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Claims for Secession and Federalism

A Comparative Study with a Special Focus on Spain

Springer

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Constitutionalizing Secession in Order to Harmonize Constitutionality and Democracy in Territorial Decentralized States Like Spain

Benito Aláez Corral and Francisco J. Bastida Freijedo

Abstract This text aims to analyze whether constitutionalizing a secession procedure is an adequate way to harmonize the roles of constitutional legality and democracy in regard to the secular territorial debate in Spain. The main reason for a positive answer to that question is the current blocking of the territorial debate in multi-ethnic Spain and the view of secession procedure as a legal tool to strengthen the binding force of the Spanish Constitution, threatened by separatist movements. As long as the constitutional amendment procedure helps in democratic States to preserve and safeguard the differentiation of the legal system, becoming a legal path to express the will of the people's constituent power as a legally constituent-constituted amendment power, and as long as the Spanish Constitution lacks absolute substantial limitations upon the constitutional amendment, in particular national unity, a right to secede may be constitutionalized using the aggravated constitutional amendment procedure of art. 168 SC. The future constitutional clause on secession, which should be coherent with the remaining constitutional principles and values, will constitutionalize the external right to self-determination of the Spanish Peoples, nowadays organized in Autonomous Communities, and will allow them unilaterally counter the binding force of the Spanish Constitution over their territories. This secessionist decision shall take place in two decisive steps through a constitutional amendment procedure set by the constituent power of the Spanish People: initiative one by the qualified majority of the regional Parliament's representatives; and decision one, voted in a referendum by the qualified majority of the Territory's electors. In between these two stages an intermediate negotiation phase of 2 years should take place, in which the seceding territory and the Spanish central Government must negotiate in order to find another non-secessionist type of constitutional amendment that could prevent the secession or, if this is not possible, the concrete conditions of the secession.

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1 Why Constitutionalizing Secession?

1.1 The Blocking of the Territorial Debate in Spain

Following Peoples's and Bailey's definition of ethnicity (2011, p. 387) Spain can be considered today a pluri-ethnic State, containing not different sovereign nations or peoples, but self-governed Autonomous Communities, with their own cultural and political identity, that live and have lived together for centuries under a common political structure and seek different degrees of self-determination, from the enjoyment of political autonomy within the Spanish State to secession in order to build a new sovereign State.

The Spanish Constitution of 1978 (SC) reflects to a great extent this idea of pluri-ethnicity in its art. 2, which recognizes the right of nationalities and regions composing Spain to enjoy political autonomy within the unity of the Spanish Nation and at the same time recognizes and protects their "*foral*" rights in its Additional Provision nr. 1 (historical self-government rights of the different territories of the Spanish Monarchy, dating back to the Middle Ages). Which nationalities or regions are entitled to access to political autonomy is laid down in art. 143 SC, combining an ethnic and a "will" element: "bordering provinces with common historic, cultural and economic characteristics, insular territories and provinces with a historic regional status may accede to self-government and form Self-governing Communities in conformity with the provisions contained in this Part and in the respective Statutes".

The self-government aims of these Spanish territorial communities have been developed and extended in the last 40 years with the help of the provisions of Title VIII SC, the Autonomy Statutes, the Acts foreseen in Art. 150 SC and all the case-law of the Constitutional Court, but not for the first time in Spanish history this path has not helped to put an end to the territorial debate in Spain and once again we now face a situation where some parts of the State aim for a degree of self-determination not covered by the constitutional framework, not even with the allowed constitutional mutations (in the sense of Böckenförde 1993, p. 6) that have taken place in the last years.

That is why it seems reasonable to look for constitutional tools that may help to reorganise the territorial issue and that contribute to creating a more stable solution than the one represented by the "State of Autonomies". Taking into account the evolution of support for secession since 2002 showed by Grau (2011, p. 200) and reflected in the political surveys of the Basque Country (http://www.ehu.eus/documents/1457190/1525260/EB+mayo+14+web.pdf) and Catalonia (http://ceo.gencat.cat/ceop/AppJava/loadFile?fileId=23053&fileType=1) in recent years, but also in a stable support of almost half of the Catalonian electorate to pro-secession political parties, such as JuntsxCat, ERC and CUP, along the regional elections since 2012 (https://www.idescat.cat/pub/?id=elepc&lang=en), it is not clear whether only a constitutional amendment transforming Spain into a formal asymmetric Federal State could be enough to stop the growing desire of many citizens of those historical

nationalities to identify self-determination with the right to secede, no matter how real the historical and legal background for this expectation.

A unilateral right to secede is not covered by the Spanish Constitution according to recent Judgments of the Constitutional Court (STC) 42/2014, of 25th March 2014, Grounds 3°-4° (https://www.tribunalconstitucional.es/ResolucionesTraducidas/STC%2042-2014E(2)%20%20DECLARACION%20SOBERANISTA%20%20SIN%20ANTECEDENTES.pdf), STC 114/2017, of 17th October, Ground 2°.A.b.(https://www.tribunalconstitucional.es/ResolucionesTraducidas/Ley%20referendum%20ENGLISH.pdf) and STC 124/2017, of 8th November, Ground 5°.c (https://www.tribunalconstitucional.es/ResolucionesTraducidas/Ley%20transitoriedad%20ENGLISH.pdf), because it is, as such, incompatible with the Constitution's supremacy clause (art. 9.1 SC), the attachment of the "national" sovereignty to the Spanish People (art. 1.2 SC) and the indissoluble unity of the Spanish Nation (art. 2 SC). Regardless its consideration from the point of view of criminal law, any attempt to secede -even through peaceful means- implies an attempt to perform a "constitutional breach", because in a State ruled by the law (art. 1.1. SC) all ends have to be prosecuted through legal means. Therefore, according to art. 168 SC the secession of any part of the Spanish realm, though a possible political end, is for now legally conditioned to a constitutional amendment decided by referendum of the whole Spanish people.

Besides this, the right to secede is not generally recognized either by the international law, as the Supreme Court of Canada in Quebec's case (Reference Re Secession of Quebec, [1998] 2 S.C.R. 217) and, in our country, Rodríguez-Zapata Pérez (1999, pp. 107–108) have pointed out; even though it is also true, as Mancini (2012, p. 487) remarks, that neither does international law exclude the possibility of this right to secede being legalized by the States. According to a widely accepted interpretation of art. 1 ICCPR and art. 1 ICSER (Raic 2002, p. 228; Medina Ortega 2014, p. 145; Mangas Martín 2013, pp. 50–53), the right to self-determination of peoples only grants the internal self-determination (political autonomy) of non-colonial peoples, which are not under the power of a foreign State, but does not grant their external self-determination (secession). This interpretation follows UN Resolution 2625 (XXV) containing the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations as the only way to harmonize the right to self-determination of peoples and the principle of respect for the territorial integrity of States, which is only subordinated to the latter and therefore accepts external self-determination and secession only as a "remedy-right" of non-colonial peoples (according to the classification of Buchanan 1997, p. 34) for the cases where the State to which they belong does not respect their right to internal self-determination or the equal human rights of their citizens, which is not the case of Spain's nationalities and regions. The Opinion of the International Court of Justice in the case of Kosovo A/64/881 of 2008 has not changed this interpretation, inasmuch as the Court did not declare the illegality of Kosovo's secession according to International Law, and did not declare either that peaceful secession is generally

legal, as long as it depends also on the internal constitutional law of the State concerned (Medina Ortega 2014, p. 167).

In sum we can conclude that the territorial political debate in Spain is legally blocked (López Basaguren 2013, p. 99) and this blockade is a highly dangerous situation for the efficacy of the constitutional system, as long as some Spanish Autonomous Communities (namely Catalonia and the Basque Country) may try—and indeed have tried—to fulfill their external self-determination beyond the constitutionally provided means. In such a context the Spanish central institutions may rely only on the need to enforce the disobeyed binding law through the application of the criminal code by the judiciary -when therefore a crime is committed- and make use of the federal coercion measures foreseen in art. 155 SC, suspending the normal functioning of the Autonomous Government (https://www.boe.es/boe/dias/2017/10/27/pdfs/BOE-A-2017-12327.pdf), without seeking a democratic and at the same time legal way out of this blockade. The always existing possibility of a legal overreaction by the Spanish central institutions in its commitment to enforce the law and to restore constitutional legality through federal coercion may as well contribute to give potential legitimacy to the -up to now- not-existing right to external self-determination of the Autonomous Communities. For that reason we aim to explore the possibilities of constitutionalizing a secession procedure as a functional way to eliminate this situation, harmonizing the respect for constitutional legality and for a modern open democratic principle. Democracy is not before and over the rule of law and it cannot be decided democratically who has to decide about the territorial borders of a legal system (Offe 1998, p. 117). But equally law is not *per se* vested with democratic legitimacy, which is required in complex modern societies to grant law's stability, and it should aim to get rid of the territorial blockade when it threatens Constitution's efficacy in part or the whole of the State's territory.

1.2 Constitutionalizing Secession in Order to Strengthen the Binding Force of the Constitution

An open constitutional democracy like Spain should not close itself to the possibility of internalizing the expectation of part of the State territory to secede, because this would run against its functional role of stabilizing political expectations, especially if there is an attempt to impose this expectation by illegal means and the legal system has to pay the price in terms of democratic legitimacy of the coercive imposition upon institutions and thousands of citizens of the legality of the blockade. The safeguarding of the legal system's binding force should lead the Constitution to leave open or even institutionalize legal ways that may allow and at the same time control this expectation of external self-determination, whenever there is a clear overwhelming majority of citizens of a territory wishing to secede.

Contrary to the material understanding of the Constitution of scholars such as Ruipérez Alamillo (2013, p. 89), we think that taking the normativity of the

Constitution seriously implies that the preservation of its binding force as a legal form (regardless of its specific content) and the correlative efficacy of the whole legal system have to take priority over the enforcement of a particular constitutional provision, no matter how important it is politically. Therefore looking for democratic constitutional arrangements between the territorial minorities and the State's majority, which could help to preserve respect for the Constitution as the highest law of the country, is more valuable than the preservation of the territorial integrity of the State or the unity of a sovereign people. In other words, if the legal system is, according to Luhmann (1993, p. 131), a self-referring and a positive social system, it is inclined to organize norm production in a democratic way in order to preserve its functional differentiation. The confrontation between constitutional legality and the democratic principle is always the consequence of a weakening of the former through a pre- and meta-legal understanding of the latter on the basis of attaching sovereignty to a pre-constitutional people (German, Spanish, Catalan, Basque, etc...), as for instance does Isensee (1989, p. 705). As long as democracy is the type of structuring of the legal system that best reflects its positivity and self-reference (Bastida Freijedo 1998, p. 389), it cannot be understood as the pure majority ruling nor be blind to the existence of a territorial minority which might seek secession. The modern pluralistic understanding of democracy since Kelsen (1920, p. 36) requires constitutional democracies to accommodate as much as possible the expectations of the majority and the expectations of the minorities, and this need is especially compelling in territorial decentralized States if the minority within the State's population represents or can become a majority within a territorial collectivity of the State. As the Supreme Court of Canada stated in its Decision Reference Re Secession of Quebec, [1998] 2 S.C.R. 217, 254, democracy is fundamentally connected to substantive goals; most importantly, the promotion of self-government and in federal systems accommodates cultural and group identities besides the majority rule. That would apply as well to Spain, where democracy is a constitutional value as much as the decision to territorially decentralize power (for now by means of Autonomous Communities).

In other words, in highly complex modern societies a democratic legal system can only preserve its legitimacy, understood as the generalized readiness to accept normative decisions regardless of their content (Luhmann 1978, p. 28), provided that it has legal procedures channeling secessionist expectations. The imposition of the present constitutional law with the help of federal coercion (art. 155 SC) or the judiciary enforcing criminal law, though legitimate, does not grant any further legitimacy to the legal system, because it merely eliminates the expressions of the secession challenge but not the roots of the challenge itself, as the results of the Catalonian election in December 2017, after the application of federal coercion by the Spanish Government and the ongoing criminal judicial proceedings against political leaders of the secession process, show (http://gencat.cat/economia/resultats-parlament2017/09AU/DAU09999CM.htm?lang=es). Coercion at this level of the legal system makes it more rigid but not necessarily more stable in terms of efficacy, which is the purpose of democratic legitimacy, because the State's living-together has to be imposed with the threat of the use of force.

The sovereignty of the People plays a better role in the democratic legitimacy of the legal system if its legal expression, the Constitution's amending power, allows

territories hoping to secede to break free democratically and legally with the Spanish legal system (Aláez Corral 2012, p. 415). Looking for general, long-term, democratic and legal constitutional arrangements, this would require an amendment of the Spanish Constitution establishing a new special amending procedure for the peaceful and legal external self-determination of the existing Autonomous Communities; that is, constitutionalizing a formal procedure of secession that releases the seceding territory of the binding force of the mother State's Constitution, as already proposed in general terms by Wood (1981, p. 110) Tosi (2007, p. 293) and Buchanan (2013). Such a new secession procedure would express the democratic binding force of the legal system, on the one hand because it would be flexible enough to provide for a legal path to unilateral secession and would not allow only coercive repression of peaceful secession expectations, and on the other hand because it would reinforce the stability of the legal system, depriving of legitimacy the attempts at secession beyond legal channels. The supposed sovereignty of the Catalan, Basque or whatever Spanish people could only be exercised through the constitutionalized secession procedure, and conversely the sovereignty of the Spanish People could only be recalled to comply with the conditions established in that constitutionalized procedure.

This proposed way out of the blockade is not just to organize or allow a non-binding consultation to know the political opinion of the Catalan, Basque, etc... citizens regarding their identity and self-determination, nor to let the central Spanish Government and the Spanish People through a referendum in accordance with the former consultation amend the constitution to make directly effective the secession of some part of the country. That would only mean a hetero-determination and not the external self-determination sought by the secession procedure, and would in any case be a short-term solution for a specific and serious situation.

Some constitutional Scholars have argued against constitutionalizing a secession procedure (Sáiz Arnáiz 2006–2007, pp. 36–42; Sunstein 1991, pp. 634–635). These arguments are, among others, that such a secession procedure would contradict the will of stability and permanence of the Constitution, because constitutionalism is the opposite to secession; that it could create more serious political or ethnic conflicts than the ones the procedure would try to address; that the political nature of secession would make impossible the constitutional review of such secession clause before the Courts; that having such a procedure would reduce the possibilities of deliberative debate in order to reach a political compromise between the parts and the whole of the federal Government, with the related increased blocking of the adoption of decisions concerning ordinary political life; or the risks of political blackmailing and strategic political handling by the territories threatening secession, which could endanger long-term governance.

Regarding the first argument it can be counter-argued that the stability and permanence of the Constitution they refer to is that of a material Constitution, that is, of concrete constitutional binding contents, not that of the formal Constitution as a higher law-form that aims to preserve itself regardless of its particular constitutional contents and its specific territorial or personal scope of efficacy. Indeed, the Constitution must be understood in contemporary constitutionalism as an evolutionary outcome of the differentiation of the legal system (Luhmann 1993, p. 470). As a

consequence of this, the constitutional amending power becomes the power to domesticate and therefore legalize revolution, that is, to allow the continuity of the legal system however profound would be its substantial transformation, including a revolutionary reduction of its territorial scope of application. Regarding the conflicts argument, it can be said that, although it could have been politically too risky, in terms of governance stability, to introduce a secession clause at some stages of Spanish history—as was the case of the Transition in 1975–1978-, after almost 40 years of constitutional democracy it does not seem rash to explore new ways to get out of the blockade of the territorial issue and constitutionalizing secession seems to be an appropriate option. Regarding the political nature of secession, it can be said for now that every constitutional issue—not only secession—is of a political nature and the higher or lower constituent consensus on it does not determine the possibility of its constitutional review. So, for instance, the Spanish Constitutional Court has intensely and decisively adjudicated through specific judicial review procedures on the politically open constitutional provisions on territorial decentralization, but conversely has not done the same on the highly specific constitutional provisions on the Monarchy, whose judicial review lacks a specific procedure for that purpose. Besides that, the absence of a secession clause has not prevented the judicial review of some practices of the Catalan Government calling for a people's consultation on external self-determination on the basis of competence in this question, concept of a referendum, sovereignty and democracy, etc..., in all cases issues as much political in nature as secession (see STC 103/2008, of 11 September, Ground 4° (https://www.tribunalconstitucional.es/ResolucionesTraducidas/103-2008,%20of%20September%2011.pdf) and STC 114/2017, of 17th October, Ground 5° (https://www.tribunalconstitucional.es/ResolucionesTraducidas/Ley%20referendum%20ENGLISH.pdf) and STC 124/2017, of 8th November, Ground 5° (https://www.tribunalconstitucional.es/ResolucionesTraducidas/Ley%20transitoriedad%20ENGLISH.pdf).

Finally, regarding the political blocking, blackmailing and governance stability risks, as Weinstock (2001, p. 182) and Shorten (2014, p. 99) point out, those arguments can be diminished if the constitutionalized secession clause is a qualified majority one, legally designed to force those in favour of secession to make a rational assessment regarding the cost/benefit of seceding or remaining within the federal State and negotiating with the federal institutions, taking into account the constitutional hurdles of secession and its impact over its own political position within their territory.

2 How to Constitutionalize Secession in Spain

2.1 Through Constitutional Amendment Notwithstanding the National Unity Clause

The Spanish Constitution explicitly determines which constitutional powers and competences belong to every Governmental Institution and does not share between

the territorially decentralized and the central Government institutions the power to call for a referendum on self-determination. Therefore there is no place for a non-formal secession arrangement according to the democratic principle as Canada's Supreme Court recalled in Quebec's case. The appeal to the democratic principle on its own is not enough to empower the Autonomous Communities with competences, like calling for a referendum on self-determination, which have not been decentralized according to art. 149.1ª.32 SC and remain in the hands of the central institutions (López Basaguren 2013, p. 95). This interpretation has been definitely confirmed by the last case-law of the Spanish Constitutional Court (STC 114/2017, of 17th October, Ground 5° (https://www.tribunalconstitucional.es/ResolucionesTraducidas/Ley%20referendum%20ENGLISH.pdf)). The general provision of a secession procedure with a previous or subsequent regional referendum on the external self-determination of any of the people's composing Spain must be introduced by means of a constitutional amendment.

The supremacy clause established by the Spanish Constitution in its art.9.1 expresses without any doubt the positivity of the Spanish legal system and is fully confirmed by the provision of two aggravated amendment procedures in Title X of the Constitution. The first one, for the ordinary constitutional amendments (art. 167), and the second ultra-aggravated procedure, for the total change of the Constitution, or an amendment affecting the core content of the Constitution to which the State's territorial organization, the national unity and the territorial integrity as well as the attachment of the national sovereignty to the Spanish people (art. 168) belong. In other words, the Spanish Constitutional system, in order to preserve its efficacy, institutionalizes ways of change and admits the total amendability of its constitutional content, including the addition of a secession procedure (STC 259/2015, of 2nd December, Ground 5° (https://www.tribunalconstitucional.es/ResolucionesTraducidas/STC%20259%20-%202015%20%209N%20(English).pdf)).

Certainly, it could have been possible for the Spanish Constitution to have prohibited expressly or impliedly the amendment of concrete constitutional provisions through the so called "eternity clauses", such as art. 79.3 German Constitution (regarding human dignity and the fundamental principles of a democratic social state, rule of law and federalism), art. 139 Italian Constitution and art.89 French Constitution (regarding the democratic republican form of government), art.193.4 and art. 194.2 Swiss Constitution (regarding international ius cogens law) or art. 288 (a) Portuguese Constitution (regarding, among others, the State's territorial unity) have done. In all these cases the legal amendment of protected issues is not possible and could only take place through an extra-legal exercise of the original constituent power. Even though more and more countries include such eternity clauses in their Constitutions (Roznai 2013a, pp. 665–670) those provisions can only be fully effective if they are self-referring and they apply also to themselves (Aláez Corral 2000, pp. 211–221). Otherwise it could be possible to change the prohibited content through a two-step amendment: first eliminating or altering the scope of the eternity clause and then amending the no longer blocked constitutional content (Biscaretti di Ruffia 1949, p. 165). So, for instance, as long as the US Supreme Court since Dillon v. Gloss (256 U.S. 368 (1921)) abandoned the idea of

implied substantive limitations upon the amendment power of Art. V US Constitution, a secession right could be constitutionalized in the US Constitution, even though the present text does not contain such a right for now (de Miguel Bárcena 2014, p. 20), as the Supreme Court expressly affirmed in Texas v. White (74 U.S. 700 (1869)).

According to a material understanding of the Spanish Constitution, it has been argued against the possibility of secession via constitutional amendment (Tajadura Tejada 2009, pp. 380–382) that the national unity is an implied substantial limitation to the Constitutional amending power and that therefore secession could only take place extra-legally by means of the original constituent power of the Spanish People (Ruipérez Alamillo 2013, pp. 131–133). Two textual counter-arguments speak against the existence of this implied limitation. First, Title X of the Spanish Constitution does not mention any substantial limitation upon constitutional amendment, unlike what happens in all of the other above-mentioned legal systems with eternity clauses, especially those that include the State's unity expressly (art. 288 a) Portuguese Constitution) or impliedly (art. 5 related to art. 139 Italian Constitution, as interpreted by Sentenza 1146/1988 of the Italian Constitutional Court) within them.

Secondly, on the grounds that art. 168 SC allows a total amendment of the Constitution or an amendment affecting the constitutional provisions of the Preliminary Title, where art. 2 of the indissoluble national unity is placed. Both constitutional provisions should be interpreted in the most harmonic way (practical concordance) and consequently, as Rodríguez-Zapata Pérez (1999, p. 118), Sáiz Arnáiz (2006–2007, p. 37) or López Basaguren (2013, p. 88) for Spain and Modugno (1999, p. 1013) for Italy have also concluded, the national unity limits the under-constitutional implementation of the territorial decentralization via the Autonomous Communities (STC 31/2010, 28th June, Grounds 3°, 7°, 12° (https://www.tribunalconstitucional.es/ResolucionesTraducidas/31-2010,%20of%20June%2028.pdf)), but does not limit the ultra-aggravated constitutional amending power (STC 103/2008, of 11th September Ground 4°(https://www.tribunalconstitucional.es/ResolucionesTraducidas/103-2008,%20of%20September%2011.pdf); STC 114/2017, of 17th October, Ground 2°.A.b.(https://www.tribunalconstitucional.es/ResolucionesTraducidas/Ley%20referendum%20ENGLISH.pdf) and STC 124/2017, of 8th November, Ground 5°.d (https://www.tribunalconstitucional.es/ResolucionesTraducidas/Ley%20transitoriedad%20ENGLISH.pdf)). The unity of the Spanish Nation does not represents the (supra) legal foundation of the State and the Constitution itself, because, even though the (Spanish, Catalan, Basque, etc...). Peoples -the Spanish, the Basque, the Catalonia, ones, etc...- could be considered already historical existing realities, as a legal concepts they are created only by their recognition in the Spanish Constitution or in the Statutes of Autonomy (STC 42/2014, 25 March, Ground 3° (https://www.tribunalconstitucional.es/ResolucionesTraducidas/STC%2042-2014E(2)%20%20DECLARACION%20SOBERANISTA%20%20SIN%20ANTECEDENTES.pdf)).

The fact that the Spanish Armed Forces, according to art. 8 SC, "safeguard Spain's sovereignty and independence and defend its territorial integrity and constitutional order" does not change any point in the above-mentioned argument.

Precisely because one of the Spanish Armed Forces' tasks is to defend the constitutional order and to this order belongs the possibility of legally changing or eliminating the mandate of the national unity, the territorial integrity of the State is not related to a metaphysical and supra-constitutional understanding of national unity, but to national unity as it has been characterized by the constitutional order. And as we have seen this is an amendable type of national unity.

2.2 The Need to Follow the Ultra-Aggravated Amendment Procedure

After clarifying that nothing withstands constitutionalizing a new secession procedure, it is necessary now to ask how it can be done, in other words which amending procedure has to be followed for that purpose.

However, before this, it should be said that we are talking about formal constitutional amendment procedures, not about any update of the historical-material constitutional concept, which understands it as a political agreement between the *foral* territories (among them Catalonia or the Basque Country) and the Spanish Monarchy, understood as pre-constitutional bodies (Herrero de Miñón 1998, pp. 88, 320). Such a constitutional understanding is not only inadequate from the point of view of the functional differentiation of politics and law, but also deeply undemocratic from the point of view of the equal and pluralistic right of Spaniards to decide on the type of territorial organization they want to live in. Certainly, the additional Provision Nr.1 SC safeguards the historical self-government rights of the *foral* territories, but according to the Spanish Constitutional Court (STC 32/1981 of 2nd February, Ground 4°; STC 76/1988 of 26th April, Grounds 4° y 5°; y STC 159/1993 of 6th May, Ground 6°) those rights can only be updated with due respect to the framework of the Spanish Constitution and their Statutes of Autonomy, in no case superseding them (Corcuera Atienza 1984, pp. 37–38; Solozábal Echavarria 1989, p. 124). Therefore, even accepting the dubious premise that those *foral* territories have ever been independent States, the Spanish Constitution does not grant them any right to change their constitutional status re-negotiating outside the constitutional amendment procedures their political status (Rodríguez-Zapata Pérez 1999, p. 120), because this would undermine the supremacy of the Spanish Constitution and its democratic principle.

Regarding the adequate formal amendment procedure, the choice between the two procedures provided for in Title X SC depends on the normative impact of the proposed amendment. Constitutionalizing a secession procedure would allow the loss of supremacy of the Constitution over part of the Spanish territory and therefore over the citizens and Governmental institutions thereof. This affects doubtlessly the core content of the territorial and personal scope of art. 9.1 SC (Spanish Constitution supremacy clause), the indissoluble unity of the Spanish Nation and the type of political decentralization of powers provided by art. 2 SC, as well as the

attachment by art. 1.2 SC of national sovereignty to a unified Spanish People (STC 31/2010, of 28th June, Ground 12°(https://www.tribunalconstitucional.es/ResolucionesTraducidas/31-2010,%20of%20June%2028.pdf)).

All these provisions are included in the Preliminary Title of the Spanish Constitution and a new constitutional amendment procedure for secession will affect them. Art. 168 SC provides for an ultra-aggravated amendment procedure whenever the proposed constitutional amendment affects (among others) the provisions of the Preliminary Title, even when there is no textual change to any of them but their core content results directly or indirectly affected (Aláez Corral 2000, p. 333). For that reason, it could not be constitutionally possible, as however suggests Payero López (2014, p. 24), to override that ultra-rigid procedure by a two-step sequence: first amending art. 168 SC in order to exclude from it the Preliminary Title affected provisions by a secession, and secondly amending the constitution for secession through the more flexible procedure of 167 SC.

Art. 168 SC. designates an ultra-aggravated constitutional amendment procedure that combines elements of democratic respect for minorities, internal self-determination of groups and individuals and the sovereignty of the Spanish People. So, according to art. 166 and art. 87.1 and 2 SC, the initiative for constitutionalizing a secession clause could be taken either by the central institutions or by the territories through the Parliaments of the Autonomous Communities (STC 42/2014, of 25 March, Grounds 3°-4° (https://www.tribunalconstitucional.es/ResolucionesTraducidas/STC%2042-2014E(2)%20%20DECLARACION%20SOBERANISTA%20%20SIN%20ANTECEDENTES.pdf)). But as far as the decision affects common interests of all the Spanish People, the final decision can only be taken by central State institutions in terms of qualified majorities (2/3 of the Members of each House of Parliament twice in a double lecture with a general election in between), and by the electors of the whole Spanish People in a national referendum.

This amendment procedure however has some weak points regarding federalism and democracy: first, the lack of territorial representation of the secession-involved territories at the Senate, which in contrast with its constitutional role (art. 69 SC) does not express the view of the Autonomous Communities regarding the common interests at stake with such a secession clause. Secondly, there is certain mistrust against direct citizens' participation, as long as according to art. 166 SC the amendment procedure cannot be started through the citizens' initiative and according to art. 149.1.32ª SC the central institutions can block any consultation to the citizens of the affected territories by not giving it their mandatory consent (Ridao i Martí 2014, p. 115). Furthermore, according to the STC 103/2008, of 11 September, Ground 4° (https://www.tribunalconstitucional.es/ResolucionesTraducidas/103-2008,%20of%20September%2011.pdf) such a consultation should not even be allowed by the central Government, as it deals with an issue (secession) over which art. 168 SC has entrusted the whole Spanish people to decide through a national referendum at the end of the amendment procedure (Castellá Andreu 2014, p. 45).

3 The Content of a Future Secession Clause

3.1 Adequacy to the Fundamental Principles of the Constitutional System

Before focusing on the content of the secession clause, it must be mentioned that such a clause should adequate to the fundamental principles of the constitutional system (Buchanan 2013, p. 208), because otherwise the legal system would lack internal coherence.

Constitutionalizing secession is thought to improve the stability and efficacy of the constitutional system as a whole in territorially decentralized States, not to split it up. For that reason, conversely, the territorial organization of the State must be designed previously or at the same time in order to have a "chilling effect" regarding secession, which has to be used only as *ultima ratio* and in order to be consistent with the existence of a secession clause in the Constitution. If the right to secede is constitutionalized in order to satisfy the right to self-determination of the different Spanish ethnic groups, whose unilateral will would be given the effect of modifying the personal and territorial scope of the Spanish Constitution, one pre-condition for the internal coherence of the legal system is that sovereignty is not politically attached to a unified, ethnically homogeneous People or nation. In other words, it would be dysfunctional to constitutionalize the right to secede but maintain the type of territorial decentralization of the State of Autonomies and the attachment of the national sovereignty to a unified Spanish People (art. 1.2 and art. 2 SC). As the Spanish Constitutional Court (STC 42/2014, of 25 March, Ground 5° (https://www.tribunalconstitucional.es/ResolucionesTraducidas/STC%2042-2014E(2)%20%20DECLARACION%20SOBERANISTA%20%20SIN%20ANTECEDENTES.pdf)) stated, "in the current constitutional order only the Spanish People is sovereign, exclusively and indivisibly, no other subject or State body or any part of the people can be endowed with sovereign status by a public power. An act issued by a public power that inevitably asserts "legal sovereign status" as a competence of the people of an Autonomous Community also denies national sovereignty, which, according to the Constitution, can only be held by the entire Spanish people. Thus, sovereignty cannot be entrusted to any group or part thereof".

To overcome this, first it is necessary to constitutionalize the territories as constituent bodies of the Spanish constitutional democracy, as proposed the Spanish Council of State (Consejo de Estado) in its Report on constitutional amendment (2006, p. 128), but also, secondly, to denationalize the sovereignty formula, suppressing the "national" and therefore unified nature of the sovereign Spanish People, as well as the indissoluble character of the unity of the Spanish Nation. Both are incompatible with federalizing sovereignty and constitutionalizing secession. This is only possible under the formula of transforming Spain into a formal federal State, not necessarily into a confederation, at least if federation and confederation are differentiated by its constitutional or international law (treaty) foundations (Kelsen 1925, p. 198). As has been said, International Law does not grant a secession right as

expression of the external self-determination of ethnic groups in constitutional democracies like Spain, and therefore the secession clause in the case of Spain should not be the expression of the will of sovereign peoples bound within a confederation, as for instance is the case of the Republic of Karakalpakstan confederated by international treaties with the republic of Uzbekistan (arts. 74–75 Const. Rep. Uzbekistan). On the contrary, whatever the federated States (current Autonomous Communities) or the Federation may do can only find its legal foundation in the constitutional provisions of the so called "Total Constitution" of the federal State (Kelsen 1925, pp. 199–200), which can accept secession of part of the State's territory as an extraordinary federal amendment procedure, submitted to the formal and substantial limitations that the federal Constitution may impose upon it, in similar fashion to the secession of the Island of Nevis from the Federation St Kitts & Nevis (art. 115 Const. St. Kitts & Nevis) or the unilateral veto power that some federal Constitutions, like the US one, grant the federated States (already Jellinek 1882, p. 272). Unlike Tosi (2007, p. 308), we do not consider secession a pre-legal right of federated States, which can only be exercised as an original constituent power thereof, but as the result of the exercises of a constituted amending power provided by the sovereign federal Constitution in order to harmonize democratic pluralism and constitutional stability.

3.2 The Secession Clause

The aim of the proposed secession clause is to grant to the territorial collectivities existing in Spain a democratically managed and legal procedure for exercising the right to external self-determination, which could put an end to the binding force of the Spanish Constitution in the seceding territories. The issue at stake should be therefore whether the seceding territory wishes to become a sovereign State, independent from the mother State, a clear question as has been formulated by Sec. 1.3 Clarity Act, Sc. 2000, c.26 for Canada and Quebec's secession, or by the Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland of 15th October 2012.

Precisely due to the effects of secession on the territorial scope of validity of the Spanish Constitution is why the secession clause has to be introduced in Title X as an extraordinary constitutional amendment procedure. It would work as paramount law for the constitutional review of any step given towards secession without respecting the formal or material requirements established in the secession clause, helping thus to implement a judicial review of a political issue like most constitutional issues.

To propose a fixed and detailed constitutional regulation of a future secession clause goes beyond the limits of this paper, but we will try to provide the directives frameworking the secession procedure. The secession clause should address at least the following three aspects: who could launch the secession procedure and how it could be launched, which democratic bodies should take the decision and with which majority it should be taken, and whether there should be any negotiation before

taking the final decision of seceding. The drafting of the secession clause should clarify all these aspects balancing the need to legalize the path to secession, the respect for the democratic will of the majorities and minorities within the seceding territory and within the whole State, as well as preventing secession from being used to blackmail the federal institutions regarding ordinary politics (Weinstock 2001, p. 196).

The secession procedure does not need to be launched as a remedy to any injustice caused by the federal Government (Buchanan 2013, p. 212). It can be launched by the empowered territorial institutions whenever they can democratically express through the foreseen procedure the clear and present will of their citizens to secede, without the previous consent of any arbitral institution –such as the Constitutional Court- deciding on the causality of the secession expectations (Buchanan 2013, pp. 221–222). The Constitutional Court should be able to review only the constitutionality of the procedure and constitutional conditions for implementing secession, nothing else.

3.3 The Secession Procedure

The difficult issue of defining who should be legitimized to launch and finally take the decision to secede in historically so heterogeneous pluri-ethnic States, like Spain, requires two questions to be answered: which territorial collectivities should be constitutionally empowered to launch and decide on the secession procedure and which governmental bodies of those territorial collectivities should take the relevant decisions (Buchanan 2013, p. 223).

Regarding the first question, it has to be said that, if constitutionalizing secession wants to remain the State's recognition of a procedure for the external self-determination of the peoples comprising it, the launching of it and the final decision on the secession should be taken by the different territorial peoples composing Spain and not by the whole Spanish People. Trying to combine this element with the whole Spanish constitutional system, it seems reasonable to identify those territorial peoples with the same criteria followed by the Spanish Constitution of 1978 for recognizing the right to political autonomy (likely to be followed in a formal federalization of Spain). This would lead to recognition of the right to initiate secession of all existing Autonomous Communities in Spain (future federated States). This would reach a democratic balance between the ethnic (objective) and the will (subjective) criteria to define the peoples that might wish to secede. Unlike what happens with the generalization of the right to political autonomy that took place in Spain in the early 1980s, this solution should not be criticized for being a "coffee for all" solution, because the proposed constitutional configuration of the secession procedure grants a fully independent decision to secede by all territorial collectivities, and this would actually have a special value only for those whose strong national identity could make this option for secession more likely, regardless of the fact that other territorial collectivities also have this option open.

Regarding the second question, constitutional democracy requires that there must be Parliaments and electoral bodies of the seceding territories who express the people's will to launch the secession procedure and eventually secede. However in order to balance the already existing political unity with the mother State, the required debate and deliberation in the seceding territory, as well as the expectation of a clear and sufficient majority in favor of secession, the secession procedure should run in a two-step way, with a negotiation phase in between. In each step the participating bodies will be different and also the required qualified majorities, in order to achieve a balance between discouraging secession (or even using it to blackmail and take advantage in ordinary politics) and allowing territorial peoples to democratically decide to abandon political union with the mother State.

The *first step of the secession procedure* involves launching the initiative to secede. The will to secede should be expressed by a qualified majority of the Parliament of the seceding territory, under the condition that the proposal to start the secession procedure has been included by all the political parties supporting it in the Parliament in their electoral programs for the previous election to the regional Parliament. Although a majority for secession is not easy to obtain in well-established democracies (Dion 1996, p. 269), a clear and adequate majority could be 2/3 of the members of the territorial Parliament. This qualified majority would preclude blackmailing conduct regarding ordinary federal politics (Weinstock 2001, p. 196), as well as would protect dissenting minorities in the seceding territory by giving them a strong blocking position; in other words, it would protect deliberation in a constitutional democracy (Norman 2003, pp. 217–218; Sunstein 1991, p. 666). As an alternative, a lower majority of 3/5 of the Members of the territorial Parliament could be required, but adding to it the need to have the direct consensus of the people of the seceding territory expressed in a plebiscite—a voting on the political issue of whether the secession procedure should be launched or not—passed with a 3/5 majority of the electors (not the voters) in favor of launching the secession procedure. However, experiences such as Quebec's show that popular consultations on such politically dividing issues as secession produce too many internal tensions within the population of the seceding territory and of the federal State (Dion 2013) and open wounds that would take a long time to heal. Therefore, we prefer the first alternative of a higher majority in the territorial Parliament and leave the people's consultation only to the final decision on the secession.

Once the decision to start the secession procedure has been approved, and before the second and final step, a deliberative federal democracy should attempt to avoid secession by bringing both parties (the federal Government and the seceding Government) to a *negotiation phase*. Following the terms established by art. 50 of the European Union Treaty both parties should negotiate for at least 2 years in order either to find an alternative constitutional arrangement that avoids secession or to agree on the political, economic and legal conditions of secession. There would be a constitutional duty to negotiate, but if after 2 years an agreement could not be reached the Government of the seceding territory would be nonetheless allowed to proceed to the second step of the secession procedure and take the final decision on secession.

Although Constitutional Courts find it difficult to be recognized by both parties as legitimate referees on the debatable issues that may arise in the negotiation, they are the only reasonable judges of this match and no other institution could play that role for two reasons. First, because it would be almost impossible to find any adequate arbitrating institution that could be recognized as legitimate by both parties. Secondly, because if the proposed institution is the European Union it is less likely that it would or even could legally accept such a refereeing role, as long as art. 4.2 of the European Union Treaty demands that the EU respects the national identity of the member States, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government, and this includes decisions on their territorial integrity (Medina Ortega 2014, p. 106). Anyway, the Constitutional Court should be allowed to review only respect for the constitutional conditions of the secession procedure, which would include: the legitimate bodies for starting or deciding secession, the required majorities, compliance with the duty to negotiate and respect for the fixed terms, etc. . ., but would not adjudicate on the legitimacy of the decision to secede as a political issue.

If it proved impossible to reach an agreement avoiding secession, in the *second step of the secession procedure* the seceding territory would be constitutionally allowed to unilaterally take the final decision on secession and therefore put an end to the efficacy of the Spanish Constitution in its territory. In this step of the procedure the decision should be taken by the electorate of the seceding territory in a referendum. This would be in line with the implementation of instruments of direct democracy in the constitutional amendment procedures, as is the case of the amendment referendum (this time voted by the whole Spanish people) established by art. 168 SC for total amendments or amendments affecting the fundamental constitutional principles.

Regarding the majority required to approve the secession referendum, a qualified majority of 3/5 of the electors (not of the voters) would reasonably balance the clear democratic will of a territorial people to secede and the rights of the dissenting unionist minority, a balance that is one of the justifications for entrenchment in constitutional democracies (Otto y Pardo 1987, p. 58). Regarding the question about which 3/5 of the electorate should be reached for the approval, the answer must be: 3/5 of the electorate of the whole seceding territory, not of each one of its administrative districts (Provinces in the case of Spain). At least that should be so if constitutionalizing a secession procedure aims to legalize the external desire for self-determination of the territorial peoples comprising Spain, not the will of administrative districts the whole State could be divided into. If one part of the seceding territory does not feel comfortable within this territorial unit, in federal States it is usually able to launch a territorial re-organizing procedure. Thus for instance, art. 29 of the German Constitution or art.53 of the Swiss Constitution, but also Interim Provision Nr. 4 SC regarding the integration of Navarra in the Basque Country. But this re-organization must be decided by the federal Government besides and before the secession procedure has been launched. Anyway a 3/5 majority of the electors of the seceding territory together with the previous procedural requirements set by the secession clause grant with a high degree of certainty the dissemination of the

secession expectation not only among the population but also among the different parts of the seceding territory.

If launching the secession procedure fails to convince 3/5 of the electorate in the initial plebiscite, or if the final referendum on secession is not approved with the 3/5 majority of the electors, it would be reasonable to set a 16-year exclusion term, during which no secession proposal could be launched in that territory, in order to relax the social tensions inherent to secession debates. If suffrage is democratically extended to citizens over 16, the length of this exclusion term is related to the incorporation of a new generation of voters to the society of the seceding territory, which should be given the opportunity to re-discuss the territorial organization framework within the federal State, according to the Jeffersonian ideal of a periodical renewal of the people's consent to the Constitution by any new generation.

If secession is finally approved by 3/5 of the electorate of the seceding territory, the federal Constitution will no longer be applicable in that territory. That does not necessarily apply to the efficacy of the federal Constitution over the people of the seceded territory, as long as according to art. 11.3 SC and art. 24 Spanish Civil Code the Spaniards living in a seceded territory cannot be deprived of Spanish nationality whenever they express their will to keep it (Sagarra i Trias 2014, p. 13). The agreed rules between Spain as mother State and the new seceded State on State's succession should determine if double nationality is allowed and under which conditions, or if not, how is the right to opt for one or another nationality to be exercised by the Spanish citizens living in the seceded territory in order to avoid loss of Spanish nationality against their will (for instance in case of automatic attachment of the nationality by the new seceded State without option to choose), because that would be a case of deprivation thereof.

Whether the seceded territory becomes a viable sovereign State or not is not a legal but a factual issue, as has been outlined by the Supreme Court of Canada in Quebec's case (Reference re Secession of Quebec, [1998] 2 S.C.R. 217, 274), and depends on elements such as the efficacy of the new State's power over its population and territory, but not on any legal decision of the mother State. It does not even depend on recognition by other States, which, according to the Consulting Opinion Nr. 1 of the Arbitration Commission of the Conference on Yugoslavia (Badinter Committee) of 1991 or art. 1 of the Montevideo American Convention on rights and duties of the States, of 26 December 2993, has only a declarative nature, not a constitutive nature of the State, even though such recognition by members of the international Community would help to strengthen the building of an effective State's power.

Moreover, from a monist understanding of the legal system, on top of which is the law of the federal mother State, the surrounding States or territories aiming to become States are mere facts (Schilling 1994, p. 300). In this sense, although the implementation of the secession clause is for the seceded territory a final legal event of the federal State, its legal effects end with the reductive delimitation of the territorial scope of the federal Constitution and do not apply to the prospective State built upon the seceded territory. The enactment of a new State's Constitution is beyond the scope of the secession clause and belongs to the kingdom of the original

constituent power of the seceded territory, whose *Grundnorm* is the secession clause founding the legal competence of this power to enact a new Constitution (Tosi 2007, p. 313).

4 Imposing Material Conditions Upon Secession?

A last question raised by the constitutionalizing of a secession clause is whether the exercise of the secession procedure could be conditioned to any material constraints, especially in order to safeguard the fundamental rights of the defeated minorities in the seceded territory. That would be the case of any required commitment to the fundamental rights of individuals and groups in the future seceded State, such as the principles and values expressed by art. 2 of the European Union Treaty or the fundamental rights according to the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights. According to what we have explained before (in 2.1) nothing prevents the Spanish constitutional amending power from establishing such material conditions to a future secession clause. Once again, the prospective secession right exercised through it would not be a pre-legal right of the territories but a new constitutional amending procedure, subject to the conditions established by the Spanish Constitution. Spain's alignment within non-militant or mere procedural democracies (STC 48/2003, of 12th March, Ground 7°) does not imply that the Constitution is not allowed through a constitutional amendment imposing substantial limitations upon future constitutional amendments to move to a militant democracy type also for a prospective Constitution of a seceded part of it. However, we should analyze if imposing such material conditions would be according to the objective and sense pursued by a secession clause.

Indeed, the entrenched procedure (especially the qualified majorities, the call for a referendum and the need to negotiate for at least 2 years) designed by the proposed secession clause itself implies a democratic safeguard of the rights of dissenting minorities within the seceding territory, but it does not guarantee its future respect by the new State following secession. However, imposing material conditions—legally binding—upon secession does not seem to be the right way to grant the democratic commitment of the new State to the human rights and the democratic principles, without at the same time opposing the external self-determination role a constitutionalized secession clause is intended to play. A different issue would be to consider the original constituent power (in this case of the seceded territory) as bound by substantial limitations derived from natural law and from human rights international law (Roznai 2013b, pp. 557, 571, 583), but this is a methodological approach to the understanding of law and the Constitution that we have already disregarded from a formal normativist point of view (Aláez Corral 2000, p. 246).

In fact, the main reason for constitutionalizing secession is to give a legalized and democratic way-out to the external self-determination expectation of the peoples coexisting in multi-ethnic States, like Spain, and therefore it is up to them to decide—even in an entrenched manner—unilaterally about secession. This goal

would be frustrated if the mother State could condition the exercise of the constituent power by the seceded territory to a supervised compromise to comply with certain principles and values. No legal sovereignty would be obtained through secession if such material constraints remained binding during the post-secession State-building phase. Besides this, even if those material constraints are foreseen by the secession clause, it would not be easy to implement them and grant its legal binding force. A repressive *ex post* judicial review would deny the main effect of the secession clause, which is secession and therefore legal independence; and a preventive *ex ante* judicial review, before the electorate of the seceding territory would be nonsense, because what matters is what the seceded people do after they have accomplished secession, not the promise to a future commitment to respect some values and principles.

However, a middle way between not establishing material conditions and establishing legally binding material conditions could be found. The secession clause could establish that the final question put to the electorate for the secession referendum should include the political commitment—bound to answering "yes" to the secession- to apply to become a Member State of the European Union, according to art. 49 of the European Union Treaty, as long as the seceded territory would no longer belong to the European Union (Mangas Martín 2013, p. 58). This would imply the current respect for the values referred to in art. 2 of the European Union Treaty—respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities, but also prevalence of pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men—as well as commitment to promoting those values (Medina Ortega 2014, p. 97). This commitment to apply for membership of the European Union would only be politically binding for the Governmental Institutions of the seceded territory and could not be legally checked or reviewed by the mother State. Its checking would correspond to the electorate of the seceded State and the political control implemented through the presidential or parliamentary elections. It would not legally prevent a withdrawal of the application by the new seceded State or the rejection of the application by non-recognition as a sovereign State and/or the veto of any Member State (including the mother State), as long as according to art. 49 of the European Union Treaty a unanimous consent of the European Council is required to accept any new Member.

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