to continue deepening the self-government of some autonomous communities, to broaden their range of powers, without jeopardizing the proper functioning of the system as a whole. And without this special regime constituting a privilege. And the truth is that there is very little margin, because in this regard the ceiling set by the Spanish Constitution has been reached. The competences still in the hands of the central institutions are the bare minimum required to guarantee the cohesion and unity of action of the state.

As for the institutional architecture of the autonomous communities, all of the statutes are cut from the same cloth, namely, that of a parliamentary regime with a legislative assembly elected by universal suffrage, according to a system of proportional representation, with the power to pass laws in those areas for which legislative competence has been devolved to the autonomous community and to submit bills or proposals for constitutional reform to the Spanish Parliament; and a government council, politically accountable to the legislative assembly, headed by a president, appointed by the assembly, which grants him or her its confidence. Unlike at the

[7] In addition to these powers, both Catalonia and the Basque Country have their own police forces and policies related to protecting and promoting the language that is co-official in the respective autonomous community. In Spain, Catalan is recognized as a co-official language in Catalonia and the Balearic Islands, Valencian in the Valencian Community, Galician in Galicia, and Euskara (Basque) in the Basque Country.

national level, it is not a dual executive: the president of the autonomous community with representative functions is also the president of the government council (they are inseparable positions). Upon taking office, the president can freely appoint and remove ministers and oversees and coordinates the implementation of his or her government agenda. However, the president is also the autonomous community's top dignitary. He or she assumes this supreme representation, which has a symbolic and ceremonial content, consisting of the institutional personification of the autonomous community *ad extra*, in its relations with other institutions. Finally, the president also represents the state (not the central government) in the autonomous community. Another piece, which rounds out the institutional framework, is the High Court of Justice, which culminates the judicial organization in the territory of each autonomous community but is not a body of the autonomous community itself, but rather part of the state judiciary, which is single.

The State of Autonomous Communities has been consolidated; it is an irreversible reality. It has placed regions that had been abandoned for centuries on the map and helped to mitigate the differences between poor and wealthy regions, and a majority of citizens view this metamorphosis positively, as it narrows the gap between the decision-makers and those whom those decisions affect. On the whole, the result has been clearly positive, with more hits than misses. But the current model has begun to be questioned by some nationalist political forces, who do not feel comfortable in the constitutional framework and advocate for independence or, failing that, a new confederal agreement, which presupposes the recognition of the right to self-determination of the nations that make up the Spanish state or "right to decide", a euphemism with which they try to disguise the right to self-determination, which would be exercised through the holding of a legal referendum.[8] They have already moved on to the next level.[9]

If we are to be honest, we must acknowledge the relative failure of the solution adopted in 1978 to facilitate the integration of the peripheral nationalisms into a common project. The unity of Spain is in greater danger today than in 1978. For some, the responsibility for this disaffection is shared, but I do not think that it can be attributed to a lack of generosity in the Spanish Constitution. It was a good idea, the best formula available in that context to organize Spain's territorial plurality,

[8] Barceló et al. (2015) and Vilajosana (2020) advocate recognizing the "right to decide". Tajadura (2014), De Miguel (2014), Ferreres (2016), Tudela (2016), Torroja (2020) and Atienza (2020) take the opposite view.

[9] They are not satisfied with compromise solutions as, ultimately, exclusive nationalism does not accept the compatibility of loyalties and feelings. It even denies the existence of the Spanish nation, falling prey to a certain lopsidedness: the territorial integrity of Spain can be disputed, but not that of the Basque Country or Catalonia (Weiler 2018). Identitarian nationalism is, by definition, insatiable. It will never renounce the ultimate goal, the promised land, even if it can mete out the pressure it applies depending on the circumstances, alternating more possibilist or pragmatic strategies with other more radical ones, seeking confrontation or conflict. In 2018, the then leader of the Parti Québécois [Quebec Party, PQ], Jean-François Lisée, said that "the independence project is irreducible", which strikes me as an enlightening word choice. This is what makes the problem unsolvable. It is hard to break free from that loop. In the best of cases, we are doomed to "conllevancia" (Ortega y Gasset), that is, to put up with one another (with truces or arrangements, not solutions).

although its performance as a tool for integration has fallen short of the expectations created at the time.

4 The Secessionist Challenge

For many years, the nationalists demanded full compliance with the statutes of autonomy and, in the case of CiU, the reform of the financing system for the autonomous communities. In the first decade of the twenty-first century, however, they changed their strategy. Considering the regional model exhausted, they chose to double down, demanding the effective exercise of the right to self-determination. The supposed disappointment is nothing more than an excuse to justify the launch of a new phase, with an openly pro-sovereignty proposal, which leads to a dead end, to the rupture of the framework for co-existence, with a not inconsiderable risk of civil confrontation.[10]

4.1 The *Ibarretxe Plan* as Precedent

An initial attempt in this regard was the "Ibarretxe Plan" (Proposal to reform the Political Statute of the Autonomous Community of the Basque Country), sponsored by the *lehendakari* (president of the Basque government) J.J. Ibarretxe. Although formally a proposal to reform the Basque Statute of Autonomy, in reality, it entailed a covert constitutional reform, as it recognized the "right to decide" of the Basque people and designed a special confederal relationship with Spain: shared sovereignty, bilaterality and free association.[11] It was approved by the Basque Parliament in December 2004 and rejected by the lower house of the Spanish Parliament in the consideration stage in February 2005.[12] This initiative had no place within the Spanish Constitution, for both substantive and formal reasons, as the established procedures were not followed. Obviously, the right to decide unilaterally on whether or

[10] Likewise troubling are certain responses to the challenge of the supremacist contempt of the pro-independence Catalans: the resurgence in some circles of a no less exclusive and uncompromising Spanish nationalism, which embraces friction and confrontation. The sentimental disconnect (on both sides) complicates the situation even further.

[11] Paradoxically, it did not address the main obstacle to the supposed political "normalization", namely, the violence of ETA. The threat then posed by the terrorist group to non-nationalist Basques was ignored. The freedoms of a large swathe of the population in the Basque Country and Navarre were at a minimum. In my view, it was obscene to engage in politics as if ETA did not exist, objectively capitalizing on the intimidation the group exerted on political adversaries. True normalization would consist simply of restoring democratic normality, i.e. the freedom to advocate any agenda in public under equal conditions without running the risk of being eliminated. Far from that, Ibarretxe used the Basque society's legitimate desire for peace as a decoy. Rather than combating ETA as an undeniable priority, he naively sought to convince them that they could achieve their goals without resorting to violence, providing them with a way out.

[12] Propuesta de reforma de Estatuto político de la Comunidad de Euskadi (BOCG. Congreso de los Diputados, serie B, nº 149–1, de 21/01/2005). Esta iniciativa fue debatida en la sesión del Pleno celebrada el 1 de febrero de 2005 (vid. Diario de Sesiones. Congreso de los Diputados. Pleno. Año 2004. VIII Legislatura. Nº 65, pp. 3089–3150).

not to be a part of Spain clashes with the terms of Article 1.2 CE, which, as seen, vests sovereignty in the Spanish people as a whole.[13]

A very tenuous confederal connection was therefore maintained (confederation is a rudimentary form of organization that has historically served as a way station), not out of conviction or as a generous concession for the sake of consensus, but to avoid ridicule. How many countries would recognize an independent Basque Country resulting from a unilateral declaration to which Spain has granted no validity? The vague reference to the status of free association is less frightening, even if it were gradually to lead to real or *de facto* independence. Furthermore, and most importantly, formal independence would mean leaving the EU.

In any case, this formula of shared sovereignty and free association is quite problematic, because it is based on the premise that there exists a Basque People with a capital "p", dating back thousands of years, with its own identity, settled across seven territories, currently organized in three different legal-political spheres located in two countries. The citizens of these territories would have the right to be consulted to decide their future. The proposal obsessively turns on the collective destiny of the Basque People. Yet it is not at all clear what "the Basque people" means for these purposes.

This aspiration is based, first, on an interpretation of the "foral" tradition in terms of original sovereignty and on an attempt to revive, at this late date in history, the archaic formula of the pact with the Crown, which is linked to the absolutist ecosystem (Herrero de Miñón 1998). As the final paragraph of the First Additional Provision CE clearly shows (the updating of the "fuero" system "shall be carried out, when appropriate, within the framework of the Constitution and of the Statutes of Autonomy"), historical rights cannot be invoked in disregard of the Constitution, as an escape route, because there are no original powers outside the constitutional framework. There are no powers other than those regulated in the constitutional text and always in the terms established therein. The Constitution cannot allow self-rupture. Thus, the counterweight to the constitutional reception of these rights is subjection to the limits set by the Constitution. The Constitutional Court had already found, in Judgment 76/1988, that "the Constitution is not the result of a pact between historical territorial authorities who conserve rights that predate and outrank the Constitution".

Second, it claims the right of the Basque people to decide their own future in accordance with the right to self-determination recognized by international law. As is well known, as a general rule, the principle that actually governs this sector of

[13] Art. 13 of the proposal sent by the Basque Parliament left no room for doubt: the capacity to decide at any given time on the relationship with Spain or definitive separation from it would always lie with the Basque people. Paragraph 3 provided as follows: "When, in the democratic exercise of their freedom to decide, the Basque citizens manifest, in a referendum proposed for this purpose, their clear and unequivocal will, as expressed through an absolute majority of the votes declared valid, to wholly or substantially change the model and regime of the political relationship with the Spanish state, […] the Basque and Spanish institutions shall be understood to be committed to guaranteeing a negotiation process to establish the new political conditions to enable, by mutual agreement, the democratic will of Basque society." See: Bilbao 2005.

the legal system is that of the territorial integrity of states and the inviolability of borders. The right to self-determination is recognized only exceptionally in the cases of peoples subject to decolonization or oppressed under foreign occupation. A condition that clearly does not exist in the case of the Basque Country or Catalonia. Basques and Catalans have never been subject to a colonial regime, they express their will and vote freely, and they are represented in the Spanish Parliament under the same conditions as all other Spaniards.

The proposal was unconstitutional for two other reasons: the self-conferral of new powers that clearly exceeded the constitutional framework[14] and the procedure laid out for its approval, which did not comply with the provisions of the Spanish legal system.[15]

In the following legislative term, the Basque Parliament passed Law 9/2008, of 27 June, "convening and regulating a popular consultation for the purpose of ascertaining public opinion in the Autonomous Community of the Basque Country on commencing negotiations to achieve peace and political normalization".[16] This law authorized the *lehendakari* to put two questions to the citizens of the Basque Country in a non-binding referendum and even set the date thereof: 25 October 2008.[17]

The law's explanatory memorandum states that it is neither a referendum nor legally binding and, therefore, the Organic Law on Different Types of Referendums [hereinafter, LOMR][18] does not apply to it, nor does it require the prior authorization of the state.[19] STC 103/2008 upheld the action of unconstitutionality filed

[14] Such as the establishment of a single constituency in the elections for the European Parliament; the creation of a specific division of the Constitutional Court, to have a joint and evenly divided composition, to settle conflicts between the state and Basque institutions; the non-application of Arts. 145 and 155 CE in the Basque Country; or the establishment of an autonomous judiciary (and Public Prosecutor's Office) (through the creation of a Basque Judicial Council to be the governing body of the judiciary within the scope of the autonomous community).

[15] Art. 46.1.c) of the Basque Statute of Autonomy provides that, once approved by the Basque Parliament, the proposed amendment "shall require in any case the approval of the Spanish Parliament by means of an Organic Law". What the Ibarretxe Plan provided for was something else entirely: the agreement reached with the Spanish state or, where applicable, the plan approved by absolute majority of the Basque Parliament would be put to a referendum for definitive ratification by Basque society. Clearly the referendum would be held whether or not the proposal was approved by the Spanish Parliament. Furthermore, the decision of the Basque electorate would be considered final.

[16] BOE nº 212, de 03/09/2011.

[17] Basque citizens would answer the following question: "Do you agree that the Basque parties, without exclusions, should start a negotiation process to reach a democratic agreement on the exercise of the Basque people's right to self-determination and that this agreement should be submitted to referendum by the end of 2010?".

[18] BOE nº 20, de 23/01/1980.

[19] In Spain, most of the Statutes of Autonomy provide for powers in matters of non-binding votes or polls within the scope of the respective autonomous community, but the calling of binding referendums must be authorized by the central Spanish government (Art. 2 LOMR). Unlike in Canada (the province of Quebec has the power to hold a referendum), in Spain, the authorization of a referendum is an exclusive competence of the state (Art. 149.1.32 CE). The consultative referendums regarding political decisions of special importance provided for under Art. 92 CE must be called by the president of the government of the nation, subject to prior authorization by the lower house of the Spanish parliament. In November 2022, the Supreme Court of the United Kingdom unanimously ruled that the Scottish parliament could not hold a new independence referendum on its own, without the approval of the UK parliament.

by the president of the Spanish government against the law, finding that this non-binding "popular consultation" was, in reality, a referendum and, as such, required the authorization of the state. For the Court, referendums are a type of "popular consultation" intended not to gauge public opinion on a given matter of public interest, but to verify the will of the electorate with all the guarantees of an electoral process. And in this case, the citizens of the Basque Country entitled to vote, that is, the electorate of that autonomous community, were being called to the polls for a consultation on a matter of a political nature for the purpose of determining their will.

But the Court went one step further, asking whether the content of the question asked was materially compatible with the Constitution. The answer was a categorical no: "The question which it was wished to put to […] consultation […] affects (Art. 2 CE) the basis of the current constitutional order (insofar as it assumes reconsideration of the identity and unity of the sovereign subject […]) and therefore it may only be subject to popular consultation via a constitutional review referendum […]", the mechanism provided for in the Constitution for such purposes. The door to the possibility of "secessionist" referendums, with or without state authorization, was thus closed.[20]

4.2 The Pro-independence *procés* in Catalonia

The launch of the pro-independence process (or *procés* as it is often called, from the Catalan) was the result of several factors that came together beginning in 2010: the acceleration of the process of construction of a national identity driven by the regional institutions, the erosion of mutual trust between political leaders, widespread malaise due to alleged fiscal abuse or spoliation (*España nos roba*, that is "Spain robs us"),[21] the austerity policies implemented to cope with the 2008 economic recession, the Constitutional Court's annulment (STC 31/2010) of some provisions of the autonomous community's 2006 Statute of Autonomy,[22] which was perceived as a grievance,[23] the coming to power of the *Partido Popular* [People's Party, PP] in 2011, etc. Prior to 2010, less than 20% of the population was in favour

[20] See: López Basaguren 2009; Tajadura 2019a. Furthermore, Organic Law 20/2003, of 23 December, amended the Criminal Code to criminalize the holding of an illegal referendum. Article 506 bis punished authorities who called an election or referendum without the powers to do so with prison sentences of three to five years and disqualification from holding public office. Art. 521 bis also punished those who facilitated, promoted or ensured the holding of such elections or referendums. These provisions were repealed by Organic Law 2/2005, of 22 June 2005, on the understanding that they are "conducts of insufficient importance to warrant criminal reproach, let alone if the punishment provided for is prison" (Explanatory Preamble).

[21] See: Borrell and Llorach 2015.

[22] Ley Orgánica 6/2006, de 19 de julio, de reforma del Estatuto de Autonomía de Cataluña (BOE nº 172, de 20/07/2006).

[23] The Preamble of the 2006 Statute of Autonomy of Catalonia stated that the autonomous community's parliament had recognized it as a "nation" (in addition to describing certain attributes or symbols thereof as "national"). STC 31/2010, of 28 June, stripped this reference from the Preamble of any interpretative value (lest there be any doubt and despite the fact that Article 1 of the aforementioned law defines Catalonia as a "nationality").

of secession. The political map had been dominated until then by two large moderate parties: CiU, a centre-right nationalist coalition that had governed the *Generalitat* [the system of institutions through which Catalan self-government is organized] since 1980, and the *Partit Socialista de Catalunya* [Socialist Party of Catalonia, PSC], a centre-left Catalanist party that had been the leading force in the general elections.

The timeline of the *procés* begins with the mass demonstration held on 11 September 2012 on the occasion of Catalonia's National Day. It visualized the commitment to achieving an independent state, with support for secession at an all-time high (48.5%). In January 2013, the Catalan Parliament approved, through Resolution 5/X, a "Declaration of sovereignty and right to decide of the people of Catalonia".[24] In STC 42/2014, the Constitutional Court found the section proclaiming the Catalan people a sovereign political and legal subject to be null and void. No fraction of the Spanish people can attribute sovereignty to itself.[25]

In October 2014, following the refusal of the lower house of the Spanish Parliament to authorize the holding of an independence referendum, the *Generalitat* promoted a non-binding vote on the political future of Catalonia under Catalan Law 10/2014, of 26 September, on popular non-referendum consultations and other forms of citizen participation.[26] As both this law and the decree calling the referendum were suspended by the Constitutional Court, having been challenged by the government of Spain under Article 161.2 CE, the "official" consultation was deactivated and, in its place, a "participatory process" was organized for the same scheduled date: 9 November. This non-binding vote was tolerated by the government of M. Rajoy but drew a turnout of just 37% of the electoral roll. Months later, STC 31/2015 would declare Catalan Law 10/2014 unconstitutional. Beginning with the distinction between referendums, which must be regulated through an organic law and require state authorization, and other types of popular non-referendum consultations of a sectoral nature, the Court reached the conclusion, already put forward in STC 103/2008, that what the law is really regulating is a referendum, even if held under a different name, because it is all citizens—not specific groups—who are called upon to decide with all the guarantees of an electoral procedure, and the decision is attributed to the entire political community, that is, to the electoral body as such. What is clearly a referendum cannot be passed off as a non-binding popular consultation for the purpose of side-stepping the requirement of mandatory state authorization (Art. 149.1.32 CE). STC 32/2015, finding Decree 129/2014 convening the popular consultation unconstitutional, was published the same day. According to the Court, the actions of the Catalan government were wholly unconstitutional insofar as they were flawed due to a lack of competence, as the power to call "consultations that

[24] BOPC nº 13, de 24/01/2013.

[25] However, a constitutional interpretation of the references to the "right to decide of the citizens of Catalonia" included in the Declaration challenged by the Spanish government is possible, provided they are understood not as a claim to a right of self-determination, but rather as a political aspiration that can be advocated within the Spanish constitutional framework. See: Ridao 2014; Ferreres 2014; Fossas 2014; Solozábal 2015.

[26] DOGC nº 6715, de 27/09/2014. See: Castellà 2014.

deal with questions that affect the constituted order and the very foundation of the constitutional order" does not correspond to autonomous communities.

With the victory of the pro-independence parties in the "plebiscitary" elections of September 2015 (72 of the 135 seats, with 47.8% of the votes) and the appointment of Carles Puigdemont as the new president of the *Generalitat* in January 2016, the rupture strategy gained momentum.[27] In September 2017, the Catalan Parliament passed two laws to call a binding referendum and regulate the "legal transition" to the establishment of the new republic.[28] Although both were suspended by the Constitutional Court at the behest of the government of the nation,[29] the illegal referendum was held on 1 October 2017, with a turnout of 42% and around 90% of the votes in favour of independence, according to data from the *Generalitat*.[30]

One month later, on 27 October, the pro-independence groups in the Catalan Parliament approved a unilateral declaration of independence (supported by 70 of the 135 MPs),[31] which received zero international recognition.[32] That same day, the Spanish government triggered the mechanism provided for under Article 155 CE. It is an extraordinary or exceptional method of state control of the autonomous communities, of direct and coercive intervention, in the model of Article 37 of the

[27] Resolution 1/XI of the Parliament of Catalonia, of 9 November 2015, on the start of the political process in Catalonia as a consequence of the election results of 27 September 2015, was declared unconstitutional by STC 259/2015, of 2 December.

[28] Ley 19/2017, de 6 de septiembre, del referéndum de autodeterminación (DOGC nº 7449, de 06/09/2017) y Ley 20/2017, de 8 de septiembre, de transitoriedad jurídica y fundacional de la República (DOGC nº 7451, de 08/09/2017).

[29] Both initiatives, which created a temporary parallel legality to conceal the rupture of the constitutional framework, were enacted by means of the emergency procedure, in blatant disregard of the requirements formulated by the Constitutional Court. Law 19/2017, of 6 September, on the self-determination referendum, which proclaimed that "the people of Catalonia are a sovereign political subject" (Art. 2), was declared unconstitutional by STC 114/2017, of 17 October. For the same reasons, STC 122/2017, of 31 October, declared Decree 139/2017, of 6 September, calling the referendum on self-determination of Catalonia, null and void.

[30] A total of 2,044,058 "Yes" votes were counted, a figure equivalent to 37% of an electoral roll prepared with no guarantees of authenticity. Nor did the referendum's organization, in disregard of the applicable legislation, offer the due guarantees of reliability (with regard to its implementation or the vote count): for instance, the *mesas electorales* (the groups of people who preside over each polling station) were assembled from the first voters to arrive on the day of the vote. Under these conditions, the result could not be verified by impartial international observers. The ballot question was as follows: "Do you want Catalonia to be an independent country in the form of a republic?" The referendum, as established in the law regulating it, would be binding and, should the count yield a majority of votes in favour, the result would entail *ope legis* Catalonia's independence, which would be proclaimed by means of a formal declaration of the Catalan Parliament, specifying its effects and starting the constituent process. On 10 October, the president of the *Generalitat* appeared before the plenary session of the Catalan Parliament, to report the result of the vote and state that he would fulfil the mandate of the people of Catalonia. However, he proposed that the effects of the declaration of independence be suspended in order to open a period of dialogue.

[31] Diari de sessions del Parlament de Catalunya, XI legislature, cinquè període · sèrie P · nº 85, pp. 3–29. Only 82 MPs participated in the vote on the proposed declaration. The rest left the chamber, denouncing its manifest illegality. It was approved with 70 votes in favour, 10 against, and 2 abstentions.

[32] See: Calduch 2019; López Basaguren 2017.

German Constitution.[33] This procedure can be used in cases of breach of constitutional or legal obligations by an autonomous community, a flagrant and contumacious breach reflected not so much in specific actions, which can be challenged in court, as in an ostensible line of conduct, a certain attitude of contempt and disloyalty by the highest bodies of the autonomous community, or when the general interest of Spain is seriously affected.[34] The aim is to restore normality, that is, restore the constitutional order, seriously altered by the behaviour of an autonomous community, without quashing the system of self-government (which is only temporarily suspended). In any case, it is an extreme measure, justifiable solely in exceptional situations, entailing the suspension of the ordinary self-government regime and the establishment during this parenthesis of a relationship of hierarchical dependence between the central government and the regional authorities.

In short, this article was applied for the first time to deal with the open breach of the constitutional order entailed in Catalonia by the holding of an illegal referendum and subsequent unilateral declaration of independence (the proclamation of the "Catalan Republic"). Upon deeming the president of the *Generalitat* to have failed to respond to the requisite complaint lodged, the Spanish government agreed, at the Council of Ministers meeting held on 21 October, the measures to be submitted to the Senate for approval.[35] The Spanish government's initiative was processed in the Senate in a committee set up for the purpose, with the autonomous community in question being allowed to submit arguments. Finally, on 27 October 2017, the

[33] In the Spanish system, several instruments of control over the autonomous communities have been introduced that entail the attribution to the state of surveillance and correction powers and, ultimately, are a manifestation of its supremacy. However, this is always premised on the notion that the ordinary relationship between the state and the autonomous communities is not based on the principle of hierarchy. These possible controls are expressly provided for in the Constitution because they are an exception to the rule, and they are almost always of a jurisdictional nature, such that the central authorities cannot of their own accord correct actions that they deem irregular, but rather must turn to the competent courts to seek the nullification of acts or laws that are not, in their opinion, compliant with the legal system.

[34] "If an Autonomous Community does not fulfil the obligations imposed upon it by the Constitution or other laws, or acts in a way seriously prejudicing the general interests of Spain, the Government, after lodging a complaint with the President of the Autonomous Community and failing to receive satisfaction therefor, may, following approval granted by an absolute majority of the Senate, take the measures necessary in order to compel the latter forcibly to meet said obligations, or in order to protect the above-mentioned general interests" (Art. 155.1 CE). To apply this clause of state compulsion or coercion, which is a clause for shutting down the system (the state reserves this mechanism in case the ordinary controls fail), the factual grounds for the intervention must occur (in both cases, the government has a broad margin of discretion to assess whether they have); the president of the autonomous community must disregard the request from the government of the nation urging him or her to rectify; and the Senate must approve the intervention (the specific measures) by absolute majority, after hearing the autonomous community. To implement these measures, which must be proportional, "the Government may issue instructions to all the authorities of the Autonomous Communities" (Art. 155.2). See: Various Authors 2019.

[35] Orden PRA/1034/2017, de 27 de octubre, por la que se publica el Acuerdo del Consejo de Ministros de 21 de octubre de 2017, por el que, en aplicación de lo dispuesto en el artículo 155 de la Constitución, se tiene por no atendido el requerimiento planteado al M. H. Sr. Presidente de la Generalitat de Cataluña, para que la Generalitat de Cataluña proceda al cumplimiento de sus obligaciones constitucionales y a la cesación de sus actuaciones gravemente contrarias al interés general, y se proponen al Senado para su aprobación las medidas necesarias para garantizar el cumplimiento de las obligaciones constitucionales y para la protección del mencionado interés general (BOE nº 260, de 27/10/2017, pp. 103,529–103544).

authorization for the Spanish government to implement the proposed measures was approved by the Senate Plenary.[36]

That same day, in an extraordinary meeting, the Council of Ministers approved a series of royal decrees containing the specific measures to be implemented under Article 155, including the dismissal of C. Puigdemont as president of the *Generalitat* (Royal Decree 942/2017) and of the other members of his cabinet, the assumption of the powers of the Catalan ministries by the corresponding Spanish ministries, and the dissolution of the Parliament of Catalonia and calling of regional elections to be held on 21 December 2017 (Royal Decree 946/2017).

In Judgments 89 and 90/2019, the Constitutional Court unanimously upheld this initial application of the extraordinary procedure for the defence of the Spanish Constitution provided for under Article 155 CE.[37] It noted the will of the Catalan authorities to consciously and systematically ignore the legal value of the Constitution, break its rules, and question the unity and territorial integrity of the state through a series of acts contrary to the constitutional order annulled by successive rulings of the Constitutional Court.[38] The Court considered nearly all the contested measures admissible: the dismissal of the president of the *Generalitat*; the early dissolution of the Catalan Parliament; the subjection of the regional authorities' actions to a regime of prior notification or authorization; the full nullity of any acts and provisions that might contravene the agreed measures; the potential replacement of the members of the regional police with members of the state security forces and bodies; etc.[39]

In the 21 December 2017 elections, the various pro-independence candidacies managed once again jointly to win an absolute majority of seats in the Catalan Parliament. With the swearing in of President Torra in May 2018, the state intervention in the autonomous community was ended. In this "post-traumatic" period, the pro-independence movement maintained its rhetoric of a complete break from Spain and strategy of political confrontation but avoided engaging in conducts of blatant disobedience. Faced with the failure of the insurrectional adventure,[40] it chose a tactical retreat.

A change in tone was observed when the socialist Pedro Sánchez took office as prime minister of Spain. Although the PSC won the Catalan regional elections of February 2021, the pro-independence forces as a whole won more votes (51%) and seats (74 out of 135). Pere Aragonés, leader of *Esquerra Republicana de Catalunya*

[36] BOCG. Senado. XII Legislatura. Nº 166, de 28/10/2017, p. 70–71.

[37] Two actions of unconstitutionality were filed against the Resolution of the Plenary Session of the Spanish Senate (which has the force of law), one by a group of more than 50 MPs from the Unidos Podemos-*En Comú Podem-En Marea* parliamentary group and the other by the Parliament of Catalonia.

[38] See the detailed list of "deliberate, patent and reiterated contraventions of the Constitution and the Statute of Autonomy of Catalonia" contained in Legal Ground 6 of STC 89/2019.

[39] On the case law of Spain's Constitutional Court in relation to the secessionist challenge, see: De Miguel 2018, 2019; Castellà 2016.

[40] A gamble that former Catalan Minister of Education Clara Ponsatí, a fugitive from justice, would sometime later call a "bluff" (*EL PAIS*, 9 June 2018: "jugamos al póquer de farol" [we were playing poker and bluffing]).

[Republican Left of Catalonia, ERC], was sworn in as president. The commitment of both governments to dialogue and rapprochement seems to have helped bring about a certain thawing or détente.[41]

Today, there is no popular mandate for secession (let alone one pursued unilaterally). Any solution necessarily involves recognizing Catalan society's internal pluralism. But the demand for a referendum remains.[42] Leaving aside those who invoke the right to self-determination and, thus, defend the legitimacy of unilateral secession,[43] there are two possible responses to this demand.

The first is to categorically reject the possibility of a referendum not provided for in the Constitution. If such an essential aspect of the constitutional text is to be amended, the only way to do it is through the procedure regulated under Article 168 thereof, in which it is the Spanish Parliament and Spanish people who play the leading roles. This stance is widely shared in both the literature and political circles. This would be Plan A: an entrenched defence of constitutional legality. Such a referendum is not possible in the current constitutional framework, full stop. However, that framework does offer a pathway, in line with what the Constitutional Court pointed to in STC 42/2014: approval by the regional parliament of an initiative for constitutional reform and the processing thereof by the Spanish Parliament. Would the Spanish MPs and senators be receptive to such an aim, if it were widely shared in Catalonia and enduring over time? Would they accept it in a gesture of political realism and enable the corresponding reform? That is the great unknown of this roadmap, which does not, today, seem politically feasible.

The other option is to accept the possibility of holding a prior referendum of a non-binding consultative nature (Article 92 CE) to gauge the support of voters for a subsequent constitutional reform initiative that would expressly include the recognition of the right to self-determination. It would be a matter of reliably verifying the seriousness and urgency of the aspiration for sovereignty before embarking on the complicated reform process.[44] In any case, it would be called in application of the democratic principle enshrined in the Spanish Constitution, not pursuant to an alleged right to self-determination, and a potential victory would not lead, as an immediate effect, to unilateral secession but to the opening of negotiations the result of which would have to be embodied in a constitutional reform, endorsed by the Spanish people as a whole, as the sole holder of the constituent power. The country would thus follow the path indicated by the Supreme Court of Canada and the "policy of clarity" adopted by that country's federal government to defuse the demand

[41] For a general account of the successive sequences of the *procés*, see: Teruel 2020.

[42] On the regulation of referendums at the autonomous community level and the constitutional case law on this matter, see: Aguado 2017; Garrido 2019; Garrido and Sáenz 2019; López Rubio 2019.

[43] This is the position of, among others, Bossacoma (2015, 2020). Tornos (2015), López Basaguren (2016) and Tajadura (2019b) take the opposite view. On the response to secessionist demands in Spain and, in particular, in Catalonia, the multi-author volume edited by López Basaguren and López (2019) is especially instructive. On the right to self-determination from the perspective of international law, see Torroja (2022) and the references cited therein.

[44] Rubio Llorente (2012), Aguado (2014), De Carreras (2014), and Ridao (2021), among others, accept this possibility; Castellà (2017) and De Vergottini (2019) do not.

for another self-determination referendum in the province of Quebec.[45] The majority of scholars are wary of this option, which is based on the idea that even secession can be "regularized" or "constitutionalized", as a way of reconciling respect for constitutional legality and the democratic principle.[46] This is because, in their view, such a referendum would in reality be binding and calling it would make the consulted electoral body (which would be only the Catalan electorate and not that of Spain as a whole, even though the effects of this decision would affect everyone) sovereign, recognizing in fact its power of self-determination.

Even if the possibility of legally channelling that demand for secession were accepted, it is impossible to ignore the contraindications of using a referendum as a tool to elucidate such a delicate and complex matter as this: a question formulated in reductionist or binary terms (yes or no to independence) generates a deep schism and a high degree of confrontation in society, as witnessed in the Brexit referendum. It would fracture Catalan society even further. A close outcome against independence would not settle the issue, and if the outcome were in favour of independence, even if only by a slight margin, it would open an irreversible, acutely traumatic process that would condemn a very large part of the population to marginalization. A negotiated agreement endorsed by broad majorities is a better solution than a binary choice (yes or no; all or nothing).

5 The Response of the Rule of Law: the Criminal Sentences Imposed on Those Responsible for the Events of October 2017

Spain is a pluralist democracy that has responded to a separatist challenge that jeopardized peaceful coexistence in Catalonia with the tools of the rule of law, respecting the rights and freedoms of Catalan citizens, who are not subject to any type of oppression or political discrimination.[47]

In its legitimate defence of the constitutional order, the state can, in the most serious cases, resort to *jus puniendi*. In this case, there were more than enough reasons to do so, as the events of October 2017 could circumstantially be considered to meet the definitions of various criminal offences. Thus, in the special proceedings conducted for the alleged crimes committed by the main leaders of the *procés*, some held in pre-trial detention and others at liberty,[48] the 2nd Chamber of the

[45] Vid. Reference re Secession of Quebec, [1998] 2 S.C.R. 217.

[46] In this regard, see: Alaéz 2015, 2021; Ruiz Soroa 2014a, 2014b. In the English-language literature, see: Weinstock 2011; Haljan 2014.

[47] As already noted, Catalans and Basques participate in the elections for MPs and senators under the same conditions as the rest of Spaniards. They also elect, by universal, free and direct suffrage, the members of their respective regional parliament, a parliament in which the nationalist forces have almost always won a majority of seats. In fact, the government of the *Generalitat* is currently led by ERC, a pro-independence party.

[48] C. Puigdemont and seven other defendants who fled from justice were declared absent, and it was agreed to shelve the case concerning them until they could be found.

Supreme Court, a judicial body made up of independent senior judges,[49] issued on 14 October 2019, after a four-month trial conducted with all the guarantees (it was live-streamed on television), a judgment of great importance and legal and political significance. The judgment sentenced Oriol Junqueras, vice-president of the *Generalitat* at the time of the events, to 13 years in prison and absolute disqualification from holding public office, and the Catalan ministers R. Romeva, J. Turull and D. Bassa to 12 years in prison and 12 years of absolute disqualification from holding public office, for the offence of sedition in joint consideration with an interrelated offence of misappropriation of public funds. It further sentenced, as perpetrators of an offence of sedition, Carme Forcadell, president of the Catalan Parliament, to a prison term of 11 years and 6 months and an equal period of absolute disqualification from holding public office; the Catalan ministers J. Forn and J. Rull to terms of 10 years and 6 months in prison and 10 years and 6 months of absolute disqualification from holding public office; and Jordi Sánchez and Jordi Cuixart, the respective leaders of the *Assemblea Nacional Catalan* [Catalan National Assembly, ANC] and Òmnium Cultural, to terms of 9 years in prison and 9 years of absolute disqualification from holding public office. Three other ministers (S. Vila, M. Borràs and C. Mundó) were convicted of an offence of disobedience and sentenced to a fine and 1 year and 8 months of special disqualification from the exercise of elective public offices.

The Court stressed that freedom of thought protects the claim of a right to self-determination, such that political advocacy by an individual or a group of any political project, even one entailing the total or partial amendment of the constitution, is not a criminal offence. However, "leading citizens in a public and tumultuous uprising, which, moreover, prevents the application of the law and obstructs compliance with court decisions" is. It recalls that protection of Spain's territorial unity is not an extravagance unique to the Spanish constitutional system. Virtually all European constitutions include provisions to ensure the territorial integrity of the state. This is why no constitution or international treaty recognizes a "right to decide" based on the alteration of the holder of sovereignty, of the original constituent power, and the pre-eminence of an alleged democratic principle over the rules and limits of the rule or law. Because there is no democracy outside the rule of law.[50]

[49] Although the defences of the accused followed a strategy of demonizing the Court, challenging nine of its judges, the judgment roundly rejects these allegations of a lack of impartiality intended to undermine its credibility. It further recalls that the promoters of the Catalan Republic were hardly in a position to lecture others on this matter. Law 20/2017, of 8 September, on legal transition and founding of the Republic did not exactly guarantee judicial independence. To begin with, it did not guarantee that judges who had been on the bench for less than three years in Catalonia would not be removed. Additionally, the president of the Supreme Court of Catalonia was to be appointed by the president of the *Generalitat* at the proposal of a Mixed Committee to be made up of the president of that court, the Catalan minister with competence in the area of justice, four members of the court's Governing Body, to be appointed by that body itself, and four people appointed by the government of the *Generalitat*.

[50] "To be sure, democracy presupposes the right to vote, but it is something more than that. It also entails respect for the political rights that the constitutional system recognizes in other citizens, a recognition of the checks and balances between powers, compliance with court decisions and, in short, a shared idea that the construction of a community's future in democracy is possible only if the legal framework that is the expression of the people's sovereignty is respected." The "right to decide" ("voting

What happened on 1 October, the judgment explains, was not simply a mass demonstration of public protest. It was "a tumultuous uprising, encouraged by the defendants, among many others, so as to use physical force and *de facto* coercion to turn court decisions of the Constitutional Court and of the High Court of Justice of Catalonia into a 'dead letter'". And what took place on 20 September was not a public rally to protest the arrests and searches being carried out in compliance with the decisions issued by an investigating judge in Barcelona. The defendants sought to show that the judges performing their duties in Catalonia had lost the ability to enforce their rulings.

The considerations set out in the judgment regarding the supposed violation of freedom of expression alleged by the defendants strike me as especially pertinent. According to the defence teams, this right was violated due to the "criminalisation of political discourses in order to justify a criminal conviction". The Court disagrees with that assertion, as none of the acts at issue and declared proved is encompassed within the material content of the right to freedom of expression. The defendants were not punished for "voicing opinions or doctrines contrary to the current constitutional status", nor "for advocating an overcoming of the existing political framework". The Spanish system, it continues, "does not identify with those others who make militant democracy one of their hallmarks. […] The same ideas advocated by the defendants have allowed them to take part in legislative elections." The "target of criminal reproach […] is to have annihilated the constitutional covenant, and to do so through the approval of laws in open and obstinate contempt of the demands of the Constitutional Court. What is sanctioned, in short, is not to give an opinion or advocate a secessionist option, but to define a parallel, constituent legality and to mobilise a multitude of citizens to oppose the execution of the legitimate decisions of the judicial authority, holding a referendum declared illegal by the Constitutional Court and the High Court of Justice of Catalonia".

The people sanctioned for breaking the law and court orders have had the opportunity to challenge all these measures and sentences before the Constitutional Court, which has upheld them in their entirety, rejecting the appeals filed against them.

First, the Constitutional Court unanimously denied the applications for suspension of the decisions remanding some of the defendants to custody.[51] It subsequently dismissed the appeals for constitutional protection against these rulings, finding that they had respected the principles of legality and proportionality and that the measure

Footnote 50 (continued)
is not a crime") cannot, therefore, be invoked as a grounds for exclusion from criminal accountability (Art. 20.7 of the Spanish Criminal Code), which would operate by conferring legitimacy on the actions at issue. That supposed right cannot be exercised, is not viable, outside the constitutional amendment procedures. Because a "constitutional consensus can be reshaped. But it cannot be destroyed unilaterally". Fragmenting the holder of sovereignty "leads, dangerously, to the denial of the fundamental rights of those other citizens who reside in Catalonia who would be demoted to the status of a minority settled in a community that has already self-determined itself. Peaceful coexistence would be wounded to death if it were allowed, as a symptom of democratic normality, that any regional government could transform the structure of the State by translating its dreams of ethnic identity into a legal text outside the legal channels of reform." See: Mangas 2020.

[51] See, for example, Order 52/2018, of 22 May, concerning Oriol Junqueras.

adopted was based on a sufficient presumption and pursued a constitutionally legitimate purpose, namely, to prevent the risk of criminal recidivism.[52]

The Plenary of the Constitutional Court dismissed, also unanimously, the appeals for constitutional protection filed against the orders issued by the investigating judge in the case, who, pursuant to Article 384 of the Criminal Procedure Law, suspended the appellants from the public offices that they had held.[53]

The appeals for constitutional protection filed by those found guilty in the Judgment of the Supreme Court (Criminal Chamber) of 14 October 2019 of an offence of sedition met with the same fate. In successive judgments handed down by the Plenary,[54] the Constitutional Court concludes that procedural guarantees were respected in the trial and that the sentences imposed cannot be considered disproportionate.[55] The severity of the sentence reflects the seriousness of the appellants' conduct, which was in no way protected by the exercise of the rights they invoked in their claims. The judgments underscore that it was not the externalization of political dissidence or the promotion of mass demonstrations that had been prosecuted, but conduct aimed at impeding the application of laws and neutralizing the decisions adopted by the courts.[56] And the subsumption of that conduct under the offence of sedition cannot be considered unreasonable.[57]

The nine pro-independence leaders sentenced to prison terms for their involvement in the events at issue in the trial for the *procés* were subsequently pardoned by

[52] See STC 50/2019, of 9 April, STC 155/2019, of 28 November, and STC 22/2020, of 13 February.

[53] In the case of Junqueras, Romeva, Sánchez, Rull and Turull, the office they held was that of members of the Parliament of Catalonia. See STC 11/2020, of 28 January, and 38/2020, of 25 February. For the court, the challenged rulings provided sufficient reasoning for the concurrence of the requirements established by law for the automatic suspension from public office of individuals under criminal investigation and weighed them in relation to the offence being prosecuted (rebellion and sedition). They therefore did not violate the appellants' right to political participation and representation.

[54] See STC 91/2021, of 22 April; STC 106/2021, of 11 May; STC 121 and STC 122/2021, of 2 June; STC 184/2021, of 28 October; STC 45/2022, of 23 March; STC 46/2022, of 24 March; and STC 47/2022, of 24 March.

[55] The judgments rejected all the violations alleged by the appellants in relation to the rights of effective judicial protection (no lack of reasoning in the individualization of the prison sentences was found), the ordinary judge predetermined by law (the arguments given by the Court to assume objective competence for the investigation and trial of the events at issue were neither arbitrary nor unreasonable), defence, the presumption of innocence, and criminal legality in connection with freedom of thought and of expression and the rights of assembly, demonstration and political participation.

[56] "All expressions of disagreement with laws […], with judicial decisions […], advocacy of their modification, denunciation of their weaknesses, even with harsh, heated, bitter and discrediting criticism, are protected by the right to protest or dissent. Something else entirely is active and concerted opposition to the actions of agents of the authorities, with legal and constitutional backing, aimed at enforcing a court order (STC 91/2021, Legal Ground 11)." The appellants' convictions "are not the result of their participation in the mass events of 20 September and 1 October 2017, but of their breach, as members of the government of the Generalitat, of their special duty to abide by the Constitution". In this regard, the Court recalls that holders of public office are bound by "an inescapable duty to abide by said fundamental statute. This does not necessarily mean defending its entire content from an ideological standpoint; however, it does mean undertaking to perform one's duties in accordance with the Constitution and with respect for the rest of the legal system (STC 259/2015)".

[57] The law criminalizing sedition is not so vague as to violate the mandate of strict legality imposed by the Constitution.

the Spanish government by means of separate royal decrees dated 22 June 2021, on the grounds of public utility. They were pardoned for the remainder of their prison sentences, provided they did not commit another serious crime within a period of three to six years. They immediately regained their freedom.

6 The Impact of the Catalan Secessionist Process on the Democratic Quality of Spain

Spain is a mature democracy that holds up perfectly to comparison and performs well in the main rankings measuring countries' democratic quality. This long-standing positive assessment by the experts is largely based on the level of protection of civil and political rights. These international rankings show no decline in the assessment of Spain's institutions and system of liberties as a result of the events occurring during the *procés*, which was a stress test for the country's political system. The Spanish authorities responded firmly, but within the limits imposed by the rule of law. Or so it can be deduced from the reports of these independent bodies and organizations.

There were no relevant changes in the country's ranking in the most turbulent years of the *procés*. The Economist Intelligence Unit's (EUI's) *Democracy Index 2018*, which provides a snapshot of the state of democracy worldwide based on an analysis of 60 indicators,[58] ranked Spain 19th out of 167 countries. It was second to last of the 20 countries considered full democracies, with a score of just over 8 (8.08), but nevertheless part of the group that topped the ranking, spearheaded, as always, by the Nordic countries. This was the same score it had received in 2017. It scored even higher on civil liberties: 8.82. Although Spain did slip two positions and lose 0.22 points compared to 2016 (8.30) due to the crisis in Catalonia, which takes its toll, it still numbered among the "full democracies", a ranking it maintained in 2019 (8.18) and 2020 (8.12). In 2021, it lost this status for the first time (7.94),[59] before recovering it in 2022 (8.07).[60]

Similarly, Freedom House's annual reports on political rights and civil liberties for 2018 and 2019 include Spain among the free countries, with an overall score of 94/100 (equal to that of the UK and Germany and ahead of France or the US), the same position it held in 2017 and slightly below that for 2016 (95/100). Spain ranks even higher in the *The Global State of Democracy* (2019) report published

[58] These indicators are grouped into five categories: electoral process and pluralism, functioning of government, political participation, political culture and civil liberties.

[59] "A deterioration of 0.18 points in Spain's score was sufficient to relegate the country from the 'full democracy' classification to that of a 'flawed democracy' […]. Spain's relegation in 2021 is the result mainly of a downgrade in its score for judicial independence, related to political divisions over the appointment of new magistrates to the General Council of the Judiciary, the body that oversees the judicial system and is intended to guarantee its independence…" (*Democracy Index 2021*, p. 10).

[60] According to the report, Spain's score improved from 2021, "driven by the lifting of pandemic-related measures by the government, resulting in an improvement in the civil liberties […]. However, political polarisation remains high ahead of the elections in 2023, and political scandals and Catalan separatism continue to pose challenges to governance" (*Democracy Index 2022*, p. 38).

by the International Institute for Democracy and Electoral Assistance (International IDEA), headquartered in Stockholm. Specifically, it is 13th out of a total of 150 states in the ranking of the world's best democracies, with an overall score of 0.77 out of 1 (similar to the UK's or Germany's and ahead of Canada, France or Austria).

In recent years, the European Commission's reports on the rule of law in the European Union[61] have not once censured the measures adopted by the Spanish authorities in defence of the constitutional order seriously threatened by the stubborn rebellion of the secessionist movement's leaders. They do not hide their concern for the delay in the renewal of the General Council of the Judiciary, certain shortcomings in the fight against corruption (such as the excessive duration of the proceedings), the status of the Public Prosecutor, or the use of spyware and surveillance software such as Pegasus. But they find no structural or systemic problems, nor do they make any reference to the alleged democratic deficit or restriction of freedoms in Catalonia that would support the pro-independence movement's narrative regarding the repression suffered by Catalan citizens.

Although Amnesty International's annual reports on the state of human rights in the world—which tend to be more critical—denounce some actions or practices of the Spanish authorities considered contrary to rights recognized in international treaties and conventions,[62] references to the political conflict in Catalonia are few and far between. The 2017/2018 report does say that the right to freedom of expression and peaceful assembly was disproportionately restricted following the decision to provisionally suspend the Catalan referendum law adopted by the Constitutional Court on 7 September and that the law enforcement officials used excessive force against protestors peacefully resisting the police operation to enforce the court order preventing the holding of the independence referendum (pp. 188–189). The most recent report, for the years 2022/2023, includes a reference to the use of spyware (Pegasus) in the mobile phones of several Catalan pro-independence politicians, journalists and lawyers (p. 192).[63]

Even in the least complacent reports, the picture painted is far from the scenario of authoritarian drift and oppression described in the pro-independence propaganda. Although some aspects of the functioning of Spain's political institutions can clearly be improved, I honestly believe that an overall assessment of Spanish democracy more than meets the international standards defining the rule of law and that the country's system of freedoms merits an overall positive appraisal.

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[61] See: Arenas 2020.

[62] It refers, for example, to the prosecutions for the offence of glorification of terrorism, cases of ill-treatment, torture or the excessive use of force by law enforcement officials, the collective expulsion of those attempting to enter Spanish territory in Ceuta and Melilla irregularly from Morocco, difficulties to exercise the right to asylum, the sanctions imposed under the Organic Law on the Protection of Public Security (LOPSC), the right to housing or violence against women.

[63] The Spanish government also confirmed that the official telephones of the Spanish prime minister, interior minister, and defence minister had been infected with the Pegasus spyware. In May, the National High Court (*Audiencia Nacional*) opened an investigation into the matter.

References

Aguado C (2014) Sobre un eventual referéndum consultivo catalán en el proceso soberanista. In: Solozábal JJ (ed) La autodeterminación a debate. Pablo Iglesias, Madrid, pp 9–29

Aguado C (2017) Sentido y posibilidades del referéndum autonómico. In: Sáenz E, Garrido C (eds) La funcionalidad del referéndum en la democracia representativa. Tirant lo Blanch, Valencia, pp 99–122

Aja E (2007) El Estado autonómico: federalismo y hechos diferenciales. Alianza, Madrid

Aláez B (2015) Constitucionalizar la secesión para armonizar la legalidad constitucional y el principio democrático en Estados territorialmente descentralizados como España. Revista D'estudis Autonòmics i Federals 22:136–183

Aláez B (2021) La acomodación constitucional de la secesión: el caso español. Escritos en homenaje a Francisco J. Bastida Freijedo. Universidad de Oviedo, Oviedo, pp 13–60

Álvarez L (2023) Legitimidad, lealtad constitucional y democracia militante. Revista De Derecho Político 117:343–356

Arenas R (2020) El Estado de Derecho en la UE: Significado, desafíos y perspectivas de futuro. Araucaria: Revista Iberoamericana de Filosofía. Política, Humanidades y Relaciones Internacionales 45:51–79

Atienza M (2020) Sobre un derecho inexistente: a propósito de "Democracia y derecho a decidir" de Josep M. Vilajosana Eunomía 19:422–443

Barceló M et al (2015) El derecho a decider. Teoría y práctica de un nuevo derecho. Atelier, Barcelona

Bilbao JM (2005) Un plan con gato encerrado: construyendo el ámbito vasco de confusión. In: Peña González J (ed) Libro Homenaje a D. Iñigo Cavero Lataillade. Tirant lo Blanch, Valencia, pp 143–153

Borrell J, Llorach J (2015) Las cuentas y los cuentos de la independencia. Catarata, Madrid

Bossacoma P (2015) Justícia i legalitat de la secessió Una teoria de l'autodeterminació nacional de Catalunya. Institut d'Estudis Autonòmics, Barcelona

Bossacoma P (2020) Morality and legality of secession: a theory of National Self-Determination. Palgrave Macmillan, Cham

Calduch R (2019) El fracaso internacional del independentismo catalán: causas jurídicas y políticas. Anuario Español De Derecho Internacional 35:127–148

Castellà JM (2014) Secesión y referéndum sobre el 'derecho a decidir' en Cataluña. Una aproximación desde el Derecho Constitucional. In: Oliver J (ed) El futuro territorial del Estado español. ¿Centralización, autonomía, federalismo, confederación o secesión? Tirant lo Blanch, Valencia, pp 451–490

Castellà JM (2016) Tribunal Constitucional y proceso secesionista catalán: respuestas jurídico-constitucionales a un conflicto político-constitucional. Teoría y Realidad Constitucional 37:561–592

Castellà JM (2017) Sobre el encaje constitucional del pretendido referéndum de secesión en Cataluña. In: Sáenz E, Garrido C (eds) La funcionalidad del referéndum en la democracia representativa. Tirant lo Blanch, Valencia, pp 129–152

De Carreras F (2014) ¿Puede celebrarse un referéndum en Cataluña? El Cronista Del Estado Social y Democrático De Derecho 42:24–35

De Miguel J (2014) El derecho a decidir y sus aporías democráticas. In: Solozábal JJ (ed) La autodeterminación a, debate. Pablo Iglesias, Madrid, pp 161–174

De Miguel J (2018) El proceso soberanista ante el Tribunal Constitucional. Revista Española De Derecho Constitucional 113:133–166
De Miguel J (2019) Justicia Constitucional y Secesión: El caso del proceso soberanista catalán. Reus, Madrid
De Miguel J (2022) Pasado y presente de la democracia militante (con especial referencia al caso español). Revista Vasca De Administración Pública 122:17–43
De Vergottini G (2019) Referéndum y secesión. Teoría y Realidad Constitucional 43:103–119
Ferreres V (2014) The Spanish Constitutional Court confronts Catalonia's 'right to decide' (Comment on the Judgment 42/2014). Eur Const Law Rev 10:571–590
Ferreres V (2016) Cataluña y el derecho a decidir. Teoría y Realidad Constitucional 37:461
Fossas E (2014) Interpretar la política. Comentario a la STC 42/2014, de 25 de marzo, sobre la Declaración de soberanía y el derecho a decidir del pueblo de Cataluña. Revista Española De Derecho Constitucional 101:273–300
Garrido C (2019) El referéndum autonómico en su laberinto. Revista Española De Derecho Constitucional 117:13–43
Garrido C, Sáenz E (2019) Referéndums y consultas populares en el Estado autonómico. Marcial Pons, Madrid
Haljan D (2014) Constitutionalising secession. Hart Publishing, Oxford
Herrero de Miñón M (1998) Derechos históricos y Constitución. Taurus, Madrid
López Basaguren A (2009) Sobre referéndum y Comunidades Autónomas. La ley vasca de la 'consulta' ante el Tribunal Constitucional (Consideraciones con motivo de la STC 103/2008). Revista D'estudis Autonòmics i Federals 9:202–240
López Basaguren A (2016) Demanda de secesión en Cataluña y sistema democrático. El procés a la luz de la experiencia comparada. Teoría y Realidad Constitucional 37:172–177
López Basaguren A (2017) Crónica de un gran error político y sus consecuencias ¿Cómo se sale del laberinto? El Cronista Del Estado Social y Democrático De Derecho 71–72:58–61
López A, Escajedo L (eds) (2019) Claims for secession and federalism: a comparative study with a special focus on Spain. Springer Nature, Cham
López Rubio D (2019) La evolución de la jurisprudencia constitucional en materia de referendos autonómicos. Revista Vasca De Administración Pública 114:161–199
Mangas A (2020) A decent Supreme Court Judgement. The Spanish Yearbook of International Law (Agora: The Catalan independence process before the Spanish Supreme Court). Span Yearb Int Law. 24:272–276
Ridao J (2014) La juridificación del derecho a decidir en España. La STC 42/2014 y el derecho a aspirar a un proceso de cambio político del orden constitucional. Revista De Derecho Político 91:91–136
Ridao J (2021) Las vías legales para un referéndum en Cataluña: El retorno al derecho a decidir y al referéndum como acto preparatorio para la defensa de objetivos políticos. In: Baamonde L, Espinosa A, López Rubio D (eds) Reflexiones constitucionales sobre la participación política directa. CEPC, Madrid, p 451
Rubio Llorente F (2012) Un referéndum para Cataluña. El País.
Ruiz Soroa JM (2014) ¿Es posible regular la secesión aquí y ahora? In: Arregi J (ed) La secesión de España. Bases para un debate desde el País Vasco. Tecnos, Madrid, pp 19–36
Ruiz Soroa JM (2014) Regular la secesión. In: Solozábal JJ (ed) La autodeterminación a debate. Pablo Iglesias, Madrid, pp 168–186
Sartori G (2005) Teoría de la Democracia (1): El debate contemporáneo. Alianza Universidad, Madrid
Solozábal JJ (2015) La sentencia sobre la declaración soberanista y el derecho a decidir del pueblo catalán (STC 42/2014). El Cronista Del Estado Social y Democrático De Derecho 50:46–49
Tajadura J (2014) El "derecho a decidir", el Estado de Derecho y la democracia. In: Solozábal JJ (ed) La autodeterminación a debate. Pablo Iglesias, Madrid, pp 213–224
Tajadura J (2019a) Referéndum, secesión y democracia: el intento de referéndum vasco sobre el ejercicio del derecho a decidir y su declaración de inconstitucionalidad en la STC 103/2008. Garrido C, Sáenz E (coords). Referéndums y consultas populares en el Estado autonómico. Marcial Pons, Madrid, pp 209–236
Tajadura J (2019b) La problemática jurídica de la secesión. In: Aragón M et al (eds) La Constitución de los Españoles. Fundación Giménez Abad and CEPC, Madrid, pp 307–323
Teruel GM (2020) Crisis constitucional e insurgencia en Cataluña: relato en defensa de la Constitución. Dykinson, Madrid

Tornos J (2015) De Escocia a Cataluña. Referéndum y reforma constitucional. Iustel, Madrid
Torroja H (2020) The "Right to Decide" in International Law as grounds for exclusion of unlawfulness. The Spanish Yearbook of International Law (Agora: The Catalan independence process before the Spanish Supreme Court). Span Yearb Int Law. 24:281–285
Torroja H (2022) La libre determinación de los pueblos, ¿un derecho a la independencia para cualquier pueblo? Thomson Reuters Aranzadi, Cizur Menor (Navarre).
Tudela J (2016) El derecho a decidir y el principio democrático. Teoría y Realidad Constitucional 37:477–497
Various Authors (2019) El artículo 155 de la Constitución: XXIV Jornadas de la Asociación de Letrados del Tribunal Constitucional. CEPC/Tribunal Constitucional, Madrid
Vilajosana JM (2020) Democracia y Derecho a Decidir Eunomía 18:375–391
Weiler JHH (2018) ¿Quién teme a una nación de naciones? Actualidad Jurídica Uría Menéndez 50:7–18
Weinstock D (2011) Constitutionalizing the right to Secede. J Polit Philos 9:182–203

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