



The Challenge of Catalan Secessionism to the European Model of the Rule of Law

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Abstract

Far from being an abstract concept, international, European, and Spanish legal orders clearly conceptualize “rule of law”. Catalan secessionism, appealing to the democratic principle, challenged the common understanding of rule of law in the period between 2012 and 2017. This article offers a detailed explanation on how secessionism fundamentally disregarded the common understandings of the rule of law principle and, more precisely, two of its essential elements: the principles of legality and respect for courts. In relation to the former, Catalan separatism assumed competences attributed to the central state, ignored procedural guarantees in passing legislation on the referendum, and adopted ad hoc legal supremacy. In relation to the second, Catalan authorities repeatedly ignored and disobeyed the Spanish Constitutional Court’s rulings. However, disrespect for Constitutional justice turned into an appeal to it when Catalan secessionist leaders sought to defend their individual rights in face of criminal prosecution.

Keywords Catalan secessionism · Rule of law · Legality · Respect for courts · Constitutional justice

1 Introduction

The illegal referendum that took place in October 2017 in Catalonia, in which citizens were called to vote on whether they wanted Catalonia “to be an independent state in the form of a republic” (Departament de la Presidència 2017) triggered several reactions. Catalan leaders and authorities sponsoring the illegal consultation

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as well several other international actors demanded the EU to intervene against Spain (Closa and Hernández 2020). They claimed that the Spanish authorities violated Art.2 of the Treaty and, more specifically, the democratic values because of their refusal to let people in Catalonia to vote. These actors even demanded the EU authorities to use Art.7 TEU against Spain considering that the “threat” to democracy in Spain because of denying the process towards independence was akin to the ones of Poland and Hungary: in these cases, scholars have amply documented a systemic threat to the rule of law (RoL) which includes the capture of the judiciary and attacks to the media and civil organizations (Wilkin 2016; Sadurski 2019; Chronowski et al. 2019; Kelemen and Pech 2019; Bard and Grabowska-Moroz 2020; Gora and de Wilde 2020).

This analogy, tough, does not resist scrutiny: two arguments question the validity of the claim. On the one hand, the conceptualization of “democracy” used by secessionist actors appealed (hidden behind the appeal to the “right to vote”) to a kind of “extreme majoritarianism” view of democracy (Wind 2020). In fact, the government of Viktor Orbán in Hungary uses a very similar notion of democracy as extreme majoritarianism (Orbán, in fact, initially endorsed the referendum).¹ In this view, “democratic means can justify any end whatsoever” (Closa 2019, 2022; Closa and Hernández 2020). Secessionist leaders hence exploited the “naïve belief that as long as elections are held, few further safeguards are needed” (Wind 2020, pp. 93). Secondly, they also relied on an organic construction of the *demos* legitimated to vote despite its presentation as a civic citizenship (Closa 2019, 2022; Closa and Hernández 2020; Wind 2020).

Given that secessionists opposed the principle of democracy to the principle of RoL, (Closa 2022), this paper focusses on the second argument: the challenge to RoL. We will argue that Catalan secessionists disregarded core meanings of the very notion of RoL that form the basis of consensus among international, European, and Spanish legal orders. More precisely, Catalan secessionist authorities ignored RoL principles of legality and respect to courts. Strikingly, some secessionist leaders invoked later these notions for their own benefit despite having repeatedly ignored them.

In short, this article aims to debunk two myths about the Catalan conflict. Firstly, it is not a conflict between the RoL (in this case illustrated by the Spanish Constitution) and democracy, as such a conflict does not hold: the latter cannot exist without the former. The independence referendum nature (content and *demos*) is incompatible with the legal framework in which the Spanish democracy (however imperfect) develops. Against claims arguing this thesis, Spanish national authorities did not annul the right to vote but rather, as the very idea of democracy demands, Spanish central authorities requested the exercise of this right *within the framework of the RoL*. Secondly, we also argue that the conflict is not between Catalonia and Spanish legality: rather the actions carried out in by political leaders and activists in Catalonia between 2012 and 2017 defy European standards and international law.

¹ Zoltán Kovács, spoke-person of the Hungarian government: “The will of the people is always what matters, that’s the position” (Barigazzi 2017).

This article presents the case along the following structure. Firstly, we discuss the scholar arguments that have backed the RoL breaches committed by Catalan authorities and highlight several deficiencies in their justifications. Secondly, we spell out the components of the notion of the RoL in the Spanish, European and International orders. Thirdly, we examine how the Catalan authorities breached the RoL by attending to their concrete actions and how they relate with distorted ideas of this fundamental value. We look at the declarations of various actors, the decisions of the Catalan pro-independence representatives, the reactions of the Spanish government and the political parties represented in the Spanish Parliament, and the judgments of the Spanish Constitutional Court (SCC) on these issues. Fourthly, we argue that Catalan secessionism has relied on double standards as it equally manipulated the notion of the RoL by trying to invoke it when its aims were at stake. In this sense, we examine the appeals of the Catalan politicians to the Spanish justice, and the deficiencies of these demands. Finally, we summarise the discussion and conclude by saying that secessionism seriously threatened the institutional and legal orders of Catalonia and Spain. Hence, requests to the EU for intervening in Spain and use Art.7 of the Treaty weakly sustain.

2 The Argumentation of the Rule of Law Breaches in Catalonia

The so-called *Procés* systematically breached the RoL. In seeking to hold an independence referendum that would serve to legitimise a process of disconnection from the Spanish state, Catalan political actors seriously compromised the principles of legality and access to justice, as detailed below. Some authors have justified these breaches as the only way out of an entrenched political conflict that the Spanish state has tried to solve through judicial means (Barceló i Serramalera 2016; Albertí Rovira 2019; López Bofill 2019, 2020; Requejo and Sanjaume-Clavet 2019; Sanjaume-Clavet 2022). Two basic points, intrinsically linked to each other, construct the argumentation: firstly, the existence of a “right to decide” and the necessity to provide political and legal exit routes to the “majoritarian” will which are, secondly, impossible to achieve through the current Spanish Constitutional framework which is argued to be unreformable.

As Closa (2022) points out, these authors construct a narrative opposing democracy vs RoL.² The Constitutional framework is subject to the principle of majoritarian decision rule: the large support among Catalan society for secessionist forces (which held at the moment of the referendum 53.3% of the seats in the Catalan Parliament) obliged to provide an exit route to these voices (López Bofill 2019; Albertí Rovira 2019). Consequently, as the Spanish state does not provide this legal exit

² This opposition is explicitly formulated as so in López Bofill 2019: “Faced with the conception held by the majority of the representatives within the Spanish institutions according to which democracy is inconceivable outside the framework and the procedures provided by the Constitution (under such account there would be no democracy outside the Spanish demos defined by the Spanish Constitution), I believe that this tunnel-vision defense of constitutional supremacy entails profound democratic deficits.”

route, secessionist actors are pushed towards disobedience as the only way of channelling the will of the majority. This argument contains two problems.

Firstly, as traditionally pointed out, it assumes that there is a pro-secessionist majority in Catalonia. While after the 2015 elections pro-secessionist forces gained a majority of seats in the Catalan Parliament, they did so by obtaining 47.6% of the votes. Non-secessionist forces gained 47.85% of the vote, although they only got 46.67% of the seats, as the electoral law overrepresents the rural constituencies which are often more favourable to secessionism (Bar 2019). Regarding the referendum of 1 October 2017, even though the “Yes” to the independence of Catalonia option gained 90% of the votes, turnout was 43%. Evidencing the fact that the electoral census had not the minimum guarantees of authenticity, the reality is that the number of “Yes” voters represents only 38% of the total number of people registered on the electoral roll in Catalonia at that time. Taking into account the existence of a self-selection bias in the people who participated in the referendum (i.e., pro-secession people), the reality is that it is difficult to argue that there is a majoritarian support for independence in Catalonia. More importantly, even if the argument that the simple majority of seats could be taken as a proxy for a majority in favour of independence, the assumption does not rely on a previous declaration and pre-commitment to a specific size of that majority. Thus, *any majority at any moment* in time in *any circumstance* would count towards the goal of generating a pro-secessionist majority.

Secondly, those authors treat ambivalently the notion of “majority”: pro-secessionism is a majoritarian option in Catalonia, but it is condemned to a perpetual minority condition within the Spanish state (Albertí Rovira 2019; López Bofill 2019; Sanjaume-Clavet 2022). The argument thus enters a vicious circle. The pro-secessionist “majority” in Catalonia, which is at the same time a minority in Spain, imposes its route of constitutional disobedience on the rest of the Catalan population, the anti-independence minority (which is in fact the majority), given that the pro-constitutional majority of the Spanish institutions (or as called by López Bofill (2019) and Sanjaume-Clavet (2022) the *demos*) prevents the pro-secessionist minority (the *demoi*) from any other way out. Advocates of breaches of the Spanish constitutional system constantly play on the representation of pro-secessionists as a “majority-minority”, as appropriate. In this sense, the RoL breach on the part of Catalan pro-secession politicians could be interpreted as an imposition of the “majority” will (the celebration of an illegal referendum) on the “minority” (the anti-secessionist citizens) which left the rights of the latter unprotected.

The second key argument that justifies RoL offenses is that self-determination is unachievable under the framework of the Spanish Constitution, which is also de facto impossible to reform due to the strict requirements included in Art.168 CE (Barceló i Serramalera 2016; López Bofill 2019; Sanjaume-Clavet 2022). Authors such as López Bofill (2020) or Verge Mestre (2020) argue that the consolidation of the Spanish constitutional democracy has been linked to the strengthening of the Spanish nation at the expense of the rest of “nationalities” living in the Spanish state, leading to a process of practical decrease of political self-governance and recentralization (Requejo and Sanjaume-Clavet 2019). Evidence contradicts these claims. Spain transformed from a highly centralized State to a highly de-centralized

political and financial system in less than 30 years (Liesbet et al. 2016; Lago-Peñas 2021). Most regions in Spain, including Catalonia, achieved an increase of competences through their subsequent reforms of Statutes of Autonomy (regional constitutions), as well as to recognize themselves either as “nationality” or “historical nationality” (Bar 2020). Hence, the constitutional framework has permitted regions to achieve high degrees of “internal self-determination” within Spain (Bar 2020).

Catalan politicians (including those with nationalist views) and the Catalan people participated in the elaboration and approval of the Spanish Constitution, which indeed enjoyed high levels of support.³ Hence, the constitutional model of territorial organisation and distribution of competences can hardly be seen as an imposition to the Catalan people, but rather the result of a consensus also including voters in Catalonia.

A rigid constitutional system, by itself, does not disqualify the democratic quality of a constitutional system. Strong requirements to reform Constitutions are aligned with the RoL idea (particularly with the principle of legal certainty). And some scholars consider those as a prerequisite for considering a State as a liberal democracy, and a guarantee for protecting minorities from an eventual tyranny of the majority (Coppedge et al. 2016; Bar 2019). Overly lax constitutional reform processes can lead to constitutional captures by disloyal actors if they obtain a sufficient parliamentary majority. Hungary is a case in point: in 2010 the Fidesz party “won two-thirds of the seats in the Parliament in a system where a single two-thirds vote is enough to change the constitution” (Schepelle 2015) and used this power to destroy the States’ check and balances (Tóth 2012; Schepelle 2015; Bárd and Pech 2019). Protecting territorial integrity through reinforced procedures of constitutional amendment not only is a widespread practice and intrinsic to the nature of constitutions, whose purpose is to maintain state unity, but it is also even protected by non-reformability clauses in some states, such as Germany.

Moreover, whereas some authors (López Bofill 2019, 2020) portray the issue as a conflict derived specifically from the origins and development of the Spanish Constitutional system, the obedience to Constitution’s provisions in the organization of referendums is not a singularity of Spain, but rather a European requirement established as so by the VC (2018).

Various scholars (Barceló i Serramalera 2016; López Bofill 2020) often cite the Scottish and Quebecoise referendums as examples to follow. However, important differences distort this comparison with the Catalan case: neither the Canadian nor the British Constitutional orders prohibit the celebration of a referendum (Bar 2019; Weiler 2019), nor were they celebrated unilaterally. The adoption of ad hoc measures to solve the Catalan issue, as Sanjaume-Clavet (2022) suggests, could also imply problems from the RoL point of view, as the establishment of informal institutions or processes may raise concerns in terms of accountability and legal certainty.

³ Jordi Solé and Miquel Roca, both Catalan politicians, were among the 13 fathers of the Constitution. Indeed, Catalan nationalism was present in the table, as Miquel Roca is considered as an historic leader of Catalan nationalism. Moreover, the Constitution was ratified in a referendum both by the Spanish Parliament and the citizens. In this regard, both participation and approval rates in the provinces of the Catalan region were very high (Lleida 66.5% and 91.9%), Tarragona (67% and 91.7%), Girona (72.3% and 90.4%) and Barcelona (67.6% and 91%).

Finally, regarding the often invoked “right to decide” (Barceló i Serramalera 2016), if it implying something else than “voting”, no such a right is contemplated neither by the Spanish, European or international legality. International law contemplates only the right to self-determination, which accordingly to United Nations (UN) Resolutions 1514, 2625 and 50/6, is reserved to colonized people and incompatible with the “partial or total disruption of the national unity and the territorial integrity of a country”.

3 Five Elements, One Widely Accepted Rule of Law Definition

Definitions given by most international organizations, including the EU, and most democratic states do not suggest that the idea of RoL open to interpretation, as nationalist movements claim. Academic experts on the issue (Schepelle and Pech 2018; Pech and Grogan 2020a, 2020b, 2021) do not agree neither with the idea of free interpretation and disposal of the definition of RoL. Rather, five elements are inherent to it.

The UN Declaration on Human Rights (1948) contains the first international references to the RoL principle.⁴ UN defined the idea of RoL in 2004 as “a principle of governance in which all persons institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards”.⁵ In 2005, UN stated the “need for universal adherence to and implementation of the RoL at both the national and international levels”.⁶

The European and national orders offer various definitions of the RoL although all of them coincide in the essentials of the idea and on the reconnaissance of its relevance for the well-functioning of democratic states. In this section, we examine the Council of Europe (CoE), EU and Spanish Constitution definitions.

⁴ “Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law” (UN 1948).

⁵ Section III, para. 6. (UN 2004).

⁶ 134(a) Reaffirm our commitment to the purposes and principles of the Charter and international law and to an international order based on the rule of law and international law, which is essential for peaceful coexistence and cooperation among States (UN 2005).

3.1 The Rule of Law and the CoE

The CoE Statute⁷ recognised RoL as one its foundational pillars even though it did not provide substantive definition. A CoE advisory body specialized in constitutional matters created in 1990, the Venice Commission (VC), filled in this vacuum through its 2011 “Rule of Law Report” that aimed at providing a “consensual definition” of the notion of RoL: until that moment, national insights framed an eventual common understanding.⁸ The Report contained a checklist that reflects the existent consensus among “legal instruments, national and international, and the writings of scholars, judges and others” on the “the core meaning of the rule of law and the elements contained within it” and aimed to evaluate the state of the RoL in all countries. In fact, the specification of RoL components in a checklist demonstrates that the essence of the definition resides in its constituent elements.

The VC improved its definition in 2016 through the “Rule of law checklist” and developed five RoL benchmarks. The first benchmark is the notion of legality, understood as supremacy of the law⁹ and the duty of public powers to comply with it.¹⁰ Public authorities must respect both, national and international law¹¹; and they have a duty to implement and enforce them.¹² The second benchmark is legal certainty, defined by elements such as the accessibility to legislation and courts decisions,¹³ the foreseeability of the law,¹⁴ the non-retroactivity of the law, and the respect of the principle of *res judicata*,¹⁵ among others. Third and fourth benchmarks are the prevention of abuse of

⁷ References to the relevance of the rule of law as a founding value can be found in the Preamble (“Reaffirming 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”) and Art.3 (“Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I) (CoE, 1949).

⁸ “This report aims to reconcile the above notions, and especially the notions of *Rule of Law*, *Rechtsstaat* and *Etat de droit*” (VC, 2011).

⁹ Para. 44: “State action must be in accordance with and authorised by the law” (VC 2016).

¹⁰ Para. 45: “In so far as legality addresses the actions of public officials, it also requires that they have authorisation to act and that they subsequently act within the limits of the powers that have been conferred upon them, and consequently respect both procedural and substantive law” (VC, 2016).

¹¹ Para. 46: “‘Law’ covers not only constitutions, international law, statutes and regulations, but also, where appropriate, judge-made law, such as common-law rules, all of which is of a binding nature. Any law must be accessible and foreseeable”. (VC 2016).

¹² Para. 53: “Although full enforcement of the law is rarely possible, a fundamental requirement of the Rule of Law is that the law must be respected. This means in particular that State bodies must effectively implement laws” (VC 2016).

¹³ Para. 57: “As court decisions can establish, elaborate upon and clarify law, their accessibility is part of legal certainty” (VC 2016).

¹⁴ Para. 58: “Foreseeability means not only that the law must, where possible, be proclaimed in advance of implementation and be foreseeable as to its effects: it must also be formulated with sufficient precision and clarity to enable legal subjects to regulate their conduct in conformity with it” (VC, 2016).

¹⁵ Para. 63: “Res judicata implies that when an appeal has been finally adjudicated, further appeals are not possible. Final judgments must be respected, unless there are cogent reasons for revising them” (VC 2016).

powers, and the principle of equality before the law and non-discrimination. Finally, the fifth benchmark is access to justice: the judiciary must be independent and impartial¹⁶ and all citizens must have the right to a fair trial.¹⁷ It also includes the recommendation for states of having Constitutional justice and for public authorities to adopt legislation in line with the decision of the Constitutional Court¹⁸ and implement its decisions when it determines that a legislation violates the Constitution.¹⁹

Since 2011, the VC has exhaustively put its efforts in monitoring the RoL in its member states (these include all EU member states). National authorities have often consulted VC regarding reforms that could seriously affect the RoL. Furthermore, the EU institutions, and particularly the European Commission (EC) have recognized the authority of the VC as a fundamental source of expertise in rule of law matters (Closa and Hernández 2021).

The VC unified the different approaches that existed in Europe among the notion of the RoL by providing a set of fundamentals which constitute the basis on which policymakers can assess the state of the rule of law in the European context.

3.2 The Rule of Law and the EU

Despite being a fundamental EU value, defined as so in Art.2 TEU, the Union lacked a clear and concrete definition of the RoL until 2014. The European Commission (EC) set the first definition in its “Rule of Law Framework”, heavily influenced by the one provided by the VC as recognised by the report itself.²⁰ This demonstrates the increasingly reliance of the EU on the CoE’s normative pre-eminency in the RoL

¹⁶ Para. 74: “The judiciary should be independent. Independence means that the judiciary is free from external pressure, and is not subject to political influence or manipulation, in particular by the executive branch. This requirement is an integral part of the fundamental democratic principle of the separation of powers. Judges should not be subject to political influence or manipulation”; and Para. 89: “Impartiality of the judiciary must be ensured in practice as well as in the law. The classical formula, as expressed for example by the case-law of the European Court of Human Rights, is that “justice must not only be done, it must also be seen to be done”. 89 This implies objective as well as subjective impartiality. The public’s perception can assist in assessing whether the judiciary is impartial in practice”.

¹⁷ Paras. from 99 to 107, which include aspects such as the access to courts, the presumption of innocence and the effectiveness of judicial decisions.

¹⁸ Para. 111: “This is why this document underlines the importance of Parliament adopting legislation in line with the decision of the Constitutional Court or equivalent body. What was said about the legislator and the executive is also true for courts: they have to remedy the cases where the constitutional jurisdiction found unconstitutionality, on the basis of the latter’s arguments” (VC 2016).

¹⁹ Para. 110: “The right to a fair trial imposes the implementation of all courts’ decisions, including those of the constitutional jurisdiction. The mere cancellation of legislation violating the Constitution is not sufficient to eliminate every effect of a violation, and would at any rate be impossible in cases of unconstitutional legislative omission” (VC 2016).

²⁰ “The precise content of the principles and standards stemming from the rule of law may vary at national level, depending on each Member State’s constitutional system. Nevertheless, case law of the Court of Justice of the European Union (“the Court of Justice”) and of the European Court of Human Rights, as well as documents drawn up by the Council of Europe, building notably on the expertise of the Venice Commission, provide a non-exhaustive list of these principles and hence define the core meaning of the rule of law as a common value of the EU in accordance with Article 2 TEU” (EC 2014).

issue (Closa and Hernández 2021). The EC defined the core elements that form the RoL: “legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law”. EU Commission documents henceforth repeat this definition. The importance of the idea of the RoL as a guarantor of the protection of democracy and human rights has been highlighted several times.²¹

The EC reiterates the “commonality” in the meaning of RoL that it considers a “well-established principle, well-defined in its core meaning” (EC 2019). The EC recognises the “different national identities and legal systems and traditions” regarding the RoL but considers that its core elements must be equally respected in all Member States (EC 2019).

The Court of Justice (CJEU) has also played an important role in clarifying the essentials of the RoL idea through its rulings since 1986 (Pech and Grogan 2020b). Either originated by EC’s infringement procedures or national courts preliminary rulings, cases such as the *Associação Sindical dos Juizes Portugueses v Tribunal de Contas* (ECJ C-64/16), *Independence of the Disciplinary Chamber of the Supreme Court of Poland* (Joined Cases C-585/18, C-624/18 and C-625/18), or *Romanian Judges* (Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19), among many others, constitute perfect examples of the reinforcement that the ECJ has made of the RoL value (Van Elsuwege and Gremmelprez 2020; Pech and Kochenov 2021). The EC has admitted the importance of the CJEU case law in the definition of the RoL principles.²²

3.3 The Rule of Law and the Spanish Constitution

Member states’ constitutions and legal traditions underline the importance of the RoL for the good functioning of the State. Indeed, the European shared core elements of the RoL are common denominator among the dominant legal traditions in the continent, the English, the French and the German ones, and their respective notions of the *Rule of Law*, the *Rechtsstaat* and the *Etat de droit*. “The argument according to which national constitutional traditions differ so substantially that no common denominator can be identified” (Pech 2009) must be therefore rejected.

Heavily influenced by the German constitutional tradition, the Spanish Constitution enshrined the principle of the RoL (*Estado de Derecho*). Indeed, Art.1.1 of

²¹ For example, in the 2019 EC “Blueprint for action” it is claimed that: “Respect for the rule of law is also essential for citizens to trust public institutions. Without such trust, democratic societies cannot function”. The 2020 “Rule of law report” states that: “Under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts”.

²² “As re-affirmed by the European Court of Justice, the very existence of effective judicial review to ensure compliance with EU law is of the essence for the rule of law. Effective justice systems are also the basis for mutual trust, which is the bedrock of the common area of freedom, justice and security, an investment friendly environment, the sustainability of long-term growth and the protection of EU financial interests. The European Court of Justice has further clarified the requirements stemming from EU law regarding judicial independence” (EC 2020).

the Constitution states that “Spain is hereby established as a social and democratic State, subject to the RoL, which advocates freedom, justice, equality and political pluralism as highest values of its legal system”.²³ Commonly, the RoL is not specified in national constitutions, being the Spanish one an exception in this sense (Pech 2009). Art.9.1 of the Constitution establishes that “Citizens and public authorities are bound by the Constitution and all other legal provisions”. Moreover, Art.9.3 provides an exhaustive list of the elements that define the *Estado de Derecho*: “The Constitution guarantees the principle of legality, the hierarchy of legal provisions, the publicity of legal statutes, the non-retroactivity of punitive provisions that are not favourable to or restrictive of individual rights, legal security, the accountability of public authorities and the prohibition of arbitrary action of public authorities”.²⁴

Other provisions of the Spanish constitution are also essentially related with the elements that are at the heart of the RoL. Art.14 claims “Spanish citizens are equal before the law”. Art.24 establishes that all citizens must have access to justice: “All persons have the right to obtain effective protection from judges and courts in the exercise of their rights and legitimate interests, without, in any case, being defenceless”. Art.117 establishes that judges must be independent, accountable, and bound to the RoL. And Chapter IX is entirely dedicated to the Constitutional Justice, establishing Art. 164 that the judgements of the Constitutional Court “have the validity of res judicata from the day following their publication, and no appeal may be brought against them”.

The following table summarises the RoL definitions at international, European, and Spanish national levels, classifying their elements attending to a comparison criterion (Table 1).

As the table shows, there exists high-degrees of consensus on the RoL standards at international, European, and national levels. Some populist leaders have argued that the RoL is an abstract and poorly defined concept open to different interpretations. In the face of the inter-order consensus presented above, such arguments seem untenable. In the following sections, we carefully examine how the Catalan secessionists breached several of these core RoL elements.

4 Catalan Separatism and Three Challenges to the Principle of Legality

Actions of the Catalan pro-independence leaders affected the principle of legality in three different ways: by illegally assuming powers that do not belong to the regional level but to the central state; by bypassing over the required procedural guarantees when enacting legislation; and by endorsing ad hoc legislation not respecting law hierarchy (Closa 2022).

²³ Translation by Pech, 2009.

²⁴ Translation by Pech 2009.

Table 1 Core elements of the Rule of Law at international, European, and Spanish legal orders. Source: own elaboration

	United Nations	Council of Europe	European Union	Spanish Constitution
1	<ul style="list-style-type: none"> • All persons institutions and entities, public and private, including the State itself, are accountable to laws • Laws are consistent with international human rights norms and standards 	<p>Legality</p> <ul style="list-style-type: none"> • Supremacy of the law • Public authorities must comply and enforce national and international law 	<p>Legality, which implies a transparent, accountable, democratic, and pluralistic process for enacting laws</p>	<ul style="list-style-type: none"> • Legality • Citizens and public authorities are bound by the Constitution and all other legal provisions • Hierarchy of legal provisions
2	<p>Laws that are publicly promulgated</p>	<p>Legal certainty</p> <ul style="list-style-type: none"> • Accessibility to legislation and courts decisions • Foreseeability • Non-retroactivity • <i>Res judicata</i> 	<p>Legal certainty</p>	<ul style="list-style-type: none"> • Publicity of legal statutes • The non-retroactivity of punitive provisions that are not favourable to or restrictive of individual rights • Legal security
3		<p>Prevention of abuse of powers</p>	<p>Prohibition of arbitrariness of the executive powers</p>	<ul style="list-style-type: none"> • Prohibition of arbitrary action of public authorities • Accountability of public authorities <p>Citizens are equal before the law</p>
4	<p>Laws are equally enforced</p>	<p>Equality before the law and non-discrimination</p>	<p>Equality before the law</p>	
5	<p>Laws are independently adjudicated</p>	<p>Access to justice</p> <ul style="list-style-type: none"> • The judiciary must be independent and impartial • Right to a fair trial • Constitutional justice 	<ul style="list-style-type: none"> • Independent and impartial courts • Effective judicial review including respect for fundamental rights 	<ul style="list-style-type: none"> • All persons have the right to obtain effective protection from judges and courts • Independent judges • Constitutional justice

4.1 The Illegal Assumptions of Powers not Devolved to the Regional Level

Catalan authorities challenged the RoL by assuming powers constitutionally attributed to the central State. They declared the Catalan people as a sovereignty entity and organised two referendums (the first one camouflaged under the names of “popular consultation” and “participatory process”). The Spanish Constitution establishes that the national sovereignty resides in the Spanish people,²⁵ as well as that the Central State is the unique entity empowered to organise referendums.²⁶ The SCC declared unconstitutional the laws approved by the Catalan Parliament and the decrees signed by the Catalan government in those two issues. The SCC reiterated this judgement several times, as explained below.

The illegal assumptions of central state’s competences started in September 2012. The Catalan Parliament approved a resolution that for the first time called for a self-determination consultation and promised to hold it during the next legislature (Parlament de Catalunya 2012). The Spanish Constitutional Court already sentenced in 2008, in relation to a popular consultation organised by the Basque authorities, that regional authorities cannot organise referendums. According to Art.149 of the Spanish Constitution, this is an exclusive competence of the central State (STC 103/2008, Fundamentos jurídicos, Para.3). Despite this constraint, the Catalan Parliament approved a declaration of sovereignty, which proclaimed the Catalan people as a “sovereign political and legal subject” (Parlament de Catalunya 2013).

The Spanish government lodged an appeal against this declaration before the SCC which ruled the Catalan declaration unconstitutional in March 2014. It was incompatible with Art.1 of the Spanish Constitution (National sovereignty is vested in the Spanish people); and Art.2 (the indissoluble unity of the Spanish nation). The SCC considered that the declaration of the Catalan sovereignty “can be understood as the recognition of powers inherent to sovereignty superior to those that derive from the autonomy recognised by the Constitution” (STC 42/2014, Para. 2).

The Catalan Parliament asked the Spanish Parliament to authorise the celebration of a referendum on Catalan independence in January 2014. The Spanish Parliament voted against the Catalan request even though internal divisions existed: most parliamentary groups argued that the celebration of a referendum would constitute a violation of the Spanish Constitution²⁷ and voted against (299 votes), while a minority of political parties, all of them representing regionalist-nationalist movements, voted in favour (47 votes) arguing that the Catalan citizens had a right to decide on

²⁵ Art. 1 of the Spanish Constitution.

²⁶ Art. 149.3.32 of the Spanish Constitution.

²⁷ Art.92 of the Spanish Constitutions says that referendums “shall be called by the King at the proposal of the President of the Government, following authorisation by the Congress of Deputies”. Art. 149 establishes that the State holds exclusive competence over the authorisation for popular consultations through the holding of referendums. In this regard, Mariano Rajoy, then Prime Minister of Spain, stated: “It is not possible to meet what the Parliament of Catalonia asks us because the Constitution does not allow it”. Rosa Díez, leader of UPyD party: “There is nothing to dialogue, Catalan authorities just have to comply with the law and the decisions of the courts. The essential is not in dispute” (Garea 2014).

their future.²⁸ The main national parties at that time formed a common front in the Spanish Parliament against Catalan secessionist leaders' attempts to get secession by unilateral declarations (Medina 2017).

As a reaction, the Catalan Parliament passed a popular consultation law in September 2014,²⁹ arguing that it was technically different from a referendum, and set the day of the consultation on 9 November (9 N). The already mentioned judgement of the Constitutional Tribunal of 2008 stated that the name "popular consultation" could not camouflage the term "referendum": whether an action calls for consultation on a matter of a manifest political nature to the electoral body of a region, which must manifest its willingness through an electoral procedure endowed with the guarantees of the electoral processes, it is clear that the consultation is a referendum (STC 103/2008, Fundamentos Jurídicos, Para. 2).

The Spanish government resorted to the Constitutional Court, which admitted the appeal and therefore took interim measures suspending the call (Tribunal Constitucional 2014b, 2014c). Despite the suspension, then president of the *Generalitat* Artur Mas promised that a "participatory process" in which there would be "open electoral sites, ballot boxes and ballots" would take place in Catalonia the 9 N (Sastre 2014). The consultation was finally held. Formally, the Catalan government did not participate in the organisation, although it provided material support for its celebration. The central government of Spain decided not to intervene. The Superior Court of Catalonia (TSC) declared the then president of the *Generalitat* Artur Mas and other Catalan pro-independence leaders disqualified for holding public office because of their organisational support to the consultation (Comunicación Poder Judicial 2017).

In 2015, the SCC delivered three key judgments. First, STC 31/2015 and STC 32/2015 declared the law and the decree of the Parliament of Catalonia on "popular consultations" unconstitutional. The law and the decree called for the organization of a real referendum, and hence the regional legislator ignored the State's constitutional exclusive competence in this matter (Art.149) (STC 31/2015, Fundamentos Jurídicos, Para. 9; STC 32/2015, Fundamentos Jurídicos, Para. 3). Second, the SCC also established in its STC 138/2015 that the material activity in support of the 9 N consultation was illegal: "It must be declared that the actions of the *Generalitat* of Catalonia preparatory or related to the consultation convened for November 9th 2014 are totally unconstitutional, as flawed with lack of competence, as the call for consultations that deal with questions that affect the constituted order and the very foundation of the constitutional order does not correspond to the Autonomous Community" (Fundamentos Jurídicos, Para. 4).

Attending to comparative constitutional law, the action of the SCC is in line with the rationale followed by other Constitutional Courts. The Italian *Corte Costituzionale* ruled in 2015 that a unilateral referendum in Veneto was incompatible with the fundamental principle of unity and indivisibility of the Italian

²⁸ Jordi Turull (Depute in the Catalan Parliament, CiU): "If we want, we can" (Garea 2014).

²⁹ Ley 10/2014, de 26 de septiembre, de consultas populares no referendarias y otras formas de participación ciudadana (Comunidad Autónoma de Cataluña, 2014).

Republic (Art.5 of the Constitution). In 2016, the German *Bundesverfassungsgericht* also stated that the Constitution does not allow for secessionist efforts by individual *Länder*. The logic followed by the German Constitutional Tribunal is that the *Länders* are not the “owners of the Basic Law”, as Germany is a nation state based on the power of the German people. In this sense, the German Constitutional Court defines the *demos* of a referendum of such a nature if the Constitution permitted for it: the issue of the territorial integrity of the state cannot be voted on by a part of the citizens but would be a matter for all citizens. The German *Bundesverfassungsgericht* rule is stricter than the SCC one, as the indissoluble unity of Germany is among the non-reformable clauses of the German Constitution. The VC (2018) has stated in this regard that “the principle of the sovereignty of the people allows the latter to take decisions only in accordance with the law. The use of referendums must be permitted only where it is provided for by the Constitution or a statute in conformity with the latter, and the procedural rules applicable to referendums must be followed”.

The SCC interpretation of the Constitution does not close the door to the canalization of secessionist claims and the celebration of a referendum on the independence of Catalonia, but makes it conditional on a reform of the Constitution. Authors (e.g. López Bofill 2019) have raised some criticisms against this interpretation, even accusations of being at odds with the RoL: since the Spanish Constitution recognises a single *demos*, all the Spaniards, empowered to take or ratify important decisions by referendum, this relegates the Catalan *demos* to an eternal condition of subordination. The assumption on which this position relies is reckoning the existence of such a Catalan *demos*. Some (Bar 2019) argue that such a conception “lacks the support of an accurate and holistic historical approach”. Additionally, a referendum in which only the Catalan *demos* could participate implies the exclusion of those that may be deeply affected by the decision, including the rest of the Spanish people and EU citizens, hence it would disempower them from participating in an issue that is also of their concern.

Regardless the SSC judgements, the Catalan Parliament held a debate on the law of the Catalonia self-determination referendum in September 2017 and approved the law convening the referendum scheduled for 1st October (1O) 2017 (Law 19/2017) (Departament de la Presidència 2017). The *Govern* signed the decree calling the referendum the same day very late at night (Puigdemont 2017a). The SCC preventively suspended the law (Tribunal Constitucional 2017a). The Public Prosecutor of the Catalan Superior Tribunal asked national and Catalan police forces (Guardia Civil, Mozos de Escuadra, Policía Nacional) to seize material related to the referendum (Carranco and García Bueno 2017). The SCC finally declared unconstitutional and null the law on the referendum (STC 114/2017) as it had been issued “without any jurisdiction support” and “outside the statutory powers of the Autonomous Community” (STC 114/2017, Fundamentos Jurídicos, Para. 3).

Although the SCC advised on the “duty to prevent or stop any initiative that involves ignoring or circumventing the agreed suspension” (Tribunal Constitucional 2017a, Para. 4), Catalan pro-secessionist authorities finally held the 1O referendum.

EU authorities immediately reacted and declared that the events were not legal under the Spanish Constitution.³⁰

4.2 The Ignorance of Procedural Guarantees in Enacting Legislation

Catalan authorities repeatedly ignored procedural guarantees when enacting the laws to “legally” back their actions in pursuit for secession. They abused the use of some provisions of the Catalan regulations, ignored legal advice, and tried to silence the opposition.

Catalan authorities abused urgency procedures. The Catalan Parliament changed its Rules of Procedure permitting the approval of referendum (Law 19/2017) and legal transition laws (Law 20/2017) by the procedure of urgency (Parlament de Catalunya 2017a). The law shortened the time for debate, restricted the presentation of amendments, and gave less time to the central government to challenge the regulations. The Catalan Council of Statutory Guarantees (an advisory body regarding the Catalan own legality) considered that the reform was illegal (Consell de Garanties Estatutàries de Catalunya 2017), as it allowed the approval of these laws by single reading and went against the Statute of Autonomy of Catalonia and the Spanish Constitution. Anti-independence Catalan political parties complained about the reform and considered it a violation of their rights as deputies of the Catalan Parliament (Puente 2017). However, the SCC considered (in November 2017) that the regulatory amendment was not illegal *if* it was interpreted in a way in which amendments were allowed (STC 139/2017, Fundamentos Jurídicos, Para. 9). Finally, the Catalan Parliament approved both the law of the referendum and the law on transitional legality via an urgent amendment of the agenda, aiming to pass both as quick as possible, so to avoid that the SCC suspended them.

The Parliament of Catalonia also ignored legal advice. Given that the enabling law that changed the Rules of Procedure was at the time held in abeyance by the SCC, Catalan politicians used instead Art.81.3 of the Regulations of the Parliament of Catalonia³¹ and changed the Parliament’s agenda of the day without following the compulsory steps to do such an urgent amendment (e.g. they skipped the request for an opinion to the Catalan Council of Statutory Guarantees (Puente 2018)). As a result, it approved both laws (referendum and legal transition) against legal opinion.

³⁰ President of the European Commission Jean Claude Juncker affirmed: “We have always said that we would follow and respect the rulings of the Spanish constitutional court and the decisions of the Spanish parliament” (Maurice, 2017). President of the European Parliament, Antonio Tajanai, said during a speech: “The European Union is not just about banks or the Euro. It is above all the defence of our values: freedom, democracy, equality, respect for the rule of law and the defence of human rights among others. When some people sow discord by wilfully ignoring the law, I think it is necessary to remember the importance of respect for the rule of law.” (original text in Spanish) (Tajani, 2017). President of the European Council, Charles Michel, tweeted: “Just spoke to @MarianoRajoy. Sharing his constitutional arguments, I appealed for finding ways to avoid further escalation and use of force” (Michel 2017).

³¹ Art.81.3: The agenda of the Plenary may be altered if it is agreed upon by it, at the proposal of the president or at the request of two parliamentary groups or one-fifth of the members of Parliament, and when it is required to do so by law enforcement. If a matter must be included, it must have complied with the regulatory procedures that allow it, except for an explicit agreement to the contrary, by an absolute majority (Parlament de Catalunya, 2015a).

The legal officers of the Parliament of Catalonia, its General Secretary and the Chief Counsel, did not endorse the procedure nor the content of the laws, and they warned that processing the law was illegal and constituted an act of disobedience to the Constitutional Court (Cia 2017). Consequently, then President of the Catalan Parliament, Carme Forcadell, assumed the competence of processing the law, even though she was not legally empowered for doing so (Lamelas 2017).

Pro-independence authorities also relegated the opposition parties, hence seriously altering the normal functioning of the Catalan Parliament. The approval of the law of the referendum in September 2017 happened with a Catalan Parliament half empty: 53 deputies of 135 walked out due to their disconformity with the violation of the legality that was taking place (BBC 2017). A majority of just 72 deputies passed the law (with 11 abstentions). Similarly, a majority of only 71 deputies approved the law on “transitional legality”. The Constitutional Court stated in a later judgment (8 November 2018) that in the act of the parliamentary processing of the law on transitional legality “very serious breaches of the legislative procedure have been incurred, which undoubtedly affected the formation of the will of the Chamber, the rights of minorities and the rights of all citizens to participate in public affairs through representatives” (STC 124/2017, Fundamentos Jurídicos, Para. 6(d)).

4.3 The Adoption of Ad Hoc Legal Supremacy

Both the reform of the Statute of Autonomy of Catalonia and the Spanish Constitution require a 2/3 majority which the pro-secession parties did not enjoy. Because of the impossibility of modifying none of these two norms, Catalan authorities instead adopted ad hoc rules and created a counterfeit legal supremacy.

On 9 November 2015 the Parliament of Catalonia adopted a declaration considered as the first step in their process of separation from Spain (Parlament de Catalunya 2015b). It declared the creation of the independent Catalan state in form of Republic (Art.2); affirmed that the Catalan authorities, and concretely the Parliament “will not be subject to the decisions of the institutions of the Spanish State, in particular of the Constitutional Court, which considers lack of legitimacy and competence”; and asked “the future government to comply exclusively with the norms or mandates approved by this Chamber” (Art.8). Finally, it encouraged the Parliament of Catalonia to take the necessary measures to open this process of disconnection from the Spanish State by processing the laws of constituent process, social security, and public finance (Arts 5 & 7).

The SCC unanimously struck the resolution down (STC 259/2015). As the Catalan Parliament “cannot be a source of legal and political legitimacy”, in violating the Constitutional order it “would infringe the bases of the Rule of Law” (STC 259/2015, Fundamentos Jurídicos, Para. 7).

In 2017 the Catalan Parliament approved the law on transitional legality (Law 20/2017), hence creating ad hoc legal supremacy over the Statute of Autonomy of Catalonia and the Spanish Constitution. They asserted their supremacy over any

other conflicting legislation and repealed any state, regional or local norm clashing with them. The SCC declared the law unconstitutional (STC 124/2017).

The VC also contested the adoption of ad hoc legality on the part of the Catalan authorities. In a letter directed to Carles Puigdemont, then president of the *Generalitat* of Catalonia, the president of the VC, Gianni Buquicchio, emphasized that any referendum shall be celebrated in full compliance with the Constitution and all the applicable law (Buquicchio 2017).

5 The Defiance to the Constitutional Court and the Principle of Access to Justice

Constitutional Justice is a fundamental element of the RoL: it is essential to guarantee the proper functioning of the principle of access to justice. The VC highlighted in its 2016 RoL Checklist the importance of laws being in conformity with the Constitution and stated that Parliaments must adopt legislation in line with the decisions of the Constitutional Court. Nonetheless, the Catalan Parliament and the *Govern* explicitly and declaredly disobeyed both the Superior Court of Catalonia and the Constitutional Court of Spain several times.

Catalan pro-secession leaders repeatedly and explicitly defied the rulings of both Catalan and Spanish courts. On 13 March 2017, the TSC condemned the former president of the *Generalitat* Artur Mas and two other cabinet officials, Joana Ortega e Irene Rigau, to disqualification for public offices for the following two years. The TSC found them guilty of disobeying the Constitutional Court because of their facilitation of the organization of the 2014 illegal consultation. The TSC considered that the judgement of the SCC of 4th November 2014 contained “a clear, explicit, concrete and final mandate to suspend all administrative activity aimed at carrying out the participatory process”. It added that the public authorities had an “inexcusable duty to comply with such mandate” (Tribunal Superior de Justicia de Catalunya 2017, Para. 1(ñ)). The same day the TSC ruled out the disqualification for public office of his colleagues, Carles Puigdemont, then president of the Catalan *Generalitat*, tweeted: “Today I received the fifth notification from the Constitutional Court. We will not stop moving forward” (Puigdemont 2017b).

Pro-secessionist authorities tried to justify these acts of disobedience to the Constitutional Court on several occasions. In April 2017, the Catalan Ombudsman wrote a report titled “Human Rights Regression: Elected Officials’ Freedom of Expression and the Separation of Powers in the Kingdom of Spain” in which he described the reform on the Constitutional Court made in 2015 as “one of the greatest examples in recent times of the unclear separation between powers in Spain”. The report argued that the reform, which gave the Constitutional Court sanctioning capacity in the case of not respecting its rulings, had as a sole purpose “to fight against the Catalan sovereignty process”. The Catalan Ombudsman upheld that this capacity to force compliance through sanctions is unseen in Europe.

Nonetheless, the 2017 VC’s opinion on this matter (Opinion 827/2015) stated that the new Spanish Law on the Constitutional Court was in conformity with European standards, though it gave some suggestions. Principally, the VC recommended

that the SCC should not be empowered to suspend acts at its own motion, but only upon request by a party (Para. 67 & 68); suggested to provide further clarification on the suspension of officials, and concretely on whether members of the parliament can be suspended; and worried on the real possibilities of enforcement of the SCC, which may pose a challenge to its own authority as “it is not unlikely that the person refusing the execution will also refuse to pay the penalty or ignore the suspension and continue exercising his or her office” (Para. 76). The VC clearly established that “the Amendment is formulated in an abstract manner and does not refer to the situation in Catalonia” (Para. 14). In summary, the VC endorsed the Spanish reform and did not provide the Catalan authorities with any justification to disobey the SCC (Ferrerres Comella 2017).

The Parliament of Catalonia took a parallel path of intentional disobedience to the SCC. Art.6 of the 9 November 2015 resolution, considered the first step in their process of separation from Spain, explicitly contained an obligation for the Catalan Parliament to disobey the Constitutional Court (Parlament de Catalunya, 2015b).

Precisely, the approval in 2016 of resolutions 263/XI and 306/XI (Parlament de Catalunya 2016a, b) regarding the referendum represented an explicit unruliness to the SCC rulings, which had already warned that these actions could lead to penal responsibilities for the President of the Parliament of Catalonia, the other members of the Bureau of Parliament and the Secretary General of Parliament, as well as the President and other members of the Governing Council of the *Generalitat* of Catalonia (Auto 24/2017, Decisison Para. 2). The Parliament of Catalonia also passed the law 4/2017 of funds (Parlament de Catalunya 2017b), which included financial support for the organization of the referendum.³² The SCC declared these budget allocations unconstitutional (STC 90/2017). Moreover, as already mentioned, even though the laws on the referendum (Law 19/2017) and on the transitional legality (Law 20/2017) were suspended in their effect and application, Catalan Parliament passed in 2017 its resolution 807/XI (Parlament de Catalunya 2017c) that designated the five members of the Electoral Sindicatura (*Sindicatura Electoral de Catalunya*, a body created for guaranteeing the transparency of the referendum process) under the legal support of the suspended laws. The SCC declared the resolution unconstitutional and illegal (STC 120/2017), although the Catalan Parliament ignored its judgement.

The *Govern* of the *Generalitat* similarly challenged Constitutional justice several times. The *Govern* approved the decrees on the call for the referendum (Decret 139/2017) and its procedural norms (Decret 140/2017). The SCC first suspended the decrees, and then declared them unconstitutional. Nonetheless, the *Govern* enforced both laws despite its illegality. The actions taken in pursue of the celebration of the referendum constituted a continued act of defiance to the SCC, which according to

³² Additional Provision 40(2): The Government, within its budgetary possibilities, shall guarantee sufficient financial resources to meet the needs and requirements arising from the holding of the referendum on the political future of Catalonia, as agreed in section I.1.2 of Resolution 306/XI of the Parliament of Catalonia, under the conditions established in the opinion 2/2017 of 2 March of the Council for Statutory Guarantees (Parlament de Catalunya 2017b).

the criminal code of Spain (Art.410) is a punishable crime, as well as a misappropriation of public funds.

Catalan authorities repeatedly ignored the advice, suspensions, and judgements of the SCC. As Closa (2022) puts it, “those events do not represent a circumstantial instrumental disobedience, but they rather are part of a fundamental policy”. These acts of defiance constitute a major breach of the RoL principle, which heavily relies on the respect for the Constitutional justice and obliges the legislator to create laws accordingly with the Constitution and the Constitutional rulings. As a result, most of the actions performed by the Catalan authorities were null in legal terms. Moreover, these recurrent disobedience to the SCC constitutes a punishable action, with severe penal consequences, accordingly with the Spanish penal code. In fact, the Supreme Court (SSC) convicted three of the secessionist leaders³³ of this crime in 2019 (STS 459/2019). The penalties included fines and a disqualification of one year and eight months for public office.

Paradoxically, despite their insubordination to the SCC, Catalan authorities appealed to it in various occasions after the events of the 10.

6 The Recognition of SCC Authority by Catalan Secessionist Leaders

Notwithstanding their recurrent and forthright defiance to Constitutional Justice, translated in various episodes of disobedience to the SCC, Catalan pro-secessionist authorities later relied on it. After the celebration of the 10 illegal referendum, the Supreme Court convicted the leaders of the Catalan secessionist movement of different crimes in 2019. These crimes covered rebellion, sedition, disobedience, and diversion and embezzlement of public funds. The penalties included jail, fines, and disqualification for public offices. Catalan leaders presented several appeals to the SCC against these sentences, even though in the resolution of 9 November 2015 they have stated that the SCC was “lacked legitimacy and competence”. Various *Recursos de Amparo* (appeals for constitutional protection) have been submitted by the convicted Catalan leaders of the Procés to the SCC.

On the one hand, the SCC admitted most of them to procedure. An illustrative example on how the SCC dealt with these *Recursos de Amparo* can be found at the end of 2018. On 19 September, Oriol Junqueras (Former Vice-president of the *Generalitat*) and Jordi Romeva (Former Counselor on External Affairs of the *Generalitat*) appealed to the SCC the decision of the SSC on their disqualification for public office, which implied them to keep on being deputies in the Catalan Parliament. Junqueras and Romeva considered that the decision of the SSC constituted a “violation of the rights of political participation and freedom of expression and ideology”, argued that “the Constitution cannot annul the functions of an elected deputy”, and defended that the SSC has no competence to investigate the crimes that they allegedly committed as they occurred in the Catalan region (EFE 2018). This argument resembles similar to the one that secessionist leaders used to sustain their

³³ Santiago Vila (Former *Conseller* of Enterprise and Knowledge), Meritxell Borrás (Former *Conseller* of Governance, Housing and Public Administrations) and Carles Mundó (Former *Conseller* of Justice).

challenges to the SCC: the non-reconnaissance of the competence of the court which is enforcing legality in each case. The SCC decided by unanimity to accept the *Recurso de Amparo*, considering the issue of “special constitutional significance” (Tribunal Constitucional 2018a). Nonetheless, it decided to deny the request for suspension of the contested resolutions of the judgement of the SSC (Tribunal Constitucional 2019a, 2019b). The SCC argued that the SSC was applying Art.384bis of the Spanish Criminal Procedure Law in its decision of disqualifying the Catalan leaders, which establishes that officers in preventive-detection must be automatically removed from their offices.³⁴ Hence, “acceding to the requested suspension would be equivalent to anticipating an eventual ruling on the appeal for protection and would mean temporarily disapplying a rule of legal rank” (Auto TC 12/2019). By admitting these *Recurros de Amparo*, the SCC has developed a rich jurisprudence on this issue, concretely on political rights.

However, on the other hand, the SCC dismissed these *Recurros de Amparo* on several occasions. For example, on 14 February 2018, Junqueras asked the SCC to suspend his preventive detention (El Plural 2018). The SCC dismissed the appeal, considering that none of the alleged violations of fundamental rights on the part of Junqueras took place (STC 155/2019). The decision of the SSC on preventive detention for Junqueras complied with the constitutional principles of legal provision, legitimate purpose, and proportionality. In 2020, Spanish media reported that the SCC had rejected up to 29 *Recurros de Amparo* of the Catalan secessionist leaders (Brunet 2020).

The SCC has been a central piece in the *Procés*: while pro-independence leaders questioned and rejected its authority and competence at multiple times, they have subsequently appealed to it. Catalan secessionist leaders’ have hence shown a contradictory approach. The SCC did not actually suspend the penalties of any of the Catalan leaders. The Spanish government decided on 22 June 2021 to concede them pardon, allowing their effective abandon of the prison next day, arguing reasons of public interest.

7 Conclusions

The case of the Catalan secessionist movement illustrates the threats that nationalist movements can pose to the RoL principles, which are not abstract concepts but well-defined notions that enjoy common understanding in Europe. It also brings to light the fragile legal foundations on which secessionist claims are often built, and highlights the fine line between politics and law, as decisions in the former can have serious consequences in the latter. Catalan leaders not only kept their actions in constant defiance of the idea of the rule of law contained in the Spanish constitutional

³⁴ Art. 384bis of the LECrim (original text in Spanish): “Firme un auto de procesamiento y decretada la prisión provisional por delito cometido por persona integrada o relacionada con bandas armadas o individuos terroristas o rebeldes, el procesado que estuviere ostentando función o cargo público quedará automáticamente suspendido en el ejercicio del mismo mientras dure la situación de prisión” (España 1882).

order, but in doing so also challenged European and international understandings of the core elements that are inseparable from this value as a key element of good and legitimate governance. Therefore, interpreting the Catalan secessionist challenge merely as a conflict between the Spanish state and the Spanish constitution vis-à-vis pro-secessionist actors while ignoring its European dimension and consequences can be misleading. It is difficult to see what the solution is to accommodate the demands and concerns of Catalan nationalist and pro-secessionist actors. However, the search for this solution should be in line with the rule of law and hence with the legal principles that protect the proper functioning of democracy and the rights of all citizens, both in Spain and in Europe.

Catalan authorities assumed competences not transposed to the regional level by the Spanish Constitution; abused the use of the law, ignored legal advice, and tried to silence the opposition; created new laws that fit in their interests; and openly disobeyed the Constitutional Court. These acts constituted major threats to the proper functioning of a liberal society. The claim of majoritarianism served pro-independence leaders as an argument to transform the law and the institutions, thus leaving the rights of those Catalan citizens that did not concur with the idea of secession unprotected.

When operating on the margins of the legal order, secessionist movements impeded the proper functioning of democracy as they based their actions in a majoritarian understanding of the notion on which they sustained their alleged legitimacy to undermine the rule of law. Much of these strategies were very similar to the ones used by the political authorities that have dismantled democracy in some EU member states, particularly in Poland and Hungary. The European institutions have taken serious actions against these governments (e.g. the EU has activated Art.7.1 and launched several infringement procedures against the Hungarian and Polish governments). Therefore, by calling for Brussels' intervention against the Spanish government, Catalan pro-secession actors were trying to make a "double" use of the EU institutions: while breaching one of the fundamental values on which the European project is based, the rule of law, paradoxically they demanded the Union to act against the Spanish state at the same time.

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