Self-Determination and Coercion in Spain. The Case of Catalonia

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ABSTRACT Catalonia remains part of Spain despite the unilateral referendum and declaration of independence that took place in October 2017. This article will explore how the central authorities blocked Catalan attempts at self-determination and secession, as well as the consequences of these actions and reactions. Internal and external self-determination in Spain to better understand the move towards unilateralism, and the application of both constitutional and criminal law responses in the subsequent central coercion, will be examined. As regards the consequences, the secession project today seems more unattainable and the project of union less attractive.

KEYWORDS self-determination; territorial autonomy; secession; referendum; Catalonia; Spain.

1. Aims, Structure and Content of the Study

Through the use of different means of coercion, the Spanish authorities made sure that Catalonia remained part of Spain after the unilateral referendum and declaration of independence that took place in October 2017. This article examines, essentially from a legal perspective, several forms of state coercion against unilateral attempts at self-determination. While the main aim of this work is to present a comprehensive juridical analysis of Catalonia's self-determination in Spain, some political, philosophical, and critical reflections will also be made.

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The article will start by taking a close look at devolution under the Spanish constitutional order because the potential and actual levels of internal self-determination matter in assessing claims for external self-determination. The 1978 Spanish Constitution designs an open and rather vague territorial organization of power. Although the system developed under this Constitution is often described as quasi or *de facto* federal, this will be questioned with regards to shared rule, the judiciary, states of emergency, constitutional revision, and sovereignty. According to the Constitutional Court, the Spanish Constitution is not a federal pact between prior existing entities, but a product of the exclusive will of the Spanish people, the sole and exclusive holders of sovereignty.

As many Catalans became dissatisfied with the level of territorial autonomy and aware of the limits of the multinational potential of the Spanish constitutional order, claims for sovereignty and secession increased significantly (especially from 2010 onwards). The referendum to legitimize external self-determination and the constitutional amending procedure to channel it will be discussed in Section 3. According to consolidated case law of the Constitutional Court of Spain, amending the Constitution is necessary not only to secede but also to hold a referendum on self-determination. The procedure that the Constitutional Court requires to amend the Spanish Constitution is set out in Article 168, the hyper-rigidity of which will be analysed. Arguably, this article reveals a *de facto* unamendability of the Constitution and, consequently, an impossibility of either seceding or holding a referendum on secession through lawful means.

In Section 4, this essay will try to encapsulate some of the main points in the lists of grievances that the pro-secession movement brandishes as reasons for secession. This discussion will combine normative analyses with historical and contextual references. An initial philosophical overview aims to show that historical and present injustices are, or at least should be, relevant for both remedial and primary theories of secession. This overview will also point out that violations and failures of internal self-determination work as arguments for external self-determination, according to an increasing number of theories of secession. From a more descriptive perspective, history seems crucial to understanding the fear and distrust of Catalan sovereigntists towards Spanish authorities. Central coercion, which is reminiscent of earlier periods of Spanish history, has recently gained prominence in these lists of grievances.

Following the 2017 unilateral referendum and declaration of independence of Catalonia, the central authorities activated exceptional coercive devices. To properly analyse this central reaction, Section 5 will first address the hasty unilateral actions of the Catalan authorities. Given these actions, the Catalan Government was dismissed by the central government and most of its members, together with other democratic representatives, public servants, and leaders of pro-secession associations, are facing long sentences and criminal charges. With respect to coercion under constitutional law, the direct rule imposed under Article 155 and the later jurisprudence of the Constitutional Court upholding it will be discussed. Since regional elections were immediately called from Madrid and direct rule was designed to terminate once the new Catalan Government was formed, the Constitutional Court found this temporary suspension of self-government to be in accordance with the Constitution. As far as coercion under criminal law is concerned, some of the main rulings of the Supreme Court will be examined from a contextual approach. Prison before trial for charges of rebellion, which entails an automatic suspension from holding public office, was the response of the Supreme Court to prevent any of the prosecuted leaders from being elected as president of Catalonia by the new Parliament. This action prevented the formation of a new Catalan Government headed by one of these prosecuted pro-secession leaders. Yet the Supreme Court did not finally convict them for rebellion but rather for sedition, construed as a tumultuous, collective disobedience.

As a result of the 2017 failure of unilateral self-determination and the central coercion without proposals for accommodation, confidence in the secession project may be declining and, at the same time, fear of the parent state seems to be growing. Central coercion must be taken into consideration not only because it generates fear of the parent state, but also because it damages confidence in the project of independence. Beyond making the management of everyday politics difficult, central coercion tends to convert a soft struggle for secession, based on democratic deliberation, mobilization, and voting, into a significantly harder one, requiring large doses of sacrifice, resistance, and force. Moreover, the perception of excessive or disproportionate coercion may run counter to moderation, negotiation, and compromise in questions of self-determination.

The refusal to negotiate and accommodate demands for self-determination together with the wide use of central coercion seems a distinctive feature to tackle and curb aspirations to self-determination in Spain, at least compared to other liberal democracies such as Canada and the UK.

2. Internal Self-Determination

Is Catalonia a *nation*, *nationality*, *national community,* or *people*? Catalonia can be considered so because of its history as a distinct realm, its own language, culture, art, festivities, myths, values, law, political institutions, and party system, among other *objective* elements; recognition as a nationality by the Spanish constitutional order as a *legal* element; and the national consciousness and identification on the part of most of its citizens as a *subjective* element. Even if Catalonia is considered to constitute a national community, it shares its territory and population with the Spanish nation: considering the former to be a nation does not prevent the latter extending to the territory and population of the other. In this way, Spain and Catalonia can be deemed overlapping or nested nations.[1]

Spain is a *de facto* multinational state and, more controversially, a *de jure* one.[2] Respect, recognition, and accommodation of *de jure* multinationalism are questions of degree. The eminent Spanish philosopher Ortega y Gasset maintained that "Spain is a thing made by Castile."[3] He added that "Castile made Spain and Castile unmade it," for Castile did not give proper consideration to Catalonia and the Basque Country. Since Castilian Spain does not recognize itself as a nation different from and equal to the Catalan and the Basque nations, it is difficult to *remake* Spain as a *de jure* multinational state. As we shall observe, Spain is not the result of any (con)federal agreement between equal nations. In particular, according to the Constitutional Court, the 1978 Spanish Constitution is not a federal pact between prior existing entities, but a product of the exclusive will of the Spanish people, the sole and exclusive holders of sovereignty (see Judgements 76/1988, 247/2007, 31/2010, 42/2014). Nevertheless, Article 2 of the Spanish Constitution recognizes, implicitly, Catalonia as a nationality:

> The Constitution is founded on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards; and it recognizes and guarantees the right to autonomy of the nationalities and regions of which it is composed, and the solidarity amongst them all.

1. Miller, *Citizenship and National Identity*, 125-131.
2. See the constitutional proposal of Weiler, "A nation of nations?".
3. Ortega y Gasset, *España invertebrada*, Part 1, §§ 3 & 5.

According to Solé Tura,[4] one of the seven drafters of the 1978 Constitution, the wording of Article 2 was imposed on the Constitutional Commission by the Spanish executive as a final agreement. This agreement was reached with certain "sectors" beyond the political party in government, by which he was probably referring to established powers such as the military. "Later, Article 2 was corrected within the narrow limits in which we were able to move," he added. The amendments made to the Government's proposal by the Commission were merely stylistic and left untouched the ideas of the "indissoluble unity of the Spanish nation" and the "common and indivisible homeland of all Spaniards." The foundation of the Constitution on these twin ideas had, and still has, a strong impact on self-determination and central coercion.[5] On the other hand, Article 2 "recognizes" the right to autonomy "of the nationalities and regions." *Recognizing* rather than *establishing* seems to endorse a pre-constitutional principle of internal self-determination.[6]

The Preamble of the Spanish Constitution reads that Spain is made up of various "peoples" and Article 2 recognizes that the Spanish "nation" is made of "nationalities and regions." As this provision draws a distinction between "nation" and "nationality," both of which come from the Latin root *natio*, what is the difference between them, and is this difference relevant to the right to self-determination? According to Solé Tura, the terms *nation* and *nationality* of Article 2 indicate a similar form of collective consciousness.[7] Although *nation* and *nationality* are historically, culturally, and sociologically alike, the difference is to be mainly political and legal. While the nation would be sovereign and independent, the nationality would be non-sovereign but entitled to territorial autonomy. Sovereignty seems to be primary, whereas autonomy is derivative or secondary. Sovereignty may imply broader and weightier competences than autonomy. Sovereignty is more related to ultimate control and, therefore, capable of maintaining and recovering competences. Indeed, sovereignty is closer to notions such as competence-competence, constitutional reform, constituent power, and independence.[8]

4. Solé Tura, *Autonomies, Federalisme i Autodeterminació*, 79-83.

5. López Bofill, "Hubris, constitutionalism, and 'the indissoluble unity of the Spanish nation'."

6. Before the adoption of the 1978 Constitution, the central executive had already provisionally re-established the Catalan autonomous government (see Decree-statute 41/1977).

7. Solé Tura, *Autonomies, Federalisme i Autodeterminació*, 18-19.

8. See Bossacoma, *Sovereignty in Europe*, § 2.

Nonetheless, the difference between *nation* and *nationality* could be provisional in the sense that the latter may refer to people that are potentially but not effectively a nation. Fraga Iribarne, the constitutional drafter most closely associated with the outgoing dictatorial regime, feared so regarding the wording of Article 2: "the term 'region' or 'autonomous region'—the only one stated in the 1931 Constitution—is perfectly sufficient to describe the historical and geographical basis of the autonomous communities. By contrast, the word 'nationalities' is misleading and full of possible complications. No more than one nation can be accepted—Spain—and no more than one 'nationality'—the Spanish. Everything else leads us to approaches as complex, delicate and full of future difficulties such as the 'principle of nationalities' and the right to self-determination that should preferably be avoided for the sake of the sacred and indestructible unity of Spain."[9]

The preamble of the current Statute of Autonomy of Catalonia refers to the "Catalan people," "Catalonia as a nation" and "the national reality of Catalonia as a nationality." Article 1 of this basic institutional norm defines Catalonia as a "nationality." Thus, the Preamble can be understood as referring to *nation* in a historical, cultural, and sociological sense, whereas Article 1 uses the word *nationality* in a legal-constitutional sense. The similarities and differences between "nation" and "nationality" are reinforced when the words "nationality" and "region" in Article 2 of the Constitution are contrasted. However, Spanish constitutional jurisprudence (among others, Judgement 31/2010) has tended to stress the difference between "nation" and "nationality" while blurring the distinction between "nationality" and "region."[10] The former pair are similar sociologically but treated differently by law, whereas the latter are different sociologically yet treated equally by law. A new sociological jurisprudence could, and should, question this predominant interpretation of the 1978 Constitution.[11]

Beyond the enshrinement of the right to autonomy of nationalities and regions, the articles of the Spanish Constitution do not identify the autono-

9. See *Boletín Oficial de las Cortes*, 5 January 1978, No. 44, p. 698. In the same vein, Fraga's intervention of 5 May 1978 in the Commission of the Spanish Congress on Constitutional Affairs. See *Diario de Sesiones del Congreso de los Diputados*, No. 59, p. 2044.

10. Viver, "La reconnaissance de la plurinationalité de l'État dans l'ordre juridique espagnol" & "Spain's Constitution and Statutes of Autonomy."

11 Bossacoma, "An egalitarian defence of territorial autonomy."

mous communities nor do they design any specific territorial model. Legally speaking, each autonomous community is created by a statute of autonomy, which regulates its institutions and specifies its competences. Following this logic, the Spanish Constitution lists state powers barred to the autonomous communities (Article 149.1), opens up the possibility of the autonomous communities assuming other powers through their statutes of autonomy (Articles 147 and 148) and, closing the circle, reserves any residual powers for the central state (Article 149.3). Thus, statutes of autonomy have the significant constitutional functions of establishing each self-governing unit, its bodies, and its powers. Given that they are statutes passed by the Spanish Parliament and because they have the function of allocating competences, statutes of autonomy should not be confused with the typical constitutions of the units of a federation. The latter are not generally passed by the central parliament, and it is the federal constitution that normally contains the allocation of competences. In the Spanish "State of Autonomies" *(Estado de las Autonomías)*, when the central parliament passes a statute of autonomy, in a way it acts as a *pouvoir constituant* despite being a *pouvoir constitué*. In principle, the territorial division of powers in Spain lies more in the hands of the constituted powers than in most federal systems.[12]

The Spanish Constitution sets the basic institutional architecture of historical nationalities such as Catalonia (Article 152.1). According to this institutional design, developed by the provisions of the Statute of Autonomy, each nationality has a parliament, a president, and a government. The Statute of Autonomy of Catalonia (passed in 1979 and substantially amended in 2006) appears to grant broad powers to Catalan authorities, but not everything is as it seems. Central legislation covers most matters and regulates many in detailed ways, leaving a narrow margin for regulation to the autonomous communities. Moreover, central political branches, supported by the Constitutional Court and ordinary courts, managed to transform a substantially asymmetric system into a rather symmetric one—with the relevant exception of the fiscal autonomy of the Basque Country and Navarre.[13]

12. Argullol & Velasco, *Institutions and Powers in Decentralized Countries*, 318-323.

13. Bossacoma & Sanjaume-Calvet, "Asymmetry as a device for equal recognition and reasonable accommodation of majority and minority nations."

Although the Spanish "State of Autonomies" is often described as quasi-federal or *de facto* federal, this is difficult to sustain with regards to shared rule, the judiciary, states of emergency, constitutional revision, and sovereignty. Shared rule is remarkably weak, since there are no significant official mechanisms for the autonomous communities, in general, or for the nationalities, in particular, to influence and check the central government. Despite the Senate being defined in Article 69 of the Spanish Constitution as "the chamber of territorial representation," it does not prioritize regional interests. The parliaments of the autonomous communities only elect about 20 per cent of the senators, whereas the rest are directly elected by universal suffrage in the same provincial constituencies as the Congress (and on the same day). Arguably, such a direct election makes it difficult to distinguish regional from state-wide interests. Additionally, the Senate is organized along party lines instead of territorial lines. In fact, this so-called territorial chamber has often been more unitarian and pro-centralization than the lower chamber.[14] Although the judiciary may seem decentralized because there is a superior court of justice in each autonomous community, it is actually a unitary judicial system. In general, centralized courts and their case law may cause centralization.[15] Spain is a remarkable instance of this, not only because it usually gives much more weight to central legislation, but also because through case law many matters tend to be dealt with homogenizing doctrines across all nationalities and regions.[16] Finally, the Spanish Constitution conceives sovereignty in a traditional mononational, centralized, absolute, and indivisible way. This deep unitarian core can be observed in the amending procedures (see Articles 167 and 168 of the Constitution) and the emergency powers (see Articles 55 and 116 of the Constitution), which are in the exclusive hands of the central branches of power.[17]

14. See Aja et al., *La reforma constitucional del Senado*; Ferreres, "Constitutional Conflicts"; López-Basaguren, "The Secession Issue and Territorial Autonomy in Spain."

15. Kelsen, *Peace Through Law*.

16 See Bossacoma, "An egalitarian defence of territorial autonomy."

17. See Cruz Villalón, "La protección extraordinaria del Estado," "Las articulaciones de un Estado compuesto," "Coerción estatal" & "Estados de alarma, excepción y sitio," and Pérez Alberdi, "Federalism and constitution." Nonetheless, each autonomous community's parliament has a power to initiate constitutional change. In addition, the Constitutional Court Judgement 42/2014 construed a special duty to discuss some of these initiatives in depth, aiming for a major change of the territorial constitution.

3. External Self-Determination

According to consolidated case law of the Constitutional Court of Spain, amending the Constitution is necessary both to secede and to hold a referendum on self-determination. The seminal Judgement 103/2008 considered the calling of a referendum to be unconstitutional if one of the possible answers would require a constitutional amendment. This doctrine has been maintained in a series of cases.[18] As this jurisprudence was designed to counter unilateral self-determination referendums (first in the Basque Country, later in Catalonia), it may change in the future if there were sincere negotiation and agreement (political conditions) as well as an adequate central legislation and authorization (legal conditions). In particular, it could change if the proponents of a referendum agreed to pursue secession through constitutional revision. If these political and legal conditions were met one day, the Constitutional Court could at least remain passive until the referendum were held.

Amending the Spanish Constitution, however, is made even more difficult since the Constitutional Court requires Article 168 to be the amending procedure rather than the ordinary one of Article 167. The procedure of Article 168 consists of three steps. Step one: an initial supermajority of central representatives (approval by two-thirds of both chambers of the Spanish Parliament). Step two: a continuity of such a supermajority after testing the Spanish people (following general elections, re-approval of the amendment by two-thirds of both chambers of the Spanish Parliament). Step three: direct and express confirmation by the Spanish people (ratification of the amendment through referendum). This procedure is so rigid that eminent scholars have considered it to constitute a *de facto* unamendability.[19] In fact, the 1978 Constitution has to date never been amended following Article 168 and, to make things worse, revising the Constitution is almost a political taboo in Spain.[20]

The procedure of Article 168 has thus three kinds of requisites: (1) *two double supermajorities in the Spanish Parliament*—two-thirds of both chambers are re-

18. Bossacoma & López Bofill, "The Secession of Catalonia."

19. Cruz Villalón, "El ordenamiento constitucional," 113; Otto, *Obras completas*, 858; Vega, *La reforma constitucional y la problemática del poder constituyente*, 148-9; Colón-Ríos, *Weak Constitutionalism*, 67, 142.

20. Ferreres, *The Constitution of Spain*, 55-59.

quired twice, (2) *a series of democratic appeals to the Spanish people*—the amending will is to be maintained after elections and referendums, (3) *a sacrifice on the part of the governing officials*—in order to call the elections needed between step one and two, the members of the central parliament and government must be prepared to risk their office and hope that the opposition will not betray the spirit of compromise needed to pass such a rigid amending procedure. When the premier, the ministers and the representatives that promote the constitutional reform perceive that the polls benefit them, they might be more willing to continue the amendment process. However, the opposition parties may be unwilling to agree on the amendment proposal on seeing that these same polls are not favouring them. The amending procedure of Article 168 therefore becomes more difficult because party politics is often driven by a logic of seeking votes, seats, and positions (and because the prime minister loses the legal power to dissolve parliament and call elections at will). In addition, if the governing forces delay the amending process in order to remain in office as long as possible, the mood for compromise of the opposition parties may gradually wear thin. Likewise, the longer the governing party tries to stay in power, the more likely it is that the voting population will change their opinion and that there will be a punishment vote against the government and the parliamentary majority.

Among the mentioned issues, the secession of Catalonia via a rigid constitutional reform requires the consultation of all Spanish citizens, since Article 168 imposes a referendum at the state level. However, there are comparative, theoretical, jurisprudential, and institutional arguments to reject a secession referendum across the entire territory of the parent state. From a comparative perspective, it is the people seeking self-determination who are usually consulted. In the course of the 20th century and up until the beginning of the 21st century, referendums have been consolidated as a democratic, legal mechanism to give voice to self-determination and secession claims. Overall, referendums have become a powerful normative tool to question the *demotic monism* of today's states as well as to create and legitimize new *demoi* and *pouvoirs constituants*.[21] This democratic device to question, create and legitimize sovereign (or partially sovereign) peoples and constituent powers loses much of its normative sense if an obligation to consult all the citizens of the parent state is imposed. According to the jurisprudence of the International Court of

21. Tierney, *Constitutional Referendums*.

Justice, "the right of self-determination requires a free and genuine expression of the will of the peoples concerned" (Opinion on Western Sahara of 1975, par. 55).[22] From a more institutional and practical perspective, the question, date, quorums, campaign, media coverage, funding and control of the process in general ought not to be decided unilaterally by the parent state, but should be agreed upon with the pro-secession unit. This agreement makes more sense regarding a sub-state-wide referendum than regarding a state-wide referendum, especially one to ratify a constitutional amendment. Instead of regulating and calling the latter referendum, central authorities may require certain conditions for authorizing the former referendum and recognizing the result as a fair and clear expression of the choice for secession.

4. Past and Present Grievances

Theories of secession are generally divided into *remedial right* and *primary right* theories.[23] While the former conceive the right to secede only as a reaction to certain injustices, the latter understand it as a basic right without the need for a prior grievance. Historical grievances may justify secession under remedial theories, as we shall see. Yet history matters for some primary theories as well. Primary theories are subdivided into *ascriptive* theories, which assign the right to secede to groups that have certain cultural and political features such as national communities; and *choice* theories, which do not assign the right to special groups but basically focus on the democratic will of a territorially concentrated group of people. Ascriptive approaches are often interested in history since national communities tend to be historical communities. The importance of history is also related to a common misconception of primary theories. All too often, primary theories are assumed to endorse an easy exit. However, a primary right to secede can be qualified (with difficult conditions to be fulfilled). Moreover, defending that nations or territorially concentrated groups have a qualified right to secede without having suffered injustices is compatible with defending that the presence of injustices should make secession easier. That is to say, the more unjust the

22. Under the Peace Conference on Yugoslavia, the Badinter Arbitration Commission strengthened these referendums as a democratic condition to obtaining international recognition as an independent state.

23 Buchanan, *Justice, Legitimacy, and Self-Determination*, 350-394.

state treatment of minority nations is, the less qualified the right to exit ought to be. Accordingly, for primary theories, historical mistreatment may justify a less conditioned exit.[24]

Despite the possibility of conceiving primary theories in such a qualified and gradual way, remedial theories are still more popular, for they tend to be less permissive regarding external self-determination. From traditional remedial theories, the right to secede emerges after occupations by force, systematic violations of human rights and economic exploitation.[25] At the turn of the century, a second wave of remedial literature approached secession with less restrictive and individualistic conceptions. If the members of a minority nation are not properly recognized and accommodated within the parent state, they ought to have a right to secede, new remedialism contends.[26] Even Buchanan changed his approach.[27] Accordingly, violations or failures of internal self-determination may work as legitimate causes for external self-determination. If not directly granting a right to secede, such violations or failures should ease international recognition and intervention.

With this theoretical background in mind, it is time to offer a historical overview of Catalan self-determination within Spain. A main idea is that *non-recognition* and *violation* of internal self-determination of Catalonia took place in many episodes of modern Spanish history. After the transition to democracy and the Constitution of 1978, however, this historical pattern has been interrupted, and perhaps even superseded. Although a few may argue that this historical pattern of non-recognition and violation continued, *disappointment* and *failure* of internal self-determination seem more reasonable interpretations. Indeed, the expectations of many Catalans of having a substantial degree of self-rule and shared rule were not fulfilled. This seems particularly relevant in a context where the Constitution designed an open and vague territorial organization of power, but under an implied unders-

24. Bossacoma, *Morality and Legality of Secession*, Part I.

25. Buchheit, *Secession*; Birch, "Another Liberal Theory of Secession"; Buchanan, *Secession*.

26. Bauböck, "Why Stay Together?"; Costa, "On Theories of Secession"; Seymour, "Secession as a Remedial Right"; Patten, *Equal Recognition*; Torbisco, "National Minorities, Self-determination and Human Rights."

27. Buchanan, *Justice, Legitimacy, and Self-Determination*.

tanding that the historical mistreatment of national pluralism needed to be reversed. Let us outline some historical periods and events:

1. This overview will start with the War of Succession at the beginning of the 18th century, since it is considered in both academia and the social imaginary as a turning point. From this point onwards, relations between Catalonia and the rest of Spain were no longer based on the unifying institution of the monarchy, but more on military occupation. The occupation and eradication of the Principality of Catalonia and of the Catalan-Aragonese Crown by King Philip V were based largely on the right of conquest, breach of the oath of allegiance made to the King, and the absolute powers of the monarch. Catalonia, similarly to the rest of the Catalan-Aragonese realms, lost its self-government and representative institutions as well as its primary law, which was the product of centuries of deliberation and compromise between the King and the estates gathered in assembly. After the War, Catalonia seemed to suffer a more intense form of absolutism than the Castiles, in particular through a significant militarization of public life.[28]

2. Spanish history from then until the transition to democracy of the late 1970s can be summarized as scarcely liberal, hardly democratic, and lacking federalism. A history in which militarization, coup d'état, dictatorship, centralization and uniformization were common themes. The non-recognition and misrecognition of national pluralism in Spain persisted in many aspects

28. See Albareda, *La Guerra de Sucesión de España*, 12-15. In the 1713 Treaty of Utrecht, the Hispanic monarchy gave an undertaking to the British monarchy that it would grant Catalonia the privileges enjoyed by the inhabitants of the Castiles. However, the resistance by the Catalans after the Treaty gave King Philip a pretext to break this international obligation. Article 13 of the Treaty provided that: "Whereas the Queen of Great Britain has continually pressed and insisted with the great earnestness, that all the inhabitants of the principality of Catalonia, of whatever state or condition they may be, should not only obtain a full and perpetual oblivion of all that was done in the late war, and enjoy the entire possession of all their estates and honours, but should also have their ancient privileges preserved safe and untouched; the Catholic King, in compliance with the said Queen of Great Britain, hereby grants and confirms to all the inhabitants of Catalonia whatsoever, not only the amnesty desired, together with the full possession of all their estates and honours, but also gives and grants to them all the privileges which the inhabitants of both Castiles, who of all the Spaniards are the most dear to the Catholic King, have and enjoy, or may hereafter have and enjoy." See Peace and Friendship Treaty of Utrecht between Spain and Great Britain. Not only the British were asking for clemency and toleration, even Louis XIV, King of France, insisted to his grandson King Philip V of Spain that he be less severe with the Catalans, recommending that he maintain their privileges.

and over time. In particular, the deprivation of self-government of Catalonia decreed at the beginning of the 18th century was somehow extended until the 20th century, when Catalonia enjoyed three periods of territorial autonomy of different natures and degrees. Territorial autonomy developed in similar proportion to democracy across Spain and vanished during the military dictatorships.[29] In addition, during the dictatorships of Primo de Rivera and Francisco Franco, the human rights of the people of Catalonia were seriously and persistently violated. Although not all these violations of human rights were selective against Catalans, they were arguably more extensive regarding members of minority nations (for instance, regarding the prohibition of the use of Catalan language and of other cultural and political manifestations covered by the freedoms of speech, assembly, and association). Since the beginning of the 20th century, the historical tendency seems to be that the more democracy and liberalism there is, the more decentralization and accommodation.

3. After the transition from dictatorship to liberal democracy in Spain, the expectations generated by the "State of Autonomies" do not seem to have satisfied the desires for self-government in Catalonia.[30] The precarious political context of the transition led to ambiguous wording in the Spanish Constitution of 1978 on the territorial organization of Spain, which was left open to subsequent implementation in various, even contradictory, ways. Dilatory or apparent compromises were struck in the making of the Constitution, which deferred the dispute or set vague rules to decide it in the future. As a result, the devolution processes in Spain took place after, and separately from, the constitution-making process. These constitutional ambiguities have been subject to interpretations in the direction of centralization and homogenization. In this respect, the central authorities have conducted a process of standardization and symmetrization of all the autonomous communities. A so-called "coffee for everybody" approach was partially meant to dilute the distinction between the "nationalities" and "regions" mentioned in Article 2 of the Spanish Constitution. Ultimately,

29. *Mancomunitat de Catalunya* (1914-1923/5), Dictatorship of Primo de Rivera (1923-1930), *Generalitat de Catalunya* and Statute of Autonomy of 1932 (1931/2-1938/9), Dictatorship of Francisco Franco (1938-1975), the current *Generalitat de Catalunya* and Statute of Autonomy of 1979 (significantly amended in 2006).

30. See Guinjoan & Rodon, "Catalonia at a crossroad"; Rodon & Sanjaume-Calvet, "A trip through the corridors of power."

this homogenization has been at the service of centralization in order to avoid due recognition and differential treatment of the Catalan and Basque nationalities.[31]

4. In 2005, almost 90 per cent of the members of the Catalan Parliament adopted a proposal to reform the Statute of Autonomy of Catalonia, with the main aims of protecting and improving Catalan national recognition, legal powers, and fiscal autonomy. Although the candidate to the Spanish premiership José Luís Rodríguez Zapatero vowed to support this reform if elected, the Spanish Parliament nonetheless made substantial cuts. In Judgement 31/2010, the Constitutional Court completed the pruning of the 2006 Statute of Autonomy, previously endorsed by the citizens of Catalonia by referendum, further weakening the strength of this basic law within the Spanish constitutional order. Some considered that the 1978 Constitution, whose open and flexible territorial provisions are to be specified and developed by a statute of autonomy agreed upon by the state and the (actual or potential) autonomous community, has been appropriated by the majority nation, at the expense of the Catalan nationality. In particular, Judgement 31/2010 was described by eminent Catalan professors as having led to a "Spanish centralist and nationalist regression in the sphere of political, cultural and economic self-government, and in the recognition of the distinct national character of Catalonia."[32] In a more technical analysis, this judgement deactivated the innovatory force of the statute of autonomy.

5. Many Catalans think that the fiscal transfer from Catalonia to the rest of Spain has been excessive and even discriminatory.[33] In particular, following the economic crisis of 2008, Catalonia was forced to be one of the first autonomous communities to turn to the central state to rescue its finances, despite being a leading economic driving force in Spain, one of the territories

31. Viver, "La reconnaissance de la plurinationalité de l'État dans l'ordre juridique espagnol" & "Spain's Constitution and Statutes of Autonomy"; Bossacoma & Sanjaume-Calvet, "Asymmetry as a device for equal recognition and reasonable accommodation of majority and minority nations."

32. Viver et al., "The consultation on the political future of Catalonia," § 3.1.

33. See Cuadras-Morató, "The economic debate," 151-157. In the past, the negative net fiscal flows (Catalonia's so-called "fiscal deficit") could be explained by the trade surplus caused by protectionism, but in times of free trade solidarity may seem the main reason for the fiscal deficit. Nonetheless, the protectionism historically granted may morally justify some fiscal deficit as well.

that contributes the most to the Spanish Treasury and, at the time, a leading autonomous community in cutting public spending. As a result, the Catalan Government demanded a fiscal regime similar to, but more solidary than, the one in the Basque Country and Navarre, which is based on centre-periphery agreement.[34] The Spanish Government, however, refused the extension of this special fiscal regime to Catalonia, arguing that it results from a particular constitutional clause only applicable to the Basque Country and Navarre. In addition, the central government was probably concerned that other self-governing units in similar circumstances to Catalonia, such as Valencia and the Balearic Islands, would demand the same.

In a more or less similar fashion, the aforementioned points tend to be part of the lists of grievances which the pro-secession movement claims as reasons for secession. Many international observers, especially those that cherish stability, may deem these complaints not to be sufficiently blatant, grave, or persistent enough to justify secession. Many internal spectators, however, are imbued with sentiments, perceptions, memories, and interpretations of simple and partial origins. While a rather objective list may be more interesting for normative analysis, more subjective lists of evils and wrongs can be of paramount importance within the seceding community and thus of interest for more empirical studies. The next section will address central coercion, which has recently gained prominence in these lists of grievances while also being reminiscent of darker periods of Spanish history.

34. Oller, Satorra & Tobeña, "Privileged Rebels," argue: "The rapidly escalating demands for secession ran almost in parallel with the accentuation of the economic recession that followed the disruption of the world financial system in 2008–2010. Such secession claims reached maximums during 2012–2014, attaining support levels of nearly 50% of citizenry in favour of independence. (…) All the data points to the conclusion that the secessionist challenge was, in fact, a rebellion of the wealthier and well-situated people." By contrast, Porta & Portos, "A bourgeois story?," contend: "As the movement for Catalan self-determination and independence became a mass phenomenon, it broadened the traditional constituency of Catalan nationalism and encompassed large sectors of the population, including the working classes. Looking at the intersection of positions on nation and class, it is suggested that cross-class alliances were crucial in accounting for the surge of support for independence that has been observed in Catalonia since 2010."

5. Central Coercion

In September 2017, two contentious statutes (commonly known as the Laws of Disconnection) were controversially passed by the Parliament of Catalonia. The Self-Determination Referendum Act called a "binding" referendum to be held on 1 October 2017. This act stipulated that a majority of voters supporting the option of secession would "imply independence," and Parliament would subsequently issue a "formal declaration of independence" (Article 4). The Legal Transition and Foundation of the Republic Act was a provisional constitutional framework for an independent Catalonia. The entry into force of this provisional constitution depended on the results of the referendum, with the provisos established by the Self-Determination Referendum Act. Both statutes were immediately challenged on several constitutional grounds (substantial and procedural) and the Constitutional Court swiftly suspended and, shortly afterwards, annulled them.[35]

Nonetheless, this unilateral and unconstitutional referendum took place on the scheduled day. Spanish police, drafted in from other autonomous communities, used force to hinder voting against thousands of citizens defending the polling stations and the ballot boxes, mostly in forms of passive resistance.[36] More than two million Catalans voted (about 40 per cent of those entitled to vote) and 90 per cent did so in favour of independence, according to the Catalan Government. A few days later, the Catalan President went to Parliament to speak on the referendum. He considered himself bound by the results but wished to suspend the effects of the declaration of independence in order to seek a negotiated solution. After this parliamentary session of 10 October 2017, however, the pro-secession parties agreed within the Palace of Parliament on a declaration of independence. It was the beginning of a staged and liquid declaration of independence.

The Spanish Premier, regarding these events as deliberately confusing, officially asked the President of Catalonia to answer affirmatively or negatively whether or not independence had been declared by him or any other Catalan

35. Constitutional Court Decisions of 7 and 12 September 2017, and Judgements 114/2017 and 124/2017.

36. While a previous Catalan referendum on independence was not intervened by using physical force in 2014, less restraint had to be expected in the reaction against another referendum only three years afterwards.

authority. If independence had been declared or no clear answer was given, the Catalan President was required to revoke such a declaration and to order the ceasing of any action to promote, advance or culminate the process of independence. This was part of the official Request of 11 October 2017 under Article 155 of the Constitution, a constitutional clause which grants extraordinary central powers to coerce autonomous communities, as we shall analyse in this section. According to the Spanish Government, the President of Catalonia did not answer in a clear, simple, and straightforward way and, therefore, on 21ST October the former requested the Spanish Senate to authorize several coercing measures. According to the President of Catalonia, the Spanish Government refused to enter into negotiations and, hence, a declaration of independence was (more formally) issued in a plenary session of the Catalan Parliament on 27 October 2017.[37]

The same day the upper chamber of the Spanish Parliament conferred the following powers on the Spanish Government, under Article 155, to block the process of independence of Catalonia: dismissing the President of Catalonia and the rest of the members of the Catalan executive, giving instructions to all Catalan public administrations and their officials, and dissolving the Parliament of Catalonia. Beyond institutional measures, several political authorities of Catalonia and two pro-secession leaders of Catalan civil associations were sent to prison awaiting trial.[38] The then-President of Catalonia together with other members of his government crossed the Spanish border to avoid prosecution and punishment. The criminal charges included, among others, the felonies of rebellion and sedition.

Before going deeper into our analyses of central coercion, let us pause a moment to offer an account of why Catalonia rushed into unilateral secession. Taking the classic film *Rebel Without a Cause* as a metaphor, the two pro-secession Catalan parties in government started a high-speed race towards the edge of the cliff. In this game of chicken, the drivers thought that whoever pulled the brake first would lose a significant part of the secessionist electorate and thus be defeated by the other party in the following elections. The leadership of both parties, instead of agreeing to stop this suicidal race, acce-

37. Passed with 70 votes in favour (out of 135 members of Parliament).

38. See the Rulings of Judge Lamela of the Central Court of Instruction (*Juzgado Central de Instrucción*) of 16 October 2017 and of 2 November 2017. The civil leaders were sent to prison before the political leaders.

lerated towards the abyss. This chicken run was spurred on by social media such as Twitter, which magnified the pressure to speed up. It was an instance of modern social networks increasing fragmentation, polarization, and extremism.[39] Arguably, secessionist parties were unable to rationally cooperate instead of senselessly compete, to listen to the silences as much as the noise, and to prioritize long-term strategies over an all-toohasty, knock-out sprint.

After this parenthesis, it is time to analyse central coercion under constitutional law, which focuses more on institutions, and then continue looking at criminal law, which targets individuals more directly. In 2015, an important legal reform granted strong powers to the Constitutional Court to enforce its own rulings. This significant increase in the Court's enforcing powers was explicitly designed to confront the Catalan secessionist challenge. In Judgements 185/2016 and 215/2016, the Constitutional Court upheld the constitutionality of the reform. Yet, the Court did not employ these new powers enthusiastically. Although the Court was eager to use its *powers of word* against self-determination and secession, it seemed unwilling to use its *powers of sword*. Maintaining the role of arbiter is difficult to harmonize with adopting the role of police.[40]

Beyond the ordinary remedies, the Spanish Constitution grants extraordinary powers to the central executive branch in times of emergency, as most constitutions do. Alarm, exception, and siege are the three types of emergency states established in Article 116 of the Constitution.[41] The first is to confront natural disasters so this is not applicable to the present case. The declaration of a state of siege requires some form of insurrection or other significant acts of force, whereas the declaration of a state of exception takes greater account of the outcomes than of the means used. These declarations tend to imply suspensions of or limitations on the fundamental rights of individuals (Article 55 of the Constitution). Since the Spanish Government did not want to indiscriminately restrict the fundamental rights of ordinary Catalan citizens, it activated Article 155 of the Constitution, a more specific

39. See Sunstein, *Designing Democracy*, ch. 1, 4.

40. See Venice Commission, *Opinion on the Law of 16 October 2015 Amending the Organic Law No. 2/1979 on the Constitutional Court*, 2017. See, also, Bossacoma, "La espada del Tribunal Constitucional."

41. See Cruz Villalón, "La protección extraordinaria del Estado," "Coerción estatal" & "Estados de alarma, excepción y sitio."

method for the direct coercion of autonomous communities that fail to fulfil their constitutional and legal obligations or that seriously impair "the general interest" of the state.[42]

Under Article 155, the central government may take, with the authorisation of the Senate, the "necessary measures" to compel the autonomous community to meet the said obligations or protect the aforementioned interest. In accordance with the Agreement of the plenary of the Senate, of 27 October 2017, the President of Catalonia and the rest of the members of the Catalan executive were dismissed and the Parliament of Catalonia was dissolved in order to hold new elections in December 2017. The central authorities substituted the self-governing ones until a new regional government was formed. Although from Catalonia it was argued that Article 155 can operate only via the "power of instruction" (to issue orders or instructions to the bodies, authorities, and officials of the autonomous communities), the Senate authorized and the Constitutional Court later upheld the "power of substitution" (to replace or substitute, either directly or via commissioners, the bodies and authorities of the autonomous communities). Was it realistic to expect the leading Catalan authorities to obey instructions from the central government immediately after declaring independence and manifestly disobeying several rulings of the Constitutional Court? After all, this power of substitution is correlative to the capacity to dismiss the autonomous government and dissolve the autonomous parliament.[43]

The dismissal and dissolution of regional bodies must be distinguished from the dissolution or liquidation of an autonomous community, as well as from the repeal or abrogation of its basic law. Accordingly, measures under Article 155 need to be timebound. The event agreed upon by the Senate to terminate direct state rule was the formation of a new regional government resulting from the new elections called by the central government. Despite not being an explicit date, an explicit event can also be a sufficiently determined

42. See Premier Rajoy's witness testimony in front of the Supreme Court of 27 February 2019.

43. Prestigious Spanish scholars had long endorsed these broad powers under Article 155. See Cruz Villalón, "La protección extraordinaria del Estado," "Las articulaciones de un Estado compuesto," "Coerción estatal" & "Estados de alarma, excepción y sitio"; García de Enterría & Fernández, *Curso de Derecho Administrativo*, 342; Muñoz Machado, *Tratado de derecho administrativo y derecho público general II*, 808.

time limit, according to the Constitutional Court (Judgements 89/2019 and 90/2019). In this respect, the Constitutional Court adopted an interesting functional interpretation of Article 155 ruling that the central intervention shall aim to re-establish constitutional order and territorial autonomy in accordance with that order. Immediately calling elections in Catalonia and ending direct rule from Madrid once the new Catalan Government is formed matches this functional interpretation well. In short, this central intervention sought not to abolish autonomous self-rule.

Until the Judgements 89 and 90 of 2019, the Court had only issued very general and vague remarks on Article 155, namely stating that it was a mechanism of "exceptional control of autonomous communities by the state" (Judgement 27/1987), "an extraordinary means of coercion" (Judgement 49/1988) that "operates as a measure of last resource" (Judgement 215/2014). Therefore, in the autumn of 2017, little was known for certain about the operation and limits of this potent constitutional clause. Some scholars pointed out some interesting ideas or theses, often searching for inspiration in comparative law. Indeed, similar clauses can be found elsewhere, such as in Article 234 of the Portuguese Constitution, Article 126 of the Italian Constitution, and Article 100 of the Austrian Constitution. More importantly, Article 155 was drafted in light of Article 37 of the Bonn Basic Law.

This German constitutional clause seems to allow for the seizure and substitution of regional executive and legislative powers, but neither dissolution of the self-governing unit nor intervention by the army.[44] One particular question was whether Article 155 could be interpreted in a more coercive way than Article 37 since the former, unlike the latter, allows the central government to act not only in the case of a self-governing unit not fulfilling the obligations imposed upon it by the Constitution or other laws, but also to protect "the general interest of Spain." While some argued that the protection of general interests could grant more political leeway,[45] others defended that Article 155 establishes nothing different from Article 37.[46] Following the

44. Vírgala, "La coacción estatal del artículo 155 de la Constitución," 71; Doerfert, "Sezession im Bundesstaat," 712-713.

45. Cruz Villalón, "Coerción estatal' & 'Estados de alarma, excepción y sitio," 57-62; Requejo Rodríguez, "La resurrección del interés general en el Estado autonómico," 164-166.

46. Muñoz Machado, *Tratado de derecho administrativo y derecho público general II*, 807-808; López-Basaguren, "The Secession Issue and Territorial Autonomy in Spain," 246-247.

latter, the Constitutional Court, in Judgement 89/2019, construed a juristic interpretation that harmonized the two requirements: the general interests of the state cannot be assessed beyond the Constitution and the legal order. These interests are to be deduced from and interpreted in accordance with the law. Another difference between the Spanish and the German provisions is based on the constitutional architecture into which they are inserted. Central government action under Article 155 must be authorized by the Spanish Senate, which is a rather nominal chamber of territorial representation. In contrast, Article 37 must be consented to by the German *Bundesrat*, where only the governments of the *Länder* are represented.[47]

From the perspective of constitutional theory, it is interesting that in exercising such extraordinary powers as are given in Article 155, two political branches shall participate, and the Constitutional Court may be asked to review it. Since in such cases regional checks and balances may be considered utopian, central checks and balances are more realistic. The Constitutional Court of Spain, however, adopted an extremely deferential judicial review through several approaches and doctrines:

1. *Time of review.* In the decision of 10 January and 7 February 2018, the Constitutional Court refused to review the measures adopted by the Senate in October 2017 in due time.[48] The Constitutional Court decided to suspend the deadline to challenge the Agreement of the Senate with the pretext that the Catalan Government had been substituted by the Spanish executive and, thus, its proper legal defence was not possible. This senatorial agreement had already been challenged by a group of members of the Spanish Congress and by the Catalan Parliament. Instead of refusing to issue a ruling at a useful time, the Court could have thought of imaginative ways to give voice to the dismissed Catalan Government. The Court even refused to admit the premature challenge by the Catalan Government of the proposal of measures that the central government brought to the Senate for authorization (ruling 142/2017).[49] As a result, a perverse message was sent to future Spanish govern-

47. See Title IV of the German Constitution (in particular, Article 51).

48 Albertí, "Cuestiones constitucionales".

49. Beyond accepting this premature challenge for exceptional reasons or reviving them once they were approved by Parliament, the Constitutional Court could, for instance, dismiss the Government in all functions excepting the power to challenge the measures adopted under Article 155; grant independence to the Catalan Legal Counsel (*Advocacia de la Genera-*

ments willing to trigger Article 155: make sure that the regional government is dismissed to avoid judicial review at a meaningful time.

2. *Decisions subject to review.* The Court only accepted to review the Agreement of the Senate, refusing to review the executive measures to implement it. A Constitutional Court tends to be better prepared and to have more authority to review such extraordinary coercive measures. Ordinary courts do not have enough institutional and social capital to confront the central government in these exceptional circumstances. The Court argues, however, that it can review only those acts that have statutory force. Again, though, substance should trump formalism in these cases.

3. *Tests of review.* Article 155 allows the taking of "necessary measures" to compel an autonomous community to meet its constitutional obligations and protect the general interest. Several academics have argued that these measures ought to be proportional (i.e.: causing as little harm as possible to territorial autonomy) and gradual (i.e.: ordered from having the least to the greatest impact on self-government).[50] In Judgement 89/2019, while admitting that the Senate may use these tests in the act of authorisation, the Court adopted much weaker tests of judicial review. It refused a strict test of proportionality, which requires the adoption of the least severe measures to accomplish the aims of Article 155. Similarly, it rejected a test of graduality, which requires implementation from less severe to more severe measures. The Court therefore granted a broad margin of discretion to the "political judgement" of the Senate, while refusing to pass judgement on the political intentions and the viability of alternative measures.

4. *Legality and Legitimacy.* In this type of judgement, the Court should take into consideration legitimacy as a broader concept than legality. The Court confuses legitimacy with legality, but the latter is not the sole source of legitimacy, especially in exceptional cases and circumstances. For instance, if legitimacy were to be considered in a broader manner, central powers of coercion may apply differently depending on whether unilateral self-determination is internal or external. In a more philosophical approach, the right to external

litat) to challenge these measures; give the parliamentary groups or the political parties the chance to challenge the measures; designate an *amicus curiae*. Nothing like that happened, however, and the Court did not even impose interim measures.

50. Viver et al., "The consultation on the political future of Catalonia," § 9.2.

self-determination should be conceived as more unilateral than the right to internal self-determination, for the latter is more bound by the principles of constitutionalism and sovereignty of the Spanish people. While each minority nation cannot decide the arrangement of the whole multinational state, arguably it can decide unilaterally to withdraw from the union if certain requisites are met. If this is accepted, unilateral internal self-determination could be subject to greater coercion than external self-determination, since the former takes advantage of the union and of the constitutional order but rejects the concomitant obligations imposed by the Constitution or other laws. Remaining in a union requires greater levels of loyalty towards the other members and the whole.[51]

5. *Unity as a principle.* The Constitutional Court considers the unity of the state a higher principle than territorial autonomy. This is long-standing jurisprudence of the Court. Following the already-quoted Article 2 of the Constitution, in the 2019 judgements, the Court maintains that "the structure of the power of the state is based on the principle of unity, the foundation of the Constitution itself." This is just further evidence that once again, when it comes to deep constitutional issues, such as sovereignty, national unity, territorial integrity and constitutional reform, Spain has a strong mononational and unitarian spirit. By contrast, if the constitutional review were to take into consideration legitimacy beyond legality, unity could be given a similar level of importance to autonomy and self-determination. Unity, as a principle rather than a rule, ought not to be applied in an all-or-nothing fashion but in a dimension of weight.[52]

We shall now turn to criminal law. The *Fiscalía* (Public Prosecution Office) considered that the main political and civil leaders committed the crime of rebellion. The *Fiscalía*, which is a centralized institution in Spain, requested 25 years of prison for the former Vice-President of Catalonia, 17 for the former Speaker of the Catalan Parliament and the two civil leaders, and 16 for five other members of the Catalan Government charged with rebellion. Instead of rebellion, the *Abogacía del Estado* (State Legal Counsel), which is even less independent from the Spanish executive than the *Fiscalía*, charged the same Catalan leaders with the crime of sedition and therefore asked for shorter

51. Bossacoma, *Morality and Legality of Secession*, ch. 13.

52. Ibid., ch. 9.

prison terms: 12 for the Vice-President, 11 and a half for the other members of the Cabinet, 10 for the Speaker of Parliament, and 8 for the civil society leaders. In addition to these petitions of imprisonment, penalties of disqualification from holding public offices were requested. As we will see, the final judgement of the Supreme Court essentially coincided with the *Abogacía del Estado*. Paradoxically, although many secessionists have criticized the lack of separation of powers, the outcomes of this case indicate that the closer the prosecution and the Court are to the central executive, the less harsh the punishment.

What are the key differences between these two criminal offences? Despite sharing some features and having certain connections, rebellion is a graver felony than sedition and, correspondingly, so is the punishment.[53] While rebellion requires a *violent* uprising, sedition only requires the uprising to be *tumultuous*. In other words, the element of *violence* is needed in the former whereas the latter just needs the element of *tumult*, which may encompass notions such as hostility, agitation, disturbance, disorder, resistance, force, and intimidation. Arguably, this violence shall be *adequate* in the sense of being suitable and sufficient to bend the will of the recipient of the crime.[54] Thus, despite confirming the presence of violent acts in September and October 2017, the Supreme Court concluded, in Judgement 459/2019, that these episodes of violence were not adequate to impose the independence of Catalonia effectively and the derogation of the Spanish Constitution in this territory.[55]

53. See Articles 472 *et seq.* and 544 *et seq.* of the Spanish Criminal Code.

54. See the Ruling of Justice Llarena of the Supreme Court of 21 March 2018. Also Ruling on appeal of 26 June 2018.

55. This judgement has received different criticisms ranging from interpreting rebellion too narrowly (Gimbernat, "Sobre los delitos de rebelión, sedición y desobediencia en la STS 459/2019, de 14 de octubre") to interpreting sedition too broadly (Llabrés, "Rebelión no, sedición tampoco"). Some considered that the crime of sedition was not only interpreted too broadly but also written too vaguely, and should thus be amended (Paredes Castañón, "¿La sedición como cajón de sastre?") or abrogated (García Rivas, "Injusta condena por sedición," Tamarit, "La insoportable gravedad de la respuesta judicial a 'los sediciosos'") in order to respect several human rights. Others, despite agreeing with the Supreme Court that the acts were seditious, nonetheless recommend the abrogation of this crime (Javato, "El delito de sedición en la STS 459/2019, de 14 de octubre de 2019"). There are also those who agree with the Supreme Court that the actions did not amount to rebellion, but disagree with its legal reasoning (Muñoz Conde, "Sobre el delito de rebelión").

According to this final judgement of 14 October 2019, there was neither a genuine will nor a proper plan to secede unilaterally. Although the Spanish Criminal Code lists "the declaration of independence of a part of the national territory" as one of the objectives of the rebellious, the Supreme Court deemed the Catalan declaration of independence as "symbolic and ineffective." The Court was convinced that the pro-secession leaders were merely trying to put pressure on the Spanish Government to enter into negotiations. The Court nonetheless concluded that the actions of the Catalan leaders were seditious since they caused, directed, promoted, and allowed tumultuous uprisings to impede, by force and by illegal means, the execution of laws and judicial resolutions, orders, and tasks.[56] Sedition is certainly broader than rebellion since it penalizes the impairment of the implementation of legal acts and resolutions as well as hindering the exercise of public functions. In this respect, while sedition is included under the Criminal Code Title "Offences against the public order," rebellion falls under the Title "Offences against the Constitution."

The constitutional order in Catalonia was not seriously put at risk by the actions and plans of the accused, reasoned the Supreme Court. The Court argued that the publication of the aforementioned measures of Article 155 of the Constitution in the official gazette was enough to stop, immediately and definitively, their deceptive secessionist pretensions. The Catalan leaders on trial were implicitly blamed by the Court for having deceived and manipulated many ordinary citizens. Beyond these moral and political reproaches, the Court did sentence many of them to prison in addition to disqualifying them from holding public office: the former Vice-President to 13 years, the five other members of the former Catalan cabinet to between 10 and 12 ye-

56. According to this case law, the crime of sedition may be committed by leading, fostering, or merely facilitating the adequate conditions for massive protests with petty public disorders to hinder or impair the normal functioning of the authorities. If political and civil leaders have too demanding duties to safeguard the public order and face severe criminal consequences in the pursuit of their claims and calls, the free exercise of democracy and the fundamental rights to protest are deterred and imperilled. Paradoxically, if this case were considered a conspiracy or attempt to commit rebellion and, hence, an offence against the Constitution, the judicial precedent would not be so perilous for most leaders of political and social movements. See Martí, "An Exotic Right," and the reply of Ferreres, "Constitutional Conflicts."

ars, the former Speaker of Parliament to 11 years, and the two civil society leaders to 9 years.[57]

Three other members of the Catalan executive were found guilty of contempt of court and sentenced to pay fines of 60,000 € each and disqualified from holding some public positions for up to 2 years. Why were they not all punished for contempt of court? It is difficult to defend that there was no open, public, clear, and persistent disobedience to judicial rulings and, in particular to those of the Constitutional Court. This Court previously stressed that it was not a mere disagreement on the interpretation of the Constitution that was taking place in Catalonia, but a recurrent discourse and action against the binding force of the jurisdiction of the Constitutional Court and of the Spanish Constitution as supreme law. Yet, the Spanish Criminal Code is very mild in punishing public authorities and officials that disobey the rulings of the Courts or hinder their execution.[58] In practise, these penalties were too soft, not to say trivial, for the many who believe that the events that occurred in Catalonia in 2017 were extremely serious and thus deserving of severe punishment. Aware of this, in Judgement 459/2019, the Supreme Court construed sedition as a macro-contempt crime: "a tumultuous, collective disobedience coupled with resistance or force."

Were there grounds for sending them to prison before trial and for keeping them there for about two years? Some may argue that imprisonment was an action that was necessary to stop the uprising that was taking place in Catalonia or to make sure they did not escape to other countries. In this respect, the reiteration of the crime and the risk of fleeing are constitutionally admitted grounds for provisional imprisonment. The argument of recurrence is questionable for, at the beginning of the prosecution, only a few were kept in prison. In March 2018, while central rule under Article 155 was being administered without hindrance, several former members of the Catalan Government were sent back to prison. This imprisonment was ordered when, after the elections called by the Spanish Government, a succession of secessionist leaders facing criminal prosecution were proposed as candidates

57. Being official authorities and spending public money on the illegal referendum partly explains the higher sentences.

58. See Articles 410 and 508 of the Spanish Criminal Code.

for President of Catalonia by the Catalan Parliament.[59] In addition, those formally charged with rebellion are suspended automatically from holding public office during the time they are in prison before trial.[60]

Electing the alleged criminals was perceived as a major challenge and, disputably, as if the institutional machinery of Catalonia were once again being put at their service. However, as far as political legitimacy is concerned, many Catalans voted (again) for the secessionist leaders and parties to show political support for their previous actions and solidarity with them as they were facing harsh criminal prosecutions. These voters told the Spanish authorities and the world that the secessionist leadership was not acting alone, but rather that it had a mandate from the Catalan people. Paraphrasing the classic Spanish play *Fuenteovejuna*, the elections of 21 December 2017 were taken as if these authorities were asking "Who declared independence?" and many ordinary Catalans answered "The people." In fact, as mentioned, the Self-Determination Referendum Act was designed to be binding and followed by a mere formal declaration of independence in Parliament, since the real declaration would have already been made by the majority of Catalan citizens casting their votes in the ballot boxes.

The second main argument for sending them to prison before trial was to avoid them escaping to other countries. Spanish jurisprudence upholds that the more severe the penalties, the greater the risk of escape. Beyond this objective criterion based on rational choice, subjective tests such as personal and family actions, conditions and resources are also taken into account. We cannot go deeply into private circumstances here, so we shall observe more general ones. According to the Supreme Court, the behaviour of the pro-secession leaders showed a recurrent disdain for the judicial authorities and their resolutions. In particular, several leaders fled to different European countries to avoid them (others were tempted to do so but remained or returned). Interestingly, Germany and Belgium refused to return the escapees and, in light of the prospects that the United Kingdom and Switzerland would

59. See the Ruling of Justice Llarena of the Supreme Court of 23 March 2018.

60. See Article 384 *bis* Criminal Procedure Act. Also Ruling of Justice Llarena of the Supreme Court of 9 July 2018. García Rivas, "Injusta condena por sedición". Llabrés, "Rebelión no, sedición tampoco."

refuse extradition as well, the Spanish authorities withdrew their requests.[61] This risk of escaping increases when those facing prosecution have the resources to flee (economic, legal and organizational), a receiving net in other countries, prospects of a reasonable standard of living there and precedents of the foreign authorities rejecting and being unwilling to extradite. Moreover, some of the so-called leaders in exile continued to be prominent figures in Catalan politics and, arguably, the former President Puigdemont continued to be the *de facto* President of Catalonia.

Before closing this section, it is worth noting a paradox between legal punishment and political accountability. Plausibly, the greater the legal threat and retribution through criminal law, the lesser is the castigation through votes and public opinion. While many moderate Catalan sovereigntists disagreed with the unilateral moves of the autumn of 2017 (or perhaps we should say the fall of 2017), they disliked the prosecution and imprisonment of the secessionist leaders for the felonies of rebellion and sedition even more. Furthermore, it is emotionally difficult for moderate sovereigntists to criticize these leaders while the latter are likely to be in jail or exile for a long time. Therefore, excessive or tough legal measures tend to hinder the voice and vote of the moderate factions of pro-secession movements, while fostering extremist reactions. If legal chastisement creates heroes and martyrs, this may weaken restraint, at least in the short run.

61. In its ruling of 12 July 2018, the Higher Regional Court of Schleswig-Holstein considered that such actions would not amount to similarly severe crimes under the German Criminal Code (i.e. those of high treason and rioting). Belgian courts have rejected the European Arrest Warrants for different reasons, some of them based on two 2019 opinions of the UN Working Group on Arbitrary Detention. These opinions called for the immediate release of the imprisoned politicians and activists along with economic compensation and other forms of reparation. The Working Group argued, amongst other considerations, that they are significant political and civil leaders whose actions were covered by freedoms of speech, association, assembly, and political participation, whereas their presumption of innocence was not respected, the elements of violence were nonexistent or insufficient, and the criminal proceedings were discriminatory and aimed at silencing the claim for self-determination. In a similar vein, in 2018, David Kaye, the UN Special Rapporteur on the right to freedom of opinion and expression, already expressed his concern "that charges of rebellion for acts that do not involve violence or incitement to violence may interfere with rights of public protest and dissent."

6. Fear of the Parent State

While in Quebec and Scotland there has been no personal punishment or collective coercion against holding referendums on sovereignty and secession, in the Basque Country and Catalonia criminal prosecutions, institutional coercion and the use of force have been very much present. In the last decade, in addition to the refusal to negotiate and accommodate demands for self-determination, institutional threats and sanctions are distinctive features of the central reaction to tackle and curb aspirations to self-determination in Spain. The lack of negotiated or tolerated ways to pursue independence and the haste in taking unilateral roads may partially explain this peculiarity. Yet criminal prosecution together with other tough coercive measures make negotiation, compromise, and accommodation even more difficult. Some believe that excessive state coercion and repression will nevertheless benefit the secessionist cause. Although this may certainly encourage distrust and fear of the parent state, it also turns the objective of independence into an unrealistic, impracticable one. Even moderate separatists wonder whether we should pursue secession if the costs are so high, or, taking a more individual approach, whether I am prepared to make such a commitment to the secessionist project as to put my life plans at risk.

Stéphane Dion developed an interesting explanatory model to elucidate and predict the democratic support for secession in "well-established democracies."[62] This model is based on the interaction between *fear* of the parent state and the *confidence* of the secessionist group in the viability of its project. According to this model, it is hard for secessionism to become a majority, since two phenomena would be necessary at the same time: that the secessionist group would both fear the parent state and trust its own project. The *fear-confidence* dynamic frequently takes opposite directions: "When one is high, the other tends to be low." As regards the *economic* sphere, if the pro-secession group dominates or is a strong force in the economy of the parent state, it might believe in its chances as an independent state, but would lack sufficient fear of the parent state to act as an incentive for secession. Conversely, if the secessionist group has been economically dominated and suffered grievances, this can act as an incentive for fear of the parent state but also as a disincentive to believing in its own capacity as an independent state. In short,

62. Dion, "Why is Secession Difficult in Well-Established Democracies?".

the richest sub-state units would not have sufficient fear of the state and the poorest would not have enough confidence in their projects. With respect to the *political* sphere, a pro-secession unit that enjoys a significant degree of autonomy would probably not fear the parent state enough to take the path of secession. *Vice versa*, a secessionist group without actual self-government would hardly have sufficient confidence in its own ability to manage an independent state properly.

Under his model, Dion forecasted that Quebec, Scotland, Catalonia and any other region of Western Europe were unlikely to become independent states in the near future.[63] Let us try briefly to apply Dion's model to Catalonia and the Basque Country. In these cases, the political fear engendered by Spain is significant. This fear can be explained by a history of scant liberalism, democracy, and multinationalism, by many Catalans and Basques feeling insufficiently respected, recognized, and represented by the central institutions, by the process of homogenization of nationalities and regions within Spain, and by the rejections of and cuts to legal proposals for protecting and enhancing both self-rule and shared rule, amongst other reasons already outlined in a previous section. Indeed, fear is often fed by both history, in more objective analysis, and memories, in more subjective folktales. In relation to the economic sphere, Catalonia and the Basque Country are wealthier autonomous communities. While in Catalonia many believe that the fiscal deficit is excessive and discriminatory, in the Basque Country there is no economic fear since its fiscal autonomy is broad and protected by a constitutional clause. Catalonia's confidence in its political and economic project seemed rather high, yet heavily dependent on expectations of maintaining or rapidly recovering the liberties and other advantages of European integration. This explains the Spanish strategy of stressing that an independent Catalonia would automatically be outside the EU and would long remain so.[64] This confidence may have declined after the fall of 2017, however.

In general, costs, risks, and expectations affect both the fear and confidence dimensions in both the political and economic spheres. Risks and (transitional) costs are different and much higher if secession is unilateral rather than

63. Ibid., 275.

64. See Bossacoma, *Secesión e integración en la Unión Europea*.

consensual.[65] Transitional costs, in particular, also depend on the powers and institutions of self-government that the seceding unit already enjoys.[66] Paradoxically, by offering a reasonable and viable alternative to secession, federalism and decentralization make secession more credible and feasible. The expectations created by the relationship between the pro-secession group and the parent state are important as well. If the secessionist group fears that the parent state might roll back or cut down the present degree of self-government substantially, even if the current level of self-government is considerable, the pro-secession group might fear the parent state. Finally, as the constitutional agreements and clauses tend to be open to interpretation, the perception as to whether the parent state has satisfied or failed to meet the expectations of self-government is important too. Satisfaction promotes confidence in the parent state, whereas violations of the agreement or the failure to develop it in a multinational way may generate distrust and even fear.

State coercion should be taken into consideration when analysing the dynamics of confidence and fear. Coercion tends to generate fear of the parent state; but it also makes the management of everyday politics difficult and, thus, confidence in the secession project and trust in the pro-secession leadership decline. Beyond day-to-day politics, coercion may convert a soft struggle for secession, based on democratic deliberation, mobilization, and voting, into a hard one, based more on sacrifice, confrontation, and force. By using coercive measures, the authorities of the parent state send an implicit message: the way to secession will not be easy, peaceful, and amicable. The failure of the Catalan attempt to secede in 2017 has spread distrust regarding the secessionist project, particularly among moderate sections of the society. Confidence feeds on success, distrust on failures.

The perception of excessive or disproportionate state coercion may cause an emotional disconnection with the parent state, even if this does not automatically lead to a political disconnection. Coercion and repression may certainly help to enhance the pro-secession majorities in Catalonia. The precedent of direct rule from Madrid and severe penal responses add to the catalogue of grievances that the pro-secession movement brandishes to convince more

65. See Bossacoma, "Secession in Liberal-Democratic Contexts".

66. Roeder, *Where Nation-States Come From*.

and more citizens to support independence.[67] If a clear, strong majority in favour of secession is established, it is unlikely that the central authorities will be able to keep responding to the secessionist challenge by coercive legal means alone. Liberal democracies are, and ought to be, based on persuasion as much as coercion.

7. Final Reflection on the Pursuit of Secession

The pursuit of unilateral secession has nourished polarization, populisms, and authoritarian tendencies in both Catalonia and Spain.[68] Three important Spanish parties (from the far-right to the centre-right) claimed, particularly during the campaigns for the Spanish elections of 2019, that Catalonia should have less autonomy and be more controlled from Madrid. Statutes of autonomy can be amended following their own amending procedures or, indirectly, through a constitutional amendment. The pro-centralization parties are nonetheless unlikely to command the necessary majorities to bring about such reforms. To circumvent these procedures, these parties argued for a permanent suspension of the autonomy of Catalonia through Article 155 of the Constitution. Since permanent direct rule from Madrid was deemed unconstitutional by the Constitutional Court in July 2019, they may try to push for more centralizing legislation and policies while appointing and promoting pro-centralization justices. Regarding the latter, it is worth recalling that *judicializing* the secessionist dispute(s) was a chief strategy of Premier Rajoy's cabinets.[69]

A centre-left party, led by Premier Sánchez, managed to form a coalition government with left-wing parties and with the acquiescence of Catalan and Basque parties. Although this central executive soon entered into nego-

67. In the 2021 elections to the Catalan Parliament, the pro-independence parties finally managed not only to obtain more than half of the parliamentary seats (74 out of 135), but also more than half of the votes (51 per cent). The turnout was low (53 per cent), but not because the pro-secession forces had decided the Election Day that was most convenient for them, since it was the judiciary that forced the elections to be held that day.

68. The rise of the political party *Vox* is an example of this.

69. On the responses and strategies of Rajoy's governments (2011-8) and Spanish political parties, see Cetrà & Harvey, "Explaining accommodation and resistance to demands for independence referendums in the UK and Spain."

tiations with Catalan authorities, major territorial reforms are not likely in the short term. Time seems necessary to strike a meaningful multinational compromise and therefore two periods should be distinguished after the defeat of the unilateral attempt at secession: the *appeasement* deal and the *reconciliation* deal. The first is a sort of modus vivendi agreement to cease centralization and coercion, from one side, and disobedience and unilateral secession, from the other (i.e.: a deal to seek stability). The second deal is a multinational confederal pact to be reached in the medium term. Within this later compromise, a qualified right or procedure to secede ought to be agreed upon—at least regarding the main principles or requisites. In this scenario, secession would be pursued in a consensual, legal, and calm manner. This gradual, staged solution seems a more adequate and pragmatic process towards multinational peace and justice.

We should note an interesting political paradox regarding the pursuit of secession before closing this article. On the one hand, the left-wing Spanish parties seem more ideologically inclined (or less reluctant) to tolerate and negotiate self-determination up to secession if a clear and persistent majority of Catalans so demands it. However, their chances of ruling the rest of Spain following the independence of Catalonia would be significantly damaged, given that many of their votes come from Catalan citizens and, on occasions, they need the support of Catalan political parties to control the central branches of government. Logically following on from that, even though the right-wing Spanish parties are much more ideologically opposed to self-determination and secession, they would be likely to obtain better electoral results and be able to exercise greater control of the central branches as a result of Catalan independence. In short, these ideologies and interests would seem not to coincide. Arguably, this makes the target of secession even more difficult, since the right would be more likely to prioritize principle and sentiment over interest while many on the left might end up giving priority to interest over principle.

In addition to the insurmountable legal obstacles against secession in Spain that we have analysed in this article, the political dynamics between principles and interests make the pursuit of secession in Spain an even thornier issue.

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