Nationalism and the Spanish Dilemma:
The Basque Case

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Liberal democracies have been founded on the nation-state model, which has now entered a state of crisis fundamentally for two types of reasons: the effects produced by globalization and the revival of the model itself. This work deals with the latter. It focuses on the problems that have arisen in Spain as a result of the presentation and approval of the so-called “Ibarretxe Plan” to the Basque Parliament, in which the Basque people’s right to self-determination is asserted. The right to self-determination is the true expression of sovereignty. When claims to sovereignty come from one part of a sovereign state, it creates a problem whose solution depends on how the concept of sovereignty is understood. This study argues that only a rational understanding of sovereignty can provide an adequate solution to the problem, because only this establishes a balanced priority between the recognition of individual rights and the preservation of the identifying elements of every community without the legal-political system self-destructing.

And how can all this come out well, I thought immediately, that one people—If the Muslims of Bosnia who speak Serbo-Croat and who belong to Serbian stock, are a people—arbitrarily establish a state in a region where there are two other peoples who had the right, and what is more, the same right, and where there are, moreover, three different ethnic groups all living together, and not only that, without going further, in the capital of various cultures, but in every town and, in the towns themselves, in every house or cottage, they live cheek by jowl. And, again, how would I have behaved myself there, if I had been a Serb in Bosnia, seeing how, to put it politely, the strongest justified a state, to put it politely, that had nothing to do with me, in my, our region?

(Handke 1996, 41) [author’s translation]
The bourgeois liberal order was founded on the idea of the nation, yet today the model of the nation-state, a state built on a specific nation, is in crisis (MacCormick 1999). This has occurred for two diametrically opposed reasons: globalization and nationalisms within the nation-state. The legal-political order expressed in the nation-state seems, from the internal point of view, inadequate to confront the problems resulting from the existence of multicultural, multireligious, and multinational states, characteristic of an era of economic, cultural, military, and political internationalization. This casts doubt on “the preservation of the identities of human groups” (Laínz 2004, 828). Thus it becomes enormously difficult to arrange the system in which different ways of life within a nation-state can live together harmoniously. From the external point of view, the political-legal system is unable to solve the problems that arise specifically from the different processes of globalization in which the world is now immersed. Therefore, it seems the presuppositions of the traditional view of the nation-state are inadequate in an epoch of plural communities, with their diverse forms of cultural, religious, and linguistic ways of life. We have also been unable to understand and solve the difficulties that stem from the aggressive capitalist economy that is generating a process of economic globalization, and which has given a global dimension to the labor market, production, and finance (Stiglitz 2002). This, in turn, has produced an uncontrolled policy of unbridled exploitation and contempt for nature (Beck 2002).

Yet there is another cause, opposed to the former, which has contributed to the crisis of the legal-political organization appropriate to the nation-state. Here, however, it is not the form of the legal-political order that is inadequate. Rather, that form has been called into question because it is not clearly adjusted to the principles on which the nation-state is built. Thus the opposition to the nation-state resolves itself in its very own claims: the legal-political order of the nation-state is shaken by the so-called nationalisms that share the same presuppositions. The ambivalent attitude of the proponents of nationalism lies in the need to ensure their identity, the continued existence of which is indispensable if political systems are to establish themselves on a stable basis and to integrate their citizens. For this study, it is irrelevant whether the struggle for the form of the nation-state is carried out through an associated free state, or via free association, or in any other way. In the
end, all these forms are governed by what matters: the right for peoples with their own identity to decide freely. In other words, the right to self-determination.

The claim to self-determination—that is, to sovereignty—by one part of a sovereign state based on liberal democratic principles causes a conflict between these principles and the identifying elements. I argue that the correct path for the resolution of that confrontation is found in the appropriate concept of sovereignty. To do this, it is necessary to introduce the current Spanish situation and to explore the political and philosophical problems that it presents. I then discuss that situation in terms of the various ways in which sovereignty has been conceived. First, sovereignty understood in terms of fact; second, sovereignty understood in normative terms; and third, a rational understanding of the constituent power. It is this last (rational understanding) that views the concept of sovereignty in a way that both permits the articulation of the right order between the institutions appropriate to liberal and identifying representative institutions, while also neutralizing the negative consequences of the right to self-determination.

The Current Spanish Situation

The right to self-determination is the main subject of the speech (Ibarretxe 2002) made by the President (Lehendakari) of the Autonomous Basque Government, Juan José Ibarretxe, to the Basque Parliament in September 2002. In it he defended the sovereignty of the Basque people and proposed its right to “decide its own future,” because it is the “master of its own fate.” The proposal was subject to two conditions: the decision would have to be democratic and, moreover, would have to be taken in a situation of peace and dialogue. The former condition is of central concern in this article. Yet it is worth mentioning that the latter demand is also relevant, because Basque terrorism has been a fact of Spanish life for decades. Clearly, a society in which violence is present is not the ideal place for this type of project to be discussed with the freedom it requires. However, three key reasons for such a discussion override this potential objection. First, philosophical-political reflection is possible, regardless of whether or not violence is present. Second, the proposal has been made and defended before the Basque Parliament, who approved it by an absolute majority. It was then put before the Spanish Parliament, which rejected
it in February 2005. The third reason is that some of the fundamental problems the Ibarretxe Plan poses are applicable to the new situation that has arisen in Catalonia. In September 2005 the Catalan Parliament approved a draft of reform for its Autonomous Statute very similar to the Basque Parliament in its demand to be a nation distinct from Spain, claiming the rights to self-determination and sovereignty. In November 2005 the Spanish Parliament voted for this draft to be processed in due course.

What is of concern here is the first of Ibarretxe’s conditions that the decision adopted by the Basque people has to be democratic. The text of the speech, as well as the proposal approved by the Basque Parliament, is articulated in a complex way around two parameters. The first is characteristic of a nationalist discourse in its defense of the distinctive and singular nature of a specific people from which the right of that people to their liberty derives. The second is typical of a liberal democratic discourse and is based on the presupposition of the majority principle, pluralism, and individual rights and freedoms. Thus it attempts to defend the independence of the Basque nation, rooted in reality—a common culture and language that are pre-political—at the same time as its sovereign will is articulated through the majority principle and respect for individual rights and freedoms. Both proposals are grounded on a combination of nationalist and liberal democratic discourses, which correspond to the same idea that ruled the construction of nation-states, where the conjugation between nation and state gave rise to liberal democracy. This achieved both democratic legitimacy (on the basis of popular sovereignty and human rights) and solidarity (based on the feeling of belonging to an “us”). Nation-states are founded, then, not only on the singularity of a specific people, but also on the recognition of individual rights and freedoms, the defense of pluralism, and the majority principle.

The Basque discourse on sovereignty tackles, in short, “one of the great debates that the world has to confront in the twenty-first century, that is, how to make law, society and politics fit national realities, how to respect the personality of nations that are not states” (Ibarretxe 2002, 18) [my translation]. This debate is connected to the crisis of the model of the nation-state mentioned at the beginning of this article. In the face of this crisis, there are those who believe that the link between state and nation no longer makes sense in an era in which the political community of the people of a state is a community where plural forms of cultural,
religious, and linguistic lives coexist (Habermas 1996; 1998; Jiménez Sánchez 2003). On such a view, to try to arbitrate coexistence based on substantial homogeneity can generate more problems than it can solve. But there are also those who see an unavoidable connection between nation and state or, put another way, between nation and the right to self-determination: between nation and sovereignty. When this type of relationship between a nation and its right to self-determination within an already consolidated liberal democratic state is defended, one reflection becomes inevitable. Can such a right be justified in those states where equal rights of both civil and political action are recognized? Equal rights, which already protect those things that are different—language and culture—in the different communities.

In this article I shall enquire into the argument of those who defend the inevitable connection between nation and the right to self-determination. This falls within the second of the causes of the crisis of the nation-state highlighted by the resurgence of nationalisms. The question is not simple, for, as we have just seen, nationalist claims are both powerfully rooted in the principles upon which the nation-state was built, yet at the same time provide a serious challenge to these principles. These principles revolve around the idea of unity or identity of a people, although this can be understood in divergent ways. According to French or Anglo-Saxon ideas, nationalism is constructed on basically political presuppositions, while for the Germans, the concept is based on ethnicity and culture (Schulze 1997). On those principles depend a people’s right to decide freely. This requires time and flexibility on both sides so as not to break apart that which matters most to us all. Of particular importance to all is civil peace, which cannot be ensured without a permanent state political organization.

From this perspective, the collective right of a people to self-determination has to be understood as the right of a people to preserve its culture, its identity, and to express what it loves and feels freely, without having to reach a more formal political identity in Carl Schmitt’s (1992) sense of an awareness of its political individuality and will for a political existence (96). This would necessarily lead to a rupture in the existing constituted power and, in consequence, to the generation of a variety of powers all of which would be constituent. It is a question then, as Hegel (1991) averred, that “the nation, as ethical substance—and this is what it is in itself” should achieve “the
objectivity of possessing a universal and universally valid existence \textit{[Dasein]} for itself and others in \textit{[the shape of] laws}” (375). Such substance would not necessarily need to culminate in a separate sovereignty, in what has normally been understood as the right to sovereignty. In short, it would not necessarily need to lead to the constitution of another state. It is true that for Hegel a people is not sovereign if it possesses only merely formal autonomy; that is, if it “has no objective legality or firmly established rationality for itself” (375). The difficulty lies in preserving the ethical substance of a people in and for itself without needing to destroy the sovereignty of an already existing state. This becomes a question of how to ensure the diversity of the different identities within a certain unit already created, whose justification is only found in the formal legal and political presuppositions on which that unit is based. In my opinion, this could only be achieved if we were capable of coordinating political liberal representation with that of the different heterogeneous nationalities in the liberal democratic institutions of a state organization itself. It is a matter of trying to articulate the representation of singular individuals (who have to go beyond their own selfish interests in the institution of common laws and representation) with respect for the real substantive values of the groups to which human beings belong. Moreover, this has to be achieved in such a way that the groups interrelate, while not calling into question the principle of liberal representation. The difficulty is evident: both types of representation correspond to different, although not necessarily contradictory, principles.

\textbf{Sovereignty Understood in Terms of Fact}

At times the concept of sovereignty has been explained through the Spinozan idea of \textit{causa sui} (Savater 2004, 213). In his \textit{Ethics}, Spinoza (1996, 43)\textsuperscript{3} said that God is the cause of Himself, in that He caused Himself before being the cause of the rest. If we translate this statement to the political field, it could be said that the political subject “Spanish nation” is the cause of all the rest: “the constitutional system.” The “Spanish nation” is not the effect of anything, but simply the cause of itself. The idea is clarified if we complement it with Spinoza’s conception of the universe, which he conceived in two forms, \textit{natura naturans} and \textit{natura naturata}. In the political order this translates into the difference
between the constituent power and the constituted power. So the “Spanish nation,” *natura naturans*, would be “the formless that generates all forms” *natura naturata* (Ayala 1973, xx) [my translation]. According to Savater, something similar occurs in the constitutional order, because the Preamble to the Spanish Constitution states that it is the “Spanish nation” which,

desiring to establish justice, liberty and security and to promote the well-being of all its members, in the exercise of its sovereignty, proclaims its will to: guarantee democratic coexistence within the Constitution and the laws in accordance with a just economic and social order; to consolidate a state of law which ensures the rule of law as the expression of the popular will; protect all Spaniards and peoples of Spain in the exercise of human rights, of their cultures and traditions, languages and institutions; to promote the progress of culture and the economy to ensure a dignified quality of life for all; to establish an advanced democratic society, and to collaborate in the strengthening of peaceful relations and effective cooperation among all the peoples of the earth. Therefore, Parliament approves, and the Spanish people ratify the following Constitution. (*Spanish Constitution* 1995-96)

It seems clear that the original cause of the constitution, *natura naturata*, is the Spanish nation, *natura naturans*, because it is this that possesses sovereignty. It is the Spanish nation that has power to establish certain rules of the game: those recognized in the constitution itself. Among these, Art. 2 states that the “Constitution is based on the indissoluble unity of the Spanish nation, the common and indivisible homeland of all Spaniards, and recognizes and guarantees the right to autonomy of the nationalities and regions that make it up and the solidarity among all of them” (*Spanish Constitution* 1995-96). For Savater (2004), the relation between the Preamble and Art. 2 affirms that the “Spanish Nation proclaims the Constitution but in turn remains established in its unity and in its autonomic pluralism by the very text itself” (213-4). It seems to me that this way of understanding the relation between the constitution and the nation is based on a theory supported by the concept of *causa sui* because, for Savater, the Spanish nation is the cause of the other, the constitution. But it so happens that the constitution is also the cause of the nation, which does not appear to fit well with the concept of *causa sui*. As it is the cause of itself, it
cannot be the effect of anything. Nevertheless, there may be a way of offering an explanation grounded on a concept such as that of *causa sui*. This can only happen, however, if we could argue that the nation, through what it causes—the constitutional text—is the cause of itself.

It should not be forgotten that, from the Spinozan perspective, the nation is “politically *natura naturans*; [therefore] it cannot and should not be subject to a Constitution, since how could a constituted body decide about its constitution?” (Ayala 1973, xx) [my translation]. So the constitution could never limit the sovereignty of the nation itself, because it is the sovereign who establishes the fundamental norm, without it being able to restrict the sovereign. If it could restrict the sovereign, it would cease to be sovereign. Arguing thus, Savater’s interpretation is caught in a vicious circle. He cannot hold that the nation is caused before being the cause of all the rest, which would be identified with the Spinozan approach in which the ideas of *causa sui* are conjugated with those of *natura naturans*. Rather, he maintains that the nation is the cause of the constitution and the constitution is the cause of the nation itself, which could perhaps be understood as consistent with the concept of *causa sui*, but not with that of *natura naturans*. Savater (2004) summarizes his approach when he says “there is a Constitution because there is a nation, but the nation itself will be what the constitutional agreement establishes that it is” (214). In other words, the nation creates the constitution, but the latter shapes the former. This does not permit us to avoid the confusion of cause and consequence in which Savater’s ideas have left us.

This is the reason why Savater’s perspective should be abandoned. His approach started from a factual conception of sovereignty, but finally leaves us in a vicious circle from which we cannot escape. The problem lies in Spinoza’s factual and nonnormative understanding of sovereignty. His presuppositions therefore do not enable us to resolve peacefully the difficulties with which the concept of sovereignty confronts us. The claim to sovereign power by a people—the Basque people’s right to self-determination—whose exercise can only come about by breaking that of another sovereign power—that invested in the Spanish people—can only be achieved by the victory of one over the other. This is the only way out that gives a factual understanding of those powers. Hence a peaceful solution seems more likely to be forthcoming if sovereignty is understood in terms differently from Spinoza’s theory. Although Savater does not state it explicitly, this
conclusion can be inferred from his text. In claiming that the nation creates the constitution and that shapes the nation, Savater’s circular argument is problematic. Yet this does not necessarily invalidate a use of the territory in which he has situated his arguments. Spinoza (1996) drew from the territory of facts: “[t]he will cannot be called free cause, but only necessary cause” (81). But Savater inhabits the territory of norms. He claims to follow Spinoza, but does not realize that what he is, in fact, doing, consists of applying ideas appropriate to one territory to that of the other. It is here that Savater’s perhaps unwitting contribution becomes salient, because he has put us in the correct territory: that of normative texts.

Sovereignty Understood in Normative Terms

The text of the Spanish Constitution establishes who is the political subject (the sovereign: the Spanish nation), the nature of that sovereignty (indissoluble), and the territorial model (Autonomous Communities), although unarguably that does not put an end to the problem. Indeed, it could be thought that this is where it begins, because it is to this conception that a reality like the Ibarretxe Plan corresponds (Ibarretxe 2003). Ignoring the real conditions of violence in which this plan has been formulated, the fact is that the plan has been presented and now has had further, albeit indirect, consequences in the Catalonian Parliament’s approval of a new draft Statute of Autonomy. It therefore seems that there is no alternative but to reflect upon it, especially on its philosophical-political theoretical presuppositions, rather than on the technical-legal aspects or its political consequences.

The first reflection to be made is that it starts from an ethnic-cultural vision which considers that the Basque people are formed with a substantive character as a people among other people. The Preamble to the draft Statute sets out that “[t]he Basque People or Euskal Herria is a people with its own identity among the peoples of Europe, repository of a unique historical, social and cultural heritage, which is geographically settled in seven territories” (Ibarretxe 2003) [my translation]. From its beginning, the Plan is based on the single identity of the Basque people, which confers on them the right to decide. To be to decide (Ser para decidir); this was the name that the National Assembly of the Basque National Party (PNV), held in January 2000,
conferred on its central political document (Barbería and Unzueta 2003, 15, 27, 171).

The text is built, moreover, on the Declaration of the Basque Parliament of 1990 in which the right to self-determination is recognized, a right also recognized in the International Pacts on human rights and finally, historical rights. It concludes by arguing that the “Basque People have the right to decide its own future” (Ibarretxe 2003, Preamble). Yet there are several reasons why the debate should not be situated only in the legal field. First, it is evident that not even an autonomous parliament can exceed the competences granted by the constitution. Second, it is not entirely clear that such a position would find much support in international law. Third, this position cannot be supported by some historical rights, should they remain in force, because they do so only to the extent that the constitution itself grants. However, the Plan does find support in a political will that goes beyond the constitution, and demands respect for certain substantive values characteristic of the Basque people. In this sense, the position of those (Herrero de Miñón and Lluch 2001) who argue that when a part of the body politic considers itself to be a substantive body, it consequently has to have the will to decide seems undeniable.

This question poses an even greater difficulty, and it is hard to agree with what some authors such as Herrero de Miñón (2002) have argued. As these authors “believe . . . that the Constitution is upheld by the cohesion of a political body . . . they cannot deny . . . the right to ‘exist’ for a part of that body that considers itself to be a substantive body” (13) [my translation]. This position gives priority to the substantive values characteristic of a specific community with the aim that its ethical substance reaches objectivity, in the Hegelian sense, by achieving the condition of state: that is to say, when it possesses for itself and for others in the shape of laws. In this way, the state puts itself above the demands that the abstract representation of unique individuals brings with it; a representation that goes beyond selfish interests in that they are able to construct common laws and representation. If the Ibarretxe Plan responds fully to these ideas, then the principle of formal, legal representation of the Enlightenment tradition will be subjugated to the nationalist principle. The interest of the nation as substantial interest would have priority over any other in the same way that class interest embodied the general interest in the tradition of progressive thought.
during a great part of the nineteenth and twentieth centuries—with the results we know so well.

The position the Plan adopts is even more complex, because it does not remain locked in the substantive position defended by Herrero de Miñón (2002; 2003). Indeed, the Plan goes far beyond it, because the ethnic-cultural approach is not omnipresent throughout the text. On the contrary, it does not seem to be inclined to an ethnic nationalism, but rather toward a civic nationalism, and the construction of a liberal democratic social order in which the role reserved for citizens is fundamental. Fundamental in that all the weight is made to fall in their “freely and democratically” exercised will. The Plan recognizes throughout its Preamble the right of the Basque people to “decide its own future,” to manifest its will. In principle, a demand of this nature should avoid ethnic traces and acquire a democratic form. This it does in Art. 9 which lays down

the exercise of Basque self-government is ruled by the values of liberty, justice and political pluralism; by the recognition and guarantee of the fundamental rights and duties set out in the universal declarations of human rights; as well as in the essential principles of democratic political systems and the rule of law. (Ibarretxe 2003, Art. 9) [my translation]

However, the Basque people’s right to manifest its will is also justified by the Plan’s insistence on defining that will as a democratic will exercised through the “free decision of Basque citizens” (Ibarretxe Plan 2003, Art. 13), in which the plan sets out a whole series of human rights and freedoms (Art. 10), as well as the fundamental rights and duties of Basque citizenship (Art. 11). In general, these do not depart from what could be found in any other declaration of rights and freedoms.

Moreover, Basque citizenship is not based on ethnicity but on the concept of local residence. According to Art. 4, “all those persons who have local residence in any of the municipalities of Community of Euskadi have Basque citizenship” [my translation]. It is true that this same Article makes a distinction between citizenship and nationality that it remits to a subsequent law. This distinction raises the possibility that, in the future, ethnic discrimination could arise, connected with what has already been underlined in the Preamble. Yet in spite of this,
it seems to me that in essence the Plan does not correspond to potentially discriminatory types of ethnic nationalism. Rather, because of its democratic form, its recognition of rights and freedoms, and by basing the concept of citizenship on local residence, it is closer to a proposal of civic nationalism. It is also true that any nationalism, including civic nationalism, could establish itself on certain pre-political characteristics. The important thing is not their existence, but rather that they may end up determining the form of social order. This does not seem to be the case here, because the way in which the Plan has been designed is permeated by a strong liberal democratic conception.

Accepting that it is a question of will, two aspects need to be clarified at this point. First, it must be conceded that the Plan recognizes in the Preamble that the “right of the Basque people to decide its own future materialises from the citizens’ respect for the right . . . to be consulted” (Ibarretxe 2003). This is reaffirmed in Art. 1, which speaks of the citizens’ “right to decide freely and democratically its own structure of organisation and political relations” (Ibarretxe 2003). This idea is similar to that recognized in the Spanish Constitution which, as we have seen, states that sovereignty resides in the Spanish people who freely and democratically decide how to order their coexistence. With the minimal reservation identified previously, there is not, from the normative point of view, any difference between the Plan and the constitution, save that they are incompatible: the Plan shatters the cornerstone of national sovereignty on which the political subject (the constitution) is built. From that point of view, we would find ourselves with two projects on the table, one based on the sovereign will of the Spanish people, and the other on that of the Basque people. The difference between them would only be the distinct substantive values on which they are grounded, but not with the legal and political values—a political democratic system and the rule of law—through which those substantive values become reality.

The second point concerning the question of will does not refer to the Plan, but because no solution is possible in the former normative perspective, it is situated in a different space, the political. While the new draft statute possesses the same liberal democratic character, it opposes the liberal democratic law in force, the Spanish Constitution. A way out of this confrontation can only be found either by compliance with the law in force, which would imply recourse to the use of force,
albeit legitimate, or by political discussion. This discussion would be between those who could be considered as the constituent powers, a discussion in which the arguments put forward by each are weighed up. It would be a question, then, of determining what are the reasons behind the will of the constituent power. This is to say, what are the constituent power’s reasons to form a specific constituted power (the will of the Basque people)? It seems clear that a will is shaped in the Plan that is respectful of liberal democratic presuppositions. But nothing is said, nor can be said, of the will that forms that will. To put it another way, the constituted power is designed in the Plan, but we cannot stop there, because we must go on to speak of the power that constitutes it. What are the reasons for the constituent power to establish the newly constituted sovereignty of the Basque people? This question highlights the fact that a normative understanding of sovereignty is insufficient. A normative view ignores the question of the constituent power and, most importantly, its need for justification. It is true that this constituent power could limit itself to exercising its power without more, as Schmitt (1987, 95) says when he argues that law is only the manifestation of the will of the one who has power to impose his norms and use them for his own benefit. Although I do not believe that any good can come from maintaining a position like this, it seems that we have no option but to open up the understanding of sovereignty in normative terms to the question of the constituent power. It is nevertheless clear that such “opening up” cannot be done in just any manner by returning to a simple understanding as mere factual power.

**Rational Understanding of the Constituent Power**

The French National Assembly of 1789 could not formally be considered as a constituent assembly, because it had been called for by the king and had arisen from elections for an Assembly of the Three Estates with specific instructions from the electors. However, as Schmitt (1992) said, “this is no reason against its democratic right to constitute itself as a constituent Assembly. It could remit itself—against the king—to the will of the French nation” (97). Something similar occurs with the draft of the new political Statute of the Community of Euskadi (the Basque Country). Its ground in the will of the Basque people is, from the political and philosophical points of view, totally democratic, even
though it breaks the will of the Spanish nation. Its basis in the will of the Basque people is made as an appeal to the new sovereign in the same way as the National Assembly. However, that appeal is not made by an Assembly but by the draft that constitutes the Basque people as sovereign. Thus, in the same way as the Spanish Constitution is founded on the sovereignty of the Spanish people, the new statute is constructed on the sovereignty of the Basque people. The difference between Basque and Spanish nationalism lies, in principle, in that the former has not managed to constitute itself as a sovereign political community, while the latter has. The problem is very difficult because the solution in either case would be painful. Should the Basque people obtain sovereignty, this would undoubtedly be at the cost of the sovereignty of the Spanish nation and vice versa. Therefore normative territory must be abandoned. If followed coherently, the theoretical presuppositions suggest we should aim to tackle the question not in the sphere of the constituted power, in both cases the sovereignty of a specific people, but rather in that of the constituent power.

In the case of Spain the constitutional norm establishes that “national sovereignty resides in the Spanish people” (Spanish Constitution 1995-96, Art. 1.2), whose will has to be democratically expressed. This will materializes in the application of the majority principle, which attempts to ensure that democracy is articulated as a “universal, free, equal, direct and secret suffrage” (Spanish Constitution 1995-96, Art. 68.1). Nevertheless, this will is limited by individual rights and liberties as well as the separation of powers, and all powers emanate from the Spanish people itself. However, alongside the present Spanish Constitution, the draft of a new draft reform of the Basque Autonomous Statute defines the will of the Basque people as the new sovereign, also democratically expressed. It is inarguable that this will, because it is liberal and democratic, possesses similar limits and characteristics to the Spanish Constitution: the respect and defense of individual rights and liberties, as well as the separation of powers. From this point of view, there are no differences between them. They have the same structure and characteristics. One law has its origin in one will; the draft law in another. The only way out of this type of confrontation, in which parties claim to have the whole of the truth, is by framing the dispute in such a way that a solution can be reached. In my opinion, the resolution of the problem can not be found in the space of norms
to the territory of fact. That way the question of the constituent power is understood in the terms in which Hart (1994) spoke, concerning the problem of acceptation. Another more recent understanding is found in Habermas' (1996) view of the formation of a rational political will.

The reason for this change of orientation can be found, fundamentally, in that the norms that establish the two sovereignties (Spanish nation and Basque nation), both have to be accepted by specific elites and assumed generally by the majority of the people. Undoubtedly, that alone would not put an end to the problem. However, it is true that we would have passed from having two confrontational norms—or more precisely, from one norm (the Constitution) and a draft norm (the new statute), whose keystones are incompatible—to a very different situation. This is one in which the confrontations are between groups of people who uphold different conceptions of sovereignty. The only possibility of solving the problem would be to ask what reasons do those who formulate a new norm of sovereignty put forward to justify it. What makes the Basque people sovereign? One may think that there are two classes of reason. Some are ethnic, and thus are both unacceptable in principle, and not supported by the terms of the draft statute itself. Yet, if the draft statute is not based on ethnicity, it can only be defended on the same grounds as those of the first concept of sovereignty understood as a question of fact. This appears to be because a constituent power only acquires legitimacy if it acts through a constituted power, so satisfying the demands of liberal democratic law. This then would come to legitimate that normative construction as democratic. Habermas (1996) expressed the point clearly, stating that when the principle of discourse assumes “a legal shape, the discourse principle is transformed into a principle of democracy” (455). Democracy is therefore only feasible through a law that embodies the principle of discourse. Reading this into the new norm of the proposed Basque statute, it would demand that liberal democratic values be respected, so responding to a situation in which “only those norms of action are valid to which all possibly affected persons could assent as participants in rational discourses” (459). The point leads us to ask the following questions: What, then, is the reason to create a new sovereign: the Basque people? Does this justify a new legal order whose legitimation is necessarily the same as that of the old sovereign: the Spanish people? Why destroy a democratic, and
therefore, legitimate state of law on the basis of the same grounds that uphold it?

I do not think that in even the least rational circumstances these questions can be answered in the affirmative. If they are to fit within a liberal democratic paradigm, the grounds on which the new sovereign is to be upheld cannot be different from those given previously to uphold the old sovereign. If there are no new grounds, there is no sense in altering the first two levels of the legal system: the norm that establishes the sovereign, and the norm that lays down the conditions under which the sovereign has to act. The latter, of course, includes the majority principle, individual rights and freedoms, and the separation of powers. A positive reply to these questions could only be entertained on the basis of other reasons situated in a paradigm distinct from the liberal democratic one. Given the principles of this paradigm, there is no strong enough reason to establish a new sovereign, insofar as this is based on the public autonomy of citizens (Habermas 1998, 253ff.) comprised of respect for subjective liberties of action, private autonomy of legal subjects, and the recognition of public freedoms. Hence there is no other remedy than to deny the justification of the claim of the new sovereign, because there are no adequate grounds on which to uphold it. Undoubtedly, this does not mean that a new sovereign cannot be constituted. It can be, but facts still do not give grounds.²⁰ Hans Kelsen (1995) expressed it very clearly when he argued that “efficacy is the condition of validity, but not its reason” (49).

Nevertheless, this absence of reasons for breaking the old sovereign and establishing the new cannot imply that the underlying cause of that claim can be denied. The recognition of certain collective rights, the recognition of certain substantive values of a specific people to which a more or less numerous group of human beings belong, is still highly relevant. This concept of people should not be understood as a nation in Schmitt’s sense. Neither does it require its formal realization in the state, as Hegel demanded. This has already been reached in the recognition of human beings that are included in a people as subjects of law and citizens with full autonomy, both private and public. Yet such a concept of people demands that the necessary transformations are made so its substantiality can be achieved without those transformations involving an alteration in the two normative levels referred to above.
Thus it seems clear that it is not enough to recognize a series of civil liberties which ensure the autonomy of subjective action. Neither is it enough to recognize political liberties which ensure the indispensable rights of citizenship in which individual representation is fully achieved. These alone do not adequately win respect for the substantive values of the groups to which human beings freely belong. This therefore leads to the intention of preserving those substantive values through the perfectly reasonable recognition of collective rights. Nevertheless, finding the correct procedure is essential if the political-formal, liberal-democratic values are not to be subordinated to the substantive values.

It is a question then, of articulating two principles in the right way and in the correct proportion. Although these principles are different, they are not mutually contradictory. However, the results obtained from their mixture will depend on how it is done, for if it is not done correctly, the result can prove fatal. This is the situation we find ourselves in if we want to mix water and sulphuric acid. In themselves, the two elements are not opposed, as are fire and the water that puts it out, or wood and the fire that feeds on it. They are simply different, although with the peculiarity that if we bring them into contact in the wrong manner, the mixture can be explosive. If the water is poured in first and then the acid added, the union between them is not only inoffensive, but also beneficial. The problems presented by a substance as toxic as sulphuric acid are controlled. If the process is reversed, the result will be harmful, for water poured onto acid will explode and break the container. The same occurs with the principles of liberal democracy and substantive values, just like what happened with liberal and social principles during the nineteenth and twentieth centuries. During that period, the recognition of a series of social rights helped to curb the excesses resulting from the exercise of subjective freedoms of action, while not calling those same freedoms into question. When these liberal and social principles are joined in the appropriate way and in the exact quantities, the result has been the construction of the welfare state. When this has not been so, either because the order was wrong or the quantities were not right, the result has been chaotic. I have only to think of the sad history of various communist regimes. For what is of interest now, it must be said that if the nationalist principle is allowed to prevail over the liberal principle, the mixture will ultimately be explosive. This already occurred when class interest was given priority.
over the general will. However, if the formalities of the liberal principles can be diluted by adding the substantive values typical of the nationalist principle, the inadequacies of the former could be corrected without requiring it to yield, or making it disappear. Neither of these circumstances would be desirable.\textsuperscript{21}

In short, it is a question of articulating a certain type of nationalism—the “divided patriotism” of Acton (Dalberg-Acton 1999, 351)—with “constitutional patriotism.” It does not seem that the republican attempts to confront new challenges by throwing overboard what is national can guide the ship of state to a safe harbor. Republicanism situates identity in the legal-political field by guaranteeing a citizenship capable of exercising its private and public autonomies. Such an aim finds itself curbed by the autonomous development of the market and the state’s administrative apparatus. This has culminated in raising doubts concerning the possibility of exercising those same subjective liberties of action. Thus it can be said the legal institutionalization of individual human rights does not provide the identity necessary for political systems to be firmly established, and their citizens integrated. Habermas’ (1998) idea that “the constitutional state undertakes to foster social integration if necessary in the legally abstract form of political participation and to secure the substantive status of citizenship in democratic ways” (159) does not seem to fit the situation. Neither democratic equality nor belonging to a political community of citizens appears to guarantee these levels of cohesion. Now it would be impossible to argue, as Germany did in 1982, in the third Committee of the General Assembly of the United Nations, that “a nation has self-determination if its individual citizens enjoy rights and liberties such as those of expression, information, assembly and association, as well as freedom of movement within the country and the right to enter and leave it freely” (Herrero de Miñón 2001, 309).

Possibly the solution consists in making the rights of others of which Handke (1996, 41) speaks compatible with the aspirations of peoples on which Hegel (1991, 375) reflected. This would have to be achieved without confusing the transformation processes characteristic of an era of economic, cultural, military, and political internationalization in which nation-states are immersed, with their dissolution as demanded by nationalisms. Breaking the nation-state is not inevitable, for no
reasons have been found for it. The nation-state is the keystone on which a democratic state of law is founded: the sovereignty of the people. It must respect individual rights and freedoms, while at the same time safeguarding the facts—language and culture—that differentiate the distinctive communities that live together under its protection. Of course, as Spinoza (1986) said, this does not mean that we renounce “the authority to abrogate [that sovereignty], as soon as [we] discover something better” (417).

Notes

Thanks are due to B. McQue, LL. B., for the translation. The author is also grateful for the suggestions of the anonymous reviewers, and the coeditor of the journal, Emma R. Norman.

1 This plurality has been greatly increased by the phenomenon of immigration. On this subject, see the monographic section 37 of Anales de la Cátedra Francisco Suárez (2003). The bibliography on multiculturalism is immense although special mention should be made of the writings of W. Kymlicka (1996). Less abundant is that referring to the risks that a multicultural society entails (Sartori 2001). See also the declarations of the British Labour Party politician, Trevor Phillips, in Time, in which he states that the Labour government considered multicultural experiments had come to an end (Delgado-Gal 2004, 17).

2 Schmitt established a significant difference between nation and people, in that the ethnic and cultural characteristics typical of a people are insufficient if they are not combined with an awareness of its political individuality and will for a political existence. It is these that define a nation for Schmitt.

3 Spinoza begins by affirming that, “[b]y cause of itself, I understand that whose essence implies existence or, what is the same thing, that whose nature can only be conceived as existing.” On the special relation between the theories of Spinoza and Hobbes, see Schmitt (1996, 57, 57ff.).

4 “The uncreated final ground of all forms, but not itself susceptible to being enclosed in one form” (Schmitt 1992, 97). Schmitt states here that the “metaphysics of the potestas constituenas as analogon to natura naturans, belongs to the doctrine of political theology.”

5 The right to autonomy granted by the constitution led to the establishment of 17 Autonomous Communities, each with its own parliament and wide legislative powers. Notwithstanding this extensive measure of autonomy, Spain remains, at least until now, a unit.

6 The draft reform of the Basque Autonomous Statute approved by the Basque Parliament and rejected by the Spanish Parliament is known as the Ibarretxe Plan. In a democratic system based on freedom of expression and the forming of a free and rational public opinion, the possibility of defending all ideas is undeniable. This does not mean that certain limits cannot be established and justified (Rawls 1993, 340ff.). It is incomprehensible that the Basque Executive that owes its legitimacy to a norm, to the Autonomous Statute now in force, whose legality comes from the Constitution, mocks that same Constitution. It is not an appropriate use of the freedom of expression. I do not claim that the Ibarretxe Plan should not have been presented, but only that the Lehendakari does not have the legitimacy to do so. There is a distinction established by Kant
that can assist us to know how we should behave in circumstances such as these. Kant differentiates between the private use of reason, necessarily limited, because it “is what one may make of it in a certain civil post or office with which he is entrusted,” and the public use of reason that does not suffer from the limitations of the former and is “which someone makes of it as a scholar before the entire public of the world of readers” (Foucault 2003, 76, 76ff.; Kant 1996, 18). I do not mean by this that his action was illegal, and much less so after the judgment of the Constitutional Court that was published in all the press on April 21, 2004. This rejected the allegations of the central government against the agreements that initiated the parliamentary procedure of the Ibarretxe Plan; one by the Basque government, and the other by the Basque Parliamentary Assembly. I refer only to the former and not the latter. This could raise other types of objections related to the problem of whether or not the institutions have to act with absolute neutrality, even in the case of actions that call in question the very institutions themselves, which fundamentally would respond to a conception of democracy that has little to do with the formalities and limitations appropriate to a constitutional democracy. The action of the Basque executive does not seem to me illegal, but rather disloyal, which would explain and justify the irritation shown in a text like that of Peces-Barba (2002) in which he spoke of Partido Nacionalista Vasco’s/National Basque Party’s (PNV’s) disloyalty.

On the discrepancy between the constitution and the Plan, the bibliography is extensive. Among many others, some of the jurists who have formulated such an opinion are: Carreras, Corcuera, Peces-Barba, Pérez Royo, Rubio Llorente, and Virgala. From their opinions, it can be clearly deduced that its unconstitutionality is evident. However, the debate should not be focused exclusively on whether or not this plan is adapted to the constitution, because it is evident that it is not. It is equally evident that if we encroach on that territory, we shall find no sensible way out, because the only way would be to restore the humiliated legal order. For this reason, I believe that we must go beyond the legal and constitutional order with the aim of finding philosophical and political reasons that could endorse it, as well as verify their weight. Undoubtedly, the work should not stop there, but the next step would consist in counterposing its reasons with those that uphold the constitution itself. The debate proposed in this text, is not, in short, a technical and legal, but philosophical and political, debate.

To tackle this question we would need instruments that seem beyond our grasp.

In this text it is irrelevant whether or not this form is imagined. The bibliography on this problem is vast, although mention should be made of Fusi (2003) and Granja Sainz (2003).

The Basque terrorist organization, Euskadi Ta Askatasuna/Basque Homeland and Freedom (ETA) broke the truce in that same month and year (Barbería and Unzueta 2003, 15).

This Declaration was supported by the PNV, Eusko Alkartasuna (EA), and Euskadiko Ezquierda (EE). In 1988, a declaration was approved by the Catalonian Parliament in which the right to self-determination was not renounced. Similar declarations and pacts were made again from July 1997 after the assassination of M. Á. Blanco by ETA. 1998 saw the Declaration of Barcelona. In the summer of that year a secret pact was concluded between PNV, EA, and ETA. Finally, in September 1998, the Pact of Lizarra was made (Barbería and Unzueta 2003, 11, 12, 21, 211).

The discussion on this is immense (Blanco Fernández 2003, 27, 27ff.; García de Enterría 2003).

The great defender of this option is Miguel Herrero y Rodríguez de Miñón, who has put forward an original proposal, although I do not know if it is already impossible, in which he has tried to articulate nationalist claims with the constitution through a right-wing reading of the First
Additional Provision, “whose clever use would permit those who claim to be constitutionalists to recognize the Basque difference and the original rights inherent in them and to the nationalist community to see themselves recognized in the Constitution of the State” (Herrero de Miñón 2001, ix; Herrero and Lluch 2001, 3, 5). On this subject see Herrero de Miñón (1998; 2003).

14 On the idea of the pre-political, although without the need to support his argument on history, see Böckenförde (2000).

15 The modernity of the text becomes evident when it differentiates between the rights and duties of Basque citizens and the defense of human rights and liberties of all persons without distinction. This basically corresponds to the difference made in the draft European Constitution between human being and citizen.

16 Schmitt (1987, 95) also states “the sovereignty of law only means the sovereignty of the men who impose the legal norms and are served by them.”

17 Schmitt adds here that it would have been democratically consistent “to let the people itself decide, because the constituent will of the people cannot be represented without Democracy becoming an Aristocracy”.

18 It is clear that the problem has not been tackled from a juridical perspective. While this is not the moment to seek to clarify the use of the term democracy, we should not forget the multiplicity of its meanings (see Jiménez Sánchez 2004).

19 Here, Schmitt’s distinction between people and nation ceases to be relevant, because it seems that both in the new statute as in the constitution the two concepts are fully interchangeable. The will of political existence is what, in reality, lies behind them.

20 This is the reason why the informal recognition of sovereignty of the Scots of which Keating (2003, 31) spoke seems to me to be unimportant. It is clear that, in fact, every people is sovereign. If it wants its independence, it can always achieve it. It all depends on the price it is willing to pay, although I do not believe that this is the sphere in which these questions must be clarified.

21 This has already happened (Jurado 2003).

References


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