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Abstract

There are a number of secessionist movements in Europe today and each of them has met with varying degrees of contestation by the respective central governments. The present paper aims to investigate what, if anything, the European Convention on Human Rights (ECHR) could contribute to secessionist movements pursuing their aims or, conversely, to limiting responses to secessionist movements. It makes the case that territorial claims can be thought of and treated as primary political in nature. A promising avenue for protection, or so the paper argues, is the freedom of association guaranteed in article 11 ECHR. The paper accordingly analyses the case law on restrictions on political parties. Finally, it argues that the European Court of Human Rights (ECtHR) in its case law conflates democracy with liberal institutions and as such creates limitations on the protection afforded to secessionist movements that may not be justified.

Keywords: Secession, democracy, liberalism, territory, Article 11 of the European Convention on Human Rights

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A Look at the ECHR's Democratic Society – Secessionist Movements and Human Rights

Lea Raible[1]

Introduction

There are a number of prominent secessionist movements in Europe today. The most high-profile regional attempts to form independent states are the cases of Scotland and Catalonia, both of which seem thwarted for the moment – not least because of anti-secessionist policies implemented by the respective central governments.

In Catalonia, the 2017 referendum held to seek consent for independence was considered unconstitutional[2] and members of the Catalonian government responsible for holding it were tried and convicted for sedition in 2019.[3] After losing their appeal in 2021, they are now taking the case to the European Court of Human Rights.[4] Having lost his immunity as an MEP it is now plausible that Carles Puidgemont will follow the same path before too long.[5] Meanwhile, the UN Human Rights Committee found Spain in violation of the ICCPR because Catalan leaders were suspended from public duties (and the opportunity to be re-elected) before they were convicted.[6]

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[2] ECtHR, *Forcadell i Lluis and Others v Spain*, App No 75147/17 (Decision, 7 May 2019). For an analysis of the constitutional framework, see Hèctor López Bofill, 'Hubris, Constitutionalism, and "the indissoluble unity of the Spanish nation": The Repression of Catalan Secessionist Referenda in Spanish Constitutional Law' (2019) 17 *International Journal of Constitutional Law* 943.

[3] Reyes Rincón, Óscar López-Fonseca, Jesús García, 'Supreme Court Finds Jailed Catalan Secession Leaders Guilty of Sedition' *El País* (Madrid, 14 October 2019) <https://english.elpais.com/elpais/2019/10/04/inenglish/1570178504_315132.html> accessed 20 May 2020.

[4] Greg Russell, 'Jailed Catalan independence leaders take case to European Court of Human Rights' *The National* (Glasgow, 3 June 2021) <https://www.thenational.scot/news/19346088.jailed-catalan-independence-leaders-take-case-european-court-human-rights/> accessed 7 June 2021. The National is – unsurprisingly – a Scottish nationalist source, which invites us to take this reporting with a pinch of salt. For a brief analysis of the convictions in light of European human rights law see Rohan Sinha, 'The Criminal Conviction of Catalan Secessionist Leaders and European Human Rights Law' *Verfassungsblog* (31 October 2019) <https://verfassungsblog.de/the-criminal-conviction-of-catalan-secessionist-leaders-and-european-human-rights-law/> accessed 7 June 2022.

[5] Emma Beswick and Alaisdair Sandford, 'Puigdemont and other Catalan leaders have lost their immunity from prosecution. What happens next?' *Euronews* (10 March 2021) <https://www.euronews.com/2021/03/10/puigdemont-and-other-catalan-leaders-have-lost-their-immunity-from-prosecution-what-happen> accessed 7 June 2022.

[6] HRC, *Oriol Junqueras i Vies et al v Spain*, UN Doc CCPR/135/D/3297/2019 (Views, 30 August 2022) (in Spanish). Press release and summary in English available at <https://www.ohchr.org/en/press-releases/2022/08/spain-violated-former-catalan-parliament-leaders-political-rights-un-human> accessed 5 October 2022.

Scotland – even though a 2014 referendum returned a result against independence[7] – at the time of writing is still governed by the secessionist Scottish National Party who have dominated the electoral landscape for years and solidified this position in the 2021 Scottish Parliament elections. Nevertheless, it finds itself confronted with a UK government refusing to grant leave to hold another vote on independence, even though it may be claimed that Brexit represents a material change of circumstances[8] and that the pro-independence majority in the Scottish Parliament constitutes at least an exploratory mandate.[9]

As such, European states have utilised various means ranging from criminal prosecution to refusal to allow a vote to determine the affected population's wishes. How do we judge which of these anti-secessionist means – if any – are justified? The present paper approaches this question from the point of view of international law to ask if there are legal frameworks available to answer it. In particular, I aim to investigate what, if anything, the European Convention on Human Rights (ECHR) could contribute to secessionist movements pursuing their aims or, conversely, to limiting responses to secessionist movements. For reasons that will become clear in section 3 below, the ECHR is a particularly promising candidate in this regard because it already includes a strong commitment to democracy, mentioning as it does, a democratic society at various points.[10]

The argument proceeds as follows. Section 1 outlines the frameworks in international law that deal more or less explicitly with territorial claims and peoplehood. It concludes that none of them apply or are otherwise readily accepted to be regulating secessionist claims in Europe today and sketches the reasons why international human rights law might have a contribution to make instead. Section 2 makes the case that territorial claims can be thought of and treated as political in nature, albeit advanced by associations and aimed at deep structural change. Based on this conclusion it further argues that the ECHR is in fact a suitable legal framework to rely on and that the most relevant provisions are those referring to political rights – in particular article 11 on freedom of assembly and association. Section 3 describes the ECHR's case law on restricting the activities of political parties and considers the potential relevance and implications for secessionist parties. Section 4 evaluates the case law through the conception of democracy employed. I argue that the European Court of Human Rights (ECtHR) does not grapple with its conception of democracy explicitly and that this has led to a conflation of liberal democracy with democracy in general. The paper concludes with a few thoughts on what the Court could change in order to contribute more substantively to this area.

[7] Generally: Stephen Tierney, 'Legal Issues Surrounding the Referendum on Independence for Scotland' (2013) 9 *European Constitutional Law Review* 359.

[8] Libby Brooks, 'Boris Johnson Refuses to Grant Scotland Powers to Hold Independence Vote' *The Guardian* (London, 14 January 2020) <https://www.theguardian.com/politics/2020/jan/14/boris-johnson-refuses-to-grant-scotland-powers-to-hold-independence-vote> accessed 20 May 2022.

[9] 'Nicola Sturgeon tells PM referendum is case of 'when - not if'', *BBC News* (9 May 2021) <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-57046408> accessed 9 June 2022.

[10] See generally Susan Marks, 'The European Convention on Human Rights and its 'Democratic Society'' (1996) 66 *British Yearbook of International Law* 209.

1. Secessions, Self-determination, and Human Rights in International Law

Human rights and secessions are no strangers.[11] In current international legal discourse, secession is thought of as the ultimate expression of a right to self-determination, which is usually conceptualised as a human right – albeit a human right held by a group: a people.[12] Further, many theories of self-determination rely on human rights and their violation to determine if a group has a right to secede.[13] That is, having suffered serious human rights abuses is often given as one of the conditions that may enable a group to claim a right to secede from a state to form their own.[14] This sort of self-determination is widely considered to no longer be legally relevant – connected as it is to the notion of colonial peoples.[15]

This does not mean that the international community is ready to leave the issue up to states only. On the contrary, since the end of formal decolonisation,[16] international organisations have relied on two broad categories of groups that seek recognition either within or against existing states to describe the international community's attitude: indigenous peoples and (national) minorities.[17] Indigenous peoples describes an archetype of a group that strives for self-determination and self-government.[18] In other words, identification as an indigenous people means recognising that such aspirations for accommodation are at least in part legitimate. (National) Minorities, on the other hand, is a term for groups who do, and are also expected to, seek integration through the respect for individual rights.[19]

Current secessionist movements in Europe are not the kind that originate from colonialism, nor are the groups in question aptly identified as either indigenous peoples or (national) minorities suffering oppression and sustained human rights abuses. A right to self-determination may well be invoked, but the usual conditions to turn it into a claim that can and should be protected against interference are not satisfied. Accommodation as indigenous peoples is – on current definitions – not open to either Catalans or Scots. Integration as national minorities, for example by being included politically or not being discriminated against, on the other hand, is not what they aspire to. This is at least in part because some of these accommodations have already been implemented in the form of individual political

[11] See for a conceptualisation of self-determination in particular that conceives of it expressly as a human right, eg, Robert McQuorqoudale, 'Self-determination: A Human Rights Approach' (1994) 43 *International and Comparative Law Quarterly* 857. For a recent overview of relevant international legal thought on self-determination see Brad R Roth, 'Self-determination Short of Secession' in Jure Vidmar, Sarah McGibbon and Lea Raible (eds), *Research Handbook on Secession* (Elgar 2022).

[12] See, eg, article 1 of the International Covenant on Civil and Political Rights.

[13] I have in mind just-cause theories as defended in, eg, Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (OUP 2004).

[14] Theories that hold this condition to be necessary are usually referred to as remedial theories: Allen Buchanan, 'Theories of Secession' (1997) 26 *Philosophy & Public Affairs* 31.

[15] See among many others Steven Wheatley, *Democracy, Minorities and International Law* (CUP 2005).

[16] This phrasing leaves space for the fact that there are ongoing colonial processes of exploitation. It is beyond the scope of this paper to address these. On this see, eg, Amy Maguire '*Contemporary Anti-colonial Self-determination Claims and the Decolonisation of International Law' (2013) 22 Griffith Law Review 238.*

[17] Will Kymlicka, 'The Internationalization of Minority Rights' (2008) 6 *International Journal of Constitutional Law* 1.

[18] ibid 3-5.

[19] ibid.

equality and significant regional autonomy. The upshot is that current secessionism in Europe sits uneasily with definitions and frameworks available in international law.

In the cases of Scotland and Catalonia, the secessionist agenda is plausibly sustainable and at least some aspects can be regarded as justified – depending, of course, on the view one takes on what would justify secessionist claims.[20] At the same time, they do not give rise to a right to external self-determination in the form of secession as it is currently recognised in international law.[21] However, it does not follow that such secessionist movements may be suppressed by any means. Accordingly, I submit it would be fruitful to investigate whether the legal choice is (or should be) between a right to secession and a right to supress it. The broader motivation of this paper is to ask what space we might find in between these options, whether secessionist movements and their members (should) have rights short of a claim to secession, that nevertheless protect the pursuit of their political agenda. In particular, the ways the UK and Spanish governments have responded to the forming of the secessionist policies raise important questions as to whether there are or should be limitations on suppressing peaceful and democratic attempts to secede. One candidate for supplying such limitations on central governments and rights for secessionist movements – if there are any – is international human rights law.

The paper addresses the potential of human rights as found in the ECHR in this regard. It first asks if the ECHR and the case law of the ECtHR as they stand could provide secessionist movements with rights to shape their political aim or for limitations on countering secessionist political movements by central governments. The ECHR – as we will see – is a plausible candidate in this respect because it is an instrument of rights protection because of its explicitly democratic credentials. After all, it mentions its 'democratic society' in various provisions as well as the preamble. It further sets out a right to free elections in article 3 of its Protocol 1.[22] The paper focuses on case law related to freedom of association and the banning of political parties who are advocating constitutional change.[23] This cluster of cases has not been systematically analysed in relation to secession in Europe today or, in fact, in relation to the democratic commitment of the ECHR more broadly.

[20] For an overview on primary right views of self-determination (invoked by the secessionist movements) and remedial rights only views (invoked by the respective central governments) see Margaret Moore, 'The Moral Value of Collective Self-Determination and the Ethics of Secession' (2019) 50 *Journal of Social Philosophy* 620.

[21] Jan Klabbers, 'The Right to be Taken Seriously: Self-determination in International Law' (2006) 28 *Human Rights Quarterly* 186. For an argument to the same effect for remedial secession see Abhimanyu George Jain, 'Bangladesh and the Right of Remedial Secession' in Jure Vidmar, Sarah McGibbon and Lea Raible (eds), *Research Handbook on Secession* (Elgar 2022).

[22] On this see Kriszta Kovács, 'Parliamentary Democracy by Default: Applying the European Convention on Human Rights to Presidential Elections and Referendums' (2020) 2 *Jus Cogens* 237.

[23] See, eg, *Yazar, Karataş, Aksoy and the People's Labour Party (HEP) v Turkey*, App No 22723/93 (Judgment, 9 April 2002). I am not suggesting that these cases are the only ones that are relevant. Other avenues worth exploring might include cases on minority protections. Eg, *Catan v Moldova and Russia*, App No 43370/04 (Judgment, 19 October 2012); *Ulusoy and Others v Turkey*, App No 34797/03 (Judgment, 3 May 2007).

2. Territorial Claims as Political Agenda

Secessionist or separatist movements in Europe make territorial claims. Their aim is to change the institution that attaches to and controls a particular part of the planet.[24] The ECHR, however, only relevantly mentions territory in its article 56 (and similar provisions in the protocols), a colonial clause relating to the territorial application of the Convention.[25] What is more, it lists the preservation of 'territorial integrity' as a potential legitimate aim in article 10 providing for freedom of expression. Nowhere, however, does it mention territorial rights or claims of groups other than the state, nor does it refer to self-determination.[26] That is, territorial claims of non-state actors are at best an afterthought in the ECHR.

To consider the ECHR's value to protect separatist movements, or to shape what they are entitled to do and how they may be counteracted, then, our understanding of these movements' claims has to focus on an aspect other than their territorial nature. I suggest that what is important for the purpose of this paper is that separatist movements' claims are political.[27] Only once we conceive of their claims as such can we analyse how these movements, and their agenda may enjoy some protection under the ECHR.

A critical reader might object at this point that territorial claims are beyond the realm of ordinary politics. They might further argue that it is a conceptual and normative mistake to treat secessionist movements' claims as political in the usual sense because the territorial aspect is irreducible. A response to this objection has to start with a concession: secessionist movements argue for deep institutional change, which – if implemented – has dramatic structural and economic effects. However, I do not think this fact, or the territorial nature of their claims are best accommodated by excluding such an agenda from the concept of the political. If we define 'political' as '[o]f, belonging to, or concerned with the form, organization, and administration of a state, and with the regulation of its relations with other states,'[28] there are two reasons for this. First, which state or institution is attached to a particular part of the planet and thus claims it as its territory falls squarely within this concern. It is, if anything, foundational to the concept rather than outside of it. Second, many claims and agendas that we conceptualise as paradigm cases of political causes – socialism or liberalism, for example – would, if implemented in a different system, entail deep and lasting change. The argument that secessionist claims entail structural change and potentially also disruption, and thus cannot be conceptualised as political does not hold in my view. It may mean that additional

[24] For a view on territory and self-determination that (rightly) emphasises this aspect against the 'personal' character of a right to self-determination to explain separatist claims in international law see Lea Brilmayer, 'Secession and Self-determination: A Territorial Interpretation' (1991) 16 *Yale Journal of International Law* 177, in particular 192-197.

[25] A highly problematic provision, article 56 ECHR in practice excluded (and continues to exclude) the application of the ECHR to colonial territories. See *Chagos Islanders v UK*, App No 35622/04 (Decision, 11 December 2012) paras 60-63 and for analysis Barbara Miltner, 'Revisiting Extraterritoriality after Al-Skeini: The ECHR and Its Lessons' (2012) 33 *Michigan Journal of International Law* 693, 700-4.

[26] This is in contrast to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of which provide for a right to self-determination of peoples in their respective article 1.

[27] It is worth mentioning that the most convincing account of territory is explicitly a *political* theory: Margaret Moore, *A Political Theory of Territory* (OUP 2015) 1-14.

[28] Oxford English Dictionary, 'Political' <https://www.oed.com/view/Entry/146887?redirectedFrom=political&> accessed 30 September 2022.

hurdles to making such claims or to following through on them may be justifiable or even necessary.[29] However, this is best seen as downstream from the question of whether secessionist movements are political movements making political claims.

Once this aspect is emphasised, we can point to a further important fact about secessionist movements in Europe. They are organised as or around political parties.[30] Accordingly, the most obviously relevant provision of the ECHR in the context of potentially protecting secessionist movements, is article 11 – the freedom of assembly and association. The protection is tied to a particular form of organising and includes at its core the protection of political parties. While this focus could be perceived as a drawback for secessionist movements because it seemingly narrows what is open to them in the context of human rights law, it is at the same time what makes this type of protection attractive as a route to push back against thwarting a secessionist agenda. The following section sets out the main characteristics of the case law on political parties, criteria for restricting their activities or banning them outright. It then proceeds to investigate the implications of these characteristics for secessionist movements.

3. Case Law of the ECtHR and Its Potential for Secessionist Movements

At a first glance, the most relevant recent article 11 case on secessionist claims is *Forcadell I Lluis v Spain*[31] and concerns Catalonia. The applicants complained about the Spanish Constitutional Court preventing the Catalan Parliament from sitting lawfully after the (unconstitutional) independence referendum held in October 2017 because it violated their freedoms of expression (article 10) and of assembly.[32] The Court, however, regards article 11 as the *lex specialis* of article 10 and thus only proceeded to consider the complaint under article 11.[33] As a result, it concerned the freedom of assembly only, which is guaranteed in article 11 alongside the freedom of association and suggests that it is the freedom of assembly, not association, that is most pertinent. The ECtHR held that this particular application was 'manifestly ill-founded' because the measures taken were proportionate. That is, they were found to be prescribed by law,[34] to be in pursuit of several legitimate aims listed in article 11[35]

[29] This is what I take to be the concern most theories of the right to self-determination and/or secede, as well as territorial rights are targeting. Examples include Joseph Raz and Avishai Margalit, 'National Self-determination' (1990) 87 *The Journal of Philosophy* 439; Allen Buchanan, 'Theories of Secession' (1997) 26 *Philosophy & Public Affairs* 31-61; Margaret Moore, 'The Moral Value of Collective Self-Determination and the Ethics of Secession' (2019) 50 *Journal of Social Philosophy* 620.

[30] The Scottish National Party in Scotland, as well as Esquerra Republicana de Catalunya and Junts per Catalunya in Catalonia are examples. It is important to note that these parties sit across a wide range of the political spectrum from left to right. It would thus be a mistake to associate secessionist claims with a particular political hue.

[31] *Forcadell i Lluis and others v Spain* (n 2).

[32] ibid, paras 1-14. It thus differs importantly from the individual communication to the HRC: *Oriol Junqueras i Vies et al v Spain* (n 6) which relied on article 25 ICCPR and guarantees the right to free elections.

[33] *Forcadell i Lluis and others v Spain* (n 2) para 24.

[34] ibid, paras 28-31.

[35] ibid, paras 32-3, relying in particular interests of public safety, the prevention of disorder and the protection of the rights and freedoms of others and citing *Herri Batasuna and Batasuna v Spain*, App No 25803/04 (Judgment, 30 June 2009) para 64.

and – obviously, in the view of the Court – to be necessary in a democratic society.[36] Throughout the analysis the ECtHR relied heavily on *Herri Batasuna v Spain*.[37] The result may well be right in light of the criteria the ECtHR usually employs, but it also illustrates significant limitations of ECHR protections of secessionist movements. To understand why, we need to examine article 11 ECHR and the strand of case law the Court cited to justify this decision in more detail.

3.1 Political Parties and Article 11 ECHR

As just seen, article 11 of the ECHR provides for a qualified right to freedom of assembly on the one hand and association on the other hand. It reads:

> 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Forcadell i Lluis v Spain at first glance suggests that it is the freedom of assembly that should interest us. But this is not entirely true. The case the ECtHR cited most in its proportionality analysis is *Herri Batasuna v Spain* and it concerns the freedom of association as it is about the ban of a political party. This is by far the most developed strand of case law that is interesting for the purposes of this paper, which justifies focussing on the freedom of association with others. *Herri Batasuna v Spain* is part of a cluster of cases on restrictions placed on political parties, which is worth examining in detail.

The ECtHR had the opportunity to clarify many points of principles and to establish and refine criteria for restricting the activities of political parties in a cluster of cases in the 1990s and early 2000s. Many (although not all, as we will see) of the relevant cases originate in Turkey, where the Constitutional Court has a monopoly on the power to disband political parties.[38] The first such case was *United Communist Party v Turkey*.[39] The Turkish Constitutional Court instituted a ban of the party based on its programme, which mentioned – rather obviously –

[36] *Forcadell i Lluis and others v Spain* (n 2) paras 34-40, relying again on *Herri Batasuna and Batasuna v Spain* (n 35) paras 77, 79, 91, 94.
[37] See (n 35).
[38] Rory O'Connell, *Law, Democracy and the European Court of Human Rights* (CUP 2020) 123. Chapter 5 of the book contains an excellent overview of the relevant case law with a view to its role for the understanding of democracy in the Convention. For detailed analysis of the Turkish cases in particular see Mustafa Koçak and Esin Örücü, 'Dissolution of Political Parties in the Name of Democracy: Cases from Turkey and the European Court of Human Rights' (2003) 9 *European Public Law* 399.
[39] *United Communist Party of Turkey and Others v Turkey*, App No 19392/92 (Grand Chamber Judgment, 30 January 1998).

the proscribed word 'Communist' and expressed support for Kurdish self-determination and regional autonomy, and was thus perceived to be threatening the territorial integrity of Turkey.[40] Consequently, this case is interesting for present purposes not only because it concerns political parties and their protection, but because it concerns a party endorsing what we might call a proto-secessionist claim.

The Court dealt for the first time explicitly with the nature of political parties as associations.[41] While only trade unions are mentioned explicitly as a form of association that enjoys protection, the ECtHR confirmed that political parties are also protected – not least because of the language of article 11. The use of 'including' to introduce the relevant clause suggests that trade unions are mentioned as one type of protected association, but importantly not the only one.[42] The Court additionally stressed that political parties are 'essential to the proper functioning of democracy', which it took to mean that there cannot be any doubt as to whether political parties enjoy the protection of article 11.[43]

Second, the Court made a first contribution to elucidating the proportionality analysis of restrictions imposed on political parties. On potential legitimate aims for a restriction – including a ban – of a political party the Court expressed the following. On the one hand, it held that political parties are '... not excluded from the protection afforded by the Convention simply because [their] activities are regarded by the national authorities as undermining the constitutional structures of the State and calling for the imposition of restrictions.'[44] On the other hand, the Grand Chamber accepted that countering separatism and threats to territorial integrity could in principle be a legitimate aim when considering banning a party because territorial integrity forms part of national security.[45] However, having examined the programme of the United Communist Party of Turkey to see if a ban was necessary in a democratic society, the Court had the following to say:

The Court considers one of the principal characteristics of democracy to be the possibility it offers of resolving a country's problems through dialogue, without recourse to violence, even when they are irksome. Democracy thrives on freedom of expression. From that point of view, there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State's population and to take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned.[46]

Secessionist movements, though, do not only seek to 'debate in public the situation of part of the State's population' as the Court puts it – they usually aim to *change* that situation. This requires them to advocate for deep structural changes, including constitutional ones. As we

[40] ibid, para 10.
[41] See further – including on the Turkish position that a political party is not an association according to article 11 –Koçak and Örücü (n 38) 403-5.
[42] *United Communist Party of Turkey and Others v Turkey* (n 39) para 24.
[43] ibid, para 25.
[44] ibid, para 27.
[45] ibid, paras 39-41.
[46] ibid, para 57.

will see, this impacts the criteria the Court relies on for potential restrictions on their activity and thus warrants a separate discussion. The next section takes up this task.

3.2 Secessionist Claims and Article 11 ECHR

The case law that is in my view most relevant for secessionist movements follows *United Communist Party v Turkey* and – just as that case – concerns the question under which circumstances political parties may be banned or dissolved.[47] This case law is relevant not only because the Court relied on it in *Forcadell i Lluis v Spain* but more broadly because secessionist movements may rely on it to protect their political associations and in particular political parties against direct interference by the state or what will be – if their hopes are to be fulfilled – the parent state of a seceding entity. Whether a restriction on the activities (including a dissolution or ban) of an association is a violation of article 11 is subject to a proportionality test in which the Court asks if the dissolution follows a 'pressing social need' or legitimate aim, and whether the dissolution (or other measure, as the case may be) is 'proportionate to the legitimate aim it pursues'.

In addition to the statements of the fundamental importance of political parties to the functioning of democracy, as part of that proportionality test, the Court regularly holds the following:

> [A] political party may promote a change in the law or the legal and constitutional structures of the State on two conditions: firstly, the means used to that end must in every respect be legal and democratic; secondly, the change proposed must itself be compatible with fundamental democratic principles. It necessarily follows that a political party whose leaders incite to violence or put forward a policy which fails to respect democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy cannot lay claim to the Convention's protection against penalties imposed on those grounds.[48]

This passage points to a fundamental aspect of article 11 protection: political parties cannot be interfered with simply because they are advocating for legal or constitutional change.[49] However, there are two important limits of the protection offered to political parties under article 11 ECHR. First, political parties with an explicitly violent purpose are liable to restrictions or prohibition. It is not sufficient for an organisation to refer to itself as revolutionary[50] or separatist, however. There must be a threat to the state related to the violent purpose.[51] While this criterion seems (and can be) straight forward and well justified, it can be difficult to apply it when parties are not themselves violent but instead accused of

[47] Eg, *Refah Partisi and others v Turkey*, App No 41340/98 (Judgment, 13 February 2003); *Herri Batasuna and Batasuna v Spain* (n 35). For analysis see O'Connell (n 38) ch 5.
[48] See *Herri Batasuna and Batasuna v Spain* (n 35) para 79 (and cases cited therein).
[49] *Yazar, Karataş, Aksoy and the People's Labour Party (HEP) v Turkey* (n 23).
[50] *Tsonev v Bulgaria*, App No 45963/99 (Judgment, 13 July 2006) para 59.
[51] O'Connell (n 38) 127.

covertly supporting violence. The leading case on this criterion – the above quoted *Herri Batasuna v Spain* – concerned Basque parties dissolved for allegedly supporting the terrorist activities of ETA.[52] The ECtHR looked to the party programmes, as well as the words and actions of the party leaders and concluded – quickly, and in my view not entirely well founded – that the prohibition of said parties was necessary and thus did not violate article 11.[53]

Second, political parties may be restricted or prohibited if they put forward a programme that is itself not democratic or aims to flout or destroy rights guaranteed in a democracy. The leading case on this aspect is *Refah Partisi v Turkey*.[54] The Turkish Constitutional Court dissolved the Welfare Party in 1998 after it had become the country's largest in the 1995 elections because its activities were deemed to be undermining the principle of secularism and democracy, particularly because the party advocated for the establishment of a legal system based on sharia.[55] The ECtHR in turn found that the dissolution did not violate article 11 of the Convention in a judgment centred on the question whether it was 'necessary in a democratic society' to prohibit the party.[56] While the Court held that it cannot be concluded that any model of society based on religious values must be inimical to democracy, it found that the version Refah advocated for would do so. It was thus no longer protected by article 11 because the particular constitutional change it promoted would undermine democracy itself and – at least in the view of to the Court – violent (and thus neither legal nor democratic) means could not be excluded.[57]

Secessionist and separatist movements fall into the category of associations that promote changes in constitutional structures and would thus be protected. At the same time, they are expected to adhere to the conditions outlined above. The key challenge for these parties lies in the criterion that they need to be democratic both in their approach and procedures, and in their aim. This condition of adhering to democracy depends on what the conception of democracy in the ECHR is. And it is this conception that creates the challenges for secessionist movements or – in fact – any political movements or parties that are trying to advance transformative change. It is thus necessary to look at this conception in some more detail.

4. Democracy in the ECHR

The case law on political parties and how they are protected by article 11 relates to their function in a democratic society and its institutions. The basic premise the Court employs is that democracy is a fundamental feature of the Convention system.[58] Evidence to this effect includes its insistence that any limitations on article 11 need to be interpreted strictly,[59] the

[52] *Herri Batasuna and Batasuna v Spain* (n 35) para 30.
[53] ibid, paras 86-91.
[54] *Refah Partisi and others v Turkey* (n 47).
[55] ibid, paras 10-44.
[56] ibid, paras 86-134.
[57] ibid, para 132.
[58] See, eg, *United Communist Party of Turkey and Others v Turkey* (n 39) para 45.
[59] ibid, para 46.

recognition of political parties as a crucial vessel of dialogue and change,[60] and their contribution to fostering pluralism of views.[61]

That said, the ECtHR does not openly and expressly grapple with the conceptualisation of democracy that the Convention is or should be adopting. But some of its pronouncements in various settings nevertheless allow us to piece together a view.[62] First, it is notable that the Court links its conception of a democratic society to a 'normative notion of pluralism'.[63] That is, the role for pluralism is not limited to the descriptive recognition that there is disagreement and a diversity of views, but the Court instead emphasises that pluralism of views held and expressed actively serves a democratic society and is at least part of what makes it valuable. The value of pluralism extends to views and positions that may shock, offend, or disturb the state or sections of the population.[64] That is, even inconvenient views or those that advocate deep institutional change are protected, particularly in the public sphere.[65] The ECtHR has also implied, but not further developed, the idea that pluralism in this sense is necessary for the development of society and individuals alike.[66]

Even from this cursory glance, the Court seems to employ a concept of democracy that relies mostly on the tenets of liberal democracy.[67] The emphasis of pluralism and the focus on the public sphere suggest that democracy to the ECtHR and thus the Convention is mostly about institutions and formal distribution of power.[68] The way the Court looks at pluralism of views in the context of expression and political parties, respectively, is telling: it accepts that uncomfortable views should be legitimate to hold and express, but it is much more cautious when these views translate to tangible consequences. This becomes clear when the Court notes that political parties may of course promote deep structural change – including constitutional change – but immediately adds that such change as well as the means employed to achieve it may not threaten the state if they are to enjoy article 11 protection.[69]

This caution can be explained by the anti-totalitarian streak of the Convention. However, liberal democracy is not the only model available. Democracy is about collective decision-making and does not necessarily have to follow a particular political philosophy to be considered morally valuable.[70] It is because of this that the reliance on liberalism's substantive tenets in the name of democracy produces a kind of circularity that may in and of itself be un-

[60] ibid, para 87.
[61] ibid, para 88.
[62] I am building, among others, on Marks (n 10) and Alain Zysset, 'Freedom of Expression, the Right to Vote, and Proportionality at the European Court of Human Rights: An Internal Critique' (2019) 17 *International Journal of Constitutional Law* 230.
[63] Alain Zysset, 'Searching for the Legitimacy of the European Court of Human Rights: The Neglected Role of Democratic Society' (2016) 5 *Global Constitutionalism* 16, 23-24.
[64] Most famously: *Handyside v United Kingdom*, App No 5493/72 (Judgment, 7 December 1976) para 49.
[65] For a critique of the Court's attachment to the public private divide see Marks (n 10) 228 ff.
[66] *Handyside v United Kingdom* (n 63) para 49.
[67] For analysis to this effect: Rory O'Connell (n 38) ch 1.
[68] Marks (n 10) 228 ff. See also generally Zysset, 'Searching for the Legitimacy of the European Court of Human Rights' (n 63) 27-29, who argues that an egalitarian account of liberal democracy is able to make sense of most of the practice of the Court.
[69] *Tsonev v Bulgaria* (n 50) para 59.
[70] Tom Christiano and Sameer Bajaj, 'Democracy' in Edward N Zalta, *The Stanford Encyclopedia of Philosophy* (Spring 2022) <https://plato.stanford.edu/archives/spr2022/entries/democracy/> accessed 19 October 2022.

democratic or at least prevent institutional change that enjoys – in principle – democratic legitimacy. Consider again part of the typical pronouncement: '[A] political party may promote a change in the law or the legal and constitutional structures of the State on two conditions: firstly, the means used to that end must in every respect be legal and democratic; secondly, the change proposed must itself be compatible with fundamental democratic principles.'[71] If the end and the means must be democratic, and the Court relies (even if implicitly) on a liberal, pluralist conception of democracy, it follows that it will remain sceptical or even hostile to movements that propose changes to this model. This implicit connection between formal democracy and substantively liberal democracy may be a challenge for secessionist movements when relying on the protection of the Convention.

One argument that is sometimes used against secessionist movements is illustrative in this respect. It is to say that they can never be democratic because of their aim to change the constitution of the *demos*, which can in turn not be decided democratically because a democratic decision would presuppose the constitution of that demos. However, whatever view one has on how to solve the democratic boundary problem, solving it is an actual paradox and thus determining the demos without its ratification can never be said to be undemocratic without more.[72] Yet, on the one hand, the Court's reasoning relies so heavily on liberal democratic theories that presuppose the existence of the demos that it invites arguments against secessionist movements on these grounds. By equating democracy and liberal democracy the Court creates the possibility for this argument to bite, even though, as a matter of logic, it should not.

A further potential limitation of the protection the ECHR offers separatist entities is that it insists on movements' absolute adherence to legality as well as non-violence. On legality, recall the Court in *Forcadell* found that the application was manifestly ill-founded in part because it followed precisely the reasoning of the Spanish Constitutional Court. Because of the insistence on complete non-violence, the Convention would no longer offer protection when oppression becomes so severe that non-violent means of pursuing an otherwise legitimate agenda becomes unviable. This relates directly to the assumptions of the ECtHR about the member: namely that they states are and will remain democratic in at least the sense that violence is never necessary to resist within their system. The phenomenon of rising populism in Europe should, however, give pause for thought in this regard.[73]

[71] *Herri Batasuna and Batasuna v Spain* (n 35) para 79.

[72] An influential debate in this area concerns the democratic boundary problem and its relationship with the all-affected-interests principle. See, eg, Robert E Goodin, 'Enfranchising All Affected Interests, and Its Alternatives' (2007) 35 *Philosophy & Public Affairs* 40; David Owen D, 'Constituting the Polity, Constituting the Demos: On the Place of the All Affected Interests Principle in Democratic Theory and in Resolving the Democratic Boundary Problem' (2012) 5 *Ethics & Global Politics* 129; Juoni Reinikainen, 'What is the Justifiable Demos of a Referendum on State Secession?' (2022) 5 *Ethics, Politics & Society* 47.

[73] For a general analysis of populism as a challenge to the Convention see, eg, Jan Petrov, 'The Populist Challenge to the European Court of Human Rights' (2020) 18 *International Journal of Constitutional Law* 476.

Conclusion

The present paper examines if the ECHR might offer some guidance on how far anti-secessionist policies may go and – conversely – what protections secessionist movements may hope for if and when they turn to the Court. After examining the ECtHR case law, two conclusions are warranted. First, most secessionist movements may rely on the protection as political parties under article 11 ECHR and many of their arguments and policies will indeed be shielded by the Convention from interference. In particular, it seems likely that a ban or significant restriction of secessionist parties would not conform to the Convention. Second, however, there are limits to the protection the Convention offers. Some of them are inherent and justified, while others are the result of the Court's reluctance to systematically grapple with its conception of democracy.

It stands to reason, of course, that any protection the Convention can only ever be limited. Human rights protection is, as such, no replacement for political contestations and solutions. However, beyond that, the limitations to the protection of secessionist movements as political parties that are not inherent in the form of the institution share that they depend on the conception of democracy the Convention and the Court rely on. In short, the Court is both too conservative and limited in its normative conceptualising of democracy and too optimistic as to how democratic (on an adequate account) the members of the Convention are. But – and this must be the main conclusion of this paper – if the Court could be persuaded to move to a more express conception of democracy while questioning the place of liberalism in it perhaps the ECHR's contribution could be made more substantive.

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