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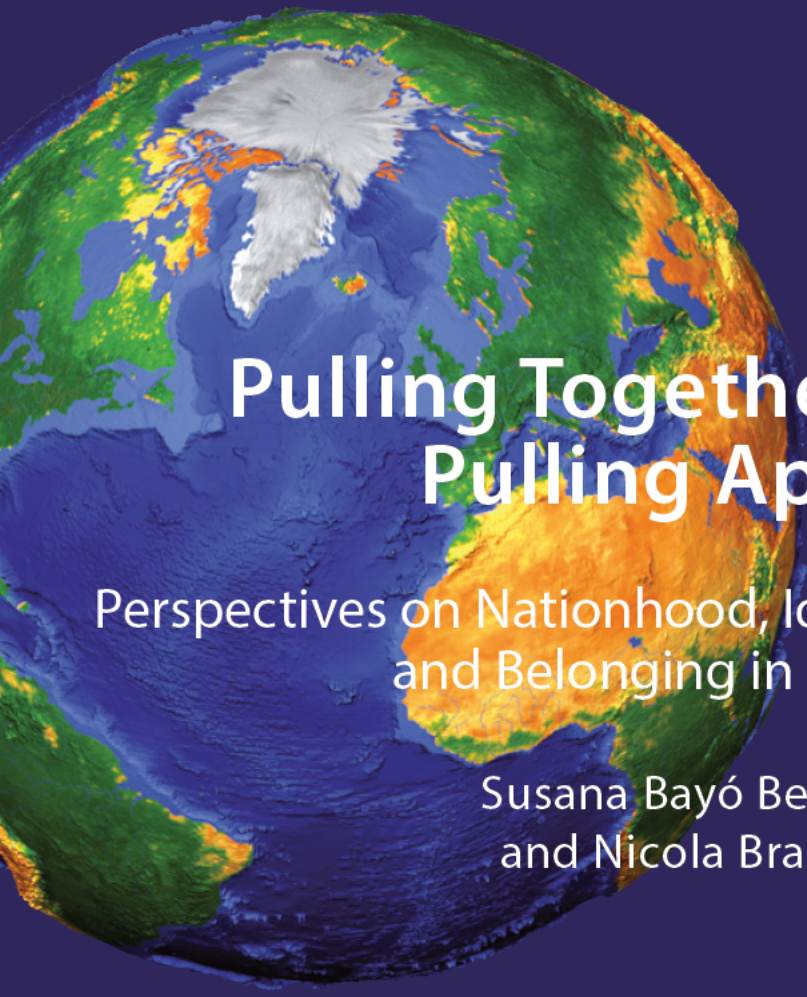

Pulling Together or Pulling Apart?

Perspectives on Nationhood, Identity, and Belonging in Europe

Susana Bayó Belenguer
and Nicola Brady (eds)

Peter Lang

NATIONALISMS ACROSS THE GLOBE

In the aftermath of the twentieth century's raging warfare, attempts were made to create an environment in which new relationships between European nations could be built around a common identity. Yet, in the twenty-first century, identity conflicts are gaining a new intensity in parts of the continent. In the analysis of some sub-state nationalist parties, the prospect of European Union membership reduces the economic and political risks of secession. Meanwhile, to the east, any moves towards expansion of EU membership are viewed by Russia not as a peace project but as acts of aggression. This volume assembles a series of comparative and single-area case studies drawn from different academic disciplines. While interrogating the history of identity conflict in the European context, an essential component of efforts to reduce such conflicts in the future, the authors bring an array of methodological approaches to analyses of the many intersecting political, cultural and economic factors that influence the formation of nationhood and identity, and the resurgence of nationalism.

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Oxford · Bern · Berlin · Bruxelles · New York · Wien

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IÑIGO URRUTIA

The Constitutional Crossroads in Spain

ABSTRACT
Since the Constitutional Court ruling (31/2010) – which included the declaration that interpretation of references to Catalonia in the 2006 Statute of Autonomy as 'a nation' and to its 'national reality' were devoid of legal effect – the Spanish central government has taken approaches to territorial power distribution which have had increasingly severe negative impacts on the autonomy of the Basque Country and Catalonia. Specifically, while the Basque and Catalan Autonomous Communities have begun to question why the current model cannot adapt to some of the more ambitious expectations of self-government, in the Spanish State the present model of devolution has been questioned precisely for the opposite reason: a perception that the model has gone too far. Facing such a complex panorama, this chapter examines the characteristics of the current Constitutional crossroads in Spain, proposing a new constitutional consensus based on the development of democracy and deepening of human rights.

The Starting Point

Throughout recorded history, Spain has been subject to the acquisition and the imposition of so many 'identities', ethnic, religious and social, that their reconciliation under the banner of a single 'State' remains to this day one of the most difficult problems faced by any government. It is little wonder, then, that the model of political decentralization in Spain has suffered constant political tensions since its inception.

Although the Basque nationalist parties did not take part in the constitutional consensus, the 1978 Constitution acknowledged the uniqueness of the Basque provinces, on the basis of historical rights. The first Additional Provision of the 1978 Constitution states as follows:

> La Constitución ampara y respeta los derechos históricos de los territorios forales. La actualización general de dicho régimen foral se llevará a cabo, en su caso, en el marco de la Constitución y de los Estatutos de Autonomía.
>
> [The Constitution protects and respects the historic rights of the territories with traditional charters (fueros). The general updating of historic rights shall be carried out, where appropriate, within the framework of the Constitution and of the Statutes of Autonomy.]

The historical rights of the Basque territories engage directly with claims of a right to special status for the Basque territories, based on the idea of the constitutional recognition for a subject: the Basque people.[1] The constitutional recognition of the forality (Basque ancient legal order) means the legal recognition of the existence of a Basque Country, which has the capacity to govern by itself and for itself (Lasagabaster 2014: 129). The recognition by the 1978 Constitution of these historical specialties was considered by the Basque nationalist parties and the supporters of the ancient law of Navarre as a tool that allowed the Southern Basque territories (the Autonomous Community of the Basque Country and Navarre) a greater degree of autonomy than other regions in Spain. Through this recognition, the Basque territories could design and implement public policies in education, public safety, economic development, and environmental protection, along with a full taxation and financial capacity. Over time, however, this interpretation was challenged legally by the restrictive view of the Constitutional Court in several judgements on the legal scope of the historical status.[2] Consequently, this has reduced the possibility for an asymmetric development of the self-government system, allowing the central state to define the extent of regional powers. Likewise, taxation and financial autonomy, which was initially considered to be a full power of the Basque territories to finance their competencies, has been subjected to central State supervision and control.

1 See also the Additional Provision of the Statute of Autonomy of the Basque Country, and the first Additional Provision of the Statute of Autonomy of Navarre (so called LORAFNA).

2 See Constitutional Courts' Decision no. 76/1988 (2 and 4 legal basis); no. 76/1988 (4 legal basis); no. 140/1990; no. 148/2006; and no. 208/2012.

At the very same time as the Spanish Constitution of 1978 was approved, the problem of the territoriality of the Basque Country arose.[3] Two separate autonomous communities were created, one for Navarra and another for the rest of the Basque provinces. The territorial configuration was rigidly established, and also consolidated by the constitutional prohibition of federations between autonomous communities.[4] In any case, the 1978 Constitution introduced a special clause for an eventual territorial integration of all the Basque territories.

Following the fourth Transitional Provision of the Spanish Constitution:

> En el caso de Navarra, y a efectos de su incorporación al Consejo General Vasco o al régimen autonómico vasco que le sustituya, en lugar de lo que establece el artículo 143 de la Constitución, la iniciativa corresponde al Órgano Foral competente, el cual adoptará su decisión por mayoría de los miembros que lo componen. Para la validez de dicha iniciativa será preciso, además, que la decisión del Órgano Foral competente sea ratificada por referéndum expresamente convocado al efecto, y aprobado por mayoría de los votos válidos emitidos.
>
> [In the case of Navarre, and for the purpose of its integration into the General Basque Council or into the autonomous Basque institutions which may replace it, the procedure contemplated by section 143 of this Constitution shall not apply. The initiative shall lie instead with the appropriate historic institution (órgano foral), whose decision must be taken by the majority of its members. The initiative shall further require for its validity the ratification by a referendum expressly held to this end and approval by the majority of votes validly cast.]

This clause has never been implemented.

The Statute of Autonomy of the Basque Country was passed in 1979, and then approved by a referendum.[5] In Navarre, the Statute of Autonomy was approved in 1992 by a unique procedure, as an Improvement of the Ancient Legal Charter, and without a referendum.[6]

3 With regard to the precedents see the Statute of Autonomy for the Basque Country of 1936.

4 See article 145.1 of the Spanish Constitution.

5 Organic Law 3/1979, of 18 December, on the Statute of Autonomy for the Basque Country.

6 Organic Law 13/1982 of 10 August, on Reintegration and Improvement of the Historical Regime of Navarre.

The Statute was drafted with a view to attributing to the Autonomous Community of the Basque Country (ACBC) all the powers and competencies not reserved by the 1978 Constitution to the central state. It also recognizes the right of the ACBC and of Navarre to almost full financial autonomy through the system of economic agreement or 'covenant'. Also recognized were the powers of the ACBC to manage essential public services such as education and health, welfare and public safety as well as a number of powers in economic matters, such as in agriculture, fisheries, transport and communications, housing, industry and energy.[7]

The major political parties in Spain (minor parties in the Basque Country) have consistently tried to impose conditions on Basque self-government. This was reflected in the Autonomy Agreements signed by the major political parties, which we will refer to below. All the self-government reforms prior to 2004 had been promoted and largely controlled by the central government with the support of both the party in office and the main nation-wide opposition party. In 1981, the two major political parties agreed on the first (so-called) Autonomy Agreement. That Agreement closed the definitive map of autonomous communities in Spain and determined the competencies of each one. It also established the internal organization of the autonomous communities, recognizing legislative powers to all of them, and created a homogenous system of relations between the central state and the autonomous communities, to the detriment of the bilateral relationship established in the Statute for the Basque Country. In short, the agreement was designed to control the timing and the process by which the Autonomous Community would acquire greater powers.[8]

7 See Articles 9, 10, 11, 12 of the Statute of Autonomy of the Basque Country.

8 On the basis of this first Autonomy Agreement, the Organic Law for Harmonization of the Autonomy Process was adopted, regulating aspects of the management of the autonomic process, and also developing the scope of the powers of the State. The Constitutional Courts' Ruling no. 76/1983, of 5 August, overturned much of the content of this law, saying that it contained merely an interpretation of the Constitution, intruding upon the jurisdiction of the Constitutional Court. Since then, the definition of the power-sharing system has been fixed by the Constitutional Court through numerous rulings.

In 1992, the second Autonomy Agreement came into force as a result of a new pact between the two major nation-wide political parties. The aim of this second agreement was to make equal the competencies of all autonomous communities.[9] At the end of the 1990s, and as a result of these top-down reforms, the Statutes of Autonomy of all the autonomous communities formally reached similar levels of power. This egalitarian approach would adversely affect the historical autonomous communities, which would be limited to levels of powers not exceeding the standards accepted by the state parties, also limiting bilateral agreements to strengthen their autonomy. Autonomy was hence homogenized.

The Proposal to Reform the Statute of Autonomy of the Basque Country of 2004: A Missed Opportunity

In December 2004, the Basque Parliament passed a proposal to reform the Statute of Autonomy of the Basque Country (entitled Proposal for a New Political Statute of the Community of the Basque Country). Any reform of a Statute of Autonomy, although formally initiated and proposed by the Autonomous Community's Parliament, had to be submitted to the Spanish Parliament for approval.[10] The proposal was adopted by the Basque Parliament, by absolute majority. In January 2005, it was sent to the Spanish Parliament to be debated and voted on.[11]

9 This was performed firstly by a Transfer Law (authorized by Article 150.2 of the Constitution) on the basis of which some state powers were transferred to the Autonomous Communities – Law 9/1992 of 23 December; and secondly, the Statutes of Autonomy were reformed in 1994, accommodating their content to the competencies previously transferred to the Autonomous Communities.

10 See article 147.3 of the Spanish Constitution.

11 In Spain the Statutes of Autonomy are finally adopted by an Organic Law of the Spanish Parliament (Cortes Generales) requiring the favourable vote of the absolute majority of the Congress of Deputies (the lower chamber).

On 1 February, the consideration of the proposal for a new Statute for the Basque Country was refused by the Spanish Parliament. The Basque proposal was firmly rejected at the initial stage of submission. The reason for the rejection was the proposed new scheme for the relationship between the Basque Country and the Spanish state, based on a free association status, on the grounds that it was not in line with the Constitution. The central state tried by every means to avoid any discussion on the merits of the proposal approved by the Basque Parliament, using arguments of legitimacy and legality, thereby avoiding a democratic debate (Lasagabaster 2005: 1035). The Spanish Parliament thus prevented an actual debate on the quality of Basque autonomy and the will of the Basque institutions as representatives of the Basque people (Lasagabaster 2005).

In fact, the three pillars of the new proposal were the following: first, the recognition that the Basque people have their own identity; second, the legal acknowledgement of the right to decide the community's own future and its relations with the Spanish state; and third, the statute of autonomy would turn the Basque Country into a community freely associated with the Spanish state, with the potential for further change according to the principle of self-determination.

Article 13.3 of the Proposal for a New Political Statute of the Community of the Basque Country contained a clear expression of the democratic principle, harnessing the future legal status of the Basque Country to the popular will. On the basis of this democratic legitimacy, the Political Statute prescribed that, in the case of a clear majority vote of the Basque people in favour of sovereignty or independence, both the Spanish State and the Autonomous Community would be compelled to start a negotiation process. This system was based on the doctrine established by the Supreme Court of Canada to which we will refer later.

Two further features of the proposed reform that also aimed at preserving areas of exclusive competence for the Basque institutions were the mechanisms for power distribution and the system of self-government guarantees. The distribution of powers was set on the basis of 'public policies' rather than on a functional division of competences. The objective was to avoid unilateral interference by the central government in areas attributed to the Basque Country (Jauregi 2005: 1010). Thus, in those areas

in which the proposal determined that the Community of the Basque Country could develop public policies, the central state would have no power to intervene without the consent of the Basque institutions. The new system of legal guarantees was based on the principles of mutual institutional loyalty, co-operation and balance of powers (Article 14 of the proposal). Two mechanisms for conflict resolution were proposed: the Basque Country–Spanish State Bilateral Commission (Article 15) and a special chamber in the Constitutional Court (Article 16).

After the proposal's rejection by the Spanish Parliament, the Prime Minister of the ACBC in 2008 promoted the approval of a Basque law regulating a public consultation for the purpose of ascertaining opinion in the ACBC on starting negotiations in order to achieve peace and political normalization. In June 2008, the Law was finally passed by the Basque Parliament.[12] However, the president of the Spanish government brought an unconstitutionality appeal against it, which was approved by the Constitutional Court in its Ruling no. 103 of 2008, declaring the Basque law unconstitutional:

> La Ley recurrida presupone la existencia de un sujeto, el 'Pueblo Vasco', titular de un 'derecho a decidir' susceptible de ser 'ejercitado' [art. 1 b) de la Ley impugnada], equivalente al titular de la soberanía, el Pueblo Español, y capaz de negociar con el Estado constituido por la Nación española los términos de una nueva relación entre éste y una de las Comunidades Autónomas en las que se organiza. La identificación de un sujeto institucional dotado de tales cualidades y competencias resulta, sin embargo, imposible sin una reforma previa de la Constitución vigente.
>
> [The appealed law presupposes the existence of a subject, the 'Basque people' holder of a 'right to decide' likely to be 'exercised' [art. 1 b) of the contested law] equivalent to the holder of sovereignty, the Spanish people, and able to negotiate with the State constituted by the Spanish nation the terms of the new relation between the state and one of the Autonomous Communities in which it is organized. The identification of an institutional subject provided with such qualities and authorities is, however, impossible without a previous reform of the current Constitution.][13]

12 See <http://parlamento.euskadi.net/pdfdocs/leyes/y20080009_f_cas.html> accessed 16 August 2018.

13 Constitutional Court Ruling no. 103/2008 of 11 September, 4th legal basis (English translation by the services of the Constitutional Court).

The argument of the Court reveals the existence of different conceptions of the democratic principle. For the Basque institutions, the law was considered to be a tool to channel popular will and popular legitimacy, to start a process for changing the current sharing of power. In contrast, the Spanish government understood the Constitution as non-negotiable, as it was so considered by the Constitutional Court.[14]

True to the Spanish state's traditional aspiration to uniformity, the only holder of sovereignty, the Spanish state, interprets territorial unity in the strictest possible sense. In short, Spanish institutions were unwilling to increase self-government as an acknowledgement of the right to decide. However, as we shall see later, the Constitutional Court has recently ruled again on the constitutionality of the right to decide, loosening its previously rigid interpretation.

The Crossroads

After a 2010 ruling in the Constitutional Court (31/2010), the central powers of the Spanish state have taken a recentralization approach to power distribution, with an increasingly severe impact on the quality of autonomy in the Basque Country and Catalonia. Specifically, some communities (especially the Basque and Catalan Autonomous Community) have begun to question why the current model cannot adapt to some of the most ambitious expectations of self-government; in the Spanish state, the present model of decentralization has been questioned precisely for the opposite reason, with arguments that the current model of political decentralization has gone too far. For the first time since the transition to democracy, representatives of the central powers of Spain favoured self-government involution, with the preference now for centralism and cuts in the self-government powers of the current autonomy framework.

14 This was the term used by the Supreme Court of Canada in the Reference re Secession of Quebec, [1998] 2 S.C.R. 217.

As a result of the current crisis of territorial organization in Spain, several scenarios can be discerned.

First, some legal scholars are in favour of a constitutional reform in order to centralize de jure the Spanish state. They argue that the distribution of power between the state and autonomous communities is obscure, inefficient and inadequate (Muñoz Machado 2012: 125; Fernández Rodríguez 2013). In fact, a rethinking of the relationship between the central state and autonomous communities is proposed, giving advantage to the former. The use of harmonization laws is also proposed as a means of reconciling the rulemaking provisions of autonomous communities. The ability of central legislature to enact harmonization laws is provided for in Article 150.3 of the Constitution:

> El Estado podrá dictar leyes que establezcan los principios necesarios para armonizar las disposiciones normativas de las Comunidades Autónomas, aun en el caso de materias atribuidas a la competencia de éstas, cuando así lo exija el interés general. Corresponde a las Cortes Generales, por mayoría absoluta de cada Cámara, la apreciación de esta necesidad.
>
> [The State may enact laws laying down the necessary principles for harmonizing the rulemaking provisions of the Self-governing Communities, even in the case of matters over which jurisdiction has been vested to the latter, where this is necessary in the general interest. It is incumbent upon the Cortes Generales, by overall majority of the members of each House, to evaluate this necessity.]

In addition, the legislative power of the Autonomous Community is called into question.

Second, more nuanced positions can be observed, suggesting that the decentralized system has worked reasonably well, serving to both encourage political participation and also to foster the development of each region in Spain (Quadra-Salcedo 2012; Sánchez Morón 2013).

Third, there is another view, also characterized by dissatisfaction with the current political development, but arguing for the breaking up of the constitutional agreement. These critics claim that the political autonomy of autonomous communities serves only to manage the policies of the central state (Viver 2011). This view leads to political positions demanding constitutional reform aimed at federalizing the state, and even to political positions supporting full sovereignty on the basis of the right to decide (Lopez 2015: 35).

All in all, there are different political options, increasingly far-removed from one another, and giving rise to difficulties when it comes to reaching a new constitutional consensus. In fact, we really are at a crossroads where we are witnessing two opposing processes of nation-building.

There has been an economic crisis, and also a constitutional and values crisis in Spain. In this context, there is a need to rethink the current system of distribution of powers between the central government and the autonomous communities.[15] Beyond purely jurisdictional issues, new perspectives are needed to cope with questions about the territorial configuration of the state, and address the claims for a greater degree of sovereignty raised by Catalonia and the Basque Country. The recent legal reforms driven by the central government are moving along another road, that of a nation-building process, with the aim of centralizing the Spanish state and making it uniform. From the opposite perspective, there is clear dissatisfaction with the current development of power sharing and the decrease in regional powers, giving rise to proposals for a very different constitutional reform, in a federal direction (Seijas 2013: 24) or towards the full sovereignty of autonomous communities. The latter involves a second process of nation building, of a constituent character.

Adapting the Legal Frame of Reference to Political Changes

The right to self-determination is a constantly evolving right which will continue to develop in the future. We should note that this right has not undergone the same development in all geographical or historical contexts, and the conditions governing it are still debated, with a range of views regarding its scope and the validity of this right when applied to

15 See Muñoz Machado (2012: 45) and Quadra-Salcedo (2012) for the view that the regional model and the territorial distribution of power have worked reasonably well; also Sánchez Morón (2013: 35).

non-colonial contexts.[16] The international community is divided about this, and the International Court of Justice has not yet ruled openly on this matter.

Even though decolonization may be considered a common expression of the right to external self-determination, there have been many developments thereof outside the colonial context. To name just a few, apart from the Bangladeshi example, we could consider the reunification of Germany, the international scenario after the breakup of the Soviet Union, Yugoslavia or Czechoslovakia as well as Eritrean secession from Ethiopia.[17]

In the Advisory Opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory[18] there is a clear statement that the right to self-determination is a right that can be applied outside contexts of decolonization. The right to self-determination implies freedom of peoples to decide their political status.[19] Self-determination is simply the right to live in a democracy.

In the view of some, secession is seen just as a remedial measure, and a remedial right, whereby if a mother-state fails to permit a people forming

16 See Hannum (1996: 28).

17 Generally, international practice has established the right to self-determination to be achieved principally through so called 'internal self-determination', by means of autonomy arrangements enabling a people to attain a certain degree of political, social, cultural etc. independence within the framework of an existing state. To what extent the notion of self-determination implies a right to 'external self-determination', and thus enables minorities to secede in order to become independent or associate with a new state, however, remains controversial. See Crawford (1998: 86).

18 ICJ Advisory Opinion of 9 July 2004, on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, paragraph 88, page 39, and paragraph 122, page 184. This clearly states that today self-determination is an erga omnes (i.e. universally applicable) right (cf. East Timor (Portugal v. Australia), 1995 I.C.J., page 102, paragraph 29). See also Case Concerning East Timor (Port. v. Austl.), 1995 I.C.J. 90, 102–3 (30 June) (characterizing East Timor as a 'non-self-governing territory,' whose people 'has the right to self-determination').

19 In the case of the Western Sahara the court of justice stated that the right to self-determination 'requires a free and genuine expression of the will of the peoples concerned' (paragraph 32).

part of it to develop freely, or systematically blocks its development, it is legitimate for that people to have recourse to secession.[20] Remedial secession is seen as an option for special cases. Although neither the principle of self-determination nor the remedial character has been formally resorted to in many secession processes that have taken place in Europe, the international community has recognized such states.

The practice of the international community suggests that there can be other methods or ways for achieving independence. In this regard the Quebec case[21] and especially the ruling of the Supreme Court of Canada concerning Quebec's secession is of particular interest.[22]

The Supreme Court of Canada, after finding that Canadian domestic law did not support a right to unilateral secession,[23] explained that under international law, 'the right to self-determination of a people is normally fulfilled through internal self-determination within the framework of an existing state.'[24] After that, the Court went a step further, drawing on 'the principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities' enshrined in the Canadian Constitution to outline a process of negotiated secession. Following the Supreme Court of Canada: although Canadian domestic law does not condone unilateral secession, 'a clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognize.'[25] The democratically expressed will of the people of Quebec to secede would oblige the Canadian state to engage with Quebec in negotiations

20 See Buchanan (2007: 331–400) presenting a comprehensive argument that '[i]nternational law should recognize a remedial right to secede' where 'secession is a remedy of last resort against serious injustices'.

21 An approach to the context can be found in Dodge (1999: 287). For an in-depth consideration of the possible contours and consequences of Quebec's secession, see Young (1998: 34–40).

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

23 Ibid., paras 32–108.

24 Ibid., para. 127.

25 Ibid., para. 150.

concerning possible separation, at least as a way of obtaining the acceptance of the result by the international community.

From its wording two important conclusions can be drawn: first, the Supreme Court of Canada proclaimed the 'democratic legitimacy' of a hypothetical secession process, provided that a clear majority[26] of Québécois support it by answering a clear referendum question. Second, based on that legitimacy, a negotiated process is required.

Bearing this in mind, let us underline the non-univocal nature of the relationship between secession and the right to self-determination. Secession may come about as a result of self-determination, but not only in that way. Secession can also be based on democratic principles without using the right to self-determination.

In the same way, the International Court of Justice considers that there is not an emerging prohibition of secession arising from the principle of territorial integrity. The conclusion of the International Court of Justice in the Advisory Opinion of 22 July 2010 on the Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo[27] is that '[t]he scope of the principle of territorial integrity is confined to the sphere of relations between States'.[28]

There are no provisions in international law that regulate secession. The secession will be legal if it is an effective political fact. International law does not recognize the right to secession as such, but neither can it be affirmed that international law denies its existence. Despite the international community being extremely reticent with regard to secession, this

26 The Court did not answer the question of what a clear majority is. In 2000, the Canadian government passed the Clarity Act, which obliges Canada to negotiate with Quebec over the terms of a possible separation only in the case of a vote on a question that sets forth a stark choice between either full separation or continued inclusion in the Canadian state. Clarity Act, 2000 S.C., Chapter 26 (Can.). In 2006, based on a proposal made by the EU, Montenegro held a referendum on separation from Serbia that required a majority of 55 per cent to succeed. See Office of Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights, Serbia and Montenegro Referendum 21 May 2006, 14 March 2006, at 3–4.

27 General List No. 141, International Court of Justice (ICJ), 22 July 2010.

28 Kosovo AO, supra note 29, at paragraph 80 (in fine).

is not prohibited by international law, based on the fact that the principle of territorial integrity applies to States.

Things seem clearer, in this regard, if secession is founded upon the right to self-determination as this will provide a more straightforward motivation for recognition by third states. If, on the other hand, secession is not linked to the right to self-determination, international law cannot be said to prohibit making it effective (Summers 2010: 16). In this case secession is not forbidden, it is merely not privileged; and the privilege will be even less forthcoming if the mother-state refuses to recognize the secession. Even so, in cases where secession is not privileged, third states may still recognize the entity that has seceded as a state on the basis of the democratic legitimacy of the process (Urrutia 2012: 138; 2014).

Following Ralph Wilde's approach here, for sub-state groups who aspire to independence the central matter is not so much what the international-law position is on the legality of declarations of independence, but rather their prospects for enjoying the support of at least the kind of critical mass of other states that will make their claim practically viable (Wilde 2011: 153).

Thomas M. Franck contends that '[i]t is wrong, to say there is no right of secession if by that one seeks to convey the impression that any secession is prohibited by international Law' (2000: 335). Malcolm Shaw opines in the same sense:

> It is true that the international community is very cautious about secessionist attempts, especially when the situation is such that threats to international peace and security are manifest. Nevertheless, as a matter of law the international system neither authorizes nor condemns such attempts, but rather stands neutral. Secession, as such, therefore, is not contrary to international law. (Shaw 2000: 136)

Approaching Secession?

In Spain a pro-independence vision is emerging. The right to decide, whose first normative expression was contained in the Draft of the Political Statute for the Basque Country, has become the hub of the sovereignty

claim. In Catalonia, the social push in favour of the right to decide has given way to political statements made by the Parliament of Catalonia on the sovereignty of the Catalan people and their right to decide.

The Parliament of Catalonia Resolution 5/X of 23 January 2013 adopted the *Declaració de sobirania i el dret a decidir del poble de Catalunya* [Declaration of sovereignty and right to decide of the people of Catalonia] which asserted that Catalonia 'sea un ente soberano y "acuerda iniciar el proceso para hacer efectivo el ejercicio del derecho a decidir para que los ciudadanos y ciudadanas de Cataluña puedan decidir su futuro político colectivo"' [is a sovereign entity and 'marks the beginning of a process by which the citizens of Catalonia will be able to choose their political future as a people'].[29]

The Constitutional Court, reaching a unanimous decision,[30] declared the first part of the text, which stated that 'El pueblo de Cataluña tiene, por razones de legitimidad democrática, carácter de sujeto político y jurídico soberano' [The people of Catalonia are, for reasons of democratic legitimacy, a sovereign political and legal subject] to be 'unconstitutional and void' (3rd legal basis).[31] However, it added that the people of Catalonia have 'the right to decide', though not the 'right to self-determination' (4th legal basis).[32] The Court recognized that 'Catalan citizens' right to

29 The Declaration was approved with eighty-five votes in favour, forty-one against and two abstentions.

30 See Ruling of the Constitutional Court of 25 March 2014.

31 See Ruling 25 March 2014, 3rd legal basis ('Se declara inconstitucional y nulo el denominado principio primero titulado "Soberanía" de la Declaración aprobada por la Resolución 5/X del Parlamento de Cataluña' [The unconstitutionality and nullity are hereby declared of principle one, entitled 'Sovereignty', in the Declaration approved by Resolution 5/X of the Parliament of Catalonia]).

32 See Ruling 25 March 2014, 4th legal basis ('Estos principios, como veremos, son adecuados a la Constitución y dan cauce a la interpretación de que el "derecho a decidir de los ciudadanos de Cataluña" no aparece proclamado como una manifestación de un derecho a la autodeterminación no reconocido en la Constitución, o como una atribución de soberanía no reconocida en ella, sino como una aspiración política a la que solo puede llegarse mediante un proceso ajustado a la legalidad constitucional' [These principles, as seen below, conform to the Constitution and enable an interpretation that 'the right to decide held by citizens

decide'[33] fits into the Constitution, if it does not imply self-determination. Such a right is

> una aspiración política a la que solo puede llegarse mediante un proceso ajustado a la legalidad constitucional con respeto a los principios de 'legitimidad democrática', 'pluralismo', y 'legalidad'. De hecho, el Tribunal destaca que la Constitución puede ser reformada a través de los procedimientos previstos para ello, incluso cabe 'modificar el fundamento mismo del orden constitucional.'
>
> [a political aspiration which can only be achieved through a process totally in line with the Constitutional order, following the principles of 'democratic legitimacy', 'pluralism' and 'legality'. In fact, the Court points out that the Constitution can be reformed according to legal procedures, including 'to modify the fundamental grounds of the Constitutional order'.][34]

Moreover, the Court urged the political powers to talk and find agreements, and pointed out that all parts of the current Constitution can be reformed.

The Court wrote that the problems that arise when a particular territory wishes to change its legal status cannot be solved by the Constitutional Court. It could only check that the applicable legal procedures to organize this dialogue are properly complied with. The Court invoked also the principles of institutional co-operation and loyalty to the Constitution, and held that if a region submits a proposal to change the Constitution, the Spanish Parliament should take it into account.

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of Catalonia' is not proclaimed as a manifestation of a right of self-determination not recognized in the Constitution, or as an unrecognized attribution of sovereignty, but as a political aspiration that may only be achieved through a process that conforms to constitutional legality]).

33 See Ruling 25 March 2014, Ruling point 2 ('Las referencias al "derecho a decidir de los ciudadanos de Cataluña" […] no son inconstitucionales' [the references to 'the right to decide of the citizens of Catalonia' […] are not unconstitutional]).

34 See Ruling 25 March 2014, 4th legal basis 'El planteamiento de concepciones que pretendan modificar el fundamento mismo del orden constitucional tiene cabida en nuestro ordenamiento' [Any approach that intends to change the very grounds of the Spanish constitutional order is acceptable in law (lit. 'has a place in our law')].

There is, definitely, a cry here for the political branches to assume the burden of negotiating a political solution to a deeply problematic meeting of opposing views at a constitutional crossroads.

This judgement reveals a new and positive approach to the issue, to the extent that it urges political powers to talk and find an agreement. However, the judgement reveals again a clash of legitimacies: on the one hand, the legitimacy of the constitutional legal order and, on the other, the political legitimacy of the Parliament of Catalonia.

It does not follow from denying a people a certain way of exercising a right that this right does not exist in and of itself. The core question is not whether the Spanish Constitution allows the Catalan people to exercise their right to decide through a referendum, but rather whether the Catalan people is vested with such a right (see Turp 2017: 60).

Definitely, the way opened up by the Supreme Court of Canada leaves open the possibility of a negotiated secession. The approach taken by the Supreme Court of Canada seems to have been assumed, perhaps in a more nuanced way, by the Spanish Constitutional Court when it demanded a negotiation between the Spanish central state and the representatives of the people of Catalonia, or of the Basque Country.

Conclusion

The current recentralization process in Spain presents novel characteristics. In a context of the economic downturn, a constitutional mutation of the horizontal relationships occurred in the exercise of public power. A constitutional mutation or transformation of the nature of political decentralization in Spain emerged which affects the regional capacity to establish public policies on key areas of the welfare state, cultural areas and self-government. Also, we can observe the weakening of social and cultural rights, which are mainly provided by the Autonomous Communities.

This imbalance has produced a situation that makes it difficult to accommodate the national realities and the desires for greater self-government within the Spanish state, and has seen new approaches emerging

that promote a constitutional rupture and are in favour of creating new constitutional legitimacies. We are facing two opposing processes of nation building, working face to face from opposite perspectives.

The unilateral recentralization process breaks the statutory consensus upon which the Autonomous Communities were created and prevents the Basque Country from fully exercising the tools and powers provided by the autonomous institutions. As a result, the capacity for self-government is weakened and opportunities for building up an adequate level of well-being and the sustainable development of its territory are limited within the current legal framework. The self-government model seems to be exhausted due to a de facto constitutional mutation, which lacks the necessary consensus.

At this stage the major unresolved issues relating to the Basque Country include its future relationship with the state, the recognition of the right to decide and the territorial articulation of all the historical Basque territories in order to ensure an appropriate welfare system. In this situation, priority should be given to ensuring the transition to a new phase without violence, thus ensuring opportunities to all policy options that can be defended by democratic means. Basque society is becoming aware of the important role it has in this new phase. The final outcome will depend solely on an accord between the central state and the democratically expressed will of the Basque people. We are facing a constitutional crossroads at which a negotiated democratic solution is needed.

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