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ARTICLE

The Council of Europe and the Catalan Secessionist Process: The Authoritarian Drift of the Radical Democratic Principle

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Abstract

This study shines a light on the problem of Catalan secessionist leaders' abuse of the term "democracy", an issue rarely discussed in the academic debate. The Catalan secessionist case has mainly been studied as a problem concerning the principle of territorial integrity and how it relates to the existence (or otherwise) of a right of self-determination for a substate entity. However, it is also a problem of democracy. For the entire secessionist process was based on a *democratic principle* outside and against the Spanish Constitution: one that defends the supremacy and inviolability of the (regional, in this case) parliamentary majority over the rule of law and respect for minority rights. It thus pitted a *radical or identity-based democracy* against the democracy protected and promoted by the Council of Europe (in which the rule of law, human rights and democracy are inseparable principles forming a single whole). The Venice Commission, the European Court of Human Rights and a divided Parliamentary Assembly have all witnessed this defence of authoritarianism through the radical democratic principle advocated by the leaders of the Catalan process. In response, the first two have defended constitutional democracy, the common heritage on which European public order is based. In 2021, the PACE took a short-lived position (it has adopted no further resolutions in this sense), buoyed by a weak majority, in favour of the Catalan radical democratic principle. Two years later, however, it, too, would defend constitutional democracy as the "genuine democracy" to which the 1949 Treaty of London refers, albeit again by a slim majority. The study concludes that there is no place for the radical democratic principle in Council of Europe law.

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1 Introduction: The Problem of the Catalan Radical Democratic Principle and the Conceptual Battle Over Democracy

This study analyses the role played by the Council of Europe in relation to the *Catalan secession process*, the events of which—explored elsewhere in this special issue—culminated in the (definitive) adoption of the unilateral declaration of independence on 27 October 2017.[1] The Council of Europe is the leading European cooperation organization in the promotion of democracy as the common heritage on which to base the ever closer union between European peoples, which, in turn, is intended to consolidate peace between them. This is the basic framework for the legal issue under study here, an issue rooted in a conceptual battle between the central and Catalan regional public powers *inside* the state of Spain over the legal classification of the "Catalan secession process" in relation to democracy.

Specifically, throughout the secessionist events and until the formation of the current Spanish government, led by the Socialist Party (PSOE),[2] the central state powers in Spain held that the events were a clear attack on constitutional democracy, which is safeguarded by the 1978 Spanish Constitution (CE, from the Spanish).[3] In contrast, the regional state powers in Catalonia maintained, and continue to maintain, that it was a pure exercise of democracy. They consistently sought to legitimate their political strategy through a logic based not only on a right to self-determination,[4] but on a *democratic principle*, which was proclaimed time and again: in legal texts adopted by the Parliament of Catalonia (later declared null and void by the Spanish Constitutional Court), by the Catalan government, and by Catalan politicians and civil society leaders as slogans to sway the population (e.g. "democracy is voting", "right to decide"). Its theoretical construction was handled from academia, by a group of jurists and political scientists, in full exercise of their right to academic freedom in a (non-militant) democratic society governed by the rule of law, such

[1] I would like to thank the Jean Monnet Center and its directors, the professors Joseph H. H. Weiler and Gráinne de Burca, for the opportunity to share some of the embryonic ideas that I develop in this article at the *Global Hauser/Emile Noël Fellows Forums* during the 2020–2021 academic year and 2021–2022 spring semester. The feedback from Professors Weiler and de Burca and the other fellows was of great help, in particular in enabling me to grasp just how difficult it is to study the Catalan case from the perspective of democracy. I am indebted and very grateful to them both and to our two wonderful groups of fellows in general.

[2] Pedro Sanchez was re-appointed prime minister by the King on 16 November 2023 after securing the support of an extremely narrow (179 to 171) absolute majority in the *Congreso de los Diputados* [lower house of the Spanish Parliament] (Royal Decree 828/2023, of 16 November, appointing Mr Pedro Sánchez-Castejón Prime Minister (Official State Gazette (hereinafter, BOE) No. 275, 17 November 2023).

[3] In its judgment on the *Procés* (STS, Judgement 459/2019, of 14 October 2019), the Supreme Court generally classified the events as sedition, misuse of public funds and disobedience. See, among many others: Mangas (2020). On the Supreme Court's arguments on the non-existence of a right to decide, see: Torroja (2020).

[4] On the non-existence of such a right of external self-determination for substate entities in the international legal system, see Remiro Brotóns and Torroja (2024) elsewhere in this special issue.

as Spain's.[5] This theory crossed borders to be defended by academics from a wide variety of Western institutions.[6] As Professor Nuria González Campañá has noted, the Catalan "right to decide" is a version of the *primary rights theory*, intended to justify independence against the Constitution and government of Spain.[7] In Catalan practice, the *right to decide*, *unilateral secession* (in violation of the Spanish Constitution) and its *alleged democratic principle* are interchangeable. Numerous scholars of recognized academic authority in both Spain and abroad have already spoken on the non-existence of this Catalan "right to decide", equated with the right of external self-determination.[8]

In terms of state power, the conceptual battle can thus be summarized as a confrontation between a *Catalan democratic principle* and *constitutional democracy*. For its proponents, this democratic principle grants the power of the people, identified solely through the parliamentary majority—and the resulting government—supremacy over any other power (e.g. the judiciary), the law, and even the supreme law of the land, i.e. the Constitution. In essence, majorities decide not only *what* is the object of power, but also *how* that power should be wielded. In the case at hand, the majority in the Parliament of Catalonia and the Catalan government decided both the *what* (the sovereignty and independence of the territory) and the *how* (carried out against the central government, the Catalan Statute of Autonomy, the CE, and the Spanish Constitutional Court). In an exercise of self-deluded pacifism, it was thought that calling these events "democracy" would transform the reality: they would cease to violate the rule of law and fundamental rights. So it was that the democratic principle or democracy, according to the Catalan regional powers, came into conflict with Spanish constitutional democracy. And, through the door opened by the term *democracy*, the serious attack on Spanish constitutional democracy was diluted in an internationalization of the problem that easily garnered sympathy. The conceptual struggle between the different state powers thus had to be internationalized as part of the secessionist strategy. For if the secessionist act were democratic, who would oppose it? Who would dare go against the Demos?

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[5] Among others, see: Vilajosana (2014, 2020), Barceló (2015). Other scholars who defend this "right to decide" based on the radical democratic principle are studied in: Pons Ràfols (2014, 2015) Professor Pons Ràfols demonstrates the non-existence of such a right to decide in both Spanish and international law.

[6] At least three reports, written in English by non-Spanish organizations, have defended a "right to decide" against the Spanish constitutional democracy. The first is the report to which Professor Marc Weller refers in Weller (2017). In his words, "This presentation is based in part on the Legal Opinion by an International Commission of Legal Experts addressing the question of *Catalonia: The Will of the People and Statehood*. The Commission was composed of Professors Marc Weller (UK), John Dugard (South Africa), Richard Falk (USA) and Ana Stanic (Slovenia). (…) [T]he Opinion was commissioned by *Esquerra Republicana de Catalunya*". The second is Levrat et al. (2017, p. 138), which, not coincidentally, until recently was also available on the Catalan government's website. The third is Caspersen et al. (2017).

[7] González Campañá (2023).

[8] For a list of works by many of these authors, see Remiro Brotóns and Torroja (2024) in this special issue of the HJRL. Of particular interest is the position in defence of constitutional democracy in Spain and Europe expressed in Weiler (2012, 2018), among others works.

As professor Josep Maria Castellà has written, constitutional law theory has a name for this behaviour in the abstract: *radical or identity-based democracy.*[9] The majority imposes itself unchecked, with no respect for the rule of law or fundamental rights (including those of the parliamentary minority). In the present case study, the behaviour is based on the use of the term "democratic principle" in disregard of the essential core of constitutional democracy. Professor Manuel Aragón, a former Spanish Constitutional Court judge, has emphatically and authoritatively clarified the relationship between the democratic principle and the Constitution. It is not that there is no democratic principle within a constitutional system to modulate how it works. Of course there is and, in fact, in advanced democracies, the Constitution is legitimated by just such a principle, which runs through it. What does not exist is a *democratic principle outside the Constitution*, for outside the Constitution, there is no law. In his words:

> the democratic principle as a principle above the Constitution (...) cannot operate as a legal principle. There is no law outside the law. Democracy outside the legal system can be a political principle, but never a legal one (...) The democratic principle, outside the Constitution, has no legal form or content (...)[10]

Radical or identity-based democracy is an ideology used by politicians to pursue a revolutionary goal (to change the Constitution by dint of facts on the ground rather than the amendment mechanisms contained in the document itself), while deceiving the people—who do not know what constitutional democracy is—by telling them that it is law, which is not true. In the Catalan secessionist process, the theory of radical or identity-based democracy ("democracy is voting", "right to decide", the democratic principle outside the Spanish Constitution) was used to conquer the people's emotions. This paper will refer to this practice as the *Catalan radical democratic principle*. It is the democratic principle that respects neither the rule of law nor fundamental rights and freedoms, which is, in truth, a political ideology that masquerades as law before the citizenry and other state powers and can be identified with authoritarianism.

This trend of describing as "democratic" things that are not, of abusing radical or identity-based democracy, was hardly invented in Catalonia. In 21st-century Europe alone, some new democracies had already witnessed similar phenomena, in terms of both the manipulation of the people, who are led to believe certain concepts (populism), and the radical understanding of democracy. In Hungary and Poland, for instance, authoritarian measures have also been described as "democratic" by their architects. What Western politician today would claim to be acting undemocratically? In the literature, the (in my view misleading) term "illiberal democracy" was coined to describe "the absence of limits on government power or the parliamentary

[9] The "voluntad popular sin límites (jurídicos)" is "democracia radical o de identidad" [the (legally) unchecked popular will is radical or identity-based democracy] (Castellà Andreu 2023a, p. 48).

[10] See: Aragón (2002, p. 59). See also the same professor's classic book Aragón (1989).

majority in populist and authoritarian contexts" (Castellà Andreu 2023a).[11] The term was later embraced by Hungarian President Orban.[12] This has sparked an intense debate in the literature, which has focused especially on delimiting the concept of the rule of law, as the violation thereof is this trend's defining feature.[13] That debate, however, falls beyond the scope of the present study, which is more general. Here, we will focus not so much on delimiting the rule of law itself as on the broader concept comprising it, i.e. constitutional democracy, its relationship to the practice of the Catalan secession process, and how it has been perceived by the competent Council of Europe bodies.

In contrast to the Catalan case, the Council of Europe and European Union did not ignore this worrying trend when it was practiced by the central governments of Poland and Hungary, but instead took a variety of measures. This may be due to the challenge posed by the Catalan case: a *comunidad autónoma* [literally, autonomous or self-governing community, the first-level administrative divisions into which Spain is divided] that uses the radical democratic principle to try to establish itself as a state and, despite its anti-democratic and authoritarian nature, gains followers in society and the scientific community because they accept that *democracy is voting* and transfer the concept of *democracy* to a substate entity. The result is a systematic situation of authoritarian behaviours in a region of a democratic state governed by the rule of law that does not take action against it because *it is unwilling or unable to do so*. It is an issue that has gone largely unremarked among international legal scholars. I raise it here, analysing the case of Catalonia and setting aside any discussion of the problem as if it were merely territorial, an aspect that has already been extensively addressed from the perspective of the principle of territorial integrity, secession and the devolution of territories.[14] Instead, I examine it solely from the perspective of democracy, as it is the secessionist leaders themselves who maintained—and still maintain—that their policies and actions are democratic. But is that really the case?

In this regard, there is a basic question: in the law of the Council of Europe, does "democracy" mean a democratic principle superior to respect for the rule of law and fundamental rights and freedoms? If so, that is, if, in Council of Europe law, the democratic principle is superior to respect for constitutional democracy in general and to respect for the rule of law in particular, then any action taken by the Spanish central authorities to repress the secessionist action (the triggering of

[11] Professor Castellà Andreu clearly delimits this concept, noting that the expression "illiberal democracy" was coined by Zakaria, and that "in accordance with this idea, electoral victory legitimates the government to control the judiciary or the Constitutional Court" (Castellà Andreu 2023a, p. 48).

[12] See: Castellà Andreu (2023b, p. 29).

[13] Numerous studies have been written on the subject, and the very title of this journal dedicated to the rule of law is further evidence of this concern.

[14] As noted elsewhere in this special issue (Remiro Brotóns and Torroja 2024), objectively, it is a *secession* process, not one of territorial separation (transfer of sovereignty or devolution). The term "secession" already implies a unilateral action against, in this case, the Spanish Constitution, the orders of the Constitutional Court and the correlative political position of the central government. On the different legal concepts behind the terms "secession", "separation" and "self-determination" in international law, see: Torroja (2023).

Art. 155 CE, court rulings, including by the Supreme Court and Constitutional Court, law enforcement actions, etc.) would have been illegal and unconstitutional and may even have violated fundamental rights and freedoms.

Generally, one could ask whether the Council of Europe has firmly defended that the will of Parliament and the government (whether central or regional) prevails over the Constitution, the judiciary, and the Constitutional Court. Specifically, one could ask what it has said about the radical democratic principle alleged by the Catalan regional powers.

To answer these questions, this paper will first briefly address the general question (2). It will then turn to the specific question by analysing the practice of the Council of Europe bodies that have spoken on the Catalan secession process in chronological order: the Venice Commission (3), the European Court of Human Rights (4) and the Parliamentary Assembly (5). (Notably, the Committee of Ministers itself has not issued any statements on it.) It will finish with some conclusions.

2 Does the Council of Europe's Concept of Democracy Include a Radical Democratic Principle?

In the Council of Europe, does "democracy" mean a democratic principle superior to respect for the rule of law and fundamental rights and freedoms? Given that the underlying problem is a battle of political wills over the conceptual content of the term "democracy", the first step is to determine what the Council of Europe understands by it. Democracy in itself can mean nothing or anything. The terms "democracy" and "democratic" are confusing, as they largely depend on the context in which they are used: to describe a state, to describe a government policy or action, to indicate the ultimate origin of sovereign power (*Kratos*), i.e. the people (*Demos*), to refer to an ideal theoretical model… When used to describe a state, it can take on multiple connotations. Hence, today, the attribute "democratic" still appears in the names of states such as the *Democratic* People's Republic of Korea or the Lao People's *Democratic* Republic, which are undeniably authoritarian. Likewise, in the wake of World War II, popular *democracies* were formed in Central and Eastern Europe, under the influence of the former USSR, that were similarly inarguably authoritarian. The case of Germany is paradigmatic: the authoritarian state was the German *Democratic* Republic, while, from the Western European perspective of the time, the democratic one was the Federal Republic. A state can thus call itself democratic without actually being so, based on an opposite perspective of the concept. A similar argument can be made in relation to the description of a given policy or action as democratic. One can argue that holding a referendum on self-determination in violation of the Spanish Constitution is democratic because the people participate, but is that democracy? The question can only be successfully settled if we first clarify the concepts. In the present case, this means specifically clarifying the concept as it is understood in Council of Europe law.

2.1 Brief Historical Perspective

From a historical perspective, the Council of Europe was created after World War II by ten democracies that knew quite well what kind of democratic system they wished never again to be subjugated to or threatened by. Hitler and Mussolini had come to power democratically; nothing prevented them from then legislating against human dignity or governing unchecked by any higher constraints and, thus, establishing totalitarian regimes. Various factors led to the re-emergence of the desire for a closer union of European states, an idea that had been broached in the past. Although they had won the war, these European countries now found themselves economically, socially and morally devastated. As the US was beginning to roll out its Marshall Plan, more than 750 prominent figures gathered in the Hague at the Congress of Europe to discuss what form such a closer union should take. The debate pitted a more progressive and idealistic faction, eager to establish a European federation endowed with supranational powers transferred to it by the states, against a more conservative one. This second group, led by Churchill, was reluctant to cede sovereignty. Instead, it insistently expressed a preference for an international cooperation organization, based on the sovereign equality of its Member States, whose organs would thus be endowed with merely consultative powers. This latter idea would be channelled through the creation of the Council of Europe, with the Treaty of London in 1949, establishing its Statute; the former would give rise, two years later, in 1951, as a result of France's perseverance and with the essential participation of Germany, to an economic integration organization in very specific areas, setting off a wide-ranging process of European integration today embodied in the European Union.[15]

The stated aim of the Council of Europe was "to achieve a greater unity" among its Member States "for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress" (Art. 1 Treaty of London).[16] In the third paragraph of the Statute's Preamble, the ten democracies reaffirmed their

> devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all *genuine* democracy (emphasis added).

This "genuine" democracy—an adjective that cannot go unremarked—was based, at least, on respect for three basic principles: the rule of law, human rights, and representative and pluralist democracy, which was that democracy then being forged through constitutions in post-WWII Europe. In identifying the essential obligations of all Member States, which must be democracies, Article 3 of the Treaty of London again emphasized respect for the

[15] For an overview of the origins of the Council of Europe, see: Polakiewicz (2019).

[16] Statute of the Council of Europe of 5 May 1949 [Treaty of London].

> principles of the *rule of law* and of the enjoyment by all persons within its jurisdiction of *human rights and fundamental freedoms* (emphasis added).

The organization's ultimate aim was thus to consolidate peace (apart from defence issues), but a peace based on that vision of democracy and no other, coupled with a necessary economic and social development built around the market economy. It was to be a European peace based on "justice and international co-operation", which were deemed "vital for the preservation of human society and civilisation" (Preamble, Treaty of London). Only in democracies that respected human rights and fundamental freedoms, the rule of law, and the representative participation and pluralism that characterized the Statute's signatories could the "justice" to which they referred be achieved. These principles and values were recognized in opposition to those protected in the originally democratic but ultimately totalitarian states that had been a direct cause of World War II, as well as to the authoritarianism of the then USSR, which would gradually be imposed on the satellite states under its influence. From the outset, these three principles were established as inseparable, as evidenced by their integration in the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (entry into force in 1953; hereinafter, ECHR). Its wording exemplifies "the interaction between human rights and democracy" (Roldán Barbero 1993, 1994), but also their interaction with the principle of legality.[17]

The organization's historical evolution underscores the importance of the inextricable conjunction of these three principles.[18] The direction it took following the fall of the Berlin Wall and the transformation of the map of Europe is illuminating. In the Vienna Declaration, adopted in 1993 by the Summit of Heads of State and Government, the organization was recognized as "the pre-eminent European political institution capable of welcoming, on an equal footing and in permanent structures, the democracies of Europe freed from communist oppression". This welcome, legally channelled through accession treaties, presupposed that the

> applicant country has brought its institutions and legal system into line with the basic principles of *democracy, the rule of law and respect for human rights*.[19]

While the organization's principles and "values" could and should be made more specific, they expressed the consensus on the minimum content of its conception of

[17] See the reference in the ECHR to "an effective political democracy" (fifth paragraph of the Preamble; note that, in the Spanish version, this phrase is rendered "un régimen político *verdaderamente* democrático" and, in the French, "un régime politique *véritablement* démocratique" (emphasis added)). See also: the reference to the rule of law in the sixth paragraph of the Preamble ("a common heritage of political traditions, ideals, freedom and the rule of law"); the requirement, in the provisions permitting the restriction of certain non-absolute rights, of legality and proportionality in a democratic society; and Art. 17 on the prohibition of the *abuse of rights* (European Convention on Human Rights of 4 November 1950, and Protocols).

[18] Witness, for instance, Greece's withdrawal, before it could be expelled, with the rise of the Colonels' regime, or Spain's admission, in 1977, once the transition process following the military dictatorship was underway, although before the democratic Constitution of 1978 had been adopted. See: Fernández Sánchez (2010).

[19] Council of Europe, Vienna Declaration 1993, paras. 6 and 7.

democracy.[20] This was done with the aim of promoting it, and it has rightly been said that, with this Declaration, the Council of Europe went from being a "club of democracies" to a "school of democracy".[21]

Today, the Council of Europe has 46 Member States united by these values and principles, which are conditions for accession. Although they are not always fully respected, they are enforced by the European Court of Human Rights (ECtHR) at the judicial level and by multiple monitoring and promotion bodies created within the organization that have a political purpose and scope.[22] There is only one coercive power, namely expulsion from the organization (Art. 8 Treaty of London), which was applied for the first time against Russia in 2022, after its invasion of Ukraine (Salinas de Frías 2022). These members comprise European countries, including all 27 EU Member States and most Eastern European countries (except Belarus), as well as some Eurasian countries, such as Turkey or Azerbaijan. As a result, although its Member States have quite different rankings on the main democracy and rule of law indices, this does not signify that the concept of democracy and the undertakings that they have made as members of the Council of Europe have different meanings.

2.2 Conceptual Synopsis

Historically, then, there is no doubt that democracy, for the Council of Europe, comprises three inseparable principles. As much as the "Holy Trinity", according to Professor Joseph H.H. Weiler, who goes on to clarify that the "metaphor of the Holy Trinity is more than an irony: Like the real Holy Trinity, they are three which are one-indivisible".[23] But what is this one? And what is it called? For some politicians and scholars interested in the radical democratic principle theories, greater precision is required. The first paragraph of the preamble of one of the legal texts adopted by the Parliamentary Assembly of the Council of Europe (hereinafter, PACE), intended to delimit the statute of the Monitoring Committee, can shed light in this regard. It reads:

> Recalling the basic values which are the Council of Europe's *raison d'être*, particularly pluralist parliamentary democracy, which is a political, legal and cultural system based on respect of human rights, the rule of law and every-

[20] To this end, the Vienna Declaration continues, "The people's representatives must have been chosen by means of free and fair elections based on universal suffrage. Guaranteed freedom of expression and notably of the media, protection of national minorities and observance of the principles of international law must remain, in our view, decisive criteria for assessing any application for membership", as well as undertaking to sign the ECHR and acceptance of its supervisory mechanism, the ECtHR (*Ibid*.). Note that the three pillars are reflected in the organization's website's masthead in the following order: human rights, democracy, rule of law. See: https://www.coe.int/en/web/portal.

[21] Carrillo Salcedo (2003, p. 14). It should be recalled that, for states, joining the Council of Europe is like a prelude to joining the EU, which, since the Maastricht Treaty, has spoken of "democratic principles" and, later, in Lisbon, included a definition of constitutional democracy, albeit without explicitly mentioning this term, based on its various components, in Art. 2 TEU.

[22] Salinas de Frías (2018, pp. 89–128).

[23] Weiler (2020).

> one's right to take part in public life, and which entails the active commitment of each individual and their government to values such as equality, social integration, tolerance and respect for diversity.[24]

Here, the PACE is referring to a political, legal and cultural system encompassing all three principles, which it calls "pluralist parliamentary democracy". Could this, then, be the generic term? A look at the organization's practice, however, suggests that it has avoided establishing a uniform name for democracy. This may be why its documents and the literature employ such a wide range of terms: pluralist democracy, liberal democracy, Western democracy, democracy (full stop), etc. The problem is that the debate then becomes bogged down because we do not know what we are talking about when we say the word "democracy". This, let us recall, is a dispute that lies at the origin of the Catalan secessionist process and its internationalization: the conceptual battle, which is a battle not over legal terms, but over the essence of the idea and content—in terms of rights and obligations—that those terms contain. Unless we clearly name them, we will forever be mired in the debate over what we are talking about. And this has become a political problem in its own right, not just for Spain, during the secession process and since, but in Europe in general, in view of the rise of new forms of authoritarianism and totalitarianism that we could today encompass within or equate with the defence of the aforementioned *radical democratic or identity principle*. Hence, the PACE's initiative to define and recover the principles of "genuine democracy" (Preamble, Treaty of London), enshrined in the adoption of Resolution 2437 (2022), on "Safeguarding and promoting genuine democracy in Europe". This initiative stresses that genuine democracy is "based on the principles of individual freedom, political liberty, other human rights and the rule of law, as enshrined in the Statute of the Council of Europe" (para. 2). The radical democratic principle thus has no place in the concept of "genuine" democracy laid out in this resolution, which, unsettlingly, not all PACE members endorsed.[25]

Those who did come out against this radical democratic principle, albeit without explicitly mentioning it, were the heads of state and government at the 2023 Reykjavík Summit, held under the motto "United around our values". It is no coincidence that the summit's final Declaration uses the expression "*true* democracies" (emphasis added), understood as those that "uphold the rule of law and ensure respect for human rights". One of the Declaration's appendices, on the Reykjavík Principles for Democracy, refers not only to one of the three

[24] Preamble, PACE Res. on "Terms of reference…". These "Terms of Reference" complete PACE Res. 1115 (1997), setting up the Monitoring Committee. This committee is a control mechanism for all the undertakings made by the Members States. Although it is a political mechanism, as Professor Gamarra Chopo highlights, it is based on legal references, which has made it a key tool for the "democratization of European states" (Gamarra Chopo 2006, p. 7).

[25] PACE Res. 2437 (2022) (72 votes in favour, 0 against, and 5 abstentions). The complete details of the initiative are available at: https://pace.coe.int/en/files/30029#trace-5. We will return to this initiative in Sect. 5 below, on the Parliamentary Assembly.

values and principles, namely, democracy, as the legitimating principle of any Constitution, but to all three:

> We, the Heads of State and Government, are committed to securing and strengthening democracy and good governance at all levels throughout Europe. We will work together to protect and promote the *three fundamental, interdependent and inalienable principles of democracy, rule of law and human rights*, as enshrined in the Statute of the Council of Europe and in the Convention for the Protection of Human Rights and Fundamental Freedoms.[26]

There is no room for doubt. The radical democratic principle has no place in the Council of Europe's concept of democracy, a term which was left unqualified at this important summit, although it is tacitly acknowledged that there are "true" democracies and others which are not.

As noted by Professor Josep Maria Castellà, a former member of the Venice Commission, from the perspective of constitutional theory, we are dealing with a specific "form of state", today called constitutional democracy or democracy under the rule of law.[27] According to this professor, the Commission describes the democracy defended and promoted by the Council of Europe as pluralist, constitutional and representative; obviously, he continues, its specific social, cultural and economic expression will take different forms in each European state.[28] But, in essence, certain minimums must always be met with regard to each of these three inseparable principles.

Thus, in European law—and, therefore, in this case, in the domestic law of the Council of Europe Member States, although it is also extensible to the European Union—the term "democracy", when used alone to refer to a state, must be understood as an elliptical form of the term "constitutional democracy" or "democracy under the rule of law". It is an internationalized concept: in this European institutional framework, the *sovereignty of the Member States is democratized* (Remiro Brotóns and Torroja 2024).[29] No other democracy is possible in this legal-institutional framework. Nor do the various state or infra-state manifestations of the radical democratic principle or radical democracy have any place in it, because they are not democracy.

[26] Council of Europe, Reykjavík Declaration 2023.

[27] Castellà Andreu (2023a, pp. 35, 48–49).

[28] Castellà Andreu (2022, 2023b).

[29] From the moment the Member States accept that the promotion of and respect for this form of state is a common interest whose management they channel through this organization, they are accepting that the way in which each one respects and protects it is no longer a domestic but an international matter. Unlike in the European Union, in the Council of Europe, the powers attributed to the main organs in this field fall within the strict framework of the function of international cooperation, which will always be respectful of the principle of sovereign equality; therefore, their decisions will always be advisory, if the state concerned has not given its consent, except in the case of norms of general international law, including peremptory norms (*jus cogens*).

3 The Venice Commission President and the Catalan radical democratic principle

The Venice Commission is an independent consultative body, created by the Committee of Ministers in 1990 and subsequently reformed through the Revised Statute in 2002.[30] As its full name suggests, its function is to oversee and promote democracy through law (Art. 1 Revised Statute) in both Member and non-Member States. It also cooperates with other international organizations and actors. Although it may carry out research on its own initiative, it may only adopt opinions at the request of a party.[31] Originally created through a partial agreement, as it brought together only a group of (as opposed to all) the Member States, since the 2002 reform, it has been considered an enlarged agreement, as it now includes at least all the Member States ("at least" because, as always, non-members and other actors may also participate).[32] It is made up of experts—each state appoints one member and one substitute—who serve "in their individual capacity and shall not receive or accept any instructions" (Art. 2 Revised Statute). They are, therefore, independent, although they are chosen and sent by the state, denoting a necessary harmony with the government in power. As a body made up of experts, it cannot adopt binding decisions because its members do not represent the state, which alone can participate in decision-making, in accordance with the principle of sovereign equality. Its documents (Reports, Codes, Guidelines, Opinions, etc.) are thus of a recommendatory nature.

The Commission has spoken on the issue of secession in constitutional democratic states on various occasions, both in statements on specific states and situations and in general reports.[33] One such general report is the Code of Good Practice on Referendums, which includes what the Commission calls "secession referendums".[34] Among the principles that it sets out, which will not be dealt with here, the first is the requirement of respect for the state Constitution and legislation.[35] The Commission's position on the radical democratic or identity principle for secessionist purposes is clear: it has no place in constitutional democracy.

The Venice Commission takes a constitutional theory approach to the issue, and its view thus uses the terms of that discipline. Consequently, it appears to equate

[30] Res. (90) 6 of the Committee of Ministers of 10 May 1990. The Commission's statute was subsequently revised through Resolution (2002) 3 of the Committee of Ministers of 21 February 2002.

[31] Opinions may be requested by organs of the Council of Europe, such as the Committee of Ministers, the Parliamentary Assembly, the Congress of Local and Regional Authorities of Europe or the Secretary General, as well as by a state or international organization or other body participating in its work. The Commission may also cooperate with constitutional courts and other international courts (Art. 3 Revised Statute).

[32] Preamble, Resolution (2002) 3 of the Committee of Ministers. See also: Statutory Resolution No. (93) 28 of 14 May 1993.

[33] Venice Commission, Opinion of 16–17 December 2005 (CDL-AD(2005)041); and Venice Commission, Opinion of 21–22 March 2014 (CDL-AD(2014)002).

[34] Venice Commission, Guidelines on the holding of referendums (CDL-AD(2006)027rev), and Venice Commission, Code of Good Practice on Referendums (CDL-AD(2007)008rev), which includes an Explanatory Memorandum. A summary of the updated position can be found in: Venice Commission, Compilation of 13 May 2022 (CDL-PI(2022)027).

[35] A principle also included in other international law texts on the same matter. See Pons Ràfols (2018).

secession, separation and self-determination, going so far as to consider colonies to have carried out a separation from the metropolitan territory.[36] The view from public international law is different (see Torroja 2023). From the perspective of the theory of public international law, it would be more than a bit disconcerting for an international body to provide recommendations for a referendum on *secession* (*stricto* sensu) because, in public international law, the term *secession* is understood to refer to a revolutionary act against a state's central government and constitutional system undertaken with the aim of establishing a new state or becoming part of another (Torroja 2023). Clearly, this is not what the Venice Commission means; it is simply using the term in a different sense.

However, beyond the interplay of terms and concepts, what is certain and agreed is that, in accordance with general international law, territorial sovereignty is the exclusive competence of each state, subject to such limits as may be imposed by peremptory law (*jus cogens*), especially respect for human dignity, the prohibition of the use of force, etc. The Venice Commission's recommendations thus address how a state should legislate on its referendums should it decide to transfer part of its sovereignty. They do not establish how secession referendums should be conducted in the absence of the agreement of the central authorities and against the constitution. It thus comes as a surprise that several reports from domestic experts on the Catalan secession process claimed that the referendum against the CE was compliant with the Venice Commission's Code of Good Practice.[37] So, too, did various resolutions adopted by the Parliament of Catalonia and the government of the *Generalitat* [the set of institutions that make up the Catalan government], as will be seen later in this section.

Unlike in the cases of Montenegro or Crimea, the Venice Commission has not adopted any report on the Catalan secession process.[38] The only report that it has adopted even indirectly related to it concerned a request from the Parliamentary Assembly for an opinion on the reform of the Organic Law on the Spanish Constitutional Court, specifically, on the inclusion of the adoption of coercive fines to enforce its decisions. The reform was undertaken in the context of repeated disobedience by the regional bodies and, in fact, these measures were subsequently applied, a matter that would eventually come before the ECtHR, as will also be seen below, in Sect. 4.[39] Prior to this report, however (the subject of which falls beyond

[36] See: Venice Commission, Report adopted on 10–11 December 1999 (CDL-INF (2000) 2 Or. F), para. 3; and, again, Venice Commission, Revised Guidelines, 8 October 2020 (CDL-AD(2020)031), para. 5.

[37] Advisory Council of National Transition (2013, p. 82), note 33. For a summary of all the documents adopted by this council, see: Advisory Council of National Transition (2014).

[38] The former member of the Venice Commission in respect of Spain Josep Maria Castellà Andreu has examined this issue in detail. See Castellà Andreu (2019, 2020).

[39] Organic Law 2/1979 of 3 October 1979, as amended by, among others, Organic Law 15/2015 of 16 October 2015; Venice Commission, Opinion of 13 March 2017 (CDL-AD(2017)003). See the first paragraph of the Conclusions of the Opinion: "69. The Venice Commission recalls that judgments of Constitutional Courts have a final and binding character. As a corollary of the supremacy of the Constitution, judgments of Constitutional Courts have to be respected by all public bodies and individuals. Disregarding a judgment of a Constitutional Court is equivalent to disregarding the Constitution and the Constitu-

the scope of the present working hypothesis), the Commission did publicly position itself on the Catalan secession process in a way that was neither prepared nor promoted and which did not fall within its statutory functions. It was an inadvertent public positioning, as it was prompted—provoked—by the then president of the *Generalitat*, Carles Puigdemont, in 2017, around four months before the unconstitutional referendum of 1 October was held.

Specifically, on 29 May 2017, Mr Puigdemont sent a letter directly to the President of the Venice Commission (without the mediation of the Spanish representation to the organization) in his capacity as the president of the *Generalitat* of Catalonia.[40] In it, he requested "the Venice Commission's collaboration" with the Catalan government's "will" to hold a referendum agreed with the Spanish government on Catalonia's political future. He was making this request as the president of the *Generalitat* on behalf of the popular will expressed through the Parliament of Catalonia. In other words, it was the people who were asking for the Commission's collaboration, as the first line of the letter makes clear, mentioning the Catalan Parliament's resolution of 18 May 2017.[41] According to the letter, despite this desire to hold an agreed and consensus-based referendum, the then Spanish prime minister, Mariano Rajoy, refused to start negotiations on the terms thereof. However, for President Puigdemont, the letter continued, the dialogue remained open. To this end, he was convinced that the information he was sending would be of interest to the Commission due to its "political significance". He concluded by noting that he was at the Commission's disposal for any further clarification that might be needed.

In a letter dated 2 June, the then president of the Venice Commission, Gianni Buquicchio, offered a clear response to this letter from Mr Puigdemont.[42] After thanking him for the information provided, he kindly reminded him of two basic principles of the functioning of a constitutional democracy, which can be summarized as follows. First, any cooperation with an international organization—in this case, the Venice Commission—must be carried out in agreement with the Spanish authorities (that is, the central ones). In fact, this is a general principle for any state according to international law. As with any other international organization, the representation of the state before the Council of Europe corresponds to the central executive power, not regional bodies. While the latter may participate in the state's *external action*, it is well known that they may not conduct *foreign policy*, as if they were subjects of international law.

Footnote 39 (continued)

ent Power, which attributed the competence to ensure this supremacy to the Constitutional Court. When a public official refuses to execute a judgment of the Constitutional Court, he or she violates the principles the rule of law, the separation of powers and loyal cooperation of state organs. Measures to enforce these judgments are therefore legitimate. In the light of the absence of common European standards, this opinion examines to which extent the Amendment introduced to Organic Law no. 2/1979 on the Constitutional Court of Spain is an appropriate means to achieve this legitimate objective".

[40] Letter in Catalan available at: https://www.elnacional.cat/es/politica/carles-puigdemont-comision-venecia-carta_162531_102.html.

[41] Catalan Parliament, Motion 122/XI.

[42] Letter in English available at: https://www.lavanguardia.com/politica/20170603/423150730181/carta-comision-venecia-respuesta-puigdemont-referendum.html.

Second, there is a need for “any referendum to be carried out in full compliance with the Constitution and the applicable legislation”, something that the Commission, whose official name is, he recalls, the European Commission for Democracy through Law, has repeatedly stressed. There was no room for the radical democratic or identity principle, so patently on display in the president of the *Generalitat*’s 29 May 2017 letter.

Here, it is worth taking a moment to briefly review the text of the Catalan Parliament resolution, of 18 May 2017, cited in Mr Puigdemont’s letter, as it is yet another example of how the radical democratic principle was at work in the Catalan secession process. According to the resolution, there is a “democratic mandate” to hold a referendum on Catalonia’s political future, and it is the Catalan government’s wish for this referendum to be held in a consensual and agreed upon way with the Spanish government in accordance with the constitutional framework. However, the Parliament has noted the “entrenchment” of the Spanish state and its institutions in refusing to allow such a referendum, as well as its display of “clearly authoritarian behaviours that violate the democratic rights of the citizenry” and which are “causing the Catalan institutions serious difficulties [to] implemen[t] the mandates of the Parliament of Catalonia” (paras. 1, 2 and 3). In view of this situation, the Parliament of Catalonia asks the Catalan government to inform the Venice Commission of the “desire of the majority of citizens of Catalonia to hold this consensual, agreed-upon referendum as expressed in the mandate of the Parliament” (para. 4). The regional parliament also asks the Catalan government to secure the “advice, recognition and endorsements of the Venice Commission in terms of the conditions that the call for the referendum must meet in order to fulfil the requirements established by its Code of Good Practice on Referendums” (para. 5). Furthermore, in the resolution, the Catalan Parliament agrees “to support the unitary mobilizations that the *Pacte Nacional pel Referèndum* (National Pact for the Referendum) may call in defence of calling and holding the referendum” (para. 6).

The Catalan president’s letter was, thus, sent on behalf of the Parliament of Catalonia. What did they expect to happen? Had they misapprehended how international society works? Did they overestimate their own power? I do not think so. They knew very well what they were doing. It was a manifestation of their firm political position of already considering themselves a distinct political subject from the Spanish state. In other words, it was reflective of their authoritarian position concerning the rule of law in Spain and, thus, a clear manifestation of the radical democratic principle sent to the President of the Venice Commission. That is why I think that the Catalan Parliament’s proposal, and Mr Puigdemont’s letter itself, once again evidenced the challenge to constitutional democracy—that is, to human rights, the rule of law and democracy itself—not only with regard to the Spanish state, but to the Council of Europe. The Venice Commission president’s eloquent response was a resounding no to the legal existence in Council of Europe law of a radical democratic or identity principle. That is the intelligent and objective reading. Yet, according to the Spanish press, President Puigdemont publicly claimed that the Venice Commission’s letter implicitly supported their position.[43] And they went ahead with the referendum in

[43] Expansión (2017).

clear violation of European Law—not out of ignorance but knowingly, as Buquicchio's letter shows. From this perspective, the holding of the referendum and the unilateral declaration of independence were also a challenge to the Venice Commission, to what it represents, and to the Council of Europe itself. Just another bump on the road to Catalonia's independence for Mr Puigdemont.

4 The ECtHR's Decisions (So Far) in Relation to the Catalan Radical Democratic Principle

Various applications have been lodged with the European Court of Human Rights (ECtHR) in relation to the events of the secessionist process. Some of the admitted cases are still pending. Of these, the most important are those concerning the applications lodged by the leaders convicted by the Spanish Supreme Court. The ECtHR has decided to join them and, so far, has addressed the parties to request information.[44] One case, *M.D. and Others v. Spain*, has ended in a ruling against Spain.[45] Others have been declared inadmissible, two of which, in particular, stand out: *Aumatell i Arnau v. Spain* and *Mª Carmen Forcadell i Lluis and Others v. Spain*. For the purposes of the present research hypothesis, this study will focus on these two decisions, as they concern applications lodged by citizens who, holding public office or posts, carried out or intended to carry out actions within the secessionist process based on a radical democratic principle.[46]

From the perspective of this study, the two applications declared inadmissible represent a challenge to the ECtHR, as they were lodged by leaders or participants in the secessionist process, who, holding public office, alleged the violation of fundamental rights and liberties in situations in which, in my view, there had been no exercise of rights at all, but rather a blatant failure to comply with the Spanish Constitution and the Constitutional Court's orders. The decisions examine each of the human rights violations alleged by the applicants in detail. In my view, it would have been bolder, had the state so alleged, to apply Article 17 ECHR, on the abuse of rights, conceived of precisely to prevent the emergence of new dictatorial regimes.

[44] Application nº 3009/21, *Jordi Turull i Negre v. Spain* and eight other applications, communicated on 19 September 2023, Statement of Facts.

[45] ECtHR, Judgment, *M.D. and Others v. Spain* (Application no. 36584/17), 28 June 2022. The case of *M.D. and Others* concerns the publication in a Spanish newspaper of the names, photos and personal details of 33 Catalan judges who had publicly signed a manifesto in favour of the "right to decide" or secession process. The applicants alleged a violation of Arts. 8 and 10 ECHR. The Court held that Article 8 ECHR had been violated on some accounts.

[46] In another case, by means of its decision of 12 June 2019, the ECtHR declared inadmissible the application that Carme Forcadell had lodged with it concerning the pre-trial detention ordered for her as a precautionary measure. The reason for the non-admission was the failure to exhaust domestic remedies, as the applicant had not filed an appeal for constitutional protection with the Constitutional Court before applying to the ECtHR. (see Ripoll Carulla and Arenas García 2020, p. 290).

4.1 Human Rights *Versus* the State's Duty to Protect Constitutional Democracy: First Inadmissibility Decision

The ECtHR's first decision, adopted in 2018, declared application no. 70219/17, lodged by Ms Aumatell i Arnau against Spain, inadmissible.[47]

4.1.1 The TC Imposes a Fine to Enforce Its Decisions in the Context of the Illegal Referendum

Ms Aumatell was a member of one of the Catalan regional electoral boards (specifically, that of Tarragona) tasked with overseeing the illegal referendum of 1 October 2017. She alleged that the fine that the Spanish Constitutional Court (hereinafter, TC from the Spanish) had imposed on her, following her repeated failure to comply with its Order suspending the electoral boards, violated various rights and prohibitions protected by the Convention, namely: the right to a fair trial (Art. 6 ECHR), no punishment without law (Art. 7 ECHR), the right to an effective remedy (Art. 13 ECHR), and, finally, the prohibition of discrimination (Art. 14 ECHR). None of the other electoral board members, who had also been fined, lodged similar applications with the ECtHR.

The facts, which have to do with the organization of the independence referendum of 1 October 2017, can be summarized as follows. The Catalan Parliament adopted the decision to create a system of electoral boards—to oversee the proper holding of the referendum—in application of Catalan Law 19/2017 on the Referendum by means of Resolution 807/XI of 7 September.[48] That same day, the TC suspended said Resolution, through its ruling of 7 September, requesting that the constitution and appointment of the boards and their members be halted. In view of the failure to implement this ruling, the TC again reminded the board members that the Resolution had been suspended through a new ruling dated 13 September. All members of the boards were personally notified of both rulings and given a period of 48 h to inform the Court of their compliance.[49]

Finally, noting the lack of a response, in order to enforce its rulings, the TC decided to impose coercive day-fines for significant amounts on all members of the electoral boards by means of its Order of 20 September 2017, in application of the terms of the Organic Law on the Constitutional Court (hereinafter, LOTC from the

[47] ECtHR, Decision of 11 September 2018.

[48] The resolution, adopted on 7 September, implemented Law 19/2017, of 6 September (Referendum Law). The function of the various boards was to oversee the self-determination referendum of 1 October 2017 in the context of the "constituent process" to create an independent Catalan state in the form of a republic.

[49] On 13 September, the official responsible for serving the notice delivered a copy of both rulings to the applicant, containing the formal order, warning her of her duty to prevent or stop any initiative that would disregard or circumvent the agreed suspension. She was likewise warned of the criminal consequences that could result from failure to comply with the law (*Aumatell i Arnau v. Spain*, para. 28).

Spanish).[50] This Order stated that the fines would be discontinued once proof had been provided that the members had resigned from their posts. It was published in the Official State Gazette (hereinafter, BOE from the Spanish) on 22 September 2017, along with the names of all the sanctioned electoral board members. A day-fine of 6,000 euros was imposed on Ms Aumatell. The Order was also published in the Official Gazette of the *Generalitat de Catalonia* (hereinafter, DOGC, from the Catalan). The Order gave the parties three days within which to submit arguments, after which the final decision on the fine would be adopted. Notice of the Order was not personally served on the applicant or any of the other board members, but was published only in the BOE and DOGC. In the days that followed, the members of the central electoral board resigned from their posts. Aumatell also resigned, while at the same time submitting arguments. The TC lifted the coercive fines imposed on all members by its Order of 14 November 2017, including the fine imposed on the applicant.[51]

4.1.2 Violation of the Fundamental Rights and Freedoms of a Member of an Electoral Board for the Referendum?

The application was considered inadmissible on the grounds that all the complaints were manifestly ill-founded. Because the application was sufficiently ill-founded to be declared inadmissible, the ECtHR did not consider the issue of the exhaustion of domestic remedies.

With regard to the violation of Article 6.1 ECHR (right to a fair trial), the applicant alleged that the fine had been imposed on her *ex parte* and that she could not be deemed a party to the proceedings before the TC. She further complained that notice of the Order of 20 September 2017 had not been served on her personally and that she had learnt of its content through the press and its publication in the BOE and DOGC.

After verifying that the criteria to establish the criminal-law nature of the fine are met, the Court first finds that the fines imposed do fall within the concept and determines the applicability of Article 6.1.[52] On the proceedings before the TC,

[50] Art. 92 LOTC. The TC imposed a coercive day-fine of 12,000 euros on the members of the central electoral board and of 6000 euros on the members of the regional electoral boards, including Ms. Aumatell. The fine would be discontinued when the board members submitted proof that they had resigned from their respective posts.

[51] It should be recalled that the TC declared null and void all the laws and resolutions of the Parliament of Catalonia, as well as the decrees of the Catalan government, concerning the implementation of the constituent process of the Republic of Catalonia (secession process) adopted in autumn 2017, in various judgments issued between 17 October and 8 November that year.

[52] The "criminal-law" nature of article 6 ECHR is an autonomous concept of the ECtHR, as it is for the Court to delimit its conceptual definition regardless of what the state legal system might establish. The Court follows the three criteria to determine this nature established by previous judgments in the cases *Engel and Others v. The Netherlands* and *Jussila v. Finland* (GC). See: Barcelona Llop (2020, pp. 207–208).

The Venice Commission's Opinion on the LOTC, as amended in 2015 (see *supra* note 39), already indicated the possible criminal nature of the TC fine and the applicability of Art. 6 ECHR, should the other legal criteria of the ECtHR be met, in view of the high amount of the penalties.

the Court finds that the "imposition of the fine is due (…) to the passivity of the applicant", who had failed to comply with the TC's previous decisions. The decision was published in the BOE and the applicant and the Public Prosecutor's Office had three days to make submissions before the fine would become enforceable. In fact, the applicant resigned and submitted arguments. The TC lifted the fine on both the applicant and all other board members by means of its Order of 14 November 2017. The Court notes that the applicant had been personally notified of the TC's previous rulings, which had warned her of "her duty to prevent or stop any initiative which would disregard or circumvent the suspension of the referendum as agreed by the Constitutional Court". Furthermore, the applicant resigned from her post in time not to have to pay the 6000 euros, such that the fact that notice of the TC's Order had not been personally served on her did not prevent her from having knowledge of its content or making submissions to that Court. Therefore, in light of the proceedings as a whole, the nature of the lawsuit and the state's margin of appreciation, the ECtHR finds that the restrictions suffered by the applicant do not entail any violation of the rights and freedoms safeguarded by the Convention. The complaint was thus dismissed as manifestly ill-founded.

As for the second complaint, the applicant alleged a violation of Article 7 of the Convention (no punishment without law), arguing that she had been subjected to an ad hoc sanction, as membership in the Tarragona electoral board is not a criminal offence and, therefore, should not be punished. The Court recalls that the three criteria for determining the criminal-law nature identified for Article 6 are likewise applicable to Article 7. Without dwelling on this a second time, it proceeds to determine whether the fine was prescribed by domestic law. In accordance with its own case law, it recalls that "law" must be understood as all domestic law "as a whole". It examines the LOTC, as amended in 2015, indicating that it provides that, in case of persistent non-compliance with its decisions, the Constitutional Court may adopt measures, including the imposition of fines, and establishes the procedure to do so. Therefore, there had been no "lack of foreseeability as provided for under Article 7 of the Convention" and the TC had acted in accordance with the law. Moreover, it affirms, the applicant had been notified of the rulings suspending the laws that she was infringing and, thus, "was aware—or should have been aware—that her conduct could be penalised by fines and entail criminal proceedings". In practice, the fine was never imposed because the TC lifted the sanction, such that the applicant did not sustain any actual economic prejudice. In conclusion, the domestic law was sufficiently clear and foreseeable and the TC had not made an arbitrary interpretation of the provisions. Therefore, this part of the application was also manifestly ill-founded.

As for the alleged violation of Article 13 ECHR (right to effective remedy, including when the violation has been committed by persons acting in an official capacity), the applicant alleged that she could not defend herself, before or after the Order of 20 September 2017, and, furthermore, that the order did not allow for any type of appeal, but rather only the submission of arguments. The ECtHR, following its prior case law, notes that, when a violation by the highest judicial authority in a Member State is alleged, "the application of Article 13 is subject to an implicit limitation". In any case, it continues, the TC had acted in accordance with Spanish law, providing

for a *súplica* appeal against the decision imposing the fine (Art. 93 LOTC). Indeed, the other electoral board members had lodged such an appeal, and they had received a detailed response from the TC, which lifted the fines, as they had complied with its rulings at that time (Order of 14 November 2017). The Court also highlights that, in one case, the TC even went so far as to withdraw its order, thereby rendering the fines without effect (the member of the Aran electoral board had tendered his resignation on the day of his appointment). Therefore, Ms Aumatell could have lodged an appeal but did not. Consequently, this complaint was also deemed inadmissible as it was manifestly ill-founded.

As concerns the alleged violation of Article 14 ECHR (prohibition of discrimination), the applicant had relied on this provision in isolation, alleging that she was a "victim of political persecution" for having expressed her willingness to participate in the independence referendum and facilitate its holding (para. 74). The Court also considered this complaint "manifestly ill-founded". Article 14 ECHR must always be invoked "in connection" with other rights and freedoms protected by the Convention, not independently (idem). It furthermore requires that "a basis of comparison be provided" (idem), as what the article prohibits is "treating [someone] differently, without objective and reasonable justification, from other persons in a comparable situation". In this case, the provision is invoked in isolation and without providing any basis for comparison to enable the identification of a possible analogy between two situations. Therefore, this part of the application is also manifestly ill-founded and had to be rejected.

The substance of the decision contributes to Spanish and European administrative law insofar as it further delimits the autonomous concept of "criminal" of Articles 6 and 7 ECHR for the purposes of determining whether an administrative sanction has such a nature; it moreover specifies that the imposition of coercive fines by the Spanish TC is of a criminal-law nature.[53] From the perspective of constitutional law, the decision can be analysed in terms of constitutional theory and comparative constitutional law in relation to the various ways that public authorities have of dealing with resistance to the enforcement of the decisions of senior judicial bodies.[54]

However, with regard to the tension between constitutional democracy and the alleged radical democratic principle, the following can be observed. First, the board member Aumatell unquestionably knew that the referendum was illegal and that she had disobeyed the TC's orders. Moreover, she had resigned from her public post and the fine had been lifted. She was the only electoral board member to lodge an application with the ECtHR to this end. Could this have been a strategy to delegitimize the Spanish state? It might have been. As Professor Susana Sanz Caballero has noted, lodging applications for this purpose has been identified in the literature as a practice followed by some individuals against Spain. Specifically, she writes that nationalist and secessionist parties use appeals to the ECtHR not only to defend their

[53] Barcelona Llop (2020).

[54] See Jiménez Alemán (2019).

causes, but, above all, to obtain rulings that "serve as an argument to delegitimize the Spanish state before international institutions."[55]

What can unequivocally be affirmed is that, in this case, the ECtHR did not consider the will of the Catalan Parliament to create electoral boards to oversee the illegal referendum of 1 October to take precedence over the TC's decisions. In the findings of law, the decision refers to Organic Law 15/2015, on the Constitutional Court, as well as to the Opinion on this law issued by the Venice Commission, recalling the first paragraph of its conclusions (already cited above), namely: "When a public official refuses to execute a judgment of the Constitutional Court, he or she violates the principles the rule of law, the separation of powers and loyal cooperation of state organs". Although it does not explicitly say so, the ECtHR thus makes clear that the radical democratic principle therefore does not prevail over respect for Spanish constitutional democracy.

4.2 Human Rights *Versus* the State's Duty to Protect Constitutional Democracy: Second Inadmissibility Decision

In the second decision in a case on the Catalan secession process, adopted in 2019, the Court similarly unanimously declared inadmissible application no. 75147/17, lodged by María Carmen Forcadell i Lluis and others against Spain.[56]

4.2.1 The TC Suspends the Regional Parliamentary Sitting in Which the UDI was to be Proclaimed

The applicants were 76 members of the Catalan Parliament who had supported the secession process, including the president of the *Mesa* [Bureau] of the Catalan Parliament, Ms Forcadell, and the then president of the regional government, Mr Puigdemont.[57] They complained that the Spanish Constitutional Court's decision to suspend the holding of the plenary sitting of the Parliament, scheduled for 9 October—in which they would announce the results of the 1 October secession referendum and proceed to proclaim Catalonia's independence (i.e. make the unilateral declaration of independence or UDI) as mandated by the Catalan Referendum Law (Art. 4, Law 19/2017)—violated several of their rights, namely: to freedom of expression (Art. 10 ECHR) and freedom of assembly (Art. 11 ECHR), as well as to political participation through elections (Art. 3 Protocol No. 1), inasmuch as it

[55] On the idea of "utiliser la Cour Européenne des droits de l'homme pour délégitimer les États", see: Sanz Caballero (2023, pp. 84 et seq).

[56] ECtHR, Decision of 7 May 2019. The application was lodged on 11 October 2017, a few days after the unconstitutional independence referendum of 1 October (see: Cuenca Curbelo 2019).

[57] Specifically, they were members of the parliamentary groups *Junts pel Sí* [Together for Yes] and *Candidatura d'Unitat Popular–Crida Constituent* [Popular Unity Candidacy–Constituent Call, CUP], who together represented 56.3% of the seats, including the president of this Parliament, Ms Forcadell, and the president of the Catalan government, Mr Puigdemont.

prevented them from expressing the will of the voters who participated in the referendum.[58] They further alleged a violation of the right to an effective remedy (Art. 6 ECHR), as neither they nor the Parliament had access to a court to submit their grievances.

The TC's suspension of the sitting was a provisional measure, decided by resolution in an appeal for constitutional protection (*recurso de amparo*) filed by 16 members of that same Catalan Parliament, in this case, from the Socialist (PSC) parliamentary group. It further noted that the decision to convene the sitting was in violation of the TC's own previous decision ordering the suspension of Catalan Law No. 19/2017, on which it was to be based. In practice, the TC's suspension of the sitting did not prevent the Parliament from meeting on 10 October, in persistent disobedience. Nor did it prevent then President Puigdemont from declaring Catalonia an independent republic, if only to immediately thereafter invite the Catalan Parliament to suspend the effects of that declaration. On 27 October, the Catalan Parliament again declared independence, this time definitively.

4.2.2 Violation of the Catalan MPs' Fundamental Rights and Freedoms?

The Court first addresses a preliminary point concerning the applicants' standing, as, under Article 34 ECHR, only individuals may lodge applications. As they were members of the Catalan Parliament, which is unquestionably a state organ, the question was raised of whether they were a group of individuals or a government organization. The Court considered that the application was lodged "on an individual basis", within the meaning of Article 34 of the Convention and that they thus did have standing.

Regarding the violation of Articles 10 (freedom of expression) and 11 (freedom of assembly), the Court, in keeping with its own case law, considers that, in this particular case, Article 10 should be regarded as a *lex generalis* in relation to Article 11, which would be a *lex specialis*. The Court reiterates that the right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression, one of the foundations of such a society. Therefore, it should not be interpreted restrictively. Consequently, the concept of assembly is broad, covering both private and public meetings, whether static or in the form of a procession, and it can be exercised by both the participants and the organizers of the gathering. However, the assembly must be "peaceful", a concept thus does not cover demonstrations in which the organizers or participants have "violent intentions".

The Court then examines whether the limitation of the right by means of the TC's suspension of the plenary sitting of the Catalan Parliament is justified in accordance with the *three conditions established by case law to this end, namely: that the measure be prescribed by law; that it pursue one or more of the legitimate aims* set out in

[58] Suspension decision of the TC of 5 October 2017. The plenary session had been called in accordance with the application of Art. 4 of Catalan Law 19/2017 (Self-determination Referendum Law). This article provided that the result of the referendum would be binding and that, if the final count of issued votes resulted in more Yes votes than No votes, the result would entail the declaration of independence of Catalonia. On these events and the relevant legal texts, see: Bilbao Ubillos (2024).

Article 11(2); and that it be "*necessary in democratic society*" to achieve those aims. The verification of whether these conditions were met leads to an opinion of proportionality in which the Court respects a certain margin of appreciation on the part of the state (the degree of which can vary, depending on the case).

First, the Court considers the condition that the measure be "prescribed by law" to have been met. In this case, the possibility of suspension was provided for under Article 56 LOTC; it was foreseeable as the TC *had suspended* the law pursuant to which the plenary sitting had been convened (Catalan Law 19/2017); and, furthermore, *there was already a precedent* from two years earlier, when, in 2015, the TC declared unconstitutional and null and void Resolution 1/XI of the Parliament of Catalonia, intended to introduce the initial measures to create an independent state in Catalonia in that sphere.

Second, the aim that the measure sought to achieve was legitimate. The Court follows the same reasoning as that put forward by the TC (in its decision to suspend the parliamentary sitting), as it finds no "valid reason" to depart from it: the purpose was "to ensure the protection of the rights and freedoms of minority parliamentarians in the Catalan Parliament against possible abuse by the parliamentary majority". It was this majority that had requested the plenary sitting (that is, the 76 MPs, out of the total number of 135, who were the applicants in this case). The TC adopted the suspension to "enabl[e] the *amparo* [constitutional protection] appellants legitimately to exercise their duties (*jus in officium*) pursuant to Article 23 of the Spanish Constitution". Thus, of the legitimate aims listed in Article 11, the suspension pursued, in particular, "public safety, the prevention of disorder and the protection of the rights and freedoms of others".

Third, the measure was necessary in a democratic society. Given that interpretation of the restrictions must be construed strictly, as "only convincing and compelling reasons can justify restrictions on freedom of association", the Court recalls its established case law on the scope of the margin of appreciation: states have a "limited margin of appreciation" to decide whether there exists a necessity for the purposes of Article 11(2). It recalls that its task is not to substitute its own view for that of the relevant national authorities but rather to review the decisions which they deliver in the exercise of their discretion in keeping with the criterion of proportionality. In this case, the decision of the Bureau of the Autonomous Parliament to authorize the holding of the plenary session had presupposed blatant non-compliance with the decisions given by the Constitutional Court on 7 and 12 September 2017 allowing the suspension of Laws Nos. 19/2017 and 20/20217, respectively. Through this suspension measure, the TC sought "to ensure compliance with its own decisions, thus preserving the constitutional order". The Court goes on to note that "it transpires from the opinion issued by the Venice Commission (see above) that it is compulsory to comply with the judgments delivered by constitutional courts, as they have competence to order any measures which they see fit to ensure such compliance".

It then adds another reasoning, following that set out by the TC in another of its decisions concerning the secession process (TC judgment of 17 October 2017, on the irregularities in the process of the passage of Law 19/2017, under which the plenary sitting of 9 October was convened). Specifically, it recalls that "a political

party may promote a change in the law or the legal and constitutional structures of the State on two conditions: firstly, the means used to that end must in every respect be legal and democratic; secondly, the change proposed must itself be compatible with fundamental democratic principles". These conditions were not met in this case. Furthermore, it adds, in keeping with the reasoning of another TC judgment (Judgment of 26 April 2018), in the particular circumstances of the case, it was essential "to prevent, firstly, the parliamentarians representing a parliamentary minority from being impeded, by an unlawful procedure put in place by the majority, in the legitimate exercise of their functions (*jus in officium*) pursuant to Article 23 of the Spanish Constitution, and, secondly, any indirect infringement of the citizens' constitutional right to participate in public affairs through the intermediary of their representatives".

In conclusion, "the interference with the applicants' right to freedom of assembly may reasonably be deemed, even in the framework of the limited margin of appreciation afforded to States, to have met a 'pressing social need'". Consequently, it was "necessary in a democratic society", in particular "in the interests of public safety, for the prevention of disorder and for the protection of the rights and freedoms of others", within the meaning of Article 11(2) of the Convention.

Furthermore, the ECtHR notes that, in any case, the president of the Catalan government appeared before the plenary Parliament the following day (10 October), declaring independence, but then leaving said declaration legally inoperative, only to ratify it again on 27 October 2017. In view of all these considerations, the complaint was rejected as manifestly ill-founded, pursuant to Article 35, paragraphs 3 and 4 ECHR.

As for the complaint under Article 3 of Protocol No. 1, the applicants alleged that the sitting's suspension infringed the right to freedom of expression of the opinion of the people in the choice of the legislature, as secured under that provision. Following its previous case law, the Court did not exclude "the possibility that a democratic process described as a 'referendum' by a Contracting State could potentially fall within the ambit of Article 3 of Protocol No. 1". Nevertheless, it continues, to this end, the process would have to take place "under conditions which will ensure the free expression of the opinion of the people in the choice of legislature. Those conditions were not met in the instant case. Indeed, the plenary sitting of the Parliament had been scheduled pursuant to [… a] Law [that] had been provisionally suspended […] by the Constitutional Court". Consequently, the decision of the Bureau of the Parliament "presupposed blatant non-compliance with the decisions of the Constitutional Court, which had been aimed at protecting the constitutional order". It thus concludes that the applicants' complaint under Article 3 of Protocol No. 1 is incompatible *ratione materiae* with the provisions of the Convention and should be rejected as manifestly ill-founded.

As for the complaint under Article 6.1 ECHR, the Court considers it to be unsubstantiated, as the applicants merely submit that neither they themselves nor the Parliament had access to a tribunal to uphold their claims. It thus rejects it as manifestly ill-founded. Additionally, it notes that the Parliament of Catalonia was a party, through its legal services, to the *amparo* proceedings that led to the judgment of 26 April 2018.

In short, although they do not say so in so many words, the applicants' underlying argument is the primacy of the regional legislative power over the CE and the highest judicial authority, i.e. the TC. The ultimate strategy is to have the regional parliament declared inviolable. The secessionist position is that democracy is the supremacy of Parliament over the law and the Constitution. We are once again faced with the Catalan radical democratic principle. The tactic is to allege infringement of fundamental rights and freedoms of 78 citizens on an individual basis. The battle they hope to win is for the ECtHR to find that the Spanish TC *lacked the competence* to prohibit the Catalan Parliament's assembly. The ECtHR, in a dialogue with the Venice Commission, takes a position in defence of the Spanish constitutional order and, therefore, in defence of the notion of constitutional democracy advocated by the Council of Europe.

The suspension of the Catalan parliamentary sitting in which the UDI was to made was necessary in a democratic society because it pursued legitimate purposes provided for in Article 11 ECHR, in particular "the interests of public safety, the prevention of disorder and the protection of the rights and freedoms of others". As Professors Ripol Carulla and Arenas García have written, the "key idea of the decision" is "that the Constitutional Court's decisions must be complied with".[59] For Professor Burgorgue-Larsen, it is a "key example" of the cases in which the ECtHR shows a deferential attitude towards the rulings of domestic courts of last instance (in this case, the TC), in "cases where the authority of Constitutional courts' decisions is in fact no longer accepted internally and, in sum, democratic stability is at stake".[60] In my view, this case was clearly also conceived of as a challenge to the ECtHR. The applicants knew that they had no right in the Spanish constitutional order to unilaterally declare independence. Once again, then, we see the radical democratic principle at work, this time before the Council of Europe.

5 The PACE, Democracy and the Radical Democratic Principle

Finally, let us turn to the Parliamentary Assembly's position on the radical democratic principle, both that alleged by the Catalan regional powers in favour of the secession process and that which might be alleged in general by any other secessionist (or otherwise) political group in a Member State.

5.1 The Resolution in Favour of the Catalan Radical Democratic Principle: Just a Blip?

With regard to the former, in January 2019, the issue of the prosecution of politicians for public statements made in the exercise of their political mandate was introduced in the PACE, the study of which was referred to the Committee on Legal Affairs and Human Rights (CLAHR). From the outset, the Committee used the topic

[59] Ripoll Carulla and Arenas García (2020, p. 290).

[60] Burgorgue-Larsen (2023, pp. 73–76).

to jointly study the situation in Turkey and in Spain.[61] At that time, in Spain, the Supreme Court trial of those Catalan politicians and civil society leaders who had led the secessionist process and were being held in pre-trial detention was getting underway (it began on 12 February 2019). The others, it should be recalled, had fled to various points of Europe. The Supreme Court handed down its judgment on 14 October 2019 (Judgment TS 459/2019).

Some two and a half years later, on 21 June 2021, the PACE adopted Resolution 2381 (2021), entitled "Should politicians be prosecuted for statements made in the exercise of their mandate?",[62] which was widely covered in Spain. Following this rhetorical title, the report denounced that in both of the aforementioned countries, "politicians [are] prosecuted for statements made in the exercise of their mandate". In the case of Turkey, it described a protracted situation of systematic violation of political freedoms, the existence of political prisoners and a lack of an independent judiciary, among other aspects.[63] In the case of Spain, the resolution focused exclusively on the Catalan secession process.

In this regard, the statements concerning the factual situation and the recommendations made to Spain contain contradictions in relation to the assessment of democracy in Spain. Diametrically opposed statements are made, reflecting the underlying tension between the Spanish central executive power and the secessionist position of the regional Catalan authorities, endorsed—or, at least, all signs seem to suggest so—by the CLAHR's rapporteur, Mr Cilevičs.

Thus, on the one hand, it is recognized that Spain is a "living democracy, with a culture of free and open public debate, and that the mere expression of pro-independence views is not a ground for criminal prosecution" and stated that the Assembly "fully respects the constitutional order of Spain" (para. 9)".[64] It is further affirmed that the "Assembly respects the independence of the Spanish tribunals" while "respecting the right to appeal to the ECHR" (para. 9.8). However, on the other, it is stated that

> Nevertheless, several senior Catalan politicians were prosecuted and eventually sentenced to long prison terms for sedition and other crimes, inter alia for statements made in the exercise of their political mandates, in support of

[61] See: PACE Doc. 14802 (Motion for a resolution, 22 January 2019). The first introductory memorandum can be read in: PACE, Committee on Legal Affairs and Human Rights (CLAHR), AS/Jur (2019) 35 (Introductory memorandum, 1 October 2019). Rapporteur Cilevičs visited Spain and met with regional and central authorities.

[62] PACE Res. 2381 (2021). It was adopted with 70 votes in favour, 28 against and 12 abstentions among the parliamentarians present and voting. In a forum of a total of 306 parliamentarians, the resolution was thus adopted by around one-fourth of the members and with only a bit more than one-third (110) of the total number of members in attendance. For the draft resolution and its explanatory memorandum, see the provisional version of the CLAHR report published on 3 June 2021 (AS/JUR (2021) 07).

[63] See paras. 8 and 10.2 of PACE Res. 2318 (2021).

[64] Spanish diplomatic efforts, and, in particular, the considerable work of Ambassador Manuel Montobbio, Representative to the Council of Europe, managed to soften the text of the draft resolution in the context of the CLAHR. (See: para. 8 of the draft, AS/JUR (2021) 07.) Additional amendments were subsequently introduced during the debate in the PACE, promoted by some Spanish parliamentarians and intended to defend the Spanish constitutional democracy; others were introduced against it. (See: PACE Doc. 15307 (Compendium, 21 June 2021).).

the unconstitutional referendum on the independence of Catalonia in October 2017 (para. 9).

The text of the resolution goes on to break this statement down into seven points, which, together, can only be read as a PACE-approved platform for the Catalan secessionist politicians.[65] Finally, paragraph 10 of the Resolution makes recommendations for all Member States in general and for the Turkish and Spanish authorities in particular. Specifically, paragraph 10.3 makes seven recommendations to the latter, which can be read as a clear defence of Catalan secessionist policies.[66]

The resolution is not binding. It is merely advisory, and the narrow vote by which it was adopted undermines its moral force. But the political consequences in Spain were not minor, even if their reception dovetailed in parallel to the conflicting domestic positions.

Thus, the central executive power and judiciary publicly and clearly spoke out against the PACE resolution. The former did so on 21 June 2021 itself, stating, through the Spanish foreign ministry, that the Assembly was not respecting the principle of separation of powers and recalling that the government cannot interfere in ongoing judicial proceedings.[67] The latter did so on 23 June 2021, through a Statement by the Permanent Committee of the General Council of the Judiciary rejecting the PACE's interference in the Spanish judiciary's independence. Highlighting the unconstitutional nature of the referendum, it noted that, in accordance with the rule of law and the principle of equality of all citizens before the law, to which the Assembly itself had referred in its resolution, any criminal conduct must have legal consequences.[68] Private associations also expressed their disagreement,[69] as did various media outlets.[70]

[65] See paras. 9.1–9.7 of the Resolution.

[66] Specifically, the recommendations were for the Spanish authorities to:
- reform the criminal provisions on rebellion and sedition (3.1);
- consider pardoning or otherwise releasing from prison the Catalan politicians convicted (…) and consider dropping extradition proceedings against Catalan politicians living abroad (3.2);
- drop the remaining prosecutions (…) and refrain from sanctioning the successors of the imprisoned politicians for symbolic actions that merely express their solidarity with those in detention (3.3);
- ensure that the criminal provision on misappropriation of public funds is applied in such a way that liability arises only when actual, quantified losses to the State budget or assets can be established (3.4);
- refrain from requiring the detained Catalan politicians to disown their deeply held political opinions in exchange for a more favourable prison regime or a chance of pardon; they may however be required to pledge to pursue their political objectives without recourse to illegal means (3.5);
- enter into an open, constructive dialogue with all political forces in Catalonia, including those opposing independence, in order to strengthen the quality of Spanish democracy through the authority of the rule of law, good governance and total respect of human rights, without recourse to criminal law, but in full respect of the constitutional order of Spain and reach a compromise that enables Spain, a strong European democracy, to settle political differences, including on sensitive issues (3.6); and
- implement these recommendations according to the principles of the rule of law as defined by the Council of Europe, paying due attention to the principle of equality of all citizens before the law (3.7).

[67] Cited in PACE, CLAHR, AS/Jur (2022) 15 (Follow-up report, 24 June 2022), para. 33.

[68] See: General Council of the Judiciary (2021).

[69] The think tank Foro de Profesores had already issued a statement on the CLAHR's draft resolution. See: Foro de Profesores (2021).

[70] Pérez (2021).

Meanwhile, the Catalan regional powers and secessionist political parties positioned themselves in favour of the resolution, interpreting it as a vindication of the radical democratic principle. Remarkably, even the *Síndic de Greuges de Catalunya* [the Catalan Ombudsman], a regional body that should be independent, given its task of defending respect for human rights by the government in Catalonia, publicly came out in favour of the resolution's radical democratic principle.[71] As the *Síndic*'s report indicates, so, too, did various Catalan civil society organizations, such as Òmnium Cultural.[72] Even an international NGO of the likes of Amnesty International seems to have emerged as an advocate of the Catalan radical democratic principle.[73]

The resolution was also cited in several domestic trials. For example, Pau Juvillà i Ballester, a member of the Catalan Parliament, invoked it before the TC,[74] and the former Catalan president Quim Torra invoked it before the judiciary.[75]

Additionally, both Catalan and Basque secessionist political groups pointed to the PACE's resolution in the Spanish Parliament to demand, one way or another, effective compliance with its recommendations. The parliamentary group *Esquerra Republicana-Euskal Herria Bildu* [Republican Left-Basque Country Unite] tabled a motion in the Senate.[76] In the *Congreso de los Diputados* [the lower house of the Spanish Parliament], the party *Esquerra Republicana de Catalunya* [Republican Left of Catalonia, ERC] tabled a motion in March 2022,[77] to which then Minister of Justice Pilar Llop responded, in Parliament itself, also citing the PACE's resolution.[78] The same group later tabled a motion in September 2022.[79] The fact of the matter—everything seems to suggest not by chance—is that on 22 December 2022, among other measures, the offence of misuse of public funds was reformed and that of sedition, eliminated by means of Organic Law 14/2022.[80] Nor can it be forgotten that the Spanish executive had already pardoned the offenders on 22 June 2021, the

[71] Síndic de Greuges de Catalunya (2022).

[72] Report in favour by other civil society associations: Òmnium Cultural (cited in Síndic de Greuges de Catalunya 2022).

[73] Cited in Síndic de Greuges de Catalunya (2022, p. 10).

[74] See: Constitutional Court Judgment 82/2023 of 3 July 2023I.

[75] He was being tried for an offence of disobedience. In his defence, he cited paras. 10.3.2 and 10.3.3 of the PACE resolution, which urge the Spanish authorities to "refrain from sanctioning the successors of the imprisoned politicians for symbolic actions that merely express their solidarity with those in detention", precisely the situation for which he was being tried. See: Criminal Court No 6 of Barcelona, summary proceedings No 486/2021, Judgment, 1 May 2022.

[76] On 3 March 2022, they tabled a motion urging the Spanish government to comply with the recommendations for Spain included in PACE Res. 2381 (2021). See: Senate, *Esquerra Republicana-Euskal Herria Bildu* parliamentary group, 3 March 2022.

[77] See: *Congreso de los Diputados*, Republican Parliamentary Group, 9 March 2022.

[78] The minister recalled that the resolution was a recommendation and that the executive had already pardoned the offenders. She additionally pointed to a future reform of the offences of sedition and rebellion, which called for "a cool-headed majority and cool-headed reflection" and a minimum consensus to affect "core aspects of co-existence". See: Europa Press (2022).

[79] See: *Congreso de los Diputados*, Republican Parliamentary Group, 22 September 2022.

[80] Organic Law 14/2022 of 22 December.

day after Resolution 2381 (2021) was adopted. The PACE's resolution had thus had the desired effect in Spanish domestic politics.[81]

In short, despite the resolution's contradictory content, the longest and most strongly worded sentences defended the secessionist position, that is, the radical democratic principle. Only a few brief sentences, included through the efforts of Spanish diplomacy and parliamentarians, defended constitutional democracy. The PACE was unmistakably assuming the argument of the radical democratic principle, the very one defended by the governments of Hungary and Poland, now being promoted by the Catalan government and the proponents of the secessionist process. One year later, an unsuccessful attempt was made to reintroduce the topic in the CLAHR. The *Partido Popular* [People's Party, PP] and Spanish Socialist Party [PSOE] managed to prevent the idea from prospering.[82] For the time being, the issue has been abandoned. Will it remain a historical footnote? As long as the current Spanish government continues to endorse the radical democratic and secessionist principle, it surely will, for once the domestic opponent has joined the other side, it is no longer necessary to turn to the PACE.[83]

5.2 Resolutions on Secessionist Movements, Self-Determination and Genuine Democracy

Beyond this incident, in the abstract and for all states, the PACE has spoken on secessionist movements, self-determination and democracy in general on several occasions. The origin of these statements lies in the concern over the multiple ethnic conflicts in states that joined the organization after 1989, which led to the tabling of a motion in 1999.[84] Shortly thereafter, Resolution 1334 (2003) "On positive experiences of autonomous regions as a source of inspiration for conflict resolution in Europe" was adopted.[85] Recognizing that the constitutions of most Council of Europe Member States do not recognise the right to secede unilaterally, the resolution proposes the recognition of a territorial autonomy for these minorities. Specifically, it proposes a territorial autonomy that "do[es] not undermine the internationally recognised borders of states" (para. 18). It also considers it "fundamental" that

[81] In the Spanish domestic political arena, it was quite useful for the alliances between the PSOE and ERC and *Junts per Catalunya* [Together for Catalonia], given that the former needed the latter two's votes to form a government.

[82] In June 2022, during the session in the CLAHR, Mr Antonio Gutiérrez Limones (SOC), Mr Marc Lamuà (SOC) and Mr Sergio Gutiérrez Prieto (SOC) introduced a dissenting Opinion stating that the "Follow up report is based on the same mistaken assumption reflected in the report and the 2021 resolution, namely, treating Spain and Turkey jointly", among others mistakes (see: Doc. AS/Jur (2022) 15, *supra* n. 67). See also: González (2022), EFE (2022).

[83] For a current overview of the alarming present moment for Spain's constitutional democracy, see: Aragón et al. (2023, 2024).

[84] A motion was tabled in 1999 to address the issue of ethnic conflicts in Europe, citing the cases of "Abkhazia in Georgia, Trans-Dnestr in Moldova, Chechnya in Russia, the occupation of the self-proclaimed Turkish Republic of Northern Cyprus in Cyprus and Nagorno-Karabakh in Azerbaijan" and "of course, the situation in Kosovo" (see: PACE Doc. 8425, 28 May 1999).

[85] PACE Res. 1334 (2003). Para. 22 briefly restates the nine basic principles proposed.

measures be adopted to protect “minorities within minorities”, such that in these autonomous entities, the 1995 Framework Convention for the Protection of National Minorities should also be applied (para. 21).[86]

The problem of ethnic minorities and secessionist movements was reiterated in 2011, in Parliamentary Assembly Resolution 1832 (2011), which states that ethnic or national minorities do not have an automatic right to secession. Their “right to self-determination should first and foremost be implemented by way of the protection of minority rights”, as established by Council of Europe and international law. It further specifies that Council of Europe law is to be found in the European Framework Convention for the Protection of National Minorities, as well as in the aforementioned Parliamentary Assembly Resolution 1334 (2003).[87] Additionally, it recommends for “all member states to refrain from recognizing or supporting in any way the de facto authorities of territories resulting from unlawful secessions, in particular those supported by foreign military intervention” (para. 8.3).

In 2017, in response to a motion tabled in 2015, the issue was again debated in context of the Legal Affairs and Human Rights Committee, resulting in the report “Towards a democratic approach to the issues of self-determination and secession”. The report reviews contemporary cases, including the Catalan one. It refers to international law and to the Parliamentary Assembly’s positions in the aforementioned Resolution 1832 (2011) and 1334 (2003). It finds that, “in the light of the complex and highly politicized nature of the legal issues at hand, (…) it would be impossible for the committee to assume the role of arbitrator and to define universally applicable, generic guidelines”. No resolution was proposed for adoption by the PACE.[88]

Finally, let us recall the PACE’s adoption of Resolution 2437 (2022) on “Safeguarding and promoting genuine democracy in Europe”. In view of the alarming democratic backsliding across the world, including Europe, the Resolution highlights the urgent need for the Member States to

> renew their commitment to safeguarding and promoting genuine democracy, based on the principles of individual freedom, political liberty, other human rights and the rule of law, as enshrined in the Statute of the Council of Europe (para. 2).[89]

[86] European Framework Convention for the Protection of National Minorities (ETS No. 157) of 1 February 1995.

[87] PACE Res. 1832 (2011), para. 7 (adopted by 79 votes in favour, 18 against, and 2 abstentions). The resolution was based on the previous report “National sovereignty and statehood in contemporary international law: the need for clarification” (PACE Doc. 12689, 12 July 2011), which concluded that “Statehood criteria have come to include such substantive standards as respect for democracy, the rule of law and human rights, guarantees for ethnic groups and minorities and the obligation to settle disputes peacefully” (para. 4.1). All the documents related to this topic and the votes are available at: https://pace.coe.int/en/files/18024.

[88] See: PACE Doc. 14390, 4 September 2017. It originated from the motion for a resolution, “Toward a democratic approach to the issues of governance in European multinational states” (PACE Doc. 13895, 30 September 2015). The full details are available at: https://pace.coe.int/en/files/24004.

[89] PACE Res. 2437 (2022) (72 votes in favour, 0 against, 5 abstentions). The term “genuine democracy” is not random: it is a reference, as the Resolution’s sponsors note, to the Preamble of the Statute of the

It emphasizes that "only *genuine democracies* can guarantee *democratic security* and achieve this common goal of 'the pursuit of peace based upon justice and international co-operation', as outlined in the Statute of the Council of Europe" (para. 3, emphasis added). Among many other aspects, it clarifies that

> democracy is not the dictatorship of the majority and that democratic legitimacy does not derive solely from winning elections but encompasses the daily practice of democratic governance in the exercise of power and the functioning of institutions. Moreover, any theory attempting to justify the existence of non-pluralistic democracies is doomed to failure owing to its inconsistency: genuine democracy must guarantee, among other things, fundamental rights and freedoms, including those of civil society, political pluralism and the independence of the judiciary and the media, and be based on the rule of law (para. 5).

Democracy is not the dictatorship of the majority. In other words, a radical democratic principle has no place in the genuine democracy of the Council of Europe. As noted, unsettlingly, the resolution was not endorsed by all PACE members. Still, it would seem that the PACE cannot be said to defend the secessionist and radical democratic principle in general for all states. Yet it is an assembly divided in this regard. The conceptual battle over democracy has spread across all Europe. Spain and the Catalan process are simply further (albeit quite relevant) evidence of the problem.

6 Conclusions

The Catalan secessionist process was based on the notion that violating the rule of law in a democracy is democracy. Brandishing mottos such as "democracy is voting" and "right to decide", it defended the idea of the supremacy of the majority over minorities, the inviolability of Parliament over the law and the Constitution. In other words, it defended a *radical or identity-based form of democracy* with the aim of convincing a population (with little to no democratic culture) of the lawfulness of the secessionist actions. This defence of radical democracy was then internationalized in the hopes of securing support in the Council of Europe.

However, the democracy protected and promoted by the Council of Europe is based on three inseparable principles, that is, principles that are one-indivisible: the rule of law, human rights and democracy. These are the minimum elements comprising a form of state that has been internationalized through this organization (and the European Union). While this form of state can be succinctly summed up with

Footnote 89 (continued)

Council of Europe (para. 1). In this respect, the Assembly reiterates the relevance of the work carried out by the European Commission for Democracy through Law (Venice Commission) on the functioning of democratic institutions, fundamental rights and electoral law, including the Code of Good Practice in Electoral Matters, the Rule of Law checklist and the Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist (para. 6). The complete details of the initiative are available at: https://pace.coe.int/en/files/30029#trace-5.

the term “constitutional democracy”, the Council of Europe uses multiple variants thereof: representative and pluralist democracy, democracy under the rule of law, or, simply, democracy, full stop. In no case, however, does this concept include the radical or identity-based democratic principle, or a concept whereby the power of the majority is not subject to any legal limits, or an authoritarian abuse by the majority against the rule of law. In this regard, there is a tendency within the organization to use expressions such as “genuine democracy” or “true democracies” to distinguish constitutional democracy, i.e. the form of democracy upheld by the Council of Europe.

That is why I maintain that the problem in Catalonia is not mainly a problem of territory (i.e. of a region that wanted or wants unilaterally to become a state), but of democracy. It is a problem of nationalist and populist authoritarianism in a region of a constitutional democratic state. During and after the secession process, the problem was internationalized, mainly through the efforts of the secessionist leaders, in a bid to win over supporters to the cause of radical democracy among certain sympathetic academics and political movements.

In this sense, in my view, the leaders and other players in the Catalan secessionist process have both abused and defied the Council of Europe institutions. They defied the Venice Commission by writing to it, seeking its collaboration, and claiming to be at its disposal, only to immediately thereafter dramatically disregard its position on the matter, as publicly expressed in its president’s response. They defied the ECtHR, lodging applications in which leaders of and participants in the process alleged violations of human rights and fundamental freedoms in situations involving no exercise of any right at all, but rather blatant failures to comply with the Spanish Constitution and the Spanish Constitutional Court’s orders. So far, both bodies have positioned themselves in defence of constitutional democracy, that is, of the European democratic public order. Finally, they defied and abused the PACE, the only body that, due to the nature of its parliamentary composition, provided an avenue for the defence of Catalan radical democracy in 2021, albeit a short-lived one.

The Catalan case is a *sui generis* situation: a region or substate entity of a democratic state advocates and applies antidemocratic nationalist authoritarian policies that go unnoticed in the international community because the central government of that state *is unable or unwilling* to confront the problem. How should the international community respond? How can this be prevented? The Council of Europe system does not seem to be fully prepared for such cases. It should be. It must be able to respond swiftly.

It is important to understand that, in Spain, there is a political and academic school of thought that advocates radical democracy by defending a democratic principle outside and against a constitutional system governed by the rule of law (what I have called here the “Catalan radical democratic principle”). This school of thought defends the invulnerability of parliaments and the decisions of the executive branch, which, because they represent a majority, need not respect the rule of law or the fundamental rights and freedoms that are inextricable from it. It is a school of thought that, in short, defends authoritarianism in opposition to constitutional democracy. Today, at the time of writing, this nationalist and anti-democratic authoritarianism has been transferred to the majority (albeit a slight one) of the Spanish Parliament.

The amnesty law accepts that the radical or identity-based democratic principle was constitutional.

But nothing can hide the reality in the face of this challenge: *true* democracy, *genuine* democracy, the democracy that is just according to the Council of Europe, is that which united European democracies in 1949, in opposition to the earlier authoritarian nationalisms and Eastern European popular democracies, for the purpose of achieving a closer union between them in order to maintain peace. In this European institutional framework, the *sovereignty* of the Member States is *democratized* through the three principles that are one-indivisible. And in this genuine democracy, there is no place for the Catalan radical democratic principle.

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