



THE EMERGENCE OF A DEMOCRATIC RIGHT TO SELF-DETERMINATION IN EUROPE

DANIEL TURP

MARC SANJAUME-CALVET

DIRECTORS / COORDINATORS

CENTRE MAURITS COPPIETERS

2016



CONCLUSION

Daniel Turp

THE EMERGENCE OF A DEMOCRATIC RIGHT OF SELF-DETERMINATION

As is evidenced in the 22 articles of this multi-authored book, the fundamental collective right to self-determination of peoples is today the subject of greater debate than ever before in Europe. The Scottish referendum of September 18th, 2014, and the Catalan election of a plebiscitary nature of September 27th, 2015, were opportunities for those two peoples of Europe to exercise their right to self-determination. From the 20th to the 21st century, one could observe that (I) there has been a significant shift towards the right of self-determination, that (II) a democratic right of peoples to self-determination has emerged, accompanied by an obligation of States to negotiate and that (III) the exercise of constituent power could open a new way for achieving such democratic right of self-determination.

1. A SIGNIFICANT SHIFT TO THE RIGHT OF SELF-DETERMINATION

The right of peoples to self-determination has been acknowledged and enacted in international instruments as important as the Charter of the United Nations,²⁴⁶ the International Covenants on Human Rights²⁴⁷ and the United Nations Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,²⁴⁸ to which we can also add – and this is of particular interest to the peoples of Europe – the Helsinki Final Act and other texts issued by the Conference of the Organization for Security and Cooperation in Europe. Yet, during the second part of the 20th century, there were attempts to contain this right within the colonial sphere and to refuse non-colonial peoples its benefits. Whether it be the peoples of Eritrea or Eastern Timor, or the republics of the former Soviet Union or Yugoslavia, there were repeated attempts to deny the right to self-determination and the achievement of independence in accordance with such right.

Yet, towards the end of the 20th century, the international community witnessed the accession to independence of all these peoples and republics. It also saw the United Kingdom recognize the right of the inhabitants of Northern Ireland to determine their own future and to decide, if such was the will of the majority, that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland.²⁴⁹ The year 2000 saw Canada's acknowledgement of the right of Quebec to "cease to be part of Canada" in a Clarity Act²⁵⁰ adopted in response to the Reference re Secession of Quebec²⁵¹ in which the Supreme Court of Canada had affirmed the "the right of the government of Quebec to pursue secession".²⁵² Adopted in 2007, the United Nations Declaration

²⁴⁶ C.N.U.C.I.O, vol. 15, p. 365.

²⁴⁷ See *International Covenant on Economic, Social and Cultural Rights*, (1976) 993 UNTS 3 and the *International Covenant on Civil and Political Rights*, (1976) 999 UNTS 171 [hereinafter *International Covenants*].

²⁴⁸ GA Res. 2625 (XXV), UN GAOR, 25th Sess., UN Doc. A/8082 (1970) [hereinafter *Declaration on Friendly Relations*].

²⁴⁹ See the *The Northern Ireland Peace Agreement*, 10 April 1998, art. 2 (Constitutional issues) and the comments of this Agreement by Alex Schwartz, *supra* p. 127.

²⁵⁰ *Statutes of Canada* (S.C.), 2000, c. 26.

²⁵¹ [1998] 2 Supreme Court Reports [S.C.R.] 217 [hereinafter *Québec Secession Reference*].

²⁵² *Id.*, par. 88.

on the Rights of Indigenous Peoples²⁵³ affirmed the right of such peoples to self-determination. With the support of several member states in the international community, Kosovo unilaterally declared its independence in 2008, and in an advisory opinion of July 22nd, 2010, the International Court of Justice maintained that this declaration was not illegal.²⁵⁴ The early 21st century also saw South Sudan take its place in the community of nations, and the United Kingdom explicitly recognising the right of the Scots to organise a referendum and to become an independent state if such was the wish of the people. Several contributions to the present collective work show that recognition of the democratic right to decide one's political and constitutional future is gaining ground: in Belgium when we think of Flanders and Wallonia; in Denmark when we consider the peoples of Greenland and the Faroe Islands; and in the United Kingdom when we take the example of Northern Ireland.

But we cannot silently ignore the difficulty the Palestinian people have in fully achieving their right of self-determination,²⁵⁵ not to mention the peoples of Western Sahara or Kurdistan, whose struggles for freedom face obstacles that have so far proved insurmountable. And what can we say of the obstinate refusal of the Spanish state to recognise the right of the Basques, Catalans and Galicians to consult their populations freely about their political and constitutional future, or about the iniquitous sentences of the Spanish Constitutional Court in these matters? As for the attitude of the French and Italian states to the nations and people that constitute them, to take the examples of the treatment of claims of self-determination by Corsica and South Tyrol, it is far from exemplary when it comes to guaranteeing the collective rights that arise from their right to self-determination.

Despite the continuing obstacles to the full achievement of the right to self-determination, it is nonetheless the case that a democratic right to

²⁵³ A/RES/61/295, UN GAOR, 61st sess., U.N. Doc. A/61/49 (2007).

²⁵⁴ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, I.C.J. Reports 2010, p. 403.

²⁵⁵ See Robert P. Barnidge, Jr., *Self-Determination, Statehood, and the Law of Negotiation: The Case of Palestine*, Oxford, Hart Publishing, 2016.

²⁵⁶ For a detailed analysis of the right to choose in a Québec context, see Daniel Turp, *Le droit de choisir: essais sur le droit du Québec à disposer de lui-même/The Right to Choose: Essays on Québec's Right of Self-Determination*, Montréal, Éditions Thémis, 2001, p. 814-821.

self-determination is emerging in this century, whose major attribute is “the right of peoples to choose”, with the essential corollary of “the obligation for States to negotiate”.²⁵⁶

2. THE RIGHT TO CHOOSE AND THE OBLIGATION TO NEGOTIATE

In accordance with the right to self-determination guaranteed in Article 1, common to both International Covenants on human rights, peoples may “freely determine their political status and freely pursue their economic, social and cultural development.” In terms of political status, the Declaration on Friendly Relations stipulates that “[t]he establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right to self-determination by that people.”

These provisions give peoples a genuine “right to choose” and confer a collective right, which is ultimately to be exercised by peoples. However, it should be remembered that the exercise of the right does not necessarily lead to national independence; it may take the form of association with another state or the acquisition of increased autonomy or fundamental individual and collective rights for the people within the state.

But it is also important to stress that the affirmation of the right to self-determination of peoples is accompanied in the same International Covenants on human rights by the imposition of an obligation on States. Therefore, “the States Parties to the present Covenant shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.” This requirement has not been more closely defined either in the Declaration on Friendly Relations or by other international instruments. It gives states a duty to negotiate with peoples who have chosen to exercise their right of self-determination and to enter into discussions about the political status that the peoples desire. Such an obligation to negotiate seems to me to derive from the duty to promote the realization of the right and to respect it.

This interpretation of the scope of the right to self-determination of

peoples is supported by the views expressed by the Supreme Court of Canada in its 1998 Reference re Secession of Quebec. Referring to the "clear expression of self-determination of Quebec" and drawing on the principles of federalism and democracy, the Canadian Supreme Court recognised that Quebec had "the right [...] to pursue secession" and that Canada has the obligation to negotiate. Two excerpts from the Court's opinion deserve quoting here:

88. The federalism principle, in conjunction with the democratic principle, dictates that the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire. [...] The clear repudiation by the people of Quebec of the existing constitutional order would confer legitimacy on demands for secession, and place an obligation on the other provinces and the federal government to acknowledge and respect that expression of democratic will by entering into negotiations and conducting them in accordance with the underlying constitutional principles already discussed.

92. However, we are equally unable to accept the [...] proposition, that a clear expression of self-determination by the people of Quebec would impose no obligations upon the other provinces or the federal government. The continued existence and operation of the Canadian constitutional order cannot remain indifferent to the clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. This would amount to the assertion that other constitutionally recognized principles necessarily trump the clearly expressed democratic will of the people of Quebec. Such a proposition fails to give sufficient weight to the underlying constitutional principles that must inform the amendment process, including the principles of democracy and federalism. The rights of other provinces and the federal government cannot deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. Negotiations would be necessary to address the interests of the federal government, of Quebec and the other provinces, and other participants, as well as the rights of all Canadians both within and outside Quebec.

Although the opinion of the Supreme Court of Canada is based on the principles of the Canadian Constitution, these principles should be seen as having a scope extending far beyond the borders of Canada and Québec. For example, could not Flanders invoke the principle of federalism as a basis for its right to choose? And is there no place for the Basque, Catalan and Galician peoples to base their right to decide on an analogous principle of democracy? Indeed, all the peoples of Europe who are seeking self-determination, could remind the governments of their States that their right to choose rests on a democratic principle, and that the exercise of such a right has as its corollary their obligation to negotiate.

The democratic principle is entrenched in many constitutions and should be seen as the source of the right to self-determination and has provided the basis for some peoples who organised self-determination referendums.

3. THE EMERGENCE OF A DEMOCRATIC RIGHT OF SELF-DETERMINATION

To determine their political status, peoples have chosen to involve their populations in a democratic process culminating in a referendum relating to such status, and notably that of a sovereign and independent State. Quebec has twice chosen to take this route. Scotland followed a similar path, which led to the organisation of the referendum of 18 September 2014. Catalonia also attempted to choose such a route. While this approach has been the preferred option in recent exercises of the right to self-determination, a new approach of a democratic nature is also emerging as an alternative.

To implement its right of self-determination, and achieve national independence or greater autonomy, a people can rely on its constituent power and initiate a process aiming to give the people their own fundamental law. This is the avenue that the Catalan government and parliament appear to have chosen, adopting a roadmap that focuses around a constituent process and the drafting of a Constitution for an independent Catalonia.²⁵⁷

There are many reasons that might favor an initiative to draft a basic law in the exercise of the right of self-determination. They relate to the necessity of defining one people's own constitutional identity, but also of resolving

the constitutional stalemate that often explains demands for independence and autonomy. In describing the values on which a political community rests and which guide institutions in the governance of the State, a constitution may become an instrument that gives a people an identity, both among citizens themselves and in the international community. A constitution is, first and foremost, a document aiming to establish the basis on which the life of a nation rests. It organises public life around a founding text that can become a tool for which a people desirous of taking part in the democratic life of the nation can take ownership.²⁵⁸

The exercise of constituent power can lead a people to draft a basic law which implies increased autonomy and the need to reform the constitution of the State to which the people belong. But it may also generate a confrontation between two constitutional orders and contribute to demonstrating that only additional autonomy or national independence will allow the people to fully express its constitutional identity. The adoption of a constitution and its approval by the people in a referendum as is envisaged in Catalonia can thus become a valid exercise of the right of self-determination. This approval could compel a state to fulfil its obligation to negotiate in response to the exercise by a people of their right to choose expressed in its first constitution.²⁵⁹

²⁵⁷ On the constituent process, the *Roadmap to Catalan Independence* contains the following statement: "Setting up a project of writing a constitutional text in a term of approximately 10 months, by way of a participatory mechanism that facilitates gathering more voices around the project through an open constituent process in which there is direct citizen participation (a Catalan Constitutional Convention), and which is later subjected to a referendum". The full text of the roadmap is available at <http://www.newscatalonia.com/2015/03/road-map-to-catalan-independence-signed.html>. On this aspect of the roadmap, Catalan President, Carles Puigdemont, commented on Catalonia's process for becoming a new state in these terms: "[O]ur citizens, will [...] need to decide at the ballot box whether they want to choose a new constituent parliament and move towards a definitive proclamation of independence"; and the Catalan government, "will not take this definitive step without democratic validation": see *Catalan News Agency*, "Puigdemont explains Catalonia's roadmap towards independence to the international audience at Chatham House", May 11, 2016.

²⁵⁸ On the relationship between the right of self-determination and the constituent power, see Daniel Turp, "Le pouvoir constituant et la constitution du Québec", in Patrick Taillon, Eugénie Brouillet and Amélie Binette (dir.), *Un regard québécois sur le droit constitutionnel : Mélanges en l'honneur d'Henri Brun et Guy Tremblay*, Montréal, Éditions Yvon Blais, 2016, p. 677-702.

As I write the conclusion of this multi-authored book on self-determination, the results of the referendum held in United Kingdom on its future relationship with the European Union show that a majority of voters (51,9%) favored the "Brexit" option and expressed their will to leave the EU. This act of British self-determination clashed with the wishes of the peoples of Scotland (62%) as well as of Northern Ireland (56%) who voted in favor of the option of remaining in the EU.

After Brexit, and because of their own acts of self-determination, the First Minister of Scotland Nicola Sturgeon has suggested that a second referendum on independence is highly likely and Northern Ireland's First Minister Martin McGuinness called for a referendum on a united Ireland.²⁶⁰ This suggests that the democratic right of self-determination of peoples, which has emerged is well and alive. And to use Ernest Renan's brilliant metaphor, that it is a "plébiscite de tous les jours".

²⁵⁹ After two referendums on the future sovereignty of Quebec, many people are now suggesting that it should follow a constituent process similar to that being followed currently in Catalonia : see Daniel Turp, « De constitution et de constituante au Québec », in Daniel Turp, *La Constitution québécoise- Essais sur le droit du Québec de se doter de sa propre loi fondamentale*, Montréal. Éditions JFD, 2013 and « Une démarche constituante s'impose- Contre le "coup d'État constitutionnel", le temps est venu pour le peuple québécois d'exercer sa souveraineté politique », *Le Devoir*, 15 avril 2013, p. A-7.

²⁶⁰ See Aljazeera, "Brexit: Scotland and Northern Ireland reconsider ties to UK - Nationalist leaders in both Scotland and Northern Ireland ponder independence referendums following Brexit", June 24, 2016.