The Catalan, Spanish and European Crisis: Dogma v Doxa

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About a year ago Catalonia made the news headlines globally. The so-called *procès* towards sovereignty had accelerated to a climax. A referendum was held on October 1st in spite of its "unconstitutional" nature and of the deployment of force by the security forces of Spain. Previously, on September 6th and 7th,, the Catalan Parliament had passed two divisive Acts for the decoupling of Catalonia from the Spanish State in the event of a majority pro-independence vote, and there had been protests in the street when a Court in Barcelona ordered the inspection of the Autonomous Government's financial department. Some of the pro-independence leaders representing civil society (Omnium and ANC) were detained and are still in prison pending trial. A few days after the referendum, the Spanish King addressed the "nation" on TV to support the use of police and judicial measures to reinstate the rule of law and scold the secessionists. To little effect: independence was proclaimed at the end of October, in a rather inconspicuous manner, and the Spanish Senate suspended Catalan home rule, imposing direct rule by the Spanish Government, which called for new elections to the Catalan Parliament.

The President of Catalonia and some of his ministers travelled to Belgium where they still remain, one other minister went to Scotland to resume her work as an Economics professor. The Spanish Supreme Court, which had seized itself of the case pre-emptying the natural jurisdiction in Barcelona that should have investigated the case, issued European Arrest Warrants against them on the charges of violent rebellion and/or sedition and/or mismanagement of public funds. The EAWs were denied on the absence of sufficient prima facie evidence to sustain charges of violent rebellion or sedition and the EAWs were later withdrawn. The Supreme Court issued a plenary statement in support of its instructing judge and criticising the judges who rejected the EAWs. Other ministers of the Generalitat, the Catalan Executive, and the President of the Parliament were detained and are still in prison pending trial on the same charges[1]. On 21 December 2017, the elections results confirmed the stalemate: a relative majority of a pro-independence mandate in Parliament but just under half of the votes cast.

Under any analysis the situation has been, and still is, critical. It is often called "the Catalan conflict" or the process. This paper deals with this conflict but does not discuss whether the Catalan people

[1] The trial will begin in January 2019, and public prosecution is proposing to condemn for crimes of rebellion and "sedition" with prison sentence of 25 years for former deputy president Junqueras, 17 years for former Parliament president Forcadell and leaders of ANC and Omnium, Sanchez and Cuixart, 16 years for former ministers of the Catalan government and 11 years for the former head of Catalan police, Trapero.

have a right to self-determination, or even secession, nor whether Spain has a justification in denying the holding of a referendum. My interest is to see how the Catalan conflict is being managed. Democratic praxis in an open society should allow differences to be confronted. Disputes and conflicts are seldom settled for good; they tend to *transform*, for better or for worse, as in Catalonia. Emotions also play an important role in conflicts, and restricting the analysis to purely epistemic factors would limit our appreciation of the disputes.

The criminalisation of the sovereignty movement and the politicization of the judiciary and the Constitutional Court have deteriorated the quality of Spanish democracy. The unilateral steps adopted by the Catalan sovereignty movement have also antagonised the citizens of Catalonia and Spain, and the rule of law has been put in jeopardy by dubious appeals to the democratic will of a majority in Parliament counting as the whole demos in this deeply divided society. The stalemate is certain. The Spanish "constitutional" camp and the political system it embodies is hegemonic in Spain, it is not going to recognise Catalonia as a "nation" with a right to decide on its constitutional status[2]. Still, the counter-hegemonic Catalan sovereignty movement is not going to abandon its claim to self-determination, and to independence. Desirable as it may be, *tertium non datur,* third ways are, for the moment, being swamped by the polarised antagonism of the two "enemies".

There is very little left in the Spanish political and legal system that can help overcome the stalemate; certainly not the Borbon Crown[3], nor the Judiciary or the Constitutional Court, i.e. the very institutions that were constitutionally designed as impartial arbiters[4]. Thus, rather than attempting a "zone of possible agreement" (ZOPA), perhaps we could look for possible *agreed disagreements* or agonistic discourses (ZOPAD). Rather than attempting to find a *solution,* based on ideal rational consensus, we suggest analysing how the Catalan and Spanish conflict could be *transformed* from its current hegemonic and coercive focus into an agonistic pluralism frame. This requires moving away from DOGMA and settling for DOXA (opinion), and this also has to do with the emotions. It also requires for each party to the conflict to recognise the other, not as an *enemy*, but as an *opponent* sharing the same zone or "territory", the same polity and *demos,* or demoi. I believe we can be part of plural demoi in Europe. I, myself, am not part of the Catalan demos, by I share the Spanish demos with the Catalans, and the European demos with Catalans, Spaniards and

2 The European legal and political system is not going to engage with Spain on this, just as it did not interfere with the decision of the Cameron government to enter into the (2012) Edinburgh Agreement with the Salmond executive to hold a referendum on independence in 2014. No objection to a referendum nor to its rejection.

3 Not only because of the TV message, but the King is seen as having encouraged companies to delocate.

4 The Crown and the judiciary together with the military, the financial system, the media, the security forces, tend to see Catalan sovereignty supporters as an "enemy". They now represent the hegemonic political system. Interestingly, the Basque President has become more of a mediator in the Catalan conflict than any other organ.

other Member State nationals.

The only arena, process or forum to build common ground is the abstract concept of the Agora, democracy, respect for Fundamental Rights, respect for diverging opinions. Even this does not currently seem possible inside the Spanish constitutional system, and even less so under its criminal justice system (CJS), mobilised as the official response to the conflict. We need the political forum badly to democratically contrast opinions, *doxa*, rather than the judicial forum that imposes constitutional doctrine, *dogma*. But the Spanish political system is barren, and the European dimension – EU and CoE – is worth exploring. In both cases, innovation will be necessary.

To begin with the EU, we should enquire whether anything is wrong with a EU based on national governments, not citizens. We could next enquire into the reasons why such important numbers of citizens in nations like Scotland or Catalonia might want to secede and establish their own Member State. This comes at a time when statehood is challenged by European integration. The rise of nationalist populisms and illiberal democracies can be seen as reactions to the loss of sovereign power to Brussels and Frankfurt, especially since the financial crisis, the austerity measures, and the eurozone governance in the making. Sub-state entities too have good reasons to be concerned.

Paradoxically, the EU is one of the few European polities with a right of exit or secession, as we are witnessing with Brexit. The whole process is being negotiated in the European arena, within the confines of civility. Other serious European crises – financial and economic, diplomatic, refugee, immigration, budget - are also being discussed through the normal constitutional mechanisms for dissent, leave the outcomes aside. The European arena could also be a platform to facilitate three "transformations" of the Catalan conflict to bring about an arena for a peaceful and democratic dissent that respects both democracy and the rule of law: de-criminalising the process, de-judicialising political conflict and de-spainising (sic) the Catalan question.

(I) The debate should move away from the CJS to the political system. But, in the meantime, it is urgent to recover some general principles of liberal Criminal Law in Spain: Ultima Ratio, proportionality, fundamental rights guarantees, natural justice and due process, individual guilt and risk/dangerousness assessment. The European Arrest Warrant (EAW) episode is a very interesting moment in the Europeanisation of the conflict. The erratic attitude of the Supreme Court displayed an unusual arrogance in contrast with the detached, impartial, and federally inspired analysis of other courts of the European judiciary. Spain is a unitary state in the field of justice and, interestingly, those courts all come from systems where Justice is not a unitary central power

(Germany, UK, Belgium, also Switzerland).

(ii) One of the reasons why it is urgent to decriminalise the approach to the conflict is the extent to which the higher judiciary is politicised and perceived as *partial* in Spain (CGPJ). This includes the Constitutional court, which has at best become an *ersatz* umpire in the Catalan crisis. Previous Spanish governments, and the Popular Party more intensely, have systematically resorted to the Constitutional Court hoping to rein in the conflict, eschewing political dialogue. It is urgent to recover the executive and parliamentary dialogue and debate. Alternatives to the Constitutional Court could be found in conventions, representative assemblies and platforms of civil society, but also in European arenas.

(iii) That is why it is important to *de-spanisise* the conflict, to see it no longer as a purely internal affair of the Kingdom of Spain, but rather a matter of European concern[5]. The Spanish government, and its diplomatic service, Spanish representatives in all European institutions could articulate ways to engage Europeans in an open debate, involving the Catalan institutions and civil society in the process, exploring all sorts of alternatives, including mediation, and exploring all available platforms for discussion. The Council of Europe – the Venice Commission to begin with - could also be a forum for contrast and discussion.

Perhaps the most important transformation should come from the judiciary and the CJS (especially public prosecution, police intelligence and penitentiary system). The judiciary is at the same time a public service and a state power, the only power the Constitution designed as unitary and centralised, and may well see itself as the guardian of State unity. The EAW episodes concerning President Puigdemont and his ministers has brought the European dimension from the bottom up, through a European instrument that operates judicially, with no intervention of national governments. It has brought some European relief to those Catalan politicians that exercised free movement within the EU, but cannot now return home. For those politicians who chose to stay and are now in pre-trial detention and deprived of their political rights by a preventive order, there is scant hope for remedy, other than the European Court of Human Rights[6]. But this will take too long.

5 After all, one year ago, some key European politicians did step in at the last moment, trying to avoid the UDI, or to deny it any value afterwards. And the EU is engaging Poland and Hungary for their "reforms" of the judicial system. On judicial independence and effective judicial protection, see judgment of the CJEU in C-64/16, *Associaçao Sindical dos Juizes Portugueses v Tribunal de Contas*, Grand Chamber judgment of 27 Feb 2018

6 In the Otegi e.a. case (Bateragune) of 6/11/2018 the ECHR has ruled Spain breached article 6 right to a fair trial, by lack of impartiality iin the composition of the Court that tried former Batasuna leader Arnaldo Otegi and several other political figures, allegedly linked to ETA. Similar lack of impartiality has also been alleged in the pre-trial investigations carried out by judges Llarena (TS) and Lamela (AN) in the Catalan process.

Some form of transitional justice is called for to deal with a problem-situation largely created by decisions adopted by the Criminal Justice System, and the political system to criminalise a whole sector of the population who calls for self-determination through peaceful means. The Spanish CJS developed repressive ticks in the fight against ETA violence and, in this path-dependency, it is approaching the Catalan conflict in a similar vein, as though it were combatting terrorism. And the Constitutional Court has followed a similar path. The sovereign dictates the *exception* and defends the state from its *enemies* at all costs, even if this means constructing the *procès* as violent beyond any rational fact-finding, and side-stepping the fundamental rights, liberties and guarantees enshrined in the Constitution. Regaining the political debate away from the custodians of constitutional dogma, the unitary institutions like the Supreme Court, the *Audiencia Nacional* and the Constitutional Court, becomes the most urgent transformation right now.

One can easily object that there are few incentives for the hegemonic forces, institutions and parties to change their approach, especially when it seems to be paying off well as a sort of populist mobilisation of the Spanish demos, and when the constitutional umpires are in the same predicament. But this is why de-spanicising the conflict becomes meaningful. We are in the transition to a new political arena in Europe: what you do inside your national context can no longer be automatically condoned as respect to your constitutional integrity (TEU: 4,2) or the blind the defense of legality and the rule of law. The governments of the Member States may feel tempted to defend each other, but there surely are limits: il y a des juges en Europe - other European judges may not be so easily convinced that all this was, and still is, necessary to defend a democratic state- and there is public opinion – the demos of European citizens – and also the Treaty on European Union proclaims important values of democracy and fundamental rights alongside the rule of law (TEU: 2, 6 and 7).

Political dialogue gives the word back to civil society and recognises all opponents. Third ways and ZOPAs may, eventually, emerge. Here as well, time, patience and civility are of the essence.