Catalonia: A ruling against the right to decide

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A reading of the 23 pages of the judgment devoted to rejecting the claim to the right to decide (199-222) reveals clearly the pirouettes resorted to by the Supreme Court (SC) in order to disqualify it. Notwithstanding its statement that "it is not our job to offer — or pursue or insinuate — political solutions to a problem with deep historical roots" (referring obviously to Catalonia's relation to Spain), it immediately goes on to reject the defence's allegations, since accepting them "would be used to affirm, in opposition to a monistic vision of sovereignty that is typical of historical constitutionalism, a constitutional pluralism, a diffuse and shared sovereignty including a co-sovereignty transcending rancid concepts affected by the passage of time."

Well yes, ladies and gentlemen, if we analyze the present and global political reality, it does not support a monistic or unilateral vision of sovereignty, since what we are witnessing is a now irreversible crisis of the sovereign national-state paradigm. In the framework of neoliberal globalization what has occurred is an intertwining of sovereignties and jurisdictions within an hierarchical inter-state system that in turn is increasingly fusing with the major economic powers around a *lex mercatoria común* under which most states are reluctant to recognize internal national and cultural diversity, and above all are draining it of democracy and popular sovereignty. Is not the reality of the European Union a confirmation of that "diffuse and shared" sovereignty, which has led even the states of the Eurozone to renounce one of their most symbolic powers, that is monetary sovereignty? […]

It is in this reality of an institutional architecture that a multilevel governance is developing and expanding on a global scale, especially around the hard core of politics — economics and finance, civil and military security, etc. — shared by the IMF, the World Bank, the central banks, NATO, the G8 and the United States. So it is truly sarcastic to speak of the exclusive sovereignty of states and, in our case, of the preservation of the sovereignty of the Spanish people when the latter have been excluded, for example, from deciding on constitutional reforms of such huge scope as the reform of the much-criticized article 135 of the Constitution — which annulled the social character of the "social and democratic rule of law" established by that same fundamental law. In reality, unfortunately, there is one area in which that exclusive state sovereignty is exercised, and in an increasingly more repressive form, as we see in the Mediterranean: the border controls imposed on the free movement of persons even while barriers to the entry and flight of capital continue to be eliminated.

In this regard, and to be brief, I take the liberty of quoting what I wrote recently in *Le Monde Diplomatique*: [1]

> "In today's world, moreover, although the sovereign state paradigm continues to exist, we know that we are actually in an increasingly interdependent world on all levels, as well as a hierarchical system of states, in turn merged with major economic powers that

> seek to impose their interests and decisions over and above the peoples and even their representative institutions. We should not be surprised, therefore, at the rise of popular-based sovereignty movements in very different places on the planet and with quite distinct ideological orientations.
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> "In what concerns us here, it should be recalled that we have arrived at this point after a long process in which most states, especially since the end of the 18th century, have tended to develop a model of nationalization of their respective populations based on the promotion of a single national identity, a single language and a single culture. This paradigm, according to which access to citizenship rights is linked to belonging — voluntarily or by force — to the official national identity, has generated many relationships of inequality and injustice, due to the lack of recognition of the different ethnic and national identities within the same State."

That is the crux of the matter and that is why the claim to the right of self-determination within demo-liberal states of the North has resurfaced. The old salt-water theory, which was intended to limit that right to colonies and occupied countries, has long since lost its applicability. That is why the internal and external dimensions of the right to self-determination are seen in cases such as that of Canada and Quebec, challenging the taboo of the "territorial integrity of states."

Yet notwithstanding this persistent and ever-increasing reality in different places, the Supreme Court clings to the thesis of "the safeguarding of the territorial integrity of the already constituted states as the natural limit to what has been called the external dimension of the right to self-determination." Aware, however, that this "territorial integrity" has been questioned in the aforementioned cases, it excuses itself by saying that "we cannot go beyond our functional space" only to do so later by rejecting any similarity between the case of Quebec and that of Canada, since "no similarity can be proclaimed between the historical origin of Quebec's claim and the unilateral act of secession attributed to the defendants."

Why not? Hasn't there been a problem of accommodation, both in Quebec and in Catalonia, of their national realities within the respective states? Yes, there is a difference, of course, but it is that while in Canada that conflict was addressed after two referendums, and a political and democratic solution has been sought despite the fact that its Constitution does not recognize the right of secession, in the Spanish state there has been no willingness to find that democratic solution. On the contrary, from the first moment a fundamentalist reading of the 1978 Constitution has been imposed making it a true straitjacket — which is what the Canadian Supreme Court judgment [on Quebec secession] rejected.

Then the SC makes a quick and superficial tour of other cases: Montenegro ("a previously constitutionalized process"), Scotland ("result of a negotiation process" and with the particular feature that the UK constitution is unwritten), or Kosovo (for the unique nature of the conflict and the EU tutelage). Interestingly, with respect to the latter, the Court passes very quickly over the Advisory Opinion of the International Court of Justice (ICJ), forgetting that while it recognizes the specificity of the case, that does not stop it from extracting some general conclusions, among them that while international law does not recognize the right to secession within existing states, it does not prohibit it either. In order to recognize it, the ICJ limits itself to demanding some procedural requirements of the collective subject that is prepared to exercise it: the non-use of force, proof that the process seeking a negotiated settlement must be exhausted, and, finally, that a clear majority of the population concerned has declared itself in favour of secession by peaceful means. [2]

Starting, therefore, from the conclusions of the ICJ, the debate should revolve around the question of

whether the negotiated settlement process has been exhausted within the framework of the Spanish State. It seems clear that since the de facto annulment of the substance of the Nou Estatut de Autonomía by the Constitutional Court, [3] there has been a widespread feeling in a large sector of Catalan society (of which about 48% vote for independentist parties, but whose real percentage could only be verified in a referendum that turns on this issue), of non-recognition as a people by the Spanish state. That 2010 ruling was understood as a breach of the territorial constitutional agreement of 1978. It is this that helps to explain the rapid rise of independentism over the almost 10 years since then, which is not to deny that other factors of a secondary order may have been an influence. All the more so when there has not been a single alternative proposal since then for a new type of consensual relationship among the parties of the regime other than the application of article 155 [4] and/or the National Security Law.

In these circumstances, and returning to the case of Kosovo, the conclusions of the ICJ should be taken into consideration and the possibility of recognizing the right to secession be accepted […] that is, to recognize that in the last resort, the negotiation routes have been exhausted and to avoid a stagnation of the conflict, it would be legitimate to respect the right to secession of the population of the affected territorial area (in this case an Autonomous Community) provided that it complies with the democratic procedural requirements. It is precisely around this hypothesis that there is a total absence of references in the Supreme Court ruling.

The final answer of the SC is, therefore, that "there is no such right" and, what is worse, that "there is no democracy outside the rule of law," thus opposing one principle to another and refusing to recognize, as did the Constitutional Court itself, that there is at least a "political aspiration" to which a political solution should be sought. The logical thing, then, would be to adopt an evolutionary interpretation of rights, as was done, by the way, with the recognition of gay marriage, and to consider, as the ICJ did, that there are extreme situations in which the legitimate exercise of the right to decide prevails over the "safeguarding of the territorial integrity of the already constituted states" and, in our case, of the sacred unity of Spain. […]

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P.S.

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https://lifeonleft.blogspot.com/2019/10/catalan-independence-leaders-sentenced.html?m=1

Footnotes

[1] Jaime Pastor, "La cuestión catalana y la disputa por la soberanía," *Le Monde Dipomatique*

(Spanish edition), No. 271, p. 3. Available in *Viento Sur*: https://vientosur.info/spip.php?article13844.

[2] Iñigo Urrutia, "Territorial Integrity and Self-Determination: The Approach of the International Court of Justice in the Advisory Opinion on Kosovo," REAF-Revista d'Estudis Autonòmics i Federals Vol. 16 (2012). Available at https://works.bepress.com/inigo_urrutia/5/.

[3] The 2006 Statute of Autonomy of Catalonia was a law passed by the Catalan legislature, then approved by Spain's parliament and later ratified in a referendum by Catalan voters. Almost immediately, the opposition center-right Popular Party challenged the statute before the Constitutional Court. The court deliberated for the next four years until June 28, 2010 when it struck down 14 of the statute's 223 articles and curtailed another 27. Among other things, the ruling struck down attempts to place the distinctive Catalan language above Spanish in the region; ruled as unconstitutional regional powers over courts and judges; and said: "The interpretation of the references to 'Catalonia as a nation' and to 'the national reality of Catalonia' in the preamble of the Statute of Autonomy of Catalonia have no legal effect." ("The Spanish Court Decision That Sparked the Modern Catalan Independence Movement," https://www.theatlantic.com/international/archive/2017/10/catalonia-referendum/541611/.) – Tr.

[4] Article 155 is only two short paragraphs of the 1978 Constitution of Spain. It says that if a regional government "does not comply with the obligations of the Constitution or other laws it imposes, or acts in a way that seriously undermines the interests of Spain," the national government can ask the Senate to vote on the use of the measure. ("What is Article 155 of the 1978 Spanish Constitution?," https://www.aljazeera.com/news/2017/10/article-155-spanish-constitution-171019100117592.html.) –