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Agora

The Catalonia independence process before the Spanish Supreme Court

The "right to decide" in International Law as grounds for exclusion of unlawfulness

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(A) THE RIGHT TO DECIDE AND THE RIGHT TO SELF-DETERMINATION

It is impossible not to notice that the entire secessionist process has been based on the existence of a "right to decide", convincing the population that this right is protected under international law. Likewise, albeit with some qualifications, from the outset of the trial, all the defendants argued that the so-called "right to decide" is one of the rights referred to in the grounds for exclusion of unlawfulness provided for under Article 20.7 of the Spanish Criminal Code.[1] It was a question that the Supreme Court had to resolve, and it does so in section 17.1 (pp. 198 to 223) of the judgment (pp. 194 to 218 of the English-language version),[2] inquiring into the existence of international, constitutional or statutory foundations, beginning with one undeniable fact: the expression "right to decide" is non-existent in both international legal texts and the 1978 Spanish Constitution [CE] and Catalan Statute of Autonomy. The following paragraphs will review the analysis of its lack of foundation in international law.[3]

The Court begins with the defendants' arguments concerning this right. Because the expression is not reflected in the law, they attributed a political nature to it, whereby the right would be based on a supposed democratic principle, namely, the right of every community to decide its own future. For the Court, the "right to decide" is a euphemism used to explain an "evolved conception" of the right to self-determination contained in Article 1 of the International

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1 "The following persons shall not be criminally accountable: (...) Any person who acts in (...) the lawful exercise of a right (...)."

2 A summary and a link to the full judgment can be found here. An English-language summary and link to an English translation of the full judgment can be found here.

3 An analysis at the European level is provided in the contribution of Javier Roldán Barbero in this same Agora.

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Covenant on Civil and Political Rights (ICCPR), through an "adaptive effort" (p. 200; p. 196 of the English version), combined with the transformation of the monist conception of sovereignty on which the 1978 Spanish Constitution is based into a diffuse and shared conception of sovereignty.

The judgment excellently demonstrates this right's non-existence in international law, using three lines of argument.

(B) THE RIGHT TO SELF-DETERMINATION IN INTERNATIONAL TEXTS

The first argument focuses on the interpretation of "international treaties". The Court explains that it will not address the historical evolution of the right to self-determination, nor delve into the content of the right or the distinction between its internal and external dimensions, nor exhaustively cite all the relevant international texts. It resolves the complexity of the topic — which is indeed complex — through a very successful argument to address the defendants' "artificial assimilation" and "adaptive effort" (p. 200; p. 196 in English): not all interpretations are valid; far from a reading based solely on the "literal tenor of their content", the interpretation of treaties must be "comprehensive" (p. 200; p. 196 in English). This statement is quite commendable.[4]

This *criterion* leads the Court to reasonably conclude that the right to self-determination has consistently been formulated indissociably from a provision safeguarding the territorial integrity of already constituted states, which would be the limit of the right's external dimension (p. 204; p. 200 in English). There is no legal purchase for the "right to decide" in it. Even broadening the possibilities afforded under customary international law or the general principles of law as far as possible does not lead to the opposite conclusion (p. 200; p. 196 in English). The Supreme Court's conclusion is entirely reasonable, in accordance with international positive law agreed upon by the states, and aligned with the virtually unanimous opinion of the international legal literature.[5]

Those familiar with public international law will be surprised by the path the Court took to reach this conclusion. It sufficed to follow the trail left by the International Court of Justice in its references to this fundamental principle of international law (a pre-emptory or *jus cogens* norm, of a customary nature, incorporated into our domestic system automatically (monism), all of which goes unremarked by the Court) and stick to the basic essential texts considered to make up the right of self-determination, as the Supreme Court of Canada did, rather than examine the

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[4] As I have noted elsewhere, these texts must be interpreted in accordance with the legal method specific to international law. Amongst other things, the Court has highlighted, in its own words, the need to eschew "isolated literal errors of interpretation" (H. Torroja Mateu, "Libre determinación de los pueblos *versus* secesión", *Cursos de derecho internacional y relaciones internacionales de Vitoria-Gasteiz 2018* (Thomson Reuters Aranzadi, 2019) 237-388).

[5] As reflected in the "Declaración sobre la falta de fundamentación en el Derecho Internacional del referéndum de independencia que se pretende celebrar en Cataluña" [Statement on the Lack of Foundation in International Law of the Independence Referendum in Catalonia] (of 19 September 2017), signed by more than 400 members of the Spanish Association of International Law and International Relations Professors (*Asociación Española de Derecho Internacional y Relaciones Internacionales*, AEPDIRI) and cited by the Supreme Court elsewhere in the judgement, at 158. See n. 4, *supra*, for a link to the full text of this statement in various languages. See also my comments on the statement in: H. Torroja Mateu, "Reflections on the 'Statement on the Lack of Foundation on International Law of the Independence Referendum that Has Been Convened in Catalonia' on the occasion of its third anniversary", 8 *Paix et Sécurité Internationales – Journal of International Law and International Relations* (2020).

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long list of resolutions, many of them subsequent to 1970 and non-binding.[6] "Nobody's perfect", Dr Araceli Mangas quips about this choice and rightly so (see "A Decent Supreme Court Judgment" above). Nevertheless, this fact in no way undermines the comprehensive interpretation of the international texts or the accuracy of the conclusion reached by the Supreme Court.

(c) The 1998 Opinion of the Supreme Court of Canada

The second argument focuses on the opinion issued by the Supreme Court of Canada on 20 August 1998. The opinion had to be addressed because the defendants had repeatedly cited it as if it were a binding international norm for Spain. In some cases, they even asked the Court to follow the model of its Canadian counterpart and propose a "solution to the territorial conflict". The Court denied this request as falling beyond the constitutional scope of its judicial function, noting, amongst other things, that the Canadian government's request for an advisory opinion from the Supreme Court of Canada in no way resembles the criminal trial for the unilateral act of secession attributed to the defendants (p. 207; p. 202 in English).

That said, the Court used the opportunity to establish the true meaning of the Canadian court's opinion, which is far from the (once again contrived) interpretation presented by the defendants as if it somehow "legitimise[d] the unilateral secession of a part of the territory of any other State" (p. 207; p. 203 in English). The Court dedicated nearly six pages to the inclusion of extensive excerpts from the Canadian Supreme Court's opinion (pp. 205-210; pp. 201-206 in English). Briefly, it shows that the opinion holds that Canadian constitutional law, like all democratic constitutionalism, upholds a dynamic conception of the Constitution and recognizes the right of the participants in the federation to initiate constitutional change. Thus, if a clear majority of Quebecers no longer wished to remain in Canada, they could not be denied the right to initiate negotiations. It is a "right [...] to pursue secession", but not unilaterally; it must be done with the participation of all the co-holders of sovereignty (the federal government and the other provinces and territories of the Canadian federation). Furthermore, importantly, these negotiations must always take into account that "democracy [...] means more than simple majority rule". The components of the federation had been creating material ties of interdependence for the last 131 years [at the time of the opinion] based on shared values, which include federalism, democracy, constitutionalism and the rule of law and respect for minorities. Case closed: the Canadian Supreme Court's opinion does not in any way establish a right to unilateral secession under Canadian law.

Finally, the Spanish Supreme Court also cites a paragraph from the Canadian opinion on international law, which explains that Quebec does not enjoy a right to self-determination as it is neither a colonial people, nor an oppressed people, nor a people that has been denied meaningful

[6] Fundamental texts include the United Nations General Assembly Resolutions 1514 (XV), of 1960, and 2625 (XXV) of 1970, and common Article 1 of the 1966 Human Rights Covenants. Additionally, it makes no sense not to cite the territorial integrity safeguard provision of paragraph 7 of Res. 2625 (XXV) of 1970, only to then cite much later resolutions that simply reiterate what the states agreed on in it. However, it is quite commendable that it cites General Recommendation No. 21 of the United Nations Committee for the Elimination of Racial Discrimination, of 1996, due to its clarity regarding the non-existence of a "right to secession".

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access to government to pursue its political, economic, cultural and social development. Something similar can be said of the people of Catalonia.[7]

In any case, in my view, the Spanish Supreme Court is not bound by another country's domestic rules and case law. Comparative law can serve as inspiration, but it can never compel. There is no international rule obliging Spain to allow a vote on the separation of one of its autonomous communities or any other fraction of its territory. None. Territorial organization is a discretionary sovereign competence of states. The principle of sovereign equality and respect for territorial integrity and national unity prevail here. And, in any event, what the Canadian opinion says is not so different — in its essence — from what the Spanish Constitution already allows: nothing prevented nor prevents the Catalan government from taking its secession plan to the two chambers of the Spanish Parliament (Article 168 of the Spanish Constitution of 1978) to debate and *negotiate with the participation of all the co-holders of sovereignty* a future constitutional reform there. That is what the Canadian Supreme Court suggests be done. In the case at hand, in my view, this is what the representative of another autonomous community did honestly, intelligently and peacefully a few years ago, showing greater loyalty to Spanish society and the country's constitutional law than the defendants have.

(D) OTHER PROCESSES FALSELY CITED AS PRECEDENTS

Finally, the third line of argument in the Court's judgment that we will explore here addresses the comparative references invoked by the defences as legitimizing precedents of secessionist processes, including the case of Montenegro, the attempted secession of Scotland and the case of Kosovo. An international lawyer cannot help but smile inwardly at the thought that the defence teams sought to justify the defendants' action against the Spanish Constitution with examples from other states. The Court could once again have resorted to pointing to the principle of sovereign equality of states and the non-existent international obligation to follow these examples. Instead, it kindly laid out in detail the circumstances of each case, before concluding that they had nothing to do with the present situation.

Montenegro's separation was provided for in the 2003 Constitution of the former state of Serbia and Montenegro. Scotland's attempt was the result of a formal negotiation process between the Scottish authorities and the British government for which there was no constitutional obstacle, a fact facilitated by the lack of a written constitution in the United Kingdom. Kosovo is a singular case, *sui generis*, with a marked origin in an ethnic and political conflict, and it thus cannot be exported as a precedent for other cases, as reiterated both by the states that have recognized it and by the European Union itself.[8]

The Court's assessment of the International Court of Justice's conclusion in its advisory

[7] Amongst other aspects of this argument by the Supreme Court of Canada that I do not share, I am critical of the third ground for being a holder of the right to self-determination of peoples, as it is the product of an isolated literal interpretation of the provision safeguarding the territorial integrity of a state contained in paragraph seven of General Assembly Resolution 2625 (XXV), of 1970, a ground that the Court itself considers *lege ferenda* elsewhere in its statement. I have discussed the misguided nature of this paragraph of the Supreme Court of Canada's decision elsewhere (see H. Torroja Mateu (2019), *op. cit.*).

[8] The end of this argument inexplicably includes an excerpt from UN General Assembly Resolution 68/153, of 18 December 2013. It is most likely a mistake, as Kosovo was not subject to "colonial or alien domination or external occupation", but rather was under the interim administration of a United Nations peace-keeping operation (UNMIK) (at 219).

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opinion on Kosovo, of 22 July 2010, is quite accurate. The fact that the Court found Kosovo's unilateral declaration of independence to be in conformity with international law does not mean that it also found it to be "the result of a right to create a separate State". The legal reasoning is commendable: it cannot be inferred from the absence of an international prohibition on unilateral declarations of independence that the ICJ is affirming that there exists a right of unilateral separation from a state. The Spanish Supreme Court could not have said it better.

In short, there is no right to decide in international law. It was a figment of the defendants' imagination, to which they attracted nearly two million Catalans, who voted for them trusting that the leaders were operating in the realm of reality, the realm of the reasonable, the logical, and the true, in which the subject adapts to the observed external object. The Court shows quite well that this was not the case. In the next section of its judgment (17.1.5), it demonstrates the non-existence of the "right to decide" in the scope of the Spanish domestic legal system (examined elsewhere in this part of the Agora).

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