
The legal nature of the *Procés*

La naturaleza jurídica del Procés

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Resumen: Analizamos la naturaleza jurídica en el Derecho internacional de la pretensión de las autoridades catalanas de secesionarse de España y de crear un Estado independiente en forma de República. Para ello tenemos en cuenta la legalidad y la legitimidad de la Constitución de 1978, y sus consecuencias para el Derecho internacional. En Bélgica o Alemania jueces internos han incumplido el Derecho internacional y europeo al no comprender la naturaleza del fenómeno.

Palabras clave: secesión; soberanía y cooperación judicial; naturaleza jurídica del *Procés*.

Abstract: We analyse the legal nature in International law of the autonomous Catalan authorities' attempt to secede from Spain and create an independent Catalan Republic. For that purpose we consider the legality and legitimacy of the 1978 Spanish Constitution and its consequences for international law. In Belgium or Germany the internal judges have broken international and European law and they have not understood the nature of the phenomenon.

Keywords: secession; sovereignty and judicial cooperation; legal nature of the *Procés*.

Summary: 1. THE LEGALITY AND LEGITIMACY OF THE 1978 CONSTITUTION. 2. SOME INTERNATIONAL CONSEQUENCES DERIVED FROM CONSTITUTIONAL LEGITIMACY. 3. BELGIUM'S FAILURE TO COMPLY WITH THE OBLIGATION TO COOPERATE, THE PRINCIPLE OF MUTUAL RECOGNITION AND THE PRINCIPLE OF (JUDICIAL) SOVEREIGNTY. 4. GERMANY'S FAILURE TO COMPLY WITH THE PRINCIPLE OF MUTUAL RECOGNITION AND THE VIOLATION OF THE PRINCIPLE (OF JUDICIAL) OF SOVEREIGNTY. 5. THE DUAL NATURE OF THE PROCES - LEGAL AND POLITICAL. 6. THE NATURE OF THE FACTS FOR INTERNATIONAL LAW.

The *Procés* is the autonomous Catalan authorities' attempt to secede from Spain and create an independent Catalan Republic. Since 2012, the events have been contrary to Spanish law, both constitutional and criminal, and they have juridical relevance for International law and for the European Union. To list some of the events which have taken place (for more details, see judge Larena's bill of indictment to the Supreme Court, among others): *escraches* and disorder; contempt of the Constitutional Court (13 cases, so far); the carrying out of consultations and illegal referendums; the approval and implementation of illegal laws; alleged acts of rebellion – as far as Spanish law is concerned, sedition, prevarication, the mobbing of institutional headquarters, mass acts of violence and intimidation, assaults, misappropriation of public funds, public disorder, hate crimes, a lack of re-

spect at an institutional level, breach of institutional neutrality, calls to the International community for recognition as a State, etc.

This has fragmented Catalan, and Spanish society while there have also been a host of economic, political, social and cultural consequences. These events have not been properly understood by other countries. Despite the fact that a postmodern coup d'état against a legitimate constitution has taken place, neither European legal cooperation nor the principle of mutual recognition have been effective, creating a confidence crisis within the European Union.

1. THE LEGALITY AND LEGITIMACY OF THE 1978 CONSTITUTION

Before getting into a discussion on the nature of the *Procés*, it is important to point out that the Spanish State is Democratic and it has a legitimate Constitution. Neither the European Union nor the Council of Europe has opened infringement proceedings against Spain. In addition, unlike other European countries, political parties that support secession can exist in Spain and they can even be in power in an autonomous region. This goes to show that the Spanish State is a tolerant one, even with those who wish to destroy it, which is not usually the case, to say the least.

Furthermore, you do not need to do an in-depth analysis to realise that Catalonia has wide-ranging autonomous powers, that people have rights, freedom and an enviable standard of living. The 1978 Constitution is based on consensus and although it does not recognize the right to self-determination, it does recognize the right to the autonomy of nationalities and of regions within the framework of national unity, as is the case with the huge majority of international constitutions.

Max Weber¹, a leading figure in the analysis of legitimacy models (traditional, charismatic and legal-rational, the latter being the democratic model) recognizes that legitimacy and legality are in a rather inadequate position. Habermas, or Rawls², observe that political domination cannot be legitimate

¹ See WEBER, M., *Economy and Society. An outline of interpretive sociology*, Fondo de Cultura Económica Mexico, 1964.

² HABERMAS, J., *Escritos sobre moralidad y etnicidad*, Paidós, 1991, at. 132; RAWLS, J., «El derecho de gentes», *Isegoría*, nº 16, 1997, 5-37.

without a procedural theory of justice. The Spanish model is democratic both in origin and in practice.

Democratic or not, a model must be legitimate in so far as both legal rules and change procedures must be respected. Moreover, it must be permeable to values and moral principles if it claims to uphold public ethics. The afore-mentioned criteria, Weber's, Habermas' and Rawls', can be found in the 1978 Spanish Constitution. The Magna Carta unites both legality and legitimacy. The central core of constitutional consensus contains legality as well as legitimacy, and observes that rule change procedures should be respected if the latter is to be modified. Aiming to change the rules is legitimate but breaking the rules is not, and this has happened in the worst possible way during the Procés. This Procés has been based not only on massive violations of the Spanish Constitution (more than 13 in total) but also on the passing of laws which are entirely unconstitutional from start to finish (for example, those of 6th and 7th September 2017). The aim of these unconstitutional laws was to create a different legality, supposedly based on an alternative democratic legitimacy, which is unacceptable in any of the world's constitutional systems.

2. SOME INTERNATIONAL CONSEQUENCES DERIVED FROM CONSTITUTIONAL LEGITIMACY

Attacking a legitimate constitution head-on has consequences in International law. First of all, *the instigators cannot be accused of a political offence and so they cannot be granted political exile*. Nor can they form *a government in exile* with the recognition of third-party states. If third-party states should offer such recognition, they would be committing an international wrongful act which infringe the principle of non-intervention in domestic affairs. Accordingly, we can compare *the theory and practice of governments in exile in the second republic and until democracy in 1978 with the theory of the regional government of Catalonia in exile declared by Puigdemont*.

In September 1942, Pablo de Azcárate wrote a *memorandum*³ explaining that the theory of the Republican government in exile was based on *the legal fiction of the continuity of the republican constitution*, which was interrupted by

³ See AZCARATE, P., *En defensa de la República. Con Negrín en el exilio*, Barcelona, Crítica, 2010, 489, at 97.

the coup d'état on 18th July (then called the Uprising, *El Alzamiento*). A comparison with Puigdemont's idea to form a government in exile would not be possible. Certain misgivings were expressed about this theory during Negrín's stay in the United Kingdom⁴ and it was only possible to consolidate it in Mexico thanks to the help given to the Spanish exile by this country. So, on 17th August 1945 in the *Republican Parliament meeting* in the Cabildos Room in the governmental palace in Mexico, a new government was formed in exile. From this day until 1977, the republican government existed in exile⁵. The Republic in exile had international legal relevance for some years, in spite of its weakness from the perspectives of effectiveness and the rules of international law⁶. All this has nothing in common with Catalonia.

Furthermore, *attacks on the rule of law and on democracy should entail a restriction of the habitual rights of free movement and residence, enforced by the states of the European Union*. There should be no room for a Republican Catalan Government in exile (the so called *Consell de la República*) on European soil. Neither should there be free movement and residence for the perpetrators of the coup. Governments in exile fell into disuse. They had served their purpose when governments were fleeing the Nazis and for the liberation movements of Colonial Countries and Peoples. Professor Talmon states that for a (State) government to be recognized, there must be a State (nobody has acknowledged Catalonia as a State), the government should be representative and not administered by the host country, and in any event, governments deposed by a constitutional process or by force without the intervention of third parties, could not be considered a government in exile. Pablo de Azcárate explained in 1942 that the theory of the republican government in exile was based on *the legal fiction of the continuity of the republican constitution*. Exactly the opposite of what has happened.

In the *Case of Hungary against Slovakia* (2011), the question was whether the President of Hungary could exercise his right of free movement and go to

⁴ See in this context MORADIELLOS, E., *Don Juan Negrín*, Barcelona, Península, 506 ss. MIRALLES, R., *Juan Negrín. La República en guerra*, Temas de hoy, 2003, at. 261

⁵ It was recognised in 1945 by Mexico, Venezuela, Colombia, Panama, Yugoslavia, Czechoslovakia, Hungary, Poland, Romania, Bulgaria y Albania. This government had different Presidents (Negrín, Giral, Llopi, Alvaro de Albornoz, Ordás, Herrera, Sánchez Albornoz, Valera). It was a legal fiction that survived mainly due to the power ratio resulting from the fact that Franco's allies lost in World War II.

⁶ See on this, furthermore, GIRAL, F.; SANTIDRIAN, P., *La República en el exilio*, Ediciones 99, 1977, at 171; OJEDA R., *México y la guerra civil española*, Turner, 2004, 335, at 283; MARTÍNEZ, R., *Republicanos en el exilio*, Barcelona, 1976, 135.

Slovakia as a regular citizen. The CJEU deemed this would not be possible as in those circumstances, the norms of International Law would apply, not European Law. A fortiori, Puigdemont and all the others who have attacked the Spanish Constitution and rule of law should not be able to exercise the right of free movement and residence. This is because they are subject to public international law and third parties should respect the principles of sovereignty and non-intervention. They should prohibit political activities that affect Spanish sovereignty. Furthermore, the Spanish Government should demand this in the same way that the British Government only allowed Negrín to be on British soil on this condition, unlike Mexico where he was welcomed as of 1945. It would be a different matter if home or foreign governments neglected to honour their duties for political or any other reasons. I am not going to address this here as a legal expert.

3. BELGIUM'S FAILURE TO COMPLY WITH THE OBLIGATION TO COOPERATE, THE PRINCIPLE OF MUTUAL RECOGNITION AND THE PRINCIPLE OF (JUDICIAL) SOVEREIGNTY

The behaviour of *the Belgian courts is unheard of*. The Spanish judge Pablo Llarena has been summonsed to court by a Belgian judge on 4th September 2018 in connection with a lawsuit presented in Belgium by Carles Puigdemont and others *escapees*. Madrid's senior judge, Antonio Viejo, refused to process the decision on the grounds of article 1 of EU Council regulations 1393/2007 which rule out processing in matters of «liability of the State for actions or omissions in the exercise of state authority». They are under no obligation to process a «legal notice if it affects the liability of the state in the exercise of its authority». This action seeks to recuse the judge for «having a case pending», which would constitute grounds for a lack of impartiality.

Sovereignty is a set of competences which are circumscribed, exclusive and exclusionary. One of these competences is setting laws and enforcing their implementation. This sovereignty (judicial, judiciary, or jurisdictional) was invaded by the Belgian judge. The Permanent Court of International Justice indicated in the well-known Lotus⁷ case «the rules of law binding upon States

⁷ Lotus Case, verdict of 7 October 1927, *Permanent Court of International Justice*, series A.n° 10. See JOVANOVIĆ, S., *Restriction des compétences discrétionnaires des Etats en droit international*, préface de P. Weil, Paris, Pedone, 1988, at 59.

therefore emanate from their own free will as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed». This is so due to the Territoriality Principle of competences, except for enabling jurisdiction. As specified by Kelsen, «the specific function of International law is the regulatory determination and delimitation of areas of territorial, personal, temporal and material validity of national juridical systems»⁸. A State cannot judge what goes on in another State, as this contravenes the distribution of international competences and the Principle of State Sovereignty (*par in parem imperium non habet*), therefore there is *immunity from jurisdiction*.

Hereupon, on 10th July 2018, the president of the Supreme Court sent a letter to the Spanish Government ministers of Foreign Affairs and Justice, requesting that they take «relevant action to ensure the integrity of State action» and of Judge Llarena regarding the lawsuit presented against him in Belgium by several of the defendants. Lesmes believes that the Belgian prosecutorial initiative «can be understood as an act aimed at undermining the guarantees of independence of the Supreme Court magistrate in charge of the case». Lesmes goes on to say that «the text of the lawsuit reveals, obliquely albeit not subtly, that it is the institutions of the Spanish State and the State's correctness in itself which are being challenged». Thus, the Spanish minister of foreign affairs is asked «in compliance with Belgian procedural practice» to call on the Belgian foreign minister so that «Belgium should appear in a Belgian court, representing the state of Belgium, but in defense of Spain's State Immunity and of the accused Supreme Court magistrate».

Were this situation not to be resolved – although we trust that it will – it could result in *an international wrongful act of Belgium against Spain given that Belgium's exercise of extraterritorial jurisdiction, invading Spain's jurisdiction*. It could be taken to the International Court of Justice⁹. In contemporary international law, a State is competent for what goes on within its territory, or under its jurisdiction or control. Belgium cannot invoke any of these three criteria. *The principle of presumption that States have jurisdiction, the principle of the competence of the State and the principle of universal jurisdiction* are not applicable.

⁸ KELSEN, H., *Principios de derecho internacional público*, Buenos Aires, El Ateneo, 1965, at 179; REMIRO BROTONS, A., *Derecho internacional público*, MacGraw-Hill, 1997, at 76.

⁹ We do not enter in this study into the legal issues that this raises.

Belgium chose not to show up in court in defense of judge Llarena as requested by the Spanish Ministers of justice and foreign affairs (this is further evidence of the lack of cooperation from this country). In light of Llarena and the Judicial Council's request for defense of immunity, the justice minister and the vice-president of the Spanish government understood that, by the end of August 2018, the Spanish Government was not competent to defend judge Llarena for his «private acts» but competent to defend «Spain's State immunity». In Oviedo, he had declared that there were no «political prisoners» in Spain or in the case being dealt with. Defense of immunity was not accorded in full.

This stance was not in line with the request of the judicial council, nor was it in accordance with reports from the State legal office (to the justice minister), just as it was not in line with the idea that to the outside world Spain cannot maintain the domestic separation of powers. The principle of State unity had been fractured. Otherwise, Llarena's declarations were perfect and they had been maliciously misinterpreted in the French translation of the trial (procedural fraud). And above all, under no circumstances was Belgium competent. It has all been an international procedural fraud. The most representative associations of judges and prosecutors consider that the government has not «honoured its duties».

The President of the Government had to redirect the situation in only a couple of days and with sound judgment, declaring that «the defence of judge Llarena before the Belgian judge was not a private matter but a State matter». If the Belgian judge does not shelve the case shortly, he will face lawsuits in Spain which have already been presented or announced by lawyers associations. On the other hand, the Belgian State should be taken to the International Court of Justice by Spain for committing a wrongful act and for violating Spanish judicial sovereignty in contrary to the principles of international law.

Judge Llarena himself would have to consider whether he files against Belgium to bodies protecting human rights for violations against him. He should consider a lawsuit either before the European Court of Human Rights, on the basis of art. 6 of the European Convention of Human Rights, or in the United Nations, before the Human Rights Committee on the basis of art. 14, 5 of the Covenant on Civil and Political Rights. His right to be tried by a court duly established by law has been violated. It will cost Spain 600.000 euros to go before the Belgian judge. Furthermore, the actions of the Belgian judge are clearly contrary to the applicable basic principles of law that any law student should know and apply. This situation is entirely unheard of. Wait and see!

Another Belgian court has not collaborated with the Supreme Court because it was considered that there was a problem of form (non-existent) to refuse the handing over of the escapees in Belgium. Their argument, with no legal basis, was that there was no prior national arrest warrant in Spain. There was a bill of indictment (which included an arrest warrant and an order of imprisonment), which constitutes much more than an arrest warrant. The Belgians have invoked the CJUE's Bob-Dogi sentence¹⁰, thus comparing the case of a Romanian lorry driver with no national arrest warrant to the case of fugitive coup leaders with «other valid and effective rulings». A case of rebellion/sedition has been equated with an environmentalist demonstration (the German case) or a traffic problem (the Belgian case). The EAW (European Arrest Warrant) is based on the *principles of mutual recognition, of double criminal liability and of territoriality in penal law*. Belgium has rejected the legal order and the bill of indictment (according to the Supreme Court).

In relation to this, Judge Pablo Llarena Conde has stated in a writ dated 19th July 2018 (legal basis second) that he had informed the Belgian Court that a national arrest warrant had been issued (first on 3rd November 2017, and then validated by the bill of indictment on 21st March 2018) prior to the arrest warrant handled in Belgium. Nonetheless, the judge states that the Belgian court concluded that the European Arrest Warrants should be deemed irregular on the understanding that there was no correct underpinning national warrant, given that:

«In all evidence, in accordance with Belgian legislation and Spanish legislation (sic), a bill of indictment does not have the same value as an arrest warrant, and therefore, it cannot be considered a valid basis for issuing a European Arrest Warrant» (according to the Belgian judge).

This appraisal of the scope of the resolution, according to judge Llarena, in the cited second subparagraph:

«Clearly diverges from the statement of adequacy we transfer to the Belgian court, and disregards the knowledge each judicial organ has of its own legal system, as well as mistrusting its declarations. Thus, the formal objections expressed in the Belgian resolutions of 16th May 2018 are clearly unacceptable, in which the handling of the European Arrest Warrants and European warrants for the extradition of Antoni Comín, Lluís Ouis and M. Serrat was rejected».

¹⁰ From 1-VI.2016.

The Belgian judge's stance lacks any legal support as it is inexplicable both in legal terms and even as regards logic. In short, it is abundantly clear that the Belgian justice system has had no desire to cooperate with the Spanish justice system. *This situation breaks with all the principles applicable in the European judicial area (recognition, confidence, cooperation, sovereignty and non-intervention to name but a few)*. In this situation, the Supreme Court could have issued a prejudicial question on the basis of article 4,2 of the Treaty on European Union and the Belgian non-compliance with the obligation to cooperate. It was probably not done because according to the Advocate General Szpunar (conclusions in the Case C-268/17, 16th May) the prejudicial question would be of an advisory nature and would not have a binding effect, or for others reasons. Furthermore, why should a prejudicial question even be proposed given that confidence has been lost. This confidence was already weak due to the Belgian justice system's lack of collaboration in the tracking down of terrorists belonging to the criminal organization ETA, in the past.

The Supreme Court could also rebel against the system of the European Arrest Warrant, as could the government or the Constitutional Court. German and Italian jurisprudence maintain that they do not consider secondary legislation of the European Union while it maintains a level of protection equal to the level of constitutional protection (in human rights). The Spanish Supreme Court and the Constitutional Court could rebel against the system of the European Arrest Warrant if this system does not maintain a level of protection equal or comparable to that of our constitutional system. The area of freedom, security and justice is being called into question and there is a risk of going back to the classical principles of International Law of self-protection and reciprocity.

The principle of sovereignty implies that a State must respect the courts of another State; the principle of cooperation, loyalty and mutual recognition makes their extradition an obligation. The Belgian case, and the German case which we will subsequently see, show the will not to cooperate. Spain could bring one or several cases before the International Court of Justice of the Hague, as much for non-compliance with international obligations (non-cooperation) as for violation of Spain's judicial powers, and of the principles of sovereignty and non-intervention, among others. Some may argue that there is no place for this within the European Union, but if mutual recognition is not effective, the pillars of cooperation crumble and the most classical principles of International law come into play.

4. GERMANY'S FAILURE TO COMPLY WITH THE PRINCIPLE OF MUTUAL RECOGNITION AND THE VIOLATION OF THE PRINCIPLE (OF JUDICIAL) OF SOVEREIGNTY

It is sad that Spain's 1978 democracy stands alone against the coup leaders. But this is nothing new. This was the case when the nazis helped Franco in the Civil War, to such an extent that a fascist regime remained in place for four decades. Spain's democracy stands alone, lacking the support of European judges. So it should not come as a surprise that prejudice and stereotypes reemerge in cases such as these, as well as separatist propaganda which has borne fruit in the past. There are those who wish to destroy the 1978 Constitution who has also gained ground.

The decision of the state of Schleswig-Holstein's court, on 25th July 2018, stating that Puigdemont would only be extradited for embezzlement, and not for rebellion (sedition was not even mentioned) reinforces what has been said in the previous paragraphs. This is another decision that violates the principle of mutual recognition and the principle of sovereignty, in relation to Spain. Due to this judgment and the abovementioned arguments, there can be no doubt that the behavior of the German court is in non-compliance with the terms of the Council Framework Decision of 13-VI-2002 and in particular, it does not respect Spain's judicial sovereignty when it superseded the duty which should correspond to the Supreme Court and when it did not respect the principle of mutual recognition, among others.

In the 2002 decision, the EAW (art. 1,1) is defined as a judicial decision issued by a member State with a view to the arrest and surrender by another member State of a requested person for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order. Member States, as stated in art. 1,2, will handle any EAW on the basis of the principle of mutual recognition. Well, when the German judge considers the case in depth, whether there was sufficient violence or not in terms of whether there was or was not rebellion, he is superseding the Spanish judge. And this is a fact which encroaches upon the jurisdiction of the Spanish judge. Consequently, *this is not in compliance with either European law or International law.*

From the perspective of European law, it may not be appealed before a German High Court or before the CJUE and none of this conforms to the *principle of exhaustion of domestic remedies*. The German High Courts should be able to conform to what the lower courts state affecting third party States, so that such a decision may be open to appeal at an international level. Otherwise, *the*

validity of this decision is incomplete. In my view, *from the perspective of Spanish, European and international law, it could be considered null and void, and thus, impossible to implement, given that it is clearly illegal.* If the German State's stance were to be confirmed as such, we would be facing a wrongful act attributable to Germany. It would also be advisable to refer for a preliminary ruling before the Union Court, on the incompatibility between this situation and art. 4,2 of the TEU. However, this is not going to happen because the construction of the European Arrest Warrant system is a botched legal edifice, and nothing leads us to believe that doing so would change the German court's decision. Basically, there would be a complete lack of the effectiveness required for judicial decisions.

On the other hand, this decision cannot have legal effect in Spain in relation to the defendants or those who have fled. This is because, as stated by the Supreme Court Prosecutor¹¹, the said decision was taken in breach of the European Legal Framework which regulates European Arrest Warrants and extradition orders. In this vein, the prosecutor states:

«The executing State must not take into consideration either the constituent elements of the crime or its specific appraisal to rule on the extradition. German judicial authority has ignored the aforesaid legal provision since it has examined matters which affect the substance of the case (the existence of a normative type element, the intensity of the violence, etc..) and they can only be assessed after the court responsible for the prosecution has taken evidence (...) the German court's decision cannot condition the greater or lesser criminal relevance of the facts nor can it influence their specific legal status. *These matters are the exclusive competence of the Spanish courts*».

As for Judge Pablo Llarena, he agreed to withdraw the European and International Arrest Warrants for the *escapees* on 19th July. In his view, the German court has not implemented decision 2002, CJEU jurisprudence or the European Handbook for the issuing and enforcement of European Arrest Warrants. He goes on to state (fifth legal basis) that the verification of dual criminality should have been confined to checking if the facts described by the Spanish judge are set out in German criminal legislation. This conflicts with the fact that the German judge did not carry out «an abstract deliberation of the projection of suspected criminality, but he approached the definitive judgment of classifica-

¹¹ Writ of the Supreme Court Prosecutor, to His Excellency the investigating magistrate in appeal number 3/20907/2017

tion of the facts in the rules of criminal law from a blinkered conclusion of how the events took place or what the intentions of the participants were».

According to Judge Pablo Llarena, the German judge is misguided in his actions for the following reasons: 1) he lacks the legal coverage to undertake the prosecution; 2) there is no mention of the fact that he has not solicited that the Spanish judge inform him of points of the investigation which could be relevant, despite the fact that the judge made himself available; 3) he modifies the points of the Spanish judge's factual account without full knowledge of the evidence; 4) he manages to assess the fundamental aspects of Puigdemont's statement, without contrasting with the allegations; 5) furthermore, although he was required to seek a prejudicial question, he did not do so (art. 267 Treaty on the Functioning of the European Union). All this is evidence of (legal basis 6) «the lack of commitment of the Schleswig Holstein Regional Court to facts which could have violated Spain's constitutional order».

This legal chaos leads us to trust our own rule of law and not that of others who breach applicable legal principles without taking into account that Spain is a Democracy and a first-rate rule of law which should not give in to attitudes of legal imperialism. This should all lead to a reconsideration of the European Arrest Warrant as it is visibly untenable. The principle of mutual confidence has switched to that of mutual distrust among democratic States and rules of law, members of the European Union. It is likely that legal cooperation would have been far more successful with any number of States from outside the European Union, which makes the impact even more emotional and especially casts doubt on the legal solidity of this area of freedom, security and justice.

5. THE DUAL NATURE OF THE PROCES – LEGAL AND POLITICAL

It cannot be said that what happened in Catalonia between 2012 and 2018 were political events in which the law does not apply. This view was maintained by some in Quebec, but as Canada's High Court confirmed, official constitutional reform would be required for secession¹². The unilateral facts opposing the Constitution and the law are legal and political at the same time, in so far as they need to be dealt with in duality, from the point of view of the law and politics.

¹² In this context GAUDREAU-DESBIENS, J.F., «Algunos desafíos legales y políticos que debe afrontar el movimiento de independencia de Quebec», *Teoría y realidad constitucional*, nº 37, 1 semestre 2016. Monográfico, La cuestión catalana, UNED, 2016, 135-162

It is believed by some that we are facing a political conflict which should not be resolved by the law. They seem to be forgetting that the law is a method of conflict resolution. Thereby, Sánchez-Cuenca considers the legalistic approach a failure¹³. Abat y Ninet¹⁴ state that Catalonia's lack of recognition as a nation hampers the possibility of negotiating the political solution to the conflict, which they consider to be about the interpretation of the Constitution, but that it should not be resolved by the Constitutional Court. This type of stance forgets that we must not confuse Law with Power, or rule of law with politics as they are entirely different concepts. In the same way, social harmony and Catalan autonomy exist thanks to this Constitution. Of course, the law and power play in the same arena and they have dialectical and complementary relations. However, they are distinct concepts and in a democratic State with a legitimate constitution, as is the case of Spain, the primacy of the Constitution cannot be subject to political games¹⁵.

In a rule of law, the courts (Supreme and Constitutional) are independent and they are not influenced by political power. If a person has broken the rules, they cannot, nor should they, allow such conduct to go unpunished in the name of political power. Politics does not dictate the rules of the game. For this reason, the government of Sánchez is right to declare (6-VII-2018) that the resolution of the Catalan parliament in which they claim to resume the independence *boja de ruta* will be revoked. Similarly, judge Llarena, under art. 384 bis of the law of criminal prosecution, has communicated to the autonomous Catalan parliament that the five remanded autonomics councillors and Puigdemont, who has fled the country, have been suspended from public office.

It remains to be seen if the rule of law can continue to be effective and if its foundations will not crumble. According to Quim Torra, the appeal lodged by the government is «indecent» and he notes that Sánchez took office as President «in recognition of the independence of the Catalan Parliament» and that «this institution must respond collectively». I am not going to go into the analysis of crimes that might continue to be committed in this legislature,

¹³ In short, this is the stance of SÁNCHEZ CUENCA, I., *La confusión nacional. La democracia española ante la crisis catalana*, La Catarata, 2018, 197, at 127.

¹⁴ ABAT, N., «The Spanish Constitution, the Constitutional Court and the Catalan referendum», in *Catalonia in Spain and Europe. Is there a way to independence*, Nomos, 2015, 42-52.

¹⁵ FERNÁNDEZ LIESA, C.R., «La relación entre Derecho y poder en el Derecho internacional», *Teoría y metodología del Derecho. Estudios en Homenaje al profesor Gregorio Peces-Barba*, vol. II, Madrid, Dykinson, 2008, 496-497; PECES-BARBA, G.; FERNÁNDEZ, E.; ASIS, R., *Curso de teoría del derecho*, Madrid, Marcial Pons, 1999, 100-102.

for lack of space. In any case, these crimes are not of a political nature, even if they are committed by politicians. This is the stance taken by the lawyer Aamer Anwar, both head of a law firm and Dean at Saint Andrews, who states that «there is no guarantee that Ponsatí's human rights will be respected in the Spanish Courts»¹⁶. We are not going to consider responding to the lawyers of the escapees of a democratic rule of law which upholds European values and maintains high standards in all the international rankings, higher still than Germany, Belgium and the United Kingdom. In any case, Llarena has withdrawn the European Arrest Warrant for Ponsatí, which means it will be very difficult for her to continue her efforts.

Certainly, the actions reflected in Judge Pablo Llarena's bill of indictment constitute *a continuing coup d'état perpetrated by the leaders of Catalan public institutions of the State*¹⁷ from both perspectives of the theory of law and constitutional law. Constitutional jurisprudence does not make use of those terms that do not appear in the Constitution or in the criminal code. Thus, in the *judgment on law 19/2017*¹⁸, *on the referendum of self-determination*, the Constitutional Court indicates that its foundation and contents show complete indifference to the Constitution, that it was not carried out by the president of the Catalan Government in his capacity as representative of the Spanish State or in the name of the King, and that it was based on the declaration of the independence of the Catalan people – even though they reside on Spanish people – and also on the supremacy of this law to the Constitution. This was all clearly null and unconstitutional and laid the foundations for a legal system which is detached from the 1978 Constitution and completely indifferent to it. Furthermore, the Constitutional Court has stated:

«The Catalan Parliament has sought to actually cancel the validity of the Constitution in Catalonia's territory and for all the Catalan people from the statute of autonomy, by way of law 19/2017 (...) an unacceptable path for

¹⁶ *El nacional*, 25-III-2018.-

¹⁷ GARCÍA ROCA, H., «Después del espectáculo revolucionario: deliberar, votar, reformar, rezar», *El Cronista*, 71.72; ARAGÓN REYES, M., «Los últimos acontecimientos en Cataluña: un examen constitucional», *El cronista del Estado social y democrático de derecho, ¿Cataluña independiente?*, pp. 71-72 ss. Para VIRGALA, E., «Golpe independentista al Estado constitucional de Derecho», *El cronista*, 71-72, at 148 we are experiencing both an institutional coup d'état and a popular uprising in order to declare the Independence of Catalonia breaking with the Constitution and with Catalan legal order.

¹⁸ In this verdict, bear in mind that the law is null and entirely unconstitutional. STC 114/2017, in regard to the law 19/2017, of the referendum of self-determination.

that matter (...) a serious offense against the rule of law and democracy (...) The resolutions of 27-X-2017 presume that the Catalan Parliament assumes attributes inherent to independence and superior to those derived from the autonomy recognized in the Constitution»¹⁹.

Other descriptions of the events – those of Judge Llarena are equally suitable²⁰ – are in terms similar to those of a coup, as much by the judges as by the head of State himself. In this way, King Felipe VI mentioned in his statement on 3rd October 2017:

«For some time, certain authorities in Catalonia have not been complying with the Constitution or the Statute of Autonomy in a persistent, conscious and deliberate way (...). These decisions have brought about systematic breaches in laws that have been passed legally and legitimately, demonstrating an inadmissible loyalty to the powers of the State. It is precisely this State that these authorities are representing in Catalonia. They have violated the democratic principles of any rule of law and they have jeopardized harmony and cohabitation in their own Catalan society, unfortunately to such an extent that it has been divided (...) These authorities have positioned themselves firmly beyond the bounds of the law and democracy. They have sought to break Spain's unity and national sovereignty, though it is the right of all Spaniards to democratically decide how to live together in peace (...) The legitimate powers of the State have the responsibility to maintain constitutional order and the normal running of its institutions, the effectiveness of the rule of law and self-government in Catalonia, on the basis of the Constitution and its Statute of Autonomy»²¹.

If you want, in the word of the historian Santos Juliá²², it is a civil uprising, unilaterally breaking the constitutional agreement of 1978, which came about after controlling the power of the State with abundant resources for decades²³.

¹⁹ Order 144/2017, of 8-XI-2017, of the Constitutional Court in plenary session, in the constitutional challenge 4334-2017

²⁰ Thus, Judge Llarena refers to «an attack of unparalleled gravity and persistence on the constitutional state, previously unheard of in any neighbouring democracy». Bill of indictment of 21/03/2018, of the instructing judge Pablo Llarena Conde, Criminal Chamber of the Supreme Court (Special case 20907/2017)

²¹ *Message from His Majesty the King*. Zarzuela Palace, 3rd October 2017.

²² See. Recently on the Catalan issue, JULIA, S., *Transición. Historia de una política española (1937-2017)*, Galaxia Gutenberg, 2017, t 466

²³ See JULIA, S., *Doblegar al Estado, El País*, 16th April 2018.

It is a not a military coup, but rather institutional in nature. This appraisal is irrefutable from the perspective of the autonomic laws of 6th and 7th September 2017, which involve a derogation of the Constitution without having followed established procedure. Kelsen²⁴ states that there is a coup d'état when «legal order is illegitimately overturned and substituted like a coup d'état, where the transition from the old order to the new order takes place in such a way that is not consistent with the principle of legitimacy, which was the same as the prior legality»²⁵. This is what happened. The appraisal has been endorsed in *a manifest by seventy professors of philosophy of law*²⁶ drawing on relevant doctrine in the theory of law. From the criminal perspective, *coups d'état are not criminalized expressis verbis*, but using other terms used to protect the different legal interests at stake, in national law²⁷.

6. THE NATURE OF THE FACTS FOR INTERNATIONAL LAW

International law has not criminalized coups d'état, not even those carried out by the very State's institutions, or in this case, those of the regions. The reason for this is that democracy and rule of law have not evolved in International Law, where there is a cohabitation of democratic and non-democratic regimes²⁸. The international community encourages and promotes de-

²⁴ KELSEN, H., *General Theory of Law and State*, México, UNAM, 1969, first edition, 1949; KELSEN, H., *Teoría pura del Derecho*, México, Porrúa, 1993, at 325.

²⁵ See my article on this subject: *El sofisma entre legalidad y legitimidad*, *El País*, 6_XII-2014.

²⁶ In the above-mentioned *Manifiesto de setenta profesores de filosofía del Derecho* a unilateral declaration of Independence in Spain was regarded as a coup d'état, and also «unilateral secession in one part of the territory of a democratic State which respects the fundamental rights of its people (including cultural rights and those of its minorities) is contradictory to the democratic ideal. Furthermore, the set of decisions progressively adopted in Catalonia were profoundly anti-democratic and unconstitutional». Another *Manifiesto de 224 profesores universitarios* asked the government to «make use of all its constitutional means without exception to safeguard democratic institutions and the unity of the Spanish nation embodied in our Constitution to prevent the holding of a false, illegitimate and illegal referendum».

²⁷ Thus, in Spanish criminal law, art. 472 the crime of rebellion. Alternatively, the existence of a crime of sedition could be considered, art. 544 (tumultuous public uprising to forcibly or illegally prevent the application of laws or court decisions, among others), *of disobedience* (art. 410), *embezzlement of public funds* (art. 432), *criminal organization* etc..

²⁸ FERNÁNDEZ LIESA, C., «Democracia y desarrollo en el orden internacional», in F. Mariño Menéndez; Carlos R. Fernández Liesa (ed.), *El desarrollo y la cooperación internacional*, Madrid, Universidad Carlos III de Madrid-Boletín Oficial del Estado, n° 24, Instituto de Estudios Internacionales y Europeos Francisco de Vitoria, Uc3M-BOE, 1997, 363, 183-233.

mocracy, but it is not an essential, universal requirement to be able to be a part of the international community. There is no universal democratic legitimacy. That is to say, a legal rule of universal scope which puts those States governed by non-democratic regimes in an illicit position in International Law. Art. 4 of the United Nations Charter on the membership of the United Nations has not been interpreted in such a way as to demand a democratic regime either. It simply limits itself to demanding they be «a peace-loving State», which they effectively all are.

Neither has it been possible in International Law to harmonise a criminal category for attacks on constitutions or rules of law. The best thing international order can guarantee is the so-called *principle of constitutional autonomy*²⁹, which is interpreted according to the principles of peaceful coexistence, from Res. 2625, among States with differing political formations, so that democracies can interact and coexist with States that are not.

Neither is there a *delicta iuris gentium* or *competencia uti universi* crime on rebellion, insurgency, revolution, secession or coups d'état. Criminal law is based on the *principle of the territoriality of criminal law* and the only exception is *universal jurisdiction*. None of this has happened which can be said to be attributable to Spain, and which allows, therefore, a foreign court for example to supersede the competent Spanish court or allow the international community to demand different actions of Spain. The insurrectionists, coup leaders or rebels do not represent those who have the right to self-determination, or to an occupied territory or a territory oppressed by another, therefore they have no foundation in International Law with which to warrant their behavior. This was the conclusion of four hundred professors of the Spanish Association of international public law and international relations in a manifest signed days before the illegal referendum on 1st October 2017.

In the view of Tomas Ramón Fernández, we are facing an uprising of a revolutionary nature³⁰. As for Remiro³¹, a continuing revolutionary act. The

²⁹ See, respectively ICJ, REC 1975, p. 43; ICJ REC 1986, pp. 258 y 263.

³⁰ FERNÁNDEZ, T. R., «En las vísperas de la Declaración unilateral de independencia», *El cronista*, 71-72.

³¹ According to this autor, it is more than a coup d'état, given that it is the greatest existential threat to Spain in the last 80 years. Moreover it has come about due to the systematic disloyalty of the nationalists who have occupied positions in the Government of Catalonia since 1978. REMIRO BROTONS, A., «La independencia como un hecho revolucionario», *Revista electrónica de estudios internacionales*, December 2017.

statute of coup leaders, rebels and rioters³², whose claims lack foundation in International Law, are domestic issues, in the different criminal classifications, which have not been harmonized at an international level.

As regards international order, the events constitute, on the whole, domestic facts. Third parties should not interfere, given that they could be violating the *principle of non-intervention in domestic affairs* as well as the *principle of sovereign equality*, in certain dimensions. The *principle of constitutional autonomy* currently in force assumes *chacun pour soi et dieu pour tous*. Ultimately, the *principle of effectiveness* will prevail in the secession of States. An institution must bring together the elements of statehood.

A coup d'état basically affects Spain and the international community looks on. Only if there are breaches of peremptory norms or *ius cogens*, such as serious human rights violations, would there be an obligation to not recognize as lawful the situation brought about by the violation of a *ius cogens* norm. It would also be relevant were Spain to systematically commit serious human rights violations in order to ensure the rule of law and were they to be considered an oppressive state. This could give rise to the possibility of a *remedial secession*, which is something the secessionists and their media outlets are seeking to achieve.

These events are not commonplace in the European Union, which is why they do not even appear on the list of EAW (European Arrest Warrants). This does not mean that they are political crimes, even if they are committed by politicians or servicemen. All this has led the international community to exercise caution and consequences in law have not been explored. And the fact is that this is seen in other countries, inappropriately, as *political events and not juridical events*. This might be an explanation for the rancid stance of the German and Belgian judges, which will have serious consequences as regards faith in the European project. These countries' reactions have not been based on the principles of mutual confidence, cooperation and loyalty which should preside in relationships among members of the E.U. Neither were they based on the values of democracy and rule of law. This is an unfortunate reflection of the problems we perceive in European integration, at least as far as judges are concerned. The old distinction between political and legal controversies reappears. *Law is not relevant in controversies which affect the essential interests of*

³² See. FERNÁNDEZ LIESA, C., *La guerra civil española y el orden jurídico internacional*, Thomson Reuters, 2014, pp. 34 ss.

*the State, such as secession*³³. A third-party State court will be tempted to retreat from a legal approach to the controversy. Art. 2 of the Treaty on European Union advocates defending values but what use has it been in shunning the persistent myths about Spain?³⁴

Pro-constitution legitimizing doctrine has not been consolidated in general international law³⁵ and there are only a few provisions in some regional democratic legitimacies, the European Union or the Council of Europe³⁶. The European Union as such has supported the rule of law and the Spanish Constitution, considering it to be a *domestic matter*. This is not how we perceive the EU States who have neither applied the principles of mutual recognition, nor have they understood the nature of the events surrounding the coup d'état, nor they have cared to understand. To conclude, I would like to comment on the letter which fifty-two retired Spanish Ambassadors sent to the German Ambassador, in which they compared the coup with that against the Weimar Republic and they wondered if there were two different measuring sticks for events which occur in Germany and Spain. In the Catalan Process, European values have not been upheld by the Belgian or German national judges – lower court judges, but judges all the same. Faced with this situation, indifference can be far more powerful than words.

³³ PASTOR RIDRUEJO, A., *Curso de Derecho internacional público y Organizaciones internacionales*, 14ª ed., Madrid, Tecnos, 2010, pp. 580 ss.

³⁴ See, on this subject, Roca Barea, M., *Imperiofobia y leyenda negra. Roma, Rusia, Estados Unidos y el Imperio español*, Biblioteca de ensayo, Siruela, 2017, 417; PAYNE, S., *En defensa de España. Desmontando mitos y leyendas negras*, Espasa, 2017, 305.

³⁵ On this, neither the doctrine of belligerence nor insurgency has served a purpose. Neither have the doctrines of Tobar, Estrada, Wilson, Larreta, Betancourt. See, on these, PÉREZ GONZÁLEZ, M., «La subjetividad internacional» (I), *Instituciones de Derecho internacional público*, Madrid, Tecnos, 2009, at. 286.

³⁶ In the Council of Europe, arts 3 and 8 the constitutive convention set out that democratic regimes should have adhesion and permanence; in the European Union these criteria also exist, more recently. Furthermore, art. 4, 2 of the Treaty on European Union states that the Union should respect the equality of member states, their treaties and their national identity, inherent in their fundamental political and constitutional structures, also with regard to local and regional autonomy, especially those whose objective is to guarantee territorial integrity, keep public order and safeguard national security.

