
Secession and post-sovereign constitution-making after 1989: Catalonia, Kosovo, and Quebec

Sujit Choudhry*

The year 1989 marked the return of the right to self-determination to center stage in constitutional politics. It was at the root of demands for constitutional democracy; it was also invoked by minority nations to make claims for secession and independent states. That year also marked the emergence of a new model of “post-sovereign” constitution-making that rejects the idea of a sovereign people who can act unilaterally with unlimited power. While this new model was developed in the context of transitions to constitutional democracy, before and after 1989, minority nations have relied on the unilateral declaration of independence as a foundational act of constitution-making, which is firmly rooted in the pre-1989 sovereign mindset. Drawing on the example of the Supreme Court of Canada’s judgment in the Quebec Secession Reference, I sketch how we might complete the legacy of 1989 by extending the project of post-sovereign constitution-making to secession.

1. Two conceptions of 1989

The fall of the Berlin Wall in 1989 marked the moment when the right of peoples to self-determination returned to center stage in constitutional politics. But this right was invoked in dramatically different constitutional contexts with fundamentally different—even contradictory—constitutional aims.

In many cases, the right to self-determination was synonymous with what Tom Frank famously called “the emerging right to democratic self-governance.”¹ It was a rallying cry of populations living under authoritarian rule, and was at the root of demands for constitutional democracy, consisting of institutionalized protection for competitive, multiparty democracy with regular, periodic elections, universal suffrage, a broad set of civil and political liberties, and the rule of law. Demands

* International IDEA/WZB Berlin Social Science Center. Email: S.Choudhry@idea.int. Zoran Oklopcic provided helpful comments on an earlier draft.

¹ Thomas Frank, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46 (1992).

to adopt new constitutions in order to implement the right to self-determination grew alongside, and became part of, the acceleration of the third wave of democratization, in Latin America, Asia, Eastern Europe, and Africa. As we assess the legacy of 1989, a central question is whether those transitions to constitutional democracy ever really took root, in Hungary, Poland, and elsewhere. We may be experiencing a process of backsliding or retrogression, with the new equilibrium being an electoral authoritarianism which cynically apes the forms and institutions of democratic life.

But the urgency of responding to threats to constitutional democracy should not lead us to forget another legacy of 1989—that the right to self-determination was invoked by minority nations within existing states to make claims for secession to establish independent states of their own. This is most clearly the case in the former Communist plurinational federations of Czechoslovakia, the Soviet Union, and Yugoslavia, which all dissolved through the secession of federal subunits. In one sense, minority nationalism was integrally linked to the broader process of democratization post-1989. Newly empowered national majorities engaged in what Rogers Brubaker calls “nation-building nationalism” consisting of the centralization of legal and political power, and the construction of a common national identity rooted in a shared history and language.² Minority nationalism arose as a defensive response to majority nation-building, giving rise to competing nationalisms within the same state. Political liberalization created the space for minority nations to make self-determination claims in the public sphere. As a political ideology, nationalism is based on the alignment of people, territory, and sovereignty; these competing nationalisms sharply disagreed about *which* people should be sovereign over *which* territory. Secessionist political mobilization is still a feature of contemporary politics, as the cases of Catalonia and Kosovo demonstrate.

In this article, I offer some notes on the way that both of these styles of post-1989 constitutional politics conceive of *constitution-making processes*. Andrew Arato persuasively argues that 1989 marked the emergence of a new model of “post-sovereign” constitution-making that rejects the idea of a sovereign people who can act unilaterally with unlimited power.³ But the technology of constitution-making processes has evolved only for cases of democratization, not for those of minority nationalism. Both before and after 1989, minority nations have relied on the unilateral declaration of independence (UDI) and secession *as foundational acts of constitution-making*, which is firmly rooted in the pre-1989 sovereign mindset. Drawing on the example of the Supreme Court of Canada’s judgment in the *Quebec Secession Reference*,⁴ I want to sketch how we might complete the legacy of 1989 by extending the project of post-sovereign constitution-making to the claims of minority nations, even in cases of secession.

² ROGERS BRUBAKER, *NATIONALISM REFRAMED: NATIONHOOD AND THE NATIONAL QUESTION IN THE NEW EUROPE* (1996).

³ ANDREW ARATO, *ADVENTURES OF THE CONSTITUENT POWER* (2017).

⁴ Reference re Secession of Quebec, [1998] 2 S.C.R. 217 [hereinafter *Quebec Secession Reference*].

2. Sovereign and post-sovereign constitution-making

Let me set the stage by comparing Arato's sovereign and post-sovereign models of constitution-making. Arato defines sovereign constitution-making, drawing on the paradigmatic example of the French Revolution, as follows:

*Sovereign constitution making involves the making of a constitution by an unbound, sovereign constituent power, institutionalized in an organ of government, that at the time of this making unites in itself all of the formal powers of the state, a process that is legitimated by reference to supposedly unified, pre-existing popular sovereignty.*⁵

Post-sovereign making originated in the pacted transition of Spain, and then was further developed in the post-1989 transitions of Eastern and Central Europe and South Africa. While each case varies, the model consists of the “following essential elements”:

1. A two- (or multi-) stage process and the making of two constitutions, where the making of the first, interim constitution regulates and limits the making of the second.
2. Roundtable negotiations that lead to the making of the first constitution. Here the important thing is . . . the relative inclusiveness of these bodies.
3. An emphasis on legal continuity throughout the transition, even if in some of the cases it is violated. Central to legal continuity is the formal role (indeed strictly formal role) of parliamentary institutions of an old regime in ratifying the initial changes, including the interim constitution, according to an old amendment rule.
4. The central role of a new, democratically elected assembly in drafting the second and final constitution . . . [subject to] the limitations of the interim constitution to which it is bound . . .
5. The significant role of constitutional courts.⁶

These two models differ along a number of dimensions. The sovereign model is a *single-stage* process, whereas the post-sovereign model is *multistage*. Impliedly, the sovereign model operates on the basis of *majoritarian* decision-making, which permits a majority to act *unilaterally* in disregard of the wishes of a dissenting minority in the name of the people as a whole; by contrast, under a post-sovereign approach constitution-making begins with an *inclusive* process that yields the first, interim constitution on the basis of a broad and enduring consensus, not a simple and transient majority. The sovereign model is based on a claim of *revolutionary legality*, which empowers the institution that asserts constituent power; the post-sovereign model is one of *constitutional continuity* with the former constitutional regime, which has the effect of empowering a broader range of institutional actors, including old regime elements. Sovereign constitution-making is *unconstrained* (*pouvoir constituant*), whereas post-sovereign constitution-making, at the second and subsequent stages, occurs in a body that is subject to hard constitutional constraints (*pouvoir constitué*) and which may be enforced by the courts.

Is there an overarching narrative that unites these particulars of differentiation? Arato suggests that “underlying” the post-sovereign model is the “fundamental idea, within an overall democratic method . . . to apply constitutionalism not only to

⁵ ARATO, *supra* note 3, at 31 (italics in original).

⁶ *Id.* at 186.

[the] result but also to the process of constitution making.”⁷ By contrast, sovereign constitution-making is a radical assertion of constituent power that is prior and superior to, and therefore not bound by, constitutional forms. But this distinction regarding conceptions of constituent power points to a deeper one regarding who the constitutional “self” is. In the sovereign model, the self is a singular sovereign people, which exists prior to the act of constitution-making and survives it. In the post-sovereign model, the people begins as a composite polity of groups (both territorial and non-territorial) and interests, brought together in a “*pactada*.”⁸ They may choose to become a single, sovereign people, or retain a layered or composite character—one of dual sovereignty in the American sense, or plurinationalism, as Canadians conceive of their constituent character.

3. Secession as constitution-making: Catalonia and Kosovo

The UDI burst on to the global stage with the American Declaration of Independence 250 years ago. It became the instrument of choice for colonies to declare themselves free from imperial rule; but it also inaugurated the process of secession by minority nations to attempt a break away from existing states and to inaugurate a new constitutional order of their own. This was true prior to 1989, and did not change after 1989. For example, the UDI was deployed by the constituent units of the Soviet Union and Yugoslavia on the pathway to statehood. Secession is an act of constitution-making—a rupture with an extant constitutional order, and the founding of a new one, perhaps drawing on inherited institutions but granting them a new autochthonous source of constitutional title. The UDI is the first step in that process—a declaration of constitutional intent that is a performative event in the birth of a new constitutional order.

I want to compare two relatively recent examples—Kosovo and Catalonia—of UDIs. In both cases, either a UDI (Kosovo) or steps seemingly leading inevitably to it (Catalonia) came before the courts. This is relatively rare. The courts arrived at opposite results—the International Court of Justice (ICJ) declared Kosovo’s UDI to be in compliance with the Constitutional Framework for Kosovo, while the Spanish Constitutional Court ruled Catalonia’s steps toward a UDI to be unconstitutional under Spain’s 1978 Constitution.⁹ Despite these opposite results, I argue that a thread unites both judgments—the grip that the sovereign model of constitution-making retains on the constitutional imagination after 1989 in cases of secessionist political mobilization.

⁷ *Id.*

⁸ *Id.* at 187.

⁹ Accordance with international law of the unilateral declaration of independence in respect of Kosovo, Advisory opinion, ICGJ 423 (ICJ 2010), July 22, 2010, International Court of Justice [hereinafter Kosovo Opinion]; Judgment 42/2014, Constitutional Court of Spain (Official Translation, available at [https://www.tribunalconstitucional.es/ResolucionesTraducidas/STC%2042-2014E\(2\)%20%20DECLARACION%20SOBERANISTA%20%20SIN%20ANTECEDENTES.pdf](https://www.tribunalconstitucional.es/ResolucionesTraducidas/STC%2042-2014E(2)%20%20DECLARACION%20SOBERANISTA%20%20SIN%20ANTECEDENTES.pdf)).

The issue of Kosovo arose before the ICJ through a request for an Advisory Opinion, which posed the question of whether the UDI issued by the “Provisional Institutions of Self-Government of Kosovo” was “in accordance with international law.” At the time of the UDI, Kosovo was governed by a legal framework that was rooted in Security Council Resolution 1244. The Special Representative of the Secretary-General had promulgated a Constitutional Framework for Kosovo thereunder. That framework provided for the election of the Assembly of Kosovo, which was held in November 2017. On February 17, 2018, the UDI was adopted at a meeting held by 109 of the 120 members of the Assembly, including the prime minister and the president (who was not a member of the Assembly).

The Constitutional Framework for Kosovo ultimately derived its legal validity from the UN Charter, and there was no serious dispute that the UDI was in contravention of that framework, since Resolution 1244 affirmed the sovereignty and territorial integrity of the Federal Republic of Yugoslavia, and the Constitutional Framework provided autonomy for Kosovo and did not contemplate independent statehood. Nonetheless, the Court held that:

The declaration of independence . . . was not intended by those who adopted it to take effect within the legal order created for the interim phase [of Kosovo’s self-government under international territorial administration], nor was it capable of doing so. On the contrary, the Court considers that the authors of that declaration did not act, or intend to act, in the capacity of an institution created by and empowered to act within that legal order but, rather, set out to adopt a measure the significance and effects of which would lie outside that order.¹⁰

The Court concluded that

the authors of the declaration of independence . . . did not act as one of the Provisional Institutions of Self-Government within the Constitutional Framework, but rather as persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration.¹¹

As many of the separate declarations noted, the Court’s conclusion was extremely problematic, even absurd.¹² The Prime Minister of Kosovo had convened a special session of the Assembly; the president presumed he was presiding over that special session and announced the results of the vote as reflecting the will of the Assembly; the members of the Assembly who voted in favor of the declaration expressly did so in their capacity as members of the Assembly. The declaration itself referred to its signatories as the democratically elected leaders of the people, who derived their representative credentials from a process operated under the Constitutional Framework.

The sovereign model of constitution-making provides a theoretical justification for the Court’s judgment. Although elected as a *pouvoir constitué*, the members of the Assembly redefined themselves as a *pouvoir constituant*, which was unconstrained by the previous legal order, including the Constitutional Framework. They broke radically with it in revolutionary fashion, by issuing a UDI. They legitimated themselves

¹⁰ *Id.*, ¶ 105.

¹¹ *Id.*, ¶ 109.

¹² See, e.g., *id.*, ¶¶ 12 to 20, for the separate declaration of then Vice President Tomka.

by reference to popular sovereignty, deriving from the recent Assembly elections. The people at issue are a singular entity—the people of Kosovo. In asserting constituent power, these representatives of the people of Kosovo were engaging in an act of constitution-making through secession, giving rise to a new constitutional order. The Court clearly regarded this exercise of *pouvoir constituant* as a form of constitution-making that itself was not bound by constitutionalism.

In many ways, the extensive jurisprudence of the Constitutional Court of Spain on Catalonia’s “right to decide” is a mirror image of the *Kosovo Opinion*—albeit much more conceptually transparent on the issue of *pouvoir constituant*. I focus on a representative decision, Judgment 42/2014. That case concerned a constitutional challenge to resolution of the Catalan *Generalitat* in 2013, approving the “Declaration of Sovereignty and the Right to Decide of the People of Catalonia.” The Declaration was not a UDI, and indeed, did not purport to have any concrete legal effects. It was a statement of political—and constitutional—intention. But the constitutional imaginary that it painted laid a groundwork for a referendum and a UDI, and it was this imaginary that the Constitutional Court struck down.

The Resolution stated that the *Generalitat* “agrees to initiate the process [to] exercise the right to decide so that the citizens of Catalonia may decide their collective political future” and laid down a series of principles to guide that process. The first principle was “sovereignty,” with the Resolution stating that “The People of Catalonia have, for reasons of democratic legitimacy, the nature of a sovereign political and legal subject.” The Court rejected this provision on textual and conceptual grounds. It contravened article 1(2) of the Spanish Constitution, which proclaims that “national sovereignty belongs to the Spanish people, from whom all State powers emanate.” Conceptually, this provision

exclusively attributes national sovereignty to the Spanish people, the perfect unit to hold constituent powers, and such, constitute the basis of the Constitution, the Spanish legal order, and the source of any political power. As in the current constitutional order only the Spanish People are sovereign, exclusively and indivisibly, no other subject or State body or any part of the people can be endowed with sovereign status by a public power.¹³

Accordingly, the Court held that the Resolution was unconstitutional, because:

An act issued by a public power that asserts “legal sovereign status” as a competence of the people of an Autonomous Community [e.g. Catalonia] inevitably also denies national sovereignty which, according to the Constitution, can only be held by the entire Spanish people. Thus, sovereignty cannot be entrusted to any group or part thereof.¹⁴

For the same reasons, the reference in the Resolution to the “people of Catalonia . . . ‘as a political and legal sovereign subject’”¹⁵ was unconstitutional, because Catalonia is “a subject that is . . . constituted in legal terms by virtue of a constitutional

¹³ Judgment 42/2014, *supra* note 9, at 6 (citations omitted). For commentary, see Victor Ferreres Comella, *The Spanish Constitutional Court Confronts Catalonia’s “Right to Decide”* (Comment on the Judgment 42/2014), 10 EUR. CONST. L. REV. 571 (2014).

¹⁴ Judgment 42/2014, *supra* note 9.

¹⁵ *Id.* at 10.

recognition . . . [and] was legally created further to the Constitution.”¹⁶ The Court noted that article 1 of the Statute of Autonomy of Catalonia declares the constitutional premise that “Catalonia, as a nationality, exercises its self-determination constituted as an Autonomous Community, in accordance with the Constitution and this Statute, its basic institutional rule.” It followed that “an Autonomous Community may not unilaterally hold a referendum of self-determination to decide on its integration in Spain”¹⁷—which in turn meant that a UDI would be unconstitutional.

In an obvious way, the results in the *Kosovo Opinion* and Judgment 42/2014 are diametrically opposed. The ICJ held that the members of the Kosovo Assembly could lay claim to a democratic mandate arising from elections that occurred under the Constitutional Framework for Kosovo, a legal order that did not contemplate a right to secession, let alone one that could be exercised unilaterally. Nevertheless, those members were still able to step outside that framework to exercise *pouvoir constituant*. In Catalonia, although a UDI had not taken place, the Judgment 42/2014 was premised on the fear that the Declaration set out a constitutional imaginary that would legitimize such an act, which would be unequivocally unconstitutional. Catalonia is a mere *pouvoir constitué*.

Yet the judgments share a common premise—the sovereign theory of constitution-making. Both courts presuppose that there is a singular, indivisible people within a constitutional order which is the *pouvoir constituant*, with the ultimate and sole authority over constitution-making. Any other entities that play a role in the constitution-making process exercise delegated, and limited, powers. In the *Kosovo Opinion*, the bearer of sovereign power is the “people of Kosovo,” whereas in Judgment 42/2014, it is “the Spanish people”; hence the disagreement between them as to who the relevant people are—the population of the state as a whole (Spain) or of a subunit (Kosovo). How would each court make sense of the other’s judgment? The ICJ might posit that the Constitutional Court of Spain, as a creature of the Spanish constitutional order itself, had no choice but to enforce constitutional orthodoxy, especially in the face of the assertion of constituent power that was only possessed by the Spanish people as a whole, from which the authority of that Court derives. But the Spanish Constitutional Court could say the same for the ICJ, which is the constitutional court for the United Nations legal order, pursuant to which the Assembly of Kosovo had been constituted and conferred with limited power. The ICJ supplied an additional reason in the *Kosovo Opinion* that might explain its willingness to re-describe the legal personality of the Kosovo Assembly—that the process surrounding a permanent solution for Kosovo had broken down, because of stalemate among the P5 in the Security Council. And so the ICJ might respond to the Constitutional Court of Spain that from a Catalonian perspective, there had been a stalemate or breakdown of the Spanish constitutional order as well, because of a series of regional elections that had led to the creation of a legislative majority in

¹⁶ *Id.* at 8.

¹⁷ *Id.* at 7.

favor of an independent Catalonia, without force or fraud—a controversial view, to be sure, but one with great force.¹⁸

4. Post-sovereign making and secession: The *Quebec Secession Reference*

A UDI followed by secession can be regarded as a breakdown of constitution-making in two ways. It is a self-conscious and deliberate act to break from a constitutional order. But it also reflects a failure of the rules governing constitutional amendment to constitute and regulate constitutional politics. As I have previously argued in *I. CON*, constitutional amendment rules are where the most fundamental clashes of nation-building occur in plurinational polities.¹⁹ By assigning the power of constitutional amendment to certain populations and/or institutions, in various combinations, the rules governing constitutional amendment stipulate the ultimate locus of political sovereignty and are the most basic statement of a community's political identity. The ability to reconfigure the most basic terms of political life must lie with the fundamental agents of political life. By looking at amending rules, we can see who those agents are. In plurinational polities, assigning roles to national minorities as part of the procedure for constitutional change accordingly acknowledges the fundamental plurinational character of the political community. The refusal to acknowledge this fact translates into a preference for constitutional amending rules that do not recognize and empower the constituent nations of a plurinational polity. And in either situation, secession is a limiting case because constitutional amendment rules conceptualize a federal subunit—such as Catalonia or Kosovo—as an entity with limited powers under the constitutional order, when it is precisely that constitutional vision that a UDI challenges. If Catalanian and Kosovar nationalists wished to make a radical and total break from their respective constitutional orders, it is hard to imagine that they would have subscribed to a process governed by it.

I think this constitutional logic explains the impulse to unilateralism—and the UDI—in the case of secession. And it sets up an elemental struggle over constituent power between peoples, each laying claim to sovereign constitution-making power. It may be that the post-sovereign model cannot apply to this kind of constitutional moment. Perhaps the post-sovereign model cannot offer an alternative to the UDI. To be sure, it offers a framework for constituent units to come together to form a new state, federal or otherwise. But perhaps it cannot apply to the problem of the constitution-making process that occurs—albeit not recognized as such—in the breakdown of constitutional orders, and the breakup of states.

¹⁸ For a recent analysis, see Victor Ferreres Comella, *Constitutional Crisis in Spain: The Catalan Secessionist Challenge*, in *CONSTITUTIONAL DEMOCRACY IN CRISIS?* 227 (Mark A. Graber, Sanford Levinson, & Mark Tushnet eds., 2018).

¹⁹ Sujit Choudhry, *Does the World Need More Canada? The Politics of the Canadian Model in Constitutional Politics and Political Theory*, 5(4) *INT'L J. CONST. L.* 606 (2007).

Or perhaps not. In the *Quebec Secession Reference*, the Supreme Court held that the Constitution of Canada prohibited a unilateral declaration of independence by Quebec. But it nonetheless held that the expressed desire of a clear majority of Quebecers in favor of a clear question on secession imposed a constitutional duty on all parties to negotiate, in good faith, to respond to that desire. Parties to those good faith negotiations would have to comply with the principles of constitutionalism and the rule of law, democracy, federalism, and minority rights. This is the post-sovereign model of negotiation, of compromise, of consensus, of stages, of constraint, of legalized procedure, of pluralism. The Court also posited that such negotiations could very well break down, and could trigger a UDI, which international law would not prohibit. The ultimate success of Quebec's attempt to attain statehood would depend on its recognition by other states, regarding which the Court said the following:

To the extent that a breach of the constitutional duty to negotiate in accordance with the principles described above undermines the legitimacy of a party's actions, it may have important ramifications at the international level. Thus, a failure of the duty to undertake negotiations and pursue them according to constitutional principles may undermine that government's claim to legitimacy which is generally a precondition for recognition by the international community. Conversely, violations of those principles by the federal or other provincial governments responding to the request for secession may undermine their legitimacy. Thus, a Quebec that had negotiated in conformity with constitutional principles and values in the face of unreasonable intransigence on the part of other participants at the federal or provincial level would be more likely to be recognized than a Quebec which did not itself act according to constitutional principles in the negotiation process. Both the legality of the acts of the parties to the negotiation process under Canadian law, and the perceived legitimacy of such action, would be important considerations in the recognition process. In this way, the adherence of the parties to the obligation to negotiate would be evaluated in an indirect manner on the international plane.²⁰

Instead of an unbounded contest between an existing constituent power and an emerging one, and recognition by other states being declaratory, the Supreme Court of Canada set out a global public law, knitting together constitutional and international law. Under this framework, a UDI was neither prohibited (contra the Constitutional Court of Spain) nor merely permitted (contra the International Court of Justice). The Supreme Court of Canada charted a middle course between these two extremes, much as Judge Simma had pleaded for in his separate declaration in the *Kosovo Opinion*. In the breakup of states, no set of national institutions will be accepted as impartial and legitimate by all sides. The project of post-sovereign constitution-making, "to apply constitutionalism . . . to the process of constitution making" requires that the "international community" plays a quasi-judicial function, to assess the conduct of states in light of a set of basic principles of constitutional democracy. This is a post-sovereign framework enforced by other states, in the spirit of 1989.

²⁰ Quebec Secession Reference, *supra* note 4, ¶ 103.