Essays

Self-Determination as an Expression of Collective Human Dignity: The Case of Catalonia

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'Je me révolte, donc nous sommes'[1]

Abstract

This paper has two distinct sections; the first one is devoted to an epistemological reconceptualization of the principle of self-determination. This principle needs to be updated to take account of the realities of the Twenty-First Century (globalization, new political structures, IT era, post-modern concept of sovereignty) and linked to the principle of Human Dignity as a collective right. The starting point is focused on the relationship between democracy and self-determination. The analysis takes both a theoretical and empirical approach to encompass a comprehensive democratic theory of self-determination. The main idea is to demonstrate in detail the link between constitutional democracies and self-determination. The second section of this paper is devoted to the individual and collective rights debate, paying special attention to the conceptualization, meanings and understanding of the fundamental principle of human dignity. This second section presents arguments to provide a justification for the transplantation of rights from the realm of the individual to that of the group. The anthropocentric conception of the theory of rights is reviewed in order to extend some of its theoretical foundations to groups, collectives and peoples. The conclusion of this paper considers whether the Spanish violent, disproportionate and repressive reaction to the peaceful and democratic Catalan process to independence legitimises the exercise of self-determination as a remedy.

I. Epistemological Reconceptualization of the Principle of Self-Determination

International relations, norms, and practices must be updated for the new era, a factual reality that Manuel Castells defined as the:

> 'new dominant social structure, the network society; a new economy, the informational/global economy; and a new culture, the culture of real

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[1] A. Camus, *L'homme révolté*, *Collection Folio essais no 15* (Paris: Gallimard, 1985), 5.

virtuality'.[2]

This new social materiality confronts directly national borders, homogenous communities and other elements that support the Peace of Westphalia ideology. We are in a new Eon and states are no longer the most significant actors in the international legal and political arena. Thus, their rights (territorial integrity and border's inalterability) and privileges are not sufficient to achieve the goals and objectives of a new society.

The principle of self-determination, in both the individual and collective sense, does not escape this new trend and requires a reconceptualization and an update to become a valid source of adapting the international legal corpus to this new reality. On this basis, this paper presents a proposal to appraise self-determination and to link it as an expression of democracy and human dignity in a collective sense. The theory faces different theoretical and normative challenges, such as the validity of the individual-collective transplantation in both cases, the justification of the epistemological link between both principles and the appropriateness of self-determination as a tool to heighten human dignity. All these questions are addressed in this work to promote the revision of the principle on self-determination for the twenty-first century.

The starting point of any epistemological reconfiguration or updating of the principle of self-determination must be an analysis of the evolution of the principle, followed by a justification of its evolutionary or dynamic character. Regardless of whether it was Lenin (based on a socialist political philosophy) or Woodrow Wilson (liberal political philosophy) who championed self-determination, the original principle was affected by internal and external variables. These are dimensions which Antonio Cassese highlighted in his famous book on the topic.[3] External self-determination, in relation to the non-self-governing territories, meant that they had the opportunity to choose freely their international status and about the manner in which self-determination would be implemented,[4] whereas the internal dimension means the right to authentic self-government; the right for a people to freely choose its own political and economic regime.[5]

In terms of the extensive acceptability of the principle of self-determination by the states and the international community, the internal dimension had less opposition. This weaker resistance of states to the internal perspective is because it respects the principle of non-intervention in domestic affairs and safeguards the territorial integrity of nation-states. Therefore, the internal dimension of self-determination is more respectful with the status quo and the predominant

[2] M. Castells, *End of Millennium: With a New Preface* (Hoboken: Wiley-Blackwell, 2nd ed, 2010), III, 372.

[3] A. Cassese, *Self-Determination of Peoples. A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995).

[4] ibid 71.

[5] ibid 101.

role of states in the international arena. Internal self-determination does not threaten the monopolistic use of violence of states and their territorial borders. The state's empire is assured; their *autorictas* and *potestas* to impose 'legitimate' violence is not under threat with an internal claim. Constitutional design of liberal constitutional democracies rests ultimately in this internal and monopolistic dimension of violence and in the hierarchical structure to enforce concrete political decisions. The state's institutions, through their institutional apparel and official discourse, have the last word when a conflict with sub-national entities, groups or any other subject arises. The principle of non-intervention is so strong that hampers the possibility of interference. In this sense, everything remains very Westphalian. Internal self-determination is only possible in the so-called constitutional democracies. In non-liberal regimes an internal claim is only a purposive principle, a dead letter, in the same way as the rest of democratic values and fundamental rights that authoritarian regimes constitutionally accommodate. Based on this, we find a link between democracy and self-determination in its internal perspective.

The external dimension of self-determination challenges states and *status quo* in a critical way, and contradicts the principle of national unity and territorial integrity. The resistance of the beneficiaries of this *status quo* is comprehensible but not desirable, especially if this static interpretation is imposed against democratic, remedial, dignity or just cause claims. If, as according to some doctrine (James Crawford), there is not really a right to secession, this will lead to the conclusion that the exercise of such a principle will rest on force, violence and enforcement.

The debate on the nature of self-determination as an individual or a collective right seems to prevail through the textual expression in international law of the right. Art 1, para 2, of the Charter of the United Nations remarks that one of the purposes of United Nations is

> 'to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples'.

The Charter also attributes the right of self-determination to peoples, in the plural and collective sense in Art 55.

Cassese is right when remarking upon the relevance of this codification in a multilateral treaty, an important turning-point which signals the maturing of the political postulate of self-determination into a legal standard of behaviour.[6] This accommodation in international law is complemented by other legal instruments that convert the principle of self-determination into a customary law with elements of *jus cogens*.[7] The General Assembly Resolution 68/175 and

[6] ibid 43.

[7] See United Nations General Assembly Resolutions, 1514 (XV) of 14 December 1960; 1541 (XV) of 15 December 1960; 2625 (XXV) of 24 October 1970; Vienna Declaration and Program

the Note of the Secretary General A/69/272, containing the interim report of the Independent Expert on the promotion of a democratic and equitable international order, are relevant in that sense due to the explicit recognition of the epistemological link between democracy and self-determination. These legal instruments recognize that universal realization of self-determination is a fundamental condition for the effective guarantee and observance of human rights.[8]

Since its legal accommodation in the international legal corpus, the principle had great reservations by the states because the dynamic nature of the principle. States were the only entities in the world community that possessed legal rights and were deemed to have absolute control over its peoples and its own territorial jurisdiction.[9] After juridification of the principle, and the recognition of its mandatory character for the parties, states have developed different arguments and guidelines to dismiss its application and, therefore, to *de facto* remove the legal character of the principle.

It seems generally accepted that the principle of self-determination and the principle of territorial integrity are in a contradictory disjunction. The principle of territorial integrity, which is a *jus cogens* element of public international law, refers to the principle of non-interference in the internal affairs of states. Traditionally, the non-interference in domestic affairs has been considered as an important tool for in the relations among states. However, empirical evidence demonstrates that an overly rigid application of this principle may cause the opposite effect. An impermeable border can distort peace and serve as cover for breaches of human rights. The secular-sacred discourse on the principle of territorial integrity has been unable to avoid the expansion of international and transnational law within the borders of the states, the prominent role of human beings and NGOs in public international law, and the fact that in the twentieth century, a vast number of new states emerged.

In constitutional terms, two constitutional principles cannot be contradictory *per se,* and constitutional courts around the world have addressed this incongruity through harmonization. Only norms of equal standing can be harmonized, otherwise, the superior norm will prevail. The orthodox doctrine has simply stated that the principle of territoriality outweighs all other norms and there is

Action of 25 June 1993; The International Covenant on Economic, Social and Political Rights, General Assembly Resolution, 2200A (XXI) of 16 December 1966; The International Covenant on Civil and Political Rights, General Assembly Resolution 2200A(XXI) of 16 December 1966 and the International Court of Justice. The International Court of Justice advisory opinions on Namibia (South West Africa), Western Sahara, the legal consequences of the construction of a wall in the Occupied Palestinian Territory and Kosovo, including commenting on the *erga omnes* character of self-determination. (See A/69/272: Promotion of a democratic and equitable international order Note by the Secretary-General of 7 August 2014).

[8] A. Abat i Ninet, 'Do You Want Catalonia to Be an Independent State in the Form of Republic?' paper delivered at the conference *The Limits and Legitimacy of Referenda*, University of Toronto, Canada, 21-22 September 2017, 14-15.

[9] A. Cassese, n 3 above, 165.

no contradiction at all. The first sector (James Crawford, Anders Henriksen), following this orthodoxy, even denies any conflict and considers that there is no contradiction between equals. Thus, it follows that territorial integrity is hierarchically superior and so prevails.[10]

Another conventional approach admits the contradiction and, similar to the constitutional terms, they claim harmonization takes place. This approach involves undermining the applicability of the principle of self-determination. The reduction of the scope of applicability aims to discourage secessionist movements. Even so, there is no express limitation to the right to self-determination, and no norm limits its applicability to colonial territories. Currently, and because the relation between territorial integrity and self-determination has been emphasised, other arguments have been used to justify self-determination (remedial, *justa causa* and the claim for democracy).

The report A/69/272: *Promotion of a democratic and equitable international order*, Note by the Secretary-General, 7 August 2014 is a good example of this new aspect of democratic legitimacy.[11] However, the relation between both concepts is more profound. Both concepts work symbiotically and the relation affects both perspectives (collective and individual) of self-determination. Democracy, as a political regime, requires individually and collectively self-determined persons. However, the converse is also true: democratic collective self-determination requires a population which desires democracy. This symbiotic relation/dependence and epistemological linkage only work out when collective self-determination is effective democratically, both procedurally and materially.[12]

II. A Democratic Theory of Self-Determination

Liah Greenfeld states that we can only talk about collective individuals and collective identities in a metaphorical sense. She remarks that:

> 'It is never the people (all or a majority of individuals) who would exercise the right of self-determination so conceived, but those who find themselves in a position to impose their particular interests on the people. These can be a group or a particular individual'.[13]

This statement is very interesting for the purpose of this paper for two reasons, firstly because it deals with the nature of the right of self-determination

[10] See J. Crawford, *The Creation of States in International Law* (Oxford: Oxford University Press, 2007); A. Henriksen, *International Law* (Oxford: Oxford University Press, 2017), 71.

[11] A/69/272: Promotion of a democratic and equitable international order Note by the Secretary-General, 7 August 2014, §32.

[12] A. Abat i Ninet, n 8 above, 14.

[13] L. Greenfeld, 'Self-Determination vis-à-vis Nationalism and Democracy: Defining the the Concept empirically', available at https://tinyurl.com/yxdlct9t (last visited 28 May 2019).

(individual, collective or both). This will determine the origin, essence, and scope of a democratic theory of self-determination. Secondly, Greenfeld's statement opens a theoretical parallelism between a theory of self-determination and the ancient Platonic classifications of political systems and constitutions (*Politeia*).

1. Individual and Collective Self-Determination

Self-determination is individual in nature; Paul Ricoeur, Pierre Bourdieu, Émile Benveniste, Jacques Derrida and Ronald Dworkin among others, have extensively analyzed this aspect of it. The theoretical elements of these theories are thus an apposite starting point to a discussion of collective transplantation of the concept to collectivities. I propose an appeal to the individual right of self-determination and to the values that arise from it, in order to make the case for a collective right to self-determination. This, however, does not imply that the collective right would be no more than the sum of individual rights.[14]

Ricoeur, Bourdieu and Benveniste's dialectics of selfhood (*Ipséité:l'identité comme fait d'être soi-même à travers le temps*) and Sameness (*Mêmeté: le fait de rester le même*) define and limit the constitution of oneself.[15] Selfhood and sameness are also relevant in a collective dimension. A people, to be self-determined in the sense of selfhood, requires consciousness. The 'condition' or 'character' of a people, group or Nation is self-ascribed; it first depends on the members of that concrete collective entity. The individuals determine the identity of the group over time, through being a collectivity of selves. In Canada are the Canadians; in France, the French, etc. According to Charles Taylor, Axel Honneth and Jürgen Habermas identity is not monologic but dialogic by necessity. Thus, the French are not the 'only' individuals who determine what the French identity is.

This collective consciousness of selfhood is variable. Identities, and more emphatically group identities, are intangible, multiple, immaterial, illusive and subjective despite the efforts of objectivise nations. A process of objectivisation that sometimes emphasizes romantic ideas (*Volkgeist*) is used and abused by current xenophobic populists. According to this idea, individual democratic self-determination provides the means to achieve collective democratic self-determination.

The second element is 'sameness', which predicates staying or being the same. From a collective perspective, sameness means that a people democratically want to be as they are; the group acknowledges that they are Canadians or French. In an international arena where sub-state entities cannot stay or be the same, self-

[14] P. Jones, 'Group Rights' 22 September 2008, available at https://tinyurl.com/y7npgmcq (last visited 28 May 2019).

[15] P. Ricoeur, *Soi-meme comme un autre* (Paris: Editions du Seuil, 1990); Id, 'Interprétation et Reconnaissance' *Cites*, XXXIII, 1-192 (2008). See also, É. Benveniste, *Problèmes de Linguistique Générale* (Paris: Gallimard and Pierre Bourdieu, 1966); Id, 'L'identité et la représentation. Éléments pour une réflexion critique sur l'idée de région' *Actes de la recherche en sciences sociales,* XXXV, 63-72 (1980).

determination is justified and legitimate.[16]

Derrida's notion of individual self-determination is enlightening for the individual/group transplantation of self-determination. He notes the need for (individual) self-determination of the self when defining democracy. According to him, democracy would be, precisely, a force (*kratos*) in form of sovereign authority (sovereign, that is, *kurios* or *kuros*, having the power to decide, to be decisive, to prevail, to have reason over or win out over and to give the force of law, *kuroō*), and thus the power and ipseity of the people (*dēmos*).[17] Self-determination in its collective sense means also the power to decide as a community. Did Quebec and Scotland not self-determine when the people voted 'no' in their referendums? They had the power to decide, to prevail, and they did so democratically.

The work of Dworkin is also thought-provoking for a democratic collective transplantation of self-determination. According to him, individual self-determination entails special responsibility for how his or her own life goes.[18] Responsibilities can be translated into obligations by the self-determining people.

Responsibilities also entail post-self-determination acts, such as how to restructure the relations between the state and the sub-state entity in case of non-secession and in case of secession. There may also be an obligation to limit on time the claim of holding of a new referendum on secession. The impact of the referendum issue on the constitutional democratic state is so relevant that it must be an exceptional mechanism. It is simply unfair and against the minimum requirement of the principle of mutual institutional loyalty to request the holding of a new referendum on secession after a brief period.

The demand for a new referendum is neither respectful of the democratic decision that follows from the outcome of the initial referendum or with the principle of self-determination. According to Thomas Jefferson, and also Georg Wilhelm Friedrich Hegel, the debate on a referendum on secession should be postponed at least for one generation, the same period required to update a constitutional system.

2. Constituent Moment and Self-Determination

Liah Greenfeld's statement, that some processes of external self-determination were primarily and essentially personalist, are also of interest. She mentions Muhammed Ali Jinnah in Pakistan, Amin Al-Husseini in the case of Palestinians, but there are other similar examples of a Founding Father or a leader of a self-determination movement. In this sense, we can include among others, Mohammad Ali in Egypt, Mustafa Kemal Ataturk in Turkey or Mohandas Gandhi (Bapu) in

[16] In this sense I want to remark the work of G. Delledonne and G. Martinico, *The Canadian Contribution to a Comparative Secession Law* (London: Palgrave Macmillan, 2019).

[17] J. Derrida, *Rogues: Two Essays on Reason* (Stanford: Stanford University Press, 2005), 13.

[18] R. Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton: Princeton University Press, 2008).

India or Artigas in Uruguay. In Africa, when in some states the decolonization meant that a 'King' was substituted by another 'King', as Mugabe did in Zimbabwe (President thereof since 1987 and currently running for a new term at the age of ninety-three), Hastings Kamuzu Banda in Malawi or Mohamed V of Morocco.

Other processes of self-determination were led by aristocratic or oligarch elites, such as the Founding Fathers of the United States of America, a group of white, rich men (a point belied by the use of the fiction 'We The People' in their constitution). An aristocratic or oligarchic (the few) self-determination also happened in other countries of the Americas.[19] Lastly, we find many democratic processes of self-determination, as happened in the Baltics, Slovenia and could happen in Catalonia, where the referendum as an instrument has become essential. In democratic self-determination, the foundation or political constituent act is lead from bottom to the top by the many.

By referring to the constituent or foundational moment (understood as the act that materializes self-determination) and who leads that act, be it the one, the few or the many, we can categorize the self-determination according to the classifications of political systems (Plato, Aristotle, Polybius, Cicero, Thomas Aquinas or Jean Bodin). The classification of the polities started with Plato, who distinguished six types, organized in pairs: kingship, tyranny, aristocracy, oligarchy and bad and good democracy.[20] Plato considered that there are, so to speak, two 'mother' constitutional models from which we can rightly say that the others have been derived. One of these we may properly call monarchy and the other democracy.

In Platonic terms, as applied to the self-determination movement, the one leading self-determination would be a King-Philosopher. He is the one that guides the blind masses to see the light of knowledge and exit from the cavern of ignorance, in this case towards a new State. If the 'King' promotes group self-determination for the benefit of all, it would be justifiable, whereas were he a philosopher, if he does so for his own benefit, it would be a tyrannical measure and self-determination would be a vitiated political act. Tyrannical or philosophical foundations of self-determination may have political and legal consequences in the form of the state and its political form. The same can be said about the other forms of government (aristocracy, oligarchy and democracy) by the few, described by Cicero[21] as *civitas optimatium*, or by the many (*civitas popularis*) lead self-determination.

Aristotle, in the third book of the Politics, also classifies systems of governments and their cyclical nature.[22] In this sense, the political power of the

[19] See R. Gargarella, *The Legal Foundations of Inequality: Constitutionalism in the Americas, 1776-1860* (Cambridge: Cambridge University Press, 2010) and the book review of J. Colón-Ríos, *International Journal of Constitutional Law*, II, 563–566 (2017).

[20] A. Abat i Ninet, 'Playing at being gods' *Philosophia Quarterly of Israel*, I, 41-55 (2009).

[21] Cicero, *De Re Publica, De Legibus* (Cambridge: Harvard University Press, 1961).

[22] Aristotle, *Politics: A Treatise on Government* (Scotts Valley: Create Space, 2010).

aristocracy is transformed into an oligarchy, then into tyranny and then transitioned towards democracy. In the case of self-determination, Aristotle shows that an aristocratic/*civitas optimatium* led self-determination does not mean necessarily that the state will remain an aristocracy, as it could later become an oligarchy or a democracy.

3. Juridification of Self-Determination

The debate on the nature of self-determination as an individual or a collective right it is overcome with the international law juridification of the right. Art 1, para 2, of the Charter of United Nations notes that one of the purposes of United Nations is 'to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples'. The Charter also attributes the right of self-determination to peoples, collectively, in Art 55. The different ways in which States interpret this norm and its implied principles are more related to the limitations and shortcomings to the right. This legal acquis has been interpreted as not recognizing the right to secede from a sovereign country, and instead to limit the scope to colonial peoples or aiming towards a progressive implementation towards self-government or independence.[23] However, the resistance to accepting of self-determination as a collective right has been more academic and theoretical than practical.

Cassese is right when remarking that the codification of this right in a multilateral treaty is significant, in that it marks an important turning-point at which the political postulate of self-determination has matured into a legal standard.[24] This legal international accommodation is complemented by other legal instruments that convert the principle of self-determination into a customary law with elements of *jus cogens*.[25] The General Assembly Resolution 68/175 and the Note of the Secretary General A/69/272, containing the interim report of the Independent Expert on the promotion of a democratic and equitable international order, are relevant to this paper due to the explicit recognition of the epistemological link between democracy and self-determination. These instruments recognize that universal realization of self-determination is a fundamental condition for the effective guarantee and observance of human rights.

Neither in constitutional law is the denial of a democratic principle of self-determination coherent. If a constitution stipulates an eternal clause of unity, the denial of self-determination is a constitutional inconsistency. The goal of constitutionalism is to facilitate self-determination fully and in the most inclusive sense.[26] Self-determination is essential to the development of constitutionalism

[23] A. Cassese, n 3 above, 42.
[24] ibid 43.
[25] See n 7 above.
[26] N. Feldman, 'Imposed constitutionalism' 37 *Connecticut Law Review*, 857, 881 (2005).

including fundamental rights, principles, institutions, and authority to govern.[27]

Self-determination is a mother-right, or in David Feldman's words a 'right of rights': it enables the recognition, accommodation and later enforcement of constitutional rights.

A Constitution is the supreme legal and political expression of self-determination. The approval of a Constitution is an act of self-determination *per se*, as it juridifies a collective decision of a people, giving it the greatest force of law. Self-determination is the *raison d'être* of constitutions. Thus denying this right (internal and externally) to another people is an incongruity. Self-determination is not an egocentric or ego-ist act, as it cannot end with our own self-determination. It must also be acknowledged from a constitutional perspective. A condition *sine qua non* for an individual to self-determine is to recognize the same right to other individuals; the same is applied to peoples.

Maurice de Sayas is right when he states:

> 'Self-determination is an expression of the individual and collective right to democracy, as democracy is an expression of the individual and collective right of self-determination'.[28]

However, the relation between both concepts and their epistemological link is more profound. Both concepts work symbiotically and the relation affects both perspectives (collective and individual) of self-determination. Democracy, as a political regime, requires individually and collectively self-determined persons, but this also works the other way around. Democratic collective self-determination requires previously democratic Men. This symbiotic relation/dependence and epistemological linkage only work out when collective self-determination is effective democratically, both procedurally and materially.

Paradoxically, the best juncture to prove that democratic self-determination is materialized and effective is when a self-determination claim is exercised by a people or group within your own State. The best time to exhibit the democratic condition is accepting and defending the results of a referendum or elections that are the contrary to those we want. Catalonia will have the opportunity to show its respect for self-determination by recognizing this right to another nation, Aran.

III. Individual and Collective Rights Debate

Before analysing the link between self-determination and human dignity the paper deals with different theoretical and normative challenges, such as the validity of the individual-collective transplantation in both cases, the justification of

[27] ibid.

[28] A/69/272: Promotion of a democratic and equitable international order Note by the Secretary-General of 7 August 2014, para 32.

the epistemological link between both principles and the appropriateness of self-determination as a tool to heighten human dignity. Self-determination has an individual sphere and nature; Ricoeur, Bourdieu, Benveniste, Derrida or Dworkin among others, have extensively analysed this aspect. In fact, the conceptual elements of these theories are the starting point to the collective transplantation. I propose then an appeal to the individual right of self-determination and to the values that arise from it, in making the case for a collective right to self-determination. This does not imply that the collective right would be no more than the sum of individual rights to which we appeal.[29] An analogous transplantation, similar to the one that is accepted for the principle of self-determination, is proposed for the principle of Human Dignity. As we appeal to individual rights of self-determination, and to values that underlie them, in making the case for a collective right of self-determination,[30] I propose making an appeal on the basis of human dignity.

Its transplantation from the realm of individuality to the collective nature is contested. The arguments are varied and they range from a negation of the existence of collective rights as such (Michael Ignatieff)[31] to a reduction of a collective sense of human dignity (Michael Rosen).[32] Human dignity has myriad meanings, although over the course of its long history it has been used primarily as a social value.[33]

It does not seem feasible to provide a universally accepted and all-inclusive definition of human dignity. There is no explicit definition of the expression 'dignity of the human person' in international instruments or in national law. Its intrinsic meaning has been left to intuitive understanding, conditioned in large measure by cultural factors.[34] Where it has been invoked in concrete situations, it has been generally assumed that a violation of human dignity can be recognized even if the abstract term cannot be defined.[35]

The concept of human dignity as a constitutional value, and as a constitutional right, is relatively new. It remains as old as modern constitutions. The principle has been extensively defined and legally accommodated in the preamble to the Charter of the United Nations, the Universal Declaration of Human Rights of 1948 and in Art 1 of the German Basic Law (*Grundgesetz*) in 1949.[36] Aharon Barak affirms: 'The question whether human dignity applies to the protection of

[29] P. Jones, n 14 above.

[30] ibid.

[31] M. Ignatieff, *Human Rights as Politics and Idolatry* (Princeton: Princeton University Press, 2001).

[32] M. Rosen, *Dignity, Its History and Meaning* (Cambridge: Harvard University Press, 2012).

[33] A. Barak, *Human Dignity, The constitutional Value and the Constitutional Right* (Cambridge: Cambridge University Press, 2015), 3.

[34] O. Schachter, 'Human Dignity as a Normative Concept' *American Journal of International Law*, 848, 849 (1983).

[35] ibid.

[36] A. Barak, n 33 above, 3.

the human race has not been yet decided'.[37] The concept is omnipresent in everyday speech and deeply embedded in political and legal discourse.[38] At this juncture, it would be appropriate to analyse whether human dignity can be applied in a collective dimension.

According to Joseph Raz, a group has a collective right if their shared interest is sufficient to ground a duty in others, and if the interest of any single member of the group is insufficient by itself to ground the duty.[39] In the case of Human Dignity of groups, the sufficient interest will lie in the fact that some of the actions that breach the dignity have a collective dimension and reflect prejudice in relation to groups of individuals. Racism, xenophobia, Anti-Judaism, Islamophobia, homophobia or Gender discrimination are not just responses to individual characteristics. As Jeremy Waldron remarks, racist talk in America refers to African-Americans as 'these people' or when the audience is African-American 'you people'.[40]

These actions and behaviours transgress human dignity individually and as a group. The key question to be answered is whether we consider that groups have value by themselves and are not necessarily dependent on the aggregation of individuals. Group dignity is not reducible to the notion of respect for collective will/autonomy since it also involves basic goods of the group that are different from autonomy, and not wholly derivative from it.[41] Konstantin Tretyakov correctly defines crowds as systems and, just like another system, they cannot be correctly explained in terms of their parts alone: any adequate understanding of how a system works should embrace the principles of interaction between its individual components and the resulting element, which are different in kind from their isolated counterparts.[42]

It is not by chance that the triumph of the normative accommodation of Human Dignity came after the Holocaust and the horrors and atrocities of the Second World War. It is the same concept that has ancient and multiple meanings, the same concept which Barak notes has endured through two thousand five hudred years of history and the same concept which has been influenced by different religions that held it as an important component of their theological approach.[43]

1. Human Dignity in a Collective Sense

[37] ibid 34.

[38] ibid.

[39] J. Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), 208. As quoted by P. Jones, n 3 above, 6.

[40] J. Waldron, 'The Dignity of Groups' *Acta Juridica*, 66, 81 (2008).

[41] K. Tretyakov, 'Corporate Identity and Group Dignity' *Washington University Jurisprudence Review*, 171, 211 (2016).

[42] ibid 214.

[43] A. Barak, n 33 above, 20 preface.

Massive breaches of human rights justify, in terms of human dignity, the application of the right to self-determination as a remedy. However, what should happen with other cases in which the essential constitutional-democratic principles are violated? Human dignity is a first-order constitutional principle, comparable to the rule of law and separation of powers, and it sets out the structuring features of this principle in three stages, drawing on (as far as possible) the full range of European constitutional orders.[44] As a constitutional foundation, the principle of dignity, first and foremost, indicates a strong commitment to the respect and protection of humanity. This must be substantiated by a fundamental rights chapter, often located in prime position and underpinned by a broad commitment to human dignity.[45]

The German Constitutional Court establishes a high standard of protection against violations of the concept of human dignity, as an absolute, supreme and eternal human right. These three traits grant unique normative status to human dignity within the German constitutional system. However, the jurisprudence of the German Constitutional Court has also limited the area that the principle covers.[46] The absolute character of the right to human dignity is unique to German law, which is naturally a factor in the narrow interpretation of the constitutional right to human dignity. Such an interpretation is not necessary for the other legal systems.[47] In other constitutions, (Israel, South Africa, Canada) human dignity has a different and broader interpretation that might be easier to connect with a collective dimension.

The next section moves from the realm of theory to that of praxis and it analyses a current case-scenario that can test the acceptance of a concept of human dignity in a collective sense, as explained in this paper. Despite the concrete casuistry of the Spanish-Catalan conflict, the Spanish non-dialogical and repressive answer to the Catalan territorial challenge places the crisis in a different level. The acts of the Spanish government endanger individual and collective human rights. Since Spanish a constitutional democracy, it was supposed to respond to these kinds of challenges (political secession, less economic power of the State, less influence and political weigh of Spain in the EU) as Canada, the United Kingdom or Denmark did, instead of balkanising the crisis.

2. The Case of Catalonia

The question is whether the repressive actions of the Spanish institutions constitute sufficient grounds to justify self-determination as a remedy in Catalonia. The actions of the Spanish government and other state institutions against the

[44] C. Dupré, 'Human Dignity in Europe: A Foundational Constitutional Principle' *European Public Law*, 319-340, 319 (2013).

[45] ibid 323.

[46] A. Barak, n 33 above, 233.

[47] ibid 241.

'seditious' and 'rebellious' Catalan institutions and representatives had begun before the October 1st referendum moved into the political epicentre. Catalan political representatives were brought to trial months before the consultation. For example, former President of Catalonia, Artur Mas, faces a criminal trial in Barcelona for organizing a symbolic popular consultation on independence on 9 November 2014. The non-binding consultation was opposed by the Spanish government which challenged the Catalan Government's decree and called for a consultation vote on independence in Spain's Constitutional Court.

The highest tribunal decided two articles of the decree were unconstitutional. The first one related to the regulation which called the referendum, which the Court held was unconstitutional. The second one was unconstitutional because, according to the Court, the popular participatory consultation was indeed a referendum and therefore the Catalan Government could not go beyond its competencies. The decision was made unanimously by the twelve members of the Court, which is controlled by a conservative majority of members appointed by the currently-ruling People's Party. This is the same Court which has been particularly hostile on distinctive identity claims.[48]

When the Constitutional Court overruled the law and the decree, the President, and the Government, against the advice of both parties that supported him, decided to accept the decision and transform the query into something radically different: a participatory process left to the public with minimal support from the Government. Later, the Spanish Constitutional Court banned the popular consultation and did not answer a request of the Catalan Government on what the Catalan institutions were allowed to do. With no answer, according to the Public Prosecutor, the Catalan government organized the symbolic voting anyway. The defence for the Catalan president and the other members of the Parliament argued that the popular initiative was manned by thousands of volunteers in order to subvert the restrictions. More than eighty point eight per cent of those who cast their vote in the 2014 vote did so in favour of independence, although the participation was approximately thirty-seven per cent of the people with the right to vote.[49]

Former President Mas, former vice-president Joana Ortega and former-Minister of Education Irene Rigau stand accused of disobedience against the state and wrongdoing (breach of trust) as a public official. They could face a ten-year ban from public office if found guilty. None of them will go to prison because the felony of misappropriation of funds was excluded from the trial. This last charge was based on the presumption that public funds had been spent to organize the voting.

The criminal prosecution of the former President has had huge political

[48] A. Abat i Ninet, 'Catalan Political Representatives Stand Criminal Trials' *International Journal of Constitutional Law Blog*, 25 February 2017.

[49] ibid.

and media repercussions in Catalonia and Spain. Around forty thousand people came out to protest at eight am on a Monday morning as Mr Mas was criminally prosecuted in what they consider a political trial. They argue that it is a judicialisation of a political conflict and a way to weaken self-government, the right to self-determination, and democracy itself. Former President Mas' et al defense further showed that the Spanish Government has disobeyed the Constitutional Court on more than twenty-six occasions and no member of the central government has faced a criminal procedure because of it. Furthermore, the criminal procedure and penal law are always an *ultima ratio* (last resort) in a democratic system; no justification was given to instruct these political facts in this latest instance.[50]

With the referendum at the centre of the political debate in Catalonia and Spain, the Spanish measures to avoid the 'illegal' consultation can be viewed as before, on and after according to when the measures were taken. The repressive actions *before the referendum,* started by the central government treasury department include taking control of the payroll of the Catalan government in order to bring additional pressure and to prevent payment for the referendum with public funds, the confiscation of everything used to 'promote or disseminate' the consultation, police identification and sanctioning of individuals hanging posters, painting or murals. The Spanish police also registered private printing presses (more than forty police registers), journals and digital newspapers. The general prosecutor threatened public and private media with incurring criminal responsibility had they broadcast or advertised any content relating to the referendum.

Other coercive measures to avoid the referendum included the interception of private correspondence and post of private citizens, the blocking of websites, arresting of fourteen Catalan government officials, the imposition of disproportionate economic fines to private persons that collaborated with the organisation of the referendum (*Junta Electoral*), the penal prosecution of hundreds of city majors, Catalan Police officers, the President of the Catalan Parliament and other parliamentarians. The Spanish government also sent thousands of militarised police officers to avoid the referendum by force and to undermine the peaceful exercise of voting. Catalonia is under siege, living under an undeclared state of emergency. Basic fundamental freedoms and rights are being regularly violated and curtailed.

On the day of the referendum. Unlike in other countries that call themselves liberal democracies, the Catalan referendum on self-determination was held in very critical, almost unimaginable conditions. Unlike in other countries that claim to cherish the ideals of democratic self-government, the Spanish government made it necessary for the ordinary citizens to protect the safety of their polling stations themselves, risking, in the process, their own physical safety. Together with the

[50] ibid.

officials of the Catalan government, political representatives and private enterprises – many Catalan citizens were made the target of unlawful violence, unleashed by the repressive apparatus of the Spanish state.[51] The Spanish militarised police used disproportionate and senseless aggression against ordinary citizens. Hundreds were hurt by the brutality of the Spanish police. A repression that wrought against ordinary people – the people who only wanted to exercise their democratic right to vote, to be heard, and make their voices count.[52] Police actions did not perform randomly, they targeted concrete electoral polls based on the symbolism (the one where President Puigdemont should vote) and where a major participation of pro-independence electors were predicted. What is particularly disturbing is that the police brutality we just experienced might not be the end of this illegal and abusive tendency, but rather only the first attempt to suppress the 'seditious' will of the Catalans. Spanish police brutality was not limited to 'ordinarily' brutal violence, but also inflicted symbolic violence aiming to threaten and condition the Catalan Republican agenda with fear.

After the referendum, the repressive measures of the Spanish Government and judicial institutions continued. The judicial repression followed with the *purge* of dozens of pro-independence workers on the Catalan administration and institution, including the imprisonment of political activists (Jordi Sánchez and Jordi Cuixart). The incarceration of these political activist breaches some of the basic principles of the Spanish criminal procedure (such as the exceptionality of the preventive detention under the Spanish penal system) and denaturalizes the criminal definition of the delicts that they are accused (sedition). The distortion of these penal crimes and principles of criminal procedure are justified *ad absurdum*. The same judge later also agreed to imprison half of the Catalan legitimate Republican Government on similar grounds and to a European arrest warrant against the rest of the Government and the President-in-exile in Belgium. The Spanish Prosecutor of the *Audiencia Nacional* (High Court) has been acting beyond his powers on the felonies under investigation and as an emergency court.

The Spanish Government followed the repressive campaign by applying and abusing of Art 155 of the Spanish Constitution. Art 155 reads as follows:

> '1. If a Self-governing Community does not fulfil the obligations imposed upon it by the Constitution or other laws, or acts in a way that is seriously prejudicial to the general interest of Spain, the Government, after having lodged a complaint with the President of the Self-governing Community and failed to receive satisfaction therefore, may, following approval granted by the overall majority of the Senate, take all measures necessary to compel the Community to meet those obligations, or to protect the abovementioned

[51] A. Abat i Ninet, 'I-CONnect Symposium: The Independence Vote in Catalonia–! Aidez la Catalogne et l'Espagne!' *International Journal of Constitutional Law Blog*, 3 October 2017.

[52] ibid.

general interest. 2. With a view to implementing the measures provided for in the foregoing paragraph, the Government may issue instructions to all the authorities of the Self-governing Communities'.[53]

The article is inspired by Art 37 of the German Basic Law (Federal execution). A major difference between the two systems is that the *Bundesrat* (Federal Council) is a chamber of representatives of the federal states (*Länder*) and the Spanish *Senado* or upper house is not a chamber of representatives of the autonomous communities, but rather of provinces. The highly exceptional nature of the mechanisms envisaged in Art 155 is not evidenced in any previous application. Nor are there any precedents for any application of Art 37 of the German Basic Law. It is also important to remark that the draft of Art 155 had several amendments along the constitutional process in 1978.[54] The Spanish government followed this vague definition and, in doing so, converted Art 155 in an unconstitutional piece of constitutional law which breached other constitutional principles. Art 155 has been interpreted as a *carte blanche* to 'legitimise' a total re-centralization of the state, distorting horizontal and vertical separation of powers and institutionalizing a *coup d'état* in Catalonia. The authoritarian abuse of Art 155 can be also understood as a stern warning to other autonomous communities in Spain. It provides a pertinent example which offers few answers to the question of whether self-determination can be understood as a remedial measure and as an expression of human dignity in the individual and collective senses.

[53] Translation of the Spanish Constitution provided by the web of the Spanish Parliament, available at https://tinyurl.com/3knbq8r (last visited 28 May 2019).

[54] See M. Bacigalupo Sagesse, 'Synopsis artículo 155' available at https://tinyurl.com/ksszzqg (last visited 28 May 2019).