THE RIGHT TO DECIDE

A proposal for its legal construction

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1. The concept of the *right to decide*: what right does the *right to decide* entail?

If the *right to decide* is understood to mean the individual right of the citizens of Catalonia to express themselves collectively on the possible secession of the Catalan territory from Spain, this right is recognised in Article 20 of the Spanish Constitution (SC) under the designation of *freedom of expression*; moreover, if this right were to be exercised, for example through a popular consultation, it would in such event entail the exercise of the fundamental right recognised in Article 23 of the SC, that is to say, the right of all citizens to participate directly in public affairs.

Consequently, what has been defined in Catalonia as the right to decide is nothing other than a formulation of rights pre-existing constitutionally in a democratic State, dressed in a new attire. Without considering whether or not the purpose of proclaiming the right to decide is to effectively establish an independent State, this right has as its content, and consequently grants as a set of faculties to their holders, the power to express collectively the individual positions of these holders with respect to the territorial future of Catalonia as a political community. Moreover, this collective positioning must reach its addressees, primarily the public authority of the Spanish State, without obstacles or impediments. Likewise, as will be seen further on, the right to decide does not grant to its holders the power to make unilaterally a constitutional

change or break, but rather it grants the power to have the freely expressed majority position taken into consideration by the addressees thereof if such position runs counter to the constitutionally established territorial order. It therefore entails, in the end, the right to initiate a change of the constitutional order and, in the specific terms in which it is formulated in Catalonia, a change in the territorial configuration.[1]

The complex nature of this right, in which structural aspects of the freedom of expression (considering the specific content of what is expressed in it) and of the rights of political participation are intertwined, gives rise to three types of obligations for the public authorities, as passive subjects of the right. Firstly, the obligation not to create obstacles and not to carry out actions that hinder the process of communicating the respective idea, an obligation derived from the aspect of this right involving freedom or autonomy of will. Secondly, as a consequence of the propositive content of the idea to be conveyed, the necessary legal instruments must be made available to citizens in order to endow the sum of the wills that are to be expressed in this respect with unity and political significance (for example, by calling a consultative referendum, by not preventing its legal call, or by providing other instruments of collective political expression to citizens), this obligation being derived from the aspect of the right to decide involving participation in public affairs. Thirdly, the majority opinion which is expressed must be taken into consideration even if it runs counter to the constitutionally established territorial order, in order to change such order, as appropriate, which is an obligation derived from the objective aspect of the right to decide, entailing precisely the preservation and assurance of free public debate and controversy in a constitutional democratic State. This is so because, as the Spanish Constitutional Court has established, the freedom of expression is not only the manifestation of a basic individual freedom but also a factor that helps to shape our democratic political system (Constitutional Court Judgement CCJ 235/2007), which admits agreement and disagreement not only within the system but also with respect to the system (ECHR Judgement De Haes and Gijsels vs. Belgium, of 24 February 1997, taken up in CCJ 235/2007).

[1] This right should not be confused with the procedural rules on the initiative for constitutional reform provided in Article 166 SC.

The claim for the right to decide has had and now has broad popular[2] and parliamentary[3] support in Catalonia. Since 1989, the Catalan Parliament has claimed a right to decide, at first in the form of the right of self-determination of the Catalan nation (Resolution of the Catalan Parliament 98/III and subsequent ones).[4] In 2012, however, in its Resolution 742/IX, the Parliament of Catalonia[5] formulated it specifically as the *right to decide* in progressive substitution of the *right of self-determination*.[6] This change of course was perhaps influenced by the foiled attempt in the Basque Country to call a consultation on a "Democratic agreement on the exercise of the Basque people's right to decide",[7] or more probably it reflects the wish to take up the slogan under which the huge demonstration was held in Barcelona on 10 July 2010.[8]

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[2] In the most recent election to the Parliament of Catalonia, in 2012, 73.47% of the voters supported parties advocating the Catalan citizens' right to be consulted, in various ways, on the political future of Catalonia.

[3] For an overall view of the whole process, see RIDAO MARTÍN, Joan: "La consulta y 'el problema catalán'. ¿De la conllevancia al Estado?" ("The Consultation and the 'Catalan Problem'. From Putting up with Each Other to an Independent State?"). *El Cronista del Estado Social y Democrático de Derecho*, no. 42, 2014, pp. 66- 77.

[4] Resolutions 229/III (1991), 679/V (1998), 994/V (1999), 631/VIII (2010) and 6/IX (2011). On the content and value of these resolutions, see the study by VIVER PI-SUNYER, Carles and GRAU CREUS, Mireia, "La contribució del Parlament al procés de consolidació i desenvolupament de l'autogovern de Catalunya i a la defensa de la seva identitat nacional" ("The Catalan Parliament's contribution to the process of consolidation and development of Catalonia's self-government and to the defence of its national identity"). *REAF*, no. 18, 2013, pp. 88-125.

[5] Which states: "I.5. The Parliament of Catalonia finds that the people of Catalonia have the need to determine their collective future freely and democratically and urges the Catalan Government to hold a consultation, as a priority, within the next legislative period."

[6] In my opinion, this point should be viewed positively, considering the right of self-determination as it is upheld by the United Nations. As is widely known, the UN deems (Resolution 1514-XV of 1960 and Resolution 2625-XXV of 1970) that the exercise of the right of self-determination provided in Article 1.2 of the Charter of 1945 and in Article 1.1 of the International Covenants on Rights of 1966 is reserved, in principle, to peoples in a situation of colonial subjection, of foreign military occupation or of integration in a State which does not respect human rights and which lacks a government representative of all the citizens of the territory. Catalonia, however, is an autonomous region with a broad political autonomy within the Spanish State, which is ruled in turn by a democratic Constitution, so it would not appear to meet these conditions.

[7] This term was used for the first time in the Basque Country, albeit in a sense different from that in which it is used in Catalonia: after the Spanish Congress of Deputies (February 2005) rejected the motion to consider the Proposal for a new Political Statute for the Basque Country, which had been approved by the Basque Parliament in December 2004, the president of the Basque Government dissolved the Basque legislative chamber in advance, going on to call an election. On forming a new government, and in the debate on general policy in September 2007, he proposed that a consultation should be called for October 2008. The Law on Consultation approved by the Basque Parliament (Law 9/2008, of 27 June) contained a single article in which the Parliament authorised the president of the Basque Government to submit two questions for a non-binding consultation to all the Basque citizens holding the right of active suffrage: "*a*) Do you agree with supporting a dialogued ending to violence if ETA previously states, unequivocally, its will to put an end to its violence for ever?; *b*) Do you agree that the Basque political parties, without exclusions, should begin a negotiation process to reach a democratic agreement on the exercise of the Basque people's right to decide, and that such agreement should be submitted to

Whatever the case may be, the process culminated with the subsequent and latest Resolution of the Catalan Parliament 5/X (2013),[9] which approved the "Declaration of Sovereignty and of the Right to Decide of the People of Catalonia", in which there was no longer any reference to the right of self-determination and which took up with determination the right to decide as a concept of strength to designate the right of the citizens of Catalonia to be consulted on their future as a political community. As stated by Vintró,[10] it is consequently a declaration of sovereignty but not properly speaking a sovereigntist declaration since it does not entail the exercise of such sovereignty and does not presuppose at any time that the purpose of the proclamation of the right to decide has to be independence as a goal. What is demanded, therefore, is the start-up of a process – of the exercise of the right to decide – which shall be democratic and "shall guarantee, especially, the plurality and the respect of all opinions, by means of deliberation and dialogue within the frame of Catalan society, so that the resulting pronouncement will be the majority expression of the people's will, which will in turn be the fundamental guarantor of the right to decide" (Point 2). Further on it will be necessary to return to this resolution since it has been the subject of the significant Spanish Constitutional Court Judgement 42/2014, of 25 March, which denies that any title whatsoever to sovereignty is held by any specific part of the Spanish People while acknowledging, on the other hand, the existence and effectiveness of the right to decide.

On close consideration, this claim is not very different from the one that lies at the base of processes like the one that took place in Quebec with respect to Canada (referendums of 1980 and 1995, and the Canadian Supreme Court decision of 1998) or

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referendum before the end of 2010?". Two challenges of unconstitutionality were lodged against this law, giving rise to the Spanish Constitutional Court Judgement (CCJ) 103/2008, which pronounced the law's unconstitutionality and consequent nullity due to the Basque Autonomous Region's lack of competence to approve a law on the call of a referendum, and due to its infringement of Articles 1.2, 2 and 168 SC and Article 119.3 of the Regulations of the Basque Parliament.

[8] The citizens of Catalonia began to claim the right to decide as such in the demonstration of 10 July 2010, which protested against the judgement of the Spanish Constitutional Court on the reform of the Autonomy Statute of Catalonia, a judgement which pronounced that many key precepts of the reform were unconstitutional. In that demonstration, which was one of the biggest ever held in Catalonia up to that time (assembling between 1.1 million people according to the Barcelona Municipal Police and 1.5 million people according to the organisers), the slogan was "We are a Nation. We Decide".

[9] This Resolution had a broad parliamentary support: of the 135 Members of the Catalan Parliament, 85 voted in favour.

[10] VINTRÓ, Joan. "La declaració de sobirania i del dret a decidir del poble de Catalunya: un apunt jurídic" ("The Declaration of Sovereignty and of the Right to Decide of the People of Catalonia: A Legal Note"). *Bloc de la Revista Catalana de Dret Públic*, 7 February 2013.

the one that is taking place in Scotland with respect to the United Kingdom (referendum of September 2014),[11] since the legal and political basis of these processes is interlinked with the democratic principle, which is in turn precisely the legitimating legal source of the right to decide.[12] Moreover, even though the right to decide may still be a right "under construction", as postulated by Bernadí,[13] it looks as if the formulation of this right outside Catalonia has achieved a certain success, as is demonstrated by the regulation that has been made of it in the Venetan Regional Law 16/2014, of 19 June, establishing provisions on the consultative referendum on independence of Veneto. This law establishes that the president of the Regional Council shall call a consultative referendum in order to determine whether or not the electorate of Veneto wants this region to become a sovereign independent republic (Art. 1.1), likewise establishing that the Regional Council shall assure that the people are correctly informed for the good exercise of the right to decide.[14] Consequently, in Veneto the expression of the people's will through a consultation on the political future of their region is the exercise of the right to decide in the same terms in which it has been formulated in Catalonia, although this right may also be exercised through other instruments of participation different from a consultative referendum, as will be explained further on.

The Spanish Government, however, has denied up to now the existence of a right to decide considered in the terms set out above. The explicit basis of its denial is

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11 This is the result of the agreement between the British Government and the Scottish Government, signed on 15 October 2012, involving the acceptance that Scotland may decide to be independent if it is so determined in a referendum.

12 The interplay between the democratic principle and the right to decide is dealt with in depth by VILAJOSANA, Josep M. in "Principi democràtic i justificació constitucional del dret a decidir" ("The Democratic Principle and the Constitutional Justification of the Right to Decide"). *REAF*, no. 19, 2014, pp. 178-210.

13 BERNADÍ, Xavier. "El derecho a decidir: características básicas de un derecho en construcción." ("The Right to Decide: Basic Features of a Right under Construction"). Conference given at the International Congress on Social Rights and Freedoms in Brazil, Italy, Portugal and Spain, on 16 June 2014.

14 "A garanzia della libera e corretta informazione sul referendum indetto, il Consiglio regionale del Veneto assicurerà un'adeguata attività di comunicazione ai favorevoli e ai contrari al quesito referendario, ponendo in essere tutti gli strumenti necessari affinché l'insieme della popolazione e della società civile veneta abbiano tutte le informazioni e le conoscenze accurate per l'esercizio del diritto a decidere, promuovendo la loro partecipazione a tale processo (art. 3.2)." ("As a guarantee of free and correct information on the announced referendum, Veneto's Regional Council will carry out a suitable programme of communication to the people who are in favour of and against the question of the referendum, implementing all the necessary instruments so that the Venetan population and civil society as a whole will have all the information and an accurate knowledge for the exercise of the right to decide, promoting their participation in said process [Art. 3.2.]").

the purported unconstitutionality of the pretension because, on the one hand, it deems that such a right would infringe Article 1.2 of the Spanish Constitution, which proclaims that "the national sovereignty resides in the Spanish People", and on the other hand, that it would also infringe Article 2, which establishes that "the Constitution is based on the indissoluble unity of the Spanish nation, the common indivisible fatherland of all Spaniards". For this reason a consultation of the citizens of Catalonia on their political future would be unconstitutional, specifically because one cannot pretend to separate any part of the territory if the Constitution establishes that the Spanish Nation is an indissoluble unit; in any case, such a decision could only be made by the holder of the sovereignty, that is to say, the Spanish people as a whole and not any one part of this people, which completely lacks any type of political status.

These assertions, however, which are presented here as those which are most closely linked to the Spanish Constitution in my opinion, are precisely those which are most greatly distanced from the Constitution because they completely ignore the rest of the Constitutional precepts – which are just as much a part of the Constitution as they are – and they take no heed of the context in which they are found. Consequently, from this point I will deal with, firstly, these other precepts and how they interact with the recognition of concentrated sovereignty and the principle of unity. However, I will begin by presenting the conclusion on this point: the exercise of the right to decide, understood in the terms set out above, fits perfectly well into the Spanish Constitution. Secondly, I will deal with the legal channels or instruments of participation through which this right may be exercised. Of course, it will also be necessary to consider the effects of exercising this right, and this will be the third aspect to be studied. Lastly, I will conclude this study with a final overall reflection on this process.

2. The constitutionality of the right to decide: constitutional principles and precepts that support the consultation of the citizens of Catalonia

Indeed, the right to decide is not directly stated in the Spanish Constitution. However, this is not because the Spanish Constitution is different from others – no constitution in the Western world directly recognises it or the right of secession – but rather because the Spanish Constitution is just that, a constitution, and its function is consequently to form a State, that is to say, an organised unit for making decisions and taking action. Accordingly, all States – autonomous, federal or regional – are unitary by

definition; without unity there is no State and a constitution seeks precisely to preserve it. This entails, however, that the fact that Article 2 of the Spanish Constitution recognises the principle of indissolubility of the unity does not make the Spanish State a more unitary State or a State more resistant to the separation of a part of its territory than other States, such as Canada or the United Kingdom, for example, where the unity of the State has been or will be democratically questioned.

Indeed, in the Western Constitutions, the coexistence of the principle of indissoluble unity (formulated expressly or tacitly) with the democratic principle is what allows, despite the preservation of unity within the constitutional framework, the production of secessionist processes such as those in the United Kingdom or Canada. In the Spanish Constitution, the democratic principle is precisely a structural principle of the political system and of the legal system recognised in Article 1 SC ("Spain is a democratic State under the rule of law"), which means that it acts as a guiding principle on creating, interpreting and applying each and all of the rest of the precepts of the Constitution and of the legal system as a whole. The way it orients these precepts will consequently depend on the content and scope attributed to the concept of *democracy.*

In this respect, one finds that the present-day Western constitutions concur in that they do not only include a procedural idea of democracy, according to which it is legitimate for the will of the majority to prevail over that of the minority if the established procedures are followed. Together with this concept, which is maintained, limits are set on what a majority of people may impose on the dissident minorities in a community. For this reason substantive aspects are added to the procedural ones and, consequently, *democracy* also means respect for minorities and for their constitutional rights. And in a democratic State the existence and exercise of these constitutional rights cannot depend on the majorities but rather they assure the permanent protection of the minorities (see Dworkin,[15] for example). This provides a democratic opportunity to those groups which, for instance, cannot become a majority for demographic reasons.

Among the constitutional rights that would fulfil this function, the Spanish Constitution recognises at least two which have been previously mentioned: freedom of expression (Art. 20 SC) and the right of citizens to participate in public affairs directly or through their representatives (Art. 23.1 SC). This right is developed institutionally in Article 92 of the Constitution, which regulates popular consultations. All citizens – and

[15] A general view of this issue is given in DWORKIN, Ronald. *La democràcia possible*. Barcelona: Paidós, 2008 (*Is Democracy Possible Here? Principles for a New Political Debate* in its original version).

not just an entity called the *Spanish people* – are holders of these rights, individually or collectively. It will be necessary to return to this aspect further on since the determination of who is a political subject in this process is of the greatest importance in establishing the scope and effects of this right.

For the time being, however, it would also be necessary to recall that the general declaration of freedom that the Constitution establishes as a "supreme value of the legal system" in Article 1.1 SC, means authorising citizens, in the Spanish system, to carry out all the activities which the Law does not forbid – the Spanish Constitutional Court has so stated (Judgement CCJ 83/1984) – or the exercise of which the Law does not subordinate to specific requirements or terms. Under the rule of law, this precept is inverted in the case of the public authorities, in the activity of which the value *freedom* (since they cannot be holders of the rights derived from it) is replaced by the necessary legal qualification (the principle of legality in the positive sense).

This first reflection on the value *freedom*, which is directly related to the possibilities of action of citizens in general, should be linked to a second reflection which considers, specifically, the possibilities of action of citizens with respect to the order of constitutionally established values and principles. From this standpoint it is affirmed – and it has likewise been affirmed by the Spanish Constitutional Court (directly formulated in the judgements CCJ 48/2003, 5/2004, 235/2007, 12/2008 and 42/2014, and implicitly stated in the judgements CCJ 11/1981 and 126/2009) – that the democracy established by the Spanish Constitution is not that which is known as a *militant democracy.*

Indeed, the fact that the text of the Spanish Constitution does not contain material limits on its reform (Articles 166 to 169 SC) and that it moreover recognises a set of reinforcing freedoms for the defence of free ideology (for example, Articles 16 and 20 SC) entail that the Spanish democracy may be excluded from those which do not tolerate options contrary to the constitutionally established values and principles, even though such values and principles are set formally within the framework of legality. The Spanish democracy, according to its constitutional configuration, does not unconstitutionalise, or even condemn, the defence of ideologies contrary to its Constitution. It is not a democracy in which is generated a "natural and fundamental meta-right", in the sense proposed by Frankerberg,[16] of self-defence of the State (in the

[16] FRANKERBERG, Günter. "Angst im Rechtsstaat". *Kritische Justiz*, no. 4, Cologne, 1977, pp. 366-370.

state of necessity or in the defence of the common good, for example), which becomes a parameter of reference for the validity and interpretation of the individual and collective rights and which imposes itself hierarchically on such rights.

Quite to the contrary, far from this concept of *militant democracy* or *protected democracy*, which for example in Germany from the 1950s to the 1970s served the purpose of illegalising parties and of forbidding the professional practice of civil servants of dubious ideology (*Berufsverbot*),[17] the Spanish Constitution establishes a plural and pluralist democracy that is not supervised and that consequently does not exclude from legality the subjects or groups which have a conception of law or of the social organisation that is different from or contradictory to the conception of the Constitution itself. The Spanish Constitutional Court so states in its Judgement CCJ 48/2003: "[...] in our constitutional system there is no room for a model of 'militant democracy' in the sense which it [the Basque Government] grants to this term; that is to say, a model which imposes not respect of but positive adhesion to the system and, in the first place, to the Constitution. In order for such a model to be applicable, an indispensable presupposition would be the existence of a regulatory core inaccessible to the procedures of constitutional reform which, owing to its selfsame intangibility, could constitute a self-standing parameter of legal correctness, whereby the mere pretension of affecting it would make a conduct anti-legal despite the fact that such conduct were to make scrupulous compliance with the respective regulatory procedures". This same judgement goes on to state: "In contrast to the French or German constitutions, the Spanish Constitution does not rule out the possibility of reform of any of its precepts and neither does it subject the possibility of constitutional revision to any other express limits than those which are strictly formal and procedural. Our Constitution certainly does also proclaim principles, duly included in its articles, which provide a basis and a rationale for its specific precepts. These are the constitutional principles, some of which are mentioned in Articles 6 and 9 of the challenged Law. All these principles bind and oblige, just as the Constitution as a whole, the citizens and the public authorities (Art. 9.1 SC), even when its reform or revision is postulated and until such reform or revision

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[17] On the meaning and scope of militant democracy in the Federal Republic of Germany between the 1950s and 1970s, see SCHMINCK-GUSTAVUS, Christoph Ulrich. *El renacimiento del Leviatán*. Barcelona: Ed. Fontanella, 1982; with review and prologue by APARICIO, Miguel Á. A view that is more comprehensive and closer in time is found in PEGORARO, Lucio. "Para una clasificación *dúctil* de *democracia militante*" ("For a *Ductile* Classification of *Militant Democracy*"). *RVAP*, no. 96, 2013, p. 193-225.

were to come to be effected by means of the procedures established in the Constitution's Title X. This having been established, and with respect for these principles, and moreover as is stated in the Explanatory Memorandum of the challenged Law, as has just been recalled, any project is compatible with the Constitution as long as it is not defended by means of an activity that infringes the democratic principles or the fundamental rights. Up to this point the affirmation is true that 'the Constitution is a sufficiently broad framework of concurrences to provide room for widely differing political options' […]." Consequently, in this respect the Spanish Constitutional Court states – and subsequently it went on to do so again in the same terms in its Judgement 42/2014 in which it affirmed that there is room for the right to decide in the Spanish Constitution – that all political or social projects are compatible with the Constitution, including those which are opposed to it, as long as they are not defended through an activity which infringes the democratic principle or the fundamental rights.

Considering all this, why should it be unconstitutional to express collectively a will opposed to upholding the unity with the Spanish State, if the Constitution does not impose any adhesion to the principle of unity? How could the call of a consultation of the citizens of Catalonia on its future as a political community infringe the democratic principle or the fundamental rights, if expression through a consultation is based precisely on the democratic principle and is an exercise of the fundamental rights recognised by the Spanish Constitution? Unless it is openly defended that the Spanish Constitution instates a militant democracy, which is something very difficult to do in view of the text of the Constitution and of the case law on this matter, it cannot be affirmed with any solid foundation that the pretension to call a popular consultation in Catalonia in which citizens are consulted on Catalonia's territorial independence is unconstitutional. There are no legal elements supporting its unconstitutionality: neither the fact that Article 2 of the Spanish Constitution recognises the indissoluble unity of the Spanish Nation makes the secession of part of its territory constitutionally impossible, and much less does it make impossible the defence and the joint exteriorisation of such a will for secession; neither can the exercise of the constitutional rights of minorities depend on the will of the majorities in a democratic State; neither does there exist any fundamental meta-right of the State that imposes itself on the constitutional rights acknowledged to citizens; and neither is the exercise of the freedom of citizens constrained beyond the pertinent constitutionally and legally determined requirements and terms.

Consequently, the consultation of the citizens of Catalonia on their political future as a community presents many more elements of constitutionality than of unconstitutionality. A different matter would be the channels through which a wish for secession may be expressed and the effects that the result of such a joint expression may have.

3. The legal channels or instruments of participation through which the right to decide may be exercised

The reports issued by consultative or advisory bodies of the Generalitat – the Government of Catalonia – establish not just one but several legal possibilities for exercising the right to decide.[18] Here I will discuss those which seem to me most appropriate, not from the standpoint of their legality since all the proposed possibilities are legal in my opinion, but rather from the standpoint of their suitability as a way of exercising the right to decide in the specific case of Catalonia.

In this respect, if by *right to decide* we understand, as previously stated, the individual right of the citizens of Catalonia to express themselves collectively on secession from the Spanish State, it is obvious that the first instrument to which reference should be made for channelling this joint expression is the figure of a popular consultation. Within this concept, constitutional case law (Judgement CCJ 103/2008) has distinguished two figures: that of the consultative referendum and that of the non-referendum popular consultation. Both cases involve non-binding consultations,[19] that is to say, they are not ratifying or sanctioning processes. The difference between the two, however, would lie in two factors: on the one hand, the call of a referendum must be authorised by the Spanish Central State authority according to Article 149.1.32 of the Spanish Constitution, while a consultation may be called by an autonomous region; and

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[18] For a general presentation of the possible legal channels, see "Informe sobre els procediments legals a través dels quals els ciutadans i les ciutadanes de Catalunya poder ser consultats sobre llur futur polític col·lectiu" ("Report on the Legal Procedures through which the Citizens of Catalonia may be Consulted on their Collective Political Future"), of the Institut d'Estudis Autonòmics (Institute of Autonomous Regional Studies), 11 March 2013; and "La consulta sobre el futur polític de Catalunya" ("The Consultation on the Political Future of Catalonia"), of the Consell Assessor per a la Transició Nacional (Advisory Council for the National Transition), 25 July 2013. A commentary on the various channels is found in CORRETJA, Mercè: "Quina és la millor via per a la consulta?" ("Which is the Best Channel for the Consultation?"). *Vilaweb*, 23 January 2014 [online]. <http://www.vilaweb.cat/noticia/4158750/20131128/quina-millor-via-consulta.html>.

[19] The only consultations that are binding are the constitutional reform referendums (Articles 167 and 168 SC) and the referendums on approval and reform of the Autonomy Statutes (Articles 151.2.3 and 152.2 SC).

on the other hand, a referendum is a consultation that: *a*) is made to the electoral body, and *b*) is formed by and exteriorised through an electoral process based on a census that is managed by the electoral administration, and is guaranteed by specific jurisdictional warranties, which are features that cannot be possessed by a non-referendum consultation[20] according to the Spanish Constitutional Court.

Bearing in mind these conditioning factors, the Spanish system currently in force envisages three possibilities of channelling the call of a referendum consultation in Catalonia: the holding of a referendum called by the Spanish State according to Organic Law 2/1980, of 18 January, on the regulation of the various modalities of referendum; the holding of a referendum called by the Government of Catalonia, pursuant to authorisation from the Spanish State, according to the Catalan Law 4/2010, of 17 March, on popular consultations by way of referendum; and the making of a request to the Spanish State to delegate to the Government of Catalonia the competence to authorise and to call referendums. Nevertheless, despite the fact that they are legal and in full force, none of these possibilities is free of problems.

The last-mentioned possibility has already been tried and the result is known to all: on 8 April 2014, the Spanish Parliament rejected by means of a (moreover unnecessary) qualified majority[21] the request of the Parliament of Catalonia that the Spanish Parliament should delegate[22] to the Government of Catalonia the competence to

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20 It is so stated in FJ (Legal Basis) 2 of the Judgement STC 103/2008: "A referendum is, accordingly, a species of the 'popular consultation' genus in which the opinion of a collective is not obtained on any matter of public interest through any procedure, but rather it is a consultation whose purpose strictly involves the opinion of the electoral body (expressing the will of the people: Judgement STC 12/2008, of 29 January, FJ 10) formed by and exteriorised through an electoral procedure, that is to say, based on the census, managed by the electoral Administration and assured with specific jurisdictional guarantees, in all cases in relation to public matters whose direct or indirect management, by means of the exercise of political power by the citizens, is the object of the fundamental right recognised by the Constitution in Art. 23 (accordingly, CCJ 119/1995, of 17 July). In order qualify a consultation as a referendum or, more precisely, in order to determine whether a popular consultation is held "by way of referendum" (Art. 149.1.32 SC) and whether its call in such event requires the authorisation reserved to the Spanish State, consideration shall be given to the identity of the consulted subject, whereby whenever such consulted subject is the electoral body, whose specific way of manifestation is that of the various electoral procedures, with their respective guarantees, a referendum consultation will be involved."

21 With a result of 299 votes against (from the parties PP, PSOE, UPyD, UPN, Foro Asturias and Coalición Canaria), 47 in favour (Izquierda Plural, CiU, PNB, BNG, Amaiur, ERC, Compromís and Geroa Bai) and one abstention, of the Member of Parliament of Coalición Canaria.

22 This request is based on a constitutionally established possibility: according to Article 150.2 SC, "The State may transfer or delegate to the Autonomous Regions, by means of an organic law, faculties pertaining to a matter of State competence which, by their nature, are susceptible to transfer or to delegation. In each case, the Law will provide the respective transfer of financial means and also the types of control that the State reserves for itself". This transfer or delegation may be requested from the

authorise, call and hold a referendum on Catalonia's political future.[23] In his speech, the prime minister of the Spanish Government stated that neither the formal aspect – the delegation of the competence – nor the substance of the issue – the object of the referendum which is intended to be held – fit within the framework of the Spanish Constitution.[24] This is so with respect to the formal aspect, he stated, because the matter for which the delegation is requested – the authorisation to call popular consultations by way of referendum – is not susceptible to delegation in the terms provided in Article 150.2 of the Spanish Constitution inasmuch as the delegation of one or several of the faculties of the State is not at issue but rather the entire competence of the State. And the substance of the matter does not fit within the framework of the Spanish Constitution, stated the prime minister of Spain, because to admit the delegation of the faculty to authorise a referendum which has the purpose of having the citizens of Catalonia express themselves on the political future of Catalonia, would be equivalent to proclaiming that, by virtue of their sole unilateral decision, it is possible to dissolve what the Spanish Constitution proclaims to be indissoluble, and it is possible to divide what the Constitution declares to be indivisible and, in fact, it would be a request to

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Parliament by an autonomous region – as in the case at hand – because the Constitution likewise so provides in Article 87.2, which reads: "The assemblies of the autonomous regions may request the Spanish Government to adopt a draft of law or to forward a bill to the Bureau of the Congress, and the assemblies of the autonomous regions may delegate before said Chamber a maximum of three members of the Assembly in charge of defending the bill of law". In the case at hand, a bill of law was forwarded to the Bureau of the Congress, where its handling was rejected by an overwhelming majority.

[23] This request was processed in compliance with Resolution 479/X of the Parliament of Catalonia, which resolved to submit to the Bureau of the Spanish Congress of Deputies the Bill of organic law on the delegation, to the Government of Catalonia, of the competence to authorise, call and hold a referendum on the political future of Catalonia; said Bill of Law provides:
"Sole Article. Delegation, to the Government of Catalonia, of the competence to authorise, call and hold a referendum on the political future of Catalonia.
1. Delegation is made, to the Government of Catalonia, of the competence to authorise, call and hold a consultative referendum so that the Catalans may express themselves on the collective political future of Catalonia, under the terms that will be agreed on with the Government of the Spanish State and under the terms provided in Points 2, 3 and 4 below.
2. The referendum shall be called and held before the close of the year 2014, and it may not coincide with electoral periods or with a date of major symbolic-political significance.
3. The call of the referendum shall be made by the Government of Catalonia.
4. The procedure for carrying out the referendum and its guarantees are those which are determined by the laws on referendum processes and electoral processes and, if applicable, by the Decree of the Government of Catalonia that calls the referendum.

[24] The speech of the prime minister of the Spanish Government was based on the technical aspects in the document which was prepared by the Spanish Government's services, called the "Criterion of the Spanish Government with respect to the handling of the Bill of Organic Law on the delegation, to the Government of Catalonia, of the competence to authorise, call and hold a referendum on the political future of Catalonia", issued on 7 March 2014, according to Article 126.4 of the Regulations of the Spanish Congress of Deputies.

delegate a decision that affects the Spanish citizens as a whole and not only a part of the Spanish citizens (and consequently Articles 1.2 and 2 of the Spanish Constitution would be infringed).[25]

Notwithstanding, the formal argument thus used by the Spanish Government may be defined as fallacious on reading the text of the petition in which the request is made for "the competence to authorise, call and hold a consultative referendum so that the Catalans may express themselves on the collective political future of Catalonia". With respect to the Spanish Government's material argument – which is nothing new and is the one that has been unvaryingly repeated from the start of the process – it may certainly be allowed that Article 150.2 SC, on limiting the possibility of transferring or delegating faculties relating to a matter of State competence to those faculties which, by their nature, are susceptible to transfer or to delegation, may be limiting the transfer or delegation of State faculties linked to the State's sovereignty, such as international relations or defence. Nevertheless, this would not prevent the delegation of the faculties to hold a referendum such as the one which it is wished to call in Catalonia. Firstly, this is so because the facts prevail: it cannot be said that a faculty is nondelegable when the selfsame subject has delegated it on previous occasions (for example, to approve the Autonomy Statute of 2006 by means of a referendum called by the Government of Catalonia). Secondly, this is so because the call of such a referendum does not usurp any function from the holder of the sovereignty – the Spanish people – and neither does it break any unity since the referendum called to determine the will of the citizens of Catalonia with respect to Catalonia's continuity within Spain is of consultative nature; it is not necessary to theorise at length on this specific aspect in order to reach the conclusion that, precisely for this reason, no right of unilateral secession can be derived from such a referendum.[26]

Even so, the Spanish Government's imperturbability in maintaining the arguments of unconstitutionality is truly concerning, especially when one considers the fact that between the drafting of the technical document that lends support to the speech of the prime minister of the Spanish Government (7 March 2014, see Note 23) and the day when the speech was given (8 April 2014), the Spanish Constitution Court Judgement of 25 March 2014 (CCJ 42/2014) – which reversed the situation, leaving the

25 "Criterion of the Government...", pp. 3 and 4.

26 In this respect, see BARCELÓ, Mercè; BERNADÍ, Xavier. "L'article 150.2: una via constitucionalment adequada" ("Article 150.2: A Constitutionally Appropriate Channel"). *Ara*, 18 February 2014.

oft-repeated unconstitutionality of the Catalan consultation without any constitutional basis – was made known.

Indeed, the Judgement CCJ 42/2014, as mentioned, resolves the challenge of the Government of the Spanish State against the Resolution of the Parliament of Catalonia 5/X, of 23 January 2013,[27] which approved the "Declaration of Sovereignty and of the Right to Decide of the People of Catalonia", requesting in that challenge the Declaration's complete nullity. Aside from a formal pronouncement of no little importance on the admissibility of the challenge,[28] in the first place it should be noted

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27 The Declaration reads: "In accordance with the majority will expressed democratically by the people of Catalonia, the Parliament of Catalonia resolves to begin the process to make effective the exercise of the right to decide so that the citizens of Catalonia may decide on their collective political future, according to the following principles:

One. *Sovereignty*. The people of Catalonia, for reasons of democratic legitimacy, have the character of sovereign political and legal subject.

Two. *Democratic legitimacy*. The process of exercising the right to decide will be scrupulously democratic and will guarantee especially plurality and respect for all options, by means of a deliberation and dialogue within Catalan society, with the aim that the resulting pronouncement will be the majority expression of the people's will, which shall be the fundamental guarantor of the right to decide.

Three. *Transparency.* All the necessary tools will be provided so that the Catalan civil society and population as a whole will have all the appropriate information for the exercise of the right to decide and so that their participation in the process will be promoted.

Four. *Dialogue*. A dialogue will be established and a negotiation will be carried out with the Spanish State, with the European institutions and with the international community as a whole.

Five. *Social cohesion*. The social and territorial cohesion of the country and the will expressed on multiple occasions by Catalan society to maintain Catalonia as a single people shall be guaranteed.

Six. *Europeanism*. The founding principles of the European Union and particularly the fundamental rights of citizens, democracy, the commitment to the welfare State, solidarity among the various peoples of Europe and the pledge for economic, social and cultural progress will be defended and promoted.

Seven. *Legality*. All the existing legal frameworks will be used to make effective the strengthening of democracy and the exercise of the right to decide.

Eight. *Leading role of the Parliament of Catalonia.* The Parliament, as the institution representing the people of Catalonia, has a leading role in this process and, consequently, the mechanisms and working dynamics that will guarantee this principle shall be agreed on and defined.

Nine. *Participation.* The Parliament of Catalonia and the Government of Catalonia should make the local world and the greatest possible number of political forces, economic and social agents, and cultural and civic entities of Catalonia active participants in this whole process. Likewise, the Parliament of Catalonia and the Government of Catalonia shall define the mechanisms that guarantee this principle.

The Parliament of Catalonia encourages all citizens to be active protagonists of the democratic process of exercising the people of Catalonia's right to decide."

28 Resolution V/X, as a resolution, is an instrument specific to the function of promoting political and government action and, consequently, it is an act of political nature without legal effects that could make it challengeable. The logical consequence of this conception would have been the dismissal of the challenge. Notwithstanding, the judgement considers that, although the Resolution has no binding effects on citizens or on the Government's action, this lack of binding power does not entail a lack of legal effects, which lie precisely in the fact that the first point of the Declaration is susceptible to produce such legal effects because it may be understood that the declaration of sovereignty, inserted into a process of dialogue and negotiation between public authorities to make effective the right to decide, is effectively a recognition of attributions that are inherent to sovereignty. To all this is added the fact that the assertive character of the Resolution demands that some specific actions should be performed, and such performance is susceptible to the parliamentary control established for the resolutions approved by the

that the challenge was not admitted in full but only partly: 1) the Judgement declares unconstitutional and null one of the nine principles of the Declaration (the first one, relating to sovereignty); 2) it declares that the references to the "right to decide of the citizens of Catalonia" contained in various parts of the Declaration are not unconstitutional if they are interpreted as they are by the Court; and 3) it dismisses the rest of the challenge. For its part, this partial admission of the challenge favours that, in what is dismissed, the Spanish Constitutional Court recognises the existence of the right to decide, endows it with content and marks out its scope, a fact that entails a clear setback for the stance of the Spanish Government which, if it had been able to foresee the result, would surely have done nothing to favour it.

In this respect, worthy of note are two substantial pronouncements: one was foreseeable, declaring unconstitutional the proclamation that the people of Catalonia have the character of sovereign political and legal subject because, according to the Constitution, sovereignty resides in the Spanish people as a whole and not in any one of its parts. The immediate consequence of this fact is that Catalonia cannot call a referendum on self-determination[29] unilaterally. This standpoint, in my opinion, is hard

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Catalan Parliament. Even so, the Court's arguments to justify its consideration of the merits of the Resolution are contrived because they derive from a hypothetical will that a parliamentary Resolution of political character should be normative. Moreover, the Court's arguments contravene prior case law relating to the nature of the challenged act (Judgement STC 40/2003, which provides that parliamentary acts in the exercise of the function of political activation or management are "lacking in binding legal effects").

[29] Legal Basis 3: "[…] The sovereign quality of the people of Catalonia is asserted for a subject 'created within the framework of the Spanish Constitution, by powers constituted by virtue of the exercise of the right to autonomy recognised likewise by the Constitution' (Spanish Constitutional Court Judgement STC 103/2008, of 11 September, Legal Basis 4). As is stated in the same Judgement with respect to a hypothesis that bears similarities to the case at hand, this subject, notwithstanding, 'is not the holder of a sovereign authority, which is exclusive to the [Spanish] Nation constituted as the State' (ibidem), since 'the Constitution is based on the unity of the Spanish Nation, which is constituted as a social and democratic State under the rule of law, whose authority flows from the Spanish People in which the national sovereignty resides' [Judgement STC 247/2007, of 12 December, Legal Basis 4a), which cites Judgement STC 4/1981, Legal Basis 3]. In other words, the identification of a subject endowed with the status of sovereign subject would prove contrary to the provisions of Articles 1.2 and 2 SC. [...]. The recognition of the sovereign quality of the people of Catalonia, which sovereign quality is not contemplated in our Constitution for the nationalities and regions which form the Spanish State, is incompatible with Article 2 SC, inasmuch as it entails granting to the partial subject for whom said quality is asserted, the power to break, by its sole will, what the Constitution declares to be its own foundation in the aforementioned constitutional precept: 'the indissoluble unity of the Spanish Nation'. [...] From this it is inferred that, within the framework of the Constitution, an autonomous region cannot call a referendum of self-determination unilaterally to decide on its integration within Spain. This conclusion is in the tenor of the one which was formulated by the Canadian Supreme Court in its pronouncement of 20 August 1998, in which it denied the accommodation of a unilateral project of secession by one of its provinces to either the Canadian Constitution or to the postulates of International Law."

to attack legally because it concords with what is provided, at least literally, in Article 1.2 SC.

The other pronouncement is the truly innovative one: according to the Constitutional Court, a right to decide exists which may contain neither a right of self-determination nor an attribution of sovereignty, but such right does authorise the holding of "a political aspiration which can only be fulfilled by means of a process complying with the constitutional legality with respect to the principles of democratic legitimacy, pluralism and legality, principles expressly proclaimed in the Declaration in close relation to the right to decide". In the foundation of this right there is the idea, with which we have previously dealt, that the Spanish constitutional order does not correspond to a model of militant democracy;[30] consequently, this order has room for "[...] all ideas which it may be wished to advocate" even if "they seek to change the selfsame foundation of the constitutional order". These ideas – such as the consideration of Catalonia's independence, for example – fit within the order "as long as they are not prepared or defended through an activity that infringes the democratic principles, the fundamental rights or the rest of the constitutional mandates, and as long as their effective achievement is accomplished within the framework of the procedures for reform of the Constitution, since abidance shall always and in all cases be made with these procedures.

Consequently, the existence of the right to decide is recognised by the Spanish Constitutional Court. In its delimitation, it does exclude two possible contents: it is neither a right of self-determination nor an attribution of sovereignty, but it does safeguard the performance of activities addressed to "preparing and defending"[31] the political aspiration or objective of changing the established constitutional order, as long as such activities are performed without infringing the democratic principles, the fundamental rights and the rest of the constitutional mandates.

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[30] As is pretended by the Government of the Spanish State in the pleading that forms the basis of the challenge on defining the exercise of the right to decide as a "political action which [...] is characterised by its open defiance of the Constitution" (Legal Basis 1.1. of the pleading).

[31] This affirmation has important legal effects: it does not appear that, from this moment on, the Spanish State can challenge the preparatory acts for the exercise of the right to decide, such as the Catalan Decree 113/2013, of 12 February, on the Creation of the Advisory Council for the National Transition; or that it can criminally prosecute, as has been publicly threatened on occasion, the politicians who defend the call of a consultation (for example, on 20 February 2014 the Spanish Congress of Deputies approved a motion entitled: "[…] on the measures that the Spanish Government intends to take to guarantee the protection of the general interest and the compliance with legality, broken by various acts already carried out in the performance of the secessionist project of Artur Mas", and neither does it appear that the Spanish State can suspend the autonomy of Catalonia on the basis of Article 155 SC, as has been expressly threatened.

Its content generates, moreover, a duty of constitutional loyalty between the autonomous public authority representing the decision of the citizens and the public authority representing the Spanish State as a whole "which, as this Court has pointed out, translates into a 'duty of reciprocal aid', of 'reciprocal support and mutual loyalty', as a 'concretisation, in turn, of the broader duty of loyalty to the Constitution' (Judgement CCJ 247/2007, of 12 December, Legal Basis 4) on the part of the public authorities", whereby, if the legislative assembly of an autonomous region were to formulate the initiation of a process of these characteristics, the Spanish Parliament "shall undertake its consideration";[32] that is to say, it generates a duty of reciprocal dialogue that presides over the whole process.

According to the Spanish Constitutional Court, from this content flows a specific scope or effects of the exercise of the right, in the sense that if the effective achievement of the result as a result of this process should entail that which the right to decide does not comprise – that is to say, self-determination or the attribution of sovereignty – this effective achievement should materialise "within the framework of the procedures for reform of the Constitution, since abidance shall always and in all cases be made with these procedures". Accordingly, it is one thing that the citizens of Catalonia, because they are not sovereign, may not decide on their political future unilaterally, and something quite different that the citizens of Catalonia may indeed be consulted on the matter of whether to continue to form part of the Spanish State and that, having been consulted with a result favourable to independence, this would lead to a constitutional reform for the effective achievement of independence, as has been set out by the Spanish Constitutional Court.

Here we have the construction of a right – that of the right to decide – by the Spanish Constitutional Court, the supreme interpreter of the Constitution, which the prime minister of the Spanish Government omitted in his speech rejecting the bill of law presented by the Parliament of Catalonia, just fourteen days after the approval of the

[32] This paragraph is hard to interpret owing to its grammatical construction. According to one reading, it may mean that the Spanish State shall undertake consideration of the proposal for reform that is made to it by the autonomous region, but rather I believe that the Constitutional Court means that the Spanish State has the obligation to consider the proposal for initiating the process to exercise the right to decide. This interpretation is closer to what the Canadian Supreme Court states in its Decision of 20 August 1998 (Paragraph 3, Legal Basis 1), from which the Spanish Court appears to have excerpted literally these phrases (the Canadian Court speaks of the obligation to consider and respect not only a specific proposal for constitutional reform but also the obligation to consider and respect the proposal in the general sense, that is to say, the process in itself).

Judgement 42/2014: he did not make a single mention of the acts "preparing for" the process, nor a single mention of the lawfulness of the political attitudes contrary to the constitutional order which respect the fundamental rights and the democratic principles, and neither a single mention of the obligation of dialogue.

The words given below of the speech of the prime minister of the Spanish Government summarise quite well the level of the technical quality and the necessary temperance that would have been required by the response to the serious problem posed in Catalonia. In this speech, both the aforementioned conditions were lacking: "This is what I want you to understand, even if you do not share what I say. It is not a matter of political will, or of flexibility, or of finding a meeting point, or of our yielding more or less... It is not something that can be solved between Mr. Mas – even if he had come today – and myself over a cup of coffee. Even if we were to have 500 coffees, we would still lack what we do not possess: the legal authority that the Constitution denies us. This is the reality of the matter, gentlemen, unless the Constitution is changed and to change the Constitution, there are rules that cannot be ignored. [...] This Assembly cannot accept that you should be handed over a non-transferable competence to call a referendum which has as its purpose the liquidation of the constitutional system and the unity of Spain".

It will thus be understood why, in this section devoted to the legal channels through which the right to decide could be exercised, we have begun by discussing the channel formed by the delegation of the competence to authorise a referendum in Catalonia, before dealing with the other two channels. It is obvious that, with the response given by the Spanish Parliament to the Parliament of Catalonia, as summarised in this passage from the speech of the prime minister of the Spanish Government, the possibility of holding a referendum called by the Spanish State in accordance with Organic Law 2/1980 and the possibility of calling a referendum in accordance with the Catalan Law 4/2010 are ruled out, since in both cases the authorisation of the Spanish State would be required. This authorisation will never be granted if it is understood, as indeed it is, that the call of such a referendum is illegal inasmuch as it has as its purpose "the liquidation of the constitutional system and the unity of Spain". For the time being, this circumstance forms an insurmountable barrier.

The aforementioned authorisation, however, would obviate all the real legal problems that each of the three channels could pose under the current regulations. These problems may be quite briefly explained as follows. With respect to the call of a

consultative referendum made in accordance with the Organic Law 2/1980, the main objection that could be raised is that said law does not expressly provide that the consultative referendum may take place within the autonomous regional territorial scope. To such objection it could be replied that the fact that the law does not so provide does not mean that the Constitution forbids it since Article 92 SC, on establishing that "The political decisions of special importance may be submitted to a consultative referendum of all the citizens", does not predetermine that the scope of such consultations shall necessarily be that of the whole territory of the Spanish State,[33] thereby opening the door to the idea that it refers to "all the citizens" who are called on any given occasion.

The call of the consultative referendum regulated by the Catalan Law 4/2010 would pose problems of a different nature. At the present time, this law is under challenge before the Spanish Constitutional Court and, even though it is in full force because the Court lifted the suspension which had been decreed on it on accepting the challenge for consideration,[34] the resolution of this matter has a dark outlook, bearing in mind the Judgement CCJ 31/2010 on the reform of the Autonomy Statute of Catalonia, in which it is stated, contradicting consolidated prior doctrine on the scope of Article 149.1.32 SC, that it is not only incumbent on the Spanish State to authorise referendums but also to establish them and to regulate them. Whatever the case may be, it is quite probable that if it were attempted to call a referendum in this way, two things could happen: in response to a new petition from the Government of the Spanish State, the Spanish Constitutional Court could make the decision to suspend the application of the law again,[35] or the Court could pass a judgement on the basis of the pretensions set out

[33] In this same sense, see AGUIAR DE LUQUE, Luis. "Democracia directa e instituciones de democracia directa en el ordenamiento constitucional español" ("Direct democracy and institutions of direct democracy in the Spanish constitutional system"). In: TRUJILLO, Gumersindo; LÓPEZ GUERRA, Luis; See GONZÁLEZ-TREVIJANO, Pedro. *La experiencia constitucional (1978-2000)* (*The Constitutional Experience. 1798-2000*). Madrid: CEPC, 2000, pp. 86-87.

[34] The admission of a challenge or a question of unconstitutionality does not suspend the effectiveness or the application of the law which is the object of the challenge. An exception to this, however, are the autonomous regional laws, when they are challenged by the Government of the Spanish State, basing itself on the provisions of Articles 161.2 SC and 30 of the Organic Law of the Constitutional Court. The effect of such suspension is the paralysation of the effectiveness of the autonomous regional regulation during a maximum time of five months, and the suspension must be ratified or lifted by the Court before that period elapses. This fact evidences the primacy and protection granted to the general interest represented by the State as opposed to the particular interest defended by the autonomous regions. In the case at hand, the suspension was lifted by the Interlocutory Decision 87/2011.

[35] In accordance with what has been explained up to here on the Spanish State's position with respect to the referendum, there can be little doubt that the Government of the Spanish State would once again request a suspension in response to any act of application of this law.

in the challenge of unconstitutionality. Aside from that, of course, a referendum called by way of the Catalan Law 4/2010 would also require the authorisation of the Spanish State, and it has already been seen what the State's response would be in such case.

From what has been set out up to here, it may be deduced that if it is wished to implement the right to decide by way of a popular consultation, which would be the logical way to do it, the consultation could only be of a non-referendum nature; that is to say, it would have to be the type of consultation which, as previously stated, does not require the authorisation of the Spanish State but which cannot use the electorate, cannot be exteriorised through an electoral procedure based on a census managed by the electoral administration, and cannot be assured with specific jurisdictional guarantees. These are no few requirements which, in any case, the Catalan Parliament is seeking to elude at present through the process of adopting a law on non-referendum consultations for the ambit of Catalonia. Even so, there is no guarantee, once this law were to be approved (possibly in the coming month of September), that the Spanish Government will not lodge a challenge of unconstitutionality, with the consequent suspension of the law.[36]

Now that we have presented the set of possible ways of holding a popular consultation in Catalonia, the resulting panorama is as follows: the only channel that has been tried out up to now – that of requesting the delegation of the competence to call a referendum – has been denied by the Spanish State because it does not accept to hand over "an non-transferable competence to call a referendum which has as its purpose the liquidation of the constitutional system and the unity of Spain", and this is so stated despite the fact that two weeks earlier the Spanish Constitutional Court opened the door to the Government of the Spanish State to agree on a consultation with the Government of Catalonia and to negotiate the consultation's result and introduce it into the Constitution. Considering the response of the Spanish Parliament to the first of the channels for calling a consultation, the other two ways, which could be channelled through respective referendum consultations, would also plausibly remain closed, not due to the technical problems which they pose under the current regulations inasmuch as while such problems exist, they are not insurmountable since all laws are reformable,

[36] It is easy to imagine the reasons for challenging this law: either because it is regulating a covert referendum since, in the specific regulation, the Spanish Government has not found sufficient aspects differentiating it from the figure of a referendum; or else because the law overreaches the Government of Catalonia's competence to regulate popular consultations as provided in Article 122 of the Autonomy Statute of Catalonia (ASC). It will be necessary to resolve both objections in view of the final text, however, if the case were to arise.

but rather because they require the authorisation of the Spanish State and the State's negative response to such a petition, as things now stand, is clearly foreseeable. Consequently, it will be necessary to consider the possibilities of action that may be opened by the future law on non-referendum consultations that is in the process of adoption by the Parliament of Catalonia, despite the fact that, like all laws, it is also subject to challenge by the Government of the Spanish State before the Spanish Constitutional Court, and its applicability can therefore be suspended in this way.

Having reached this point, the question is whether, upon having had recourse in vain to all real possibilities of exercising the right to decide through any type of popular consultation as provided in the Spanish legal system – because the Government of the Spanish State goes about closing such possibilities one by one by means of all sorts of obstacles – there would remain any other way to determine the opinion of the citizens of Catalonia with respect to their political future as a community.

In this respect, from Catalonia the possibility has been proposed of calling elections in which the political parties in favour of the consultation would include in their electoral programmes, in a clearly understandable way, a point in common which would allow it to be recognised that in Catalonia there is a clear majority in favour of independence. No law forbids this and the call should not be subject to any special requirements.[37] Of course, not only would there be the difficulty of all the interested political parties reaching agreement on the common point to be included in their programmes, but also the problem posed by the fact that elections also involve other factors, other points on each party's programme, which can distort the result of the question. This is something that would possibly not happen in a referendum or in a non-referendum consultation, in which the question would be asked directly with no further complications.

In any case, whatever path is followed to come to make known the will of the citizens of Catalonia – and as things stand today, Catalonia's citizens appear to be quite determined to make their will known – the important thing is to determine the effects of the consultation (or of the election or of whatever system were to be established to make known the position of the citizens in a fully reliable way). We will now discuss these effects.

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37 See CORRETJA, Mercè: *Op. cit*.

4. The effects of the right to decide: the obligations of the public authorities and the effects of a pronouncement in favour of secession. Its relation to the specific entitlement to the right to decide

A legal construction of the right to decide, such as that which we seek to present here, should also refer to the effects of the right to decide from two intertwining standpoints. On the one hand, from the standpoint of the passive subject of the right, we should examine the obligations that this right generates in the public authorities before and after a collective pronouncement of the citizens of Catalonia is made on a possible secession from the Spanish State. On the other hand, it will be necessary to determine the effects of such a pronouncement on the constitutional system now in force. Intrinsically tied to the effects of the right to decide, there is a prior matter to be resolved which predetermines these effects to a great extent: it must be determined who is the holder of the right to decide in the terms in which we have defined it.

If we had structured the right to decide as a right of self-determination, understanding the latter to be a right that endows its holder with the ultimate power of making unilateral political decisions, it is obvious that the holder of this right, at least within the Spanish legal system, would be the Spanish people as a whole, since Article 1.2 SC provides that "The national sovereignty resides in the Spanish people, from which flow all the powers of the State". Accordingly, it would not be possible to recognise the entitlement of the citizens of Catalonia to such a right since, as only one part of the Spanish people, they do not hold on their own the sovereignty that resides in the Spanish people as a whole, that is to say, the Spanish people considered as a unit to which the constituent power is attributed. For this reason, the Spanish Constitutional Court stated in the Judgement CCJ 42/2014 that, within the framework of the Spanish Constitution, an autonomous region may not call unilaterally a referendum on self-determination to decide on its integration within Spain (Legal Basis 3), and for this reason it declared the so called *sovereignty principle* of the aforementioned Resolution 5/X to be unconstitutional and null.

However, even if the foregoing argument is true, at least from the legal standpoint, it is also true that the sovereign people do not always act in a uniform and united way in the exercise of their sovereignty. This is the case, for example, when they elect their representatives in autonomous regional elections or in local elections, or when the inhabitants of a municipality make decisions by the system of open council,

because then democratic freedom or the share of sovereignty which they hold is exercised in a disaggregate way. In other words, not all acts of sovereignty – and an act of sovereignty is constituted as much by voting for autonomous regional representatives as by voting in a referendum on constitutional reform – entail the same *demos* corresponding to the ideal unit of attribution of constituent power. Accordingly, the Autonomy Statute of Catalonia may refer to the "people of Catalonia" or to the "citizens of Catalonia", which are other non-sovereign forms of *demos* which are, notwithstanding, capable of being the centre of attribution and representation of their decisions. For this reason the Parliament of Catalonia represents the people of Catalonia, according to the Autonomy Statute of Catalonia (Art. 55 ASC).

This is precisely the case of the entitlement to the right to decide: as a freedom of expression, as a right of political participation, its entitlement is individual, even though it is exercised collectively, while the attribution of "the decision", that is to say, the expression of the majority in the form of a political proposal of change of the constitutional order, corresponds to the people or the citizens of Catalonia as a whole. It may be maintained that the effects of this "decision" cannot be those of a sovereign unilateral decision: they cannot indeed because the part – the people of Catalonia – is not the whole in which sovereignty resides – the Spanish people as a whole. This is one thing, however, while it would be quite another thing to consider that, beyond the Spanish people, other *demos* or centres of political attribution of the jointly-made individual decisions of citizens cannot be recognised.

This ties up with whatever obligations that the right to decide, as a right, generates for the public authorities. At the beginning of this article it was pointed out that the complex nature of the right to decide, in which structural elements of the freedom of expression and of the rights of political participation intertwine, generates three types of obligations for the public authorities, as passive subjects of the right: to refrain from creating obstacles or from carrying out actions that hinder the process of proposing the dissident political idea; to make available to citizens the necessary legal instruments to endow with unity and political significance the sum of wills which wishes to express itself in this respect (for example, by calling a consultative referendum, by not preventing the legal call of a consultative referendum by another Public Administration, or by providing citizens with other instruments of joint political expression); and to take into consideration the majority opinion expressed if such

opinion differs from the constitutionally established territorial order with the aim, as the case may be, of changing such constitutional order.

The argumentation in favour of these obligations – which would be generated by the right and which, as previously explained, would flow from both the subjective aspect of the basic rights it comprises and from the objective aspect of the right to decide – has been strengthened by the Spanish Constitutional Court Judgement CCJ 42/2014, which has placed emphasis, precisely, on the obligations flowing from the configuration of the right to decide as an element shaping the political system, inasmuch as it is a right that guarantees the free public debate in a constitutional democratic State.

Indeed, as may be recalled, this Judgement configures the right to decide as a political aspiration which is susceptible to be defended within the framework of the Constitution and which should be reached by means of a process accommodated to the principles of democratic legitimacy, pluralism and legality, which are proclaimed in the Declaration itself. The Spanish Constitutional Court states that, in this process, there is room for a proposal that seeks to change the established constitutional order, such as the secession from Spain, as long as the activities addressed to "preparing and defending" such a political aspiration are performed without infringing the democratic principles, the fundamental rights or the rest of the constitutional mandates. In this way and under these conditions, a duty of constitutional loyalty would be generated between the autonomous regional public authority representing the decision of the citizens and the public authority representing the State as a whole. Accordingly, if the legislative assembly of an autonomous region were to initiate a process of these characteristics, the Spanish Parliament would have to give consideration to the proposal, that is to say, a duty of reciprocal dialogue would be generated between the parts involved.

This is the key idea of the Judgement; on examining Point 4 of the Declaration, which proclaims the principle of "dialogue" in Legal Basis 4.*b*, the Constitutional Court creates an obligation of dialogue and negotiation for the public authorities, because the Constitution, states the Court, does not and cannot expressly deal with all the problems that can arise within the constitutional order, particularly those derived from the will of one part of the Spanish State to change that part's legal status. Likewise, the resolution of such problems is not incumbent on the Constitutional Court but rather on the territorial authorities, through dialogue and cooperation and even through a broad sense of dialogue "which does not exclude any legitimate system or institution whatsoever that is capable of contributing its initiative to political decisions, nor any procedure

whatsoever that respects the constitutional framework", that is to say, without excluding, obviously enough, legally called popular consultations.

As has been said, this Judgement is highly significant as opposed to the Spanish Government's belligerent attitude with respect to any offer of dialogue or any proposal of calling a consultation. It is as significant as the fact that the Declaration approved by Resolution 5/X contains an express reference to "dialogue" in Point 2, from which are derived legal consequences in the form of faculties and obligations for the public authorities inasmuch as the Spanish Constitutional Court recognises that Resolution 5/X of the Parliament of Catalonia has legal effects (legal effects which are applicable to all the principles it contains, except the one which has been declared unconstitutional and null: the sovereignty principle).

Indeed, the principle of dialogue is recognised in Point 2 of the Declaration, in the internal ambit (within the scope of Catalan society), and in Point 4, in the external ambit: "Dialogue and negotiations will be held with the Spanish State, and also with the European institutions and with the international community as a whole." Just as the rest of the principles, the principle of dialogue has as its purpose the effective achievement of the right to decide (Legal Basis FJ 4*c* of the Judgement), in all the phases and with all the consequences involved.

Consequently, the dialogue that positivises the Declaration should be present at the time of the "preparation" of the exercise of the right to decide, which may take the form of a consultation, as has been explained in the foregoing section and as would be only logical in a system such as ours, in which popular consultations are constitutionally provided and legally regulated. Therefore, in the phase of defending, preparing and calling the consultation, the scope of the dialogue and agreement would be the ways of holding the consultation and the question. Notwithstanding, both the ways of holding the consultation and the question should allow the effective exercise of the right to decide, because the negotiation, as previously mentioned, has the purpose of effectively achieving this right and, accordingly, as stated by the Spanish Constitutional Court, of permitting the "minority to make proposals and to express itself on the proposals of the majority" (Legal Basis 4*a*). On the other hand, the absence of dialogue would not allow the achievement of the right to decide to be prevented, as long as the chosen way of holding the consultation were to lie within the limits specified by the Constitutional Court (as long as it is "not prepared or defended through an activity that infringes the

democratic principles, the fundamental rights or the rest of the constitutional mandates...", Legal Basis 4*c*).

Dialogue should also be present in the phase of concretising the result of the consultation if this result is in its majority favourable to secession, and it would require the conciliation of the various interests and obligations by way of negotiation between what would then be – indeed – two legitimate majorities, within the framework of the procedures of reform of the Constitution.

This brings us to the last matter to be considered, relating to the effects of such a pronouncement as we are dealing with here. It may be easily deduced from all that has been said up to now, and it has moreover been expressly stated, that a majority pronouncement of the citizens of Catalonia in favour of independence would not have the effect of unilaterally generating such independence because a decision of this kind is incumbent on the Spanish people as a whole, according to Article 1.2 SC. This is so, of course, as long as it is wished to achieve this independence within the constitutional framework in force without a prior break, inasmuch as in such case we would not be dealing with the exercise of the right to decide but rather with a different type of legitimacy.

The effective achievement of a majority pronouncement of independence expressed as the exercise of the right to decide, on the other hand, should be materialised "within the framework of the procedures for reform of the Constitution, since abidance shall always and in all cases be made with these procedures". The Spanish Constitutional Court brings up two matters in relation to this process: one, that this reform should be carried out once the proposal has been made, which is obvious, of course, since without a prior proposal (arising from a consultation, for example) a constitutional reform[38] makes no sense; and two, the role of dialogue, which just as has been previously said, generates reciprocal obligations of negotiation for the parts, obligations which may lead to an effective secession by way of constitutional reform.

[38] This is a point that does not appear to have been understood by some authors, who insist that the constitutional reform should take place before the call of a referendum. Some even propose that it is incumbent on the Spanish People as a whole to vote on Catalonia's possible secession. Nothing could be more absurd from the standpoint of legal logic and from that of the right in question. At present, it is not the Spanish people who are demanding that a change of the constitutional order should be considered, but rather a substantial part of the citizens of Catalonia. Even though these citizens appear to form the majority, it may happen that, once a referendum were to be held, it could be found that such a majority does not exist, which would put an end to the proposal and the constitutional reform would not be necessary.

5. The legal existence of the right to decide: an overall reflection

What began as a slogan presiding a huge demonstration in Catalonia in 2010 in favour of the "right to decide", has come to be formulated by the Spanish Constitutional Court as a right that fits into the Spanish Constitution, if such right is understood to be a political aspiration which may aptly be defended within the framework of the Constitution, allowing in such case the citizens of Catalonia to propose their territorial independence, as long as this process is channelled through the procedures of constitutional reform [CCJ 42/2014, Legal Basis 4*c*)].

Accordingly, on the basis of its existence precisely as a right and not as a political slogan, this right should be built from a legal standpoint in order to embrace all its structural elements: its nature, holders, content, ways of being exercised, the obligations it generates for the public authorities, and its effects.

To the extent that constitutional limits exist on this right, since it is not a right of absolute character like the rest and must therefore be inserted within a constitutional framework which establishes that the sovereignty of the national people resides in the Spanish people, this right cannot seek to contain the power for the citizens of Catalonia to express a will of secession with unilateral effects, at least from the constitutional standpoint. As opposed to this, neither may it be pretended that the citizens of Catalonia may not pronounce themselves on this matter. Firstly, this is so because the citizens (or the people) of Catalonia form a political *demos* which, without being the *demos* corresponding to the ideal unit of attribution of constituent power, does indeed have the legally recognised capacity to jointly express proposals, regardless of whether such proposals are to elect the political representatives of this *demos* or to express dissidence with respect to the political future of their territory. Secondly, this is so because, in a democratic State as is the Spanish State, there are no "fundamental meta-rights of the State" which impose themselves on the recognised constitutional rights of citizens. Not even Article 2 of the Spanish Constitution, which proclaims the indissoluble unity of the Spanish nation, is immune to the secession of a part of its territory and much less to the joint defence and exteriorisation of such a will of secession. No militant democracy has been proclaimed in Spain, as has been repeatedly stated by the Spanish Constitutional Court, but rather a plural and pluralist democracy that is not supervised and that consequently does not exclude from legality the subjects or groups which have a

conception of law or of the social organisation that is different from or contradictory to the conception of the Constitution itself, as long as it is not defended through an activity which infringes the democratic principle or the fundamental rights.

The right to decide, configured in part as a right of proposal, is freedom of expression and, by virtue of the content of the selfsame proposal, it is a right of political participation in public affairs, a right that is decisively established if the respective proposal is channelled by way of a popular consultation or through elections. Consequently, it grants its holders the power to express collectively, without obstacles or impediments, the individual position that is attributed to a joint *demos* with respect to the territorial future of Catalonia as a political community, and it moreover grants the power to have the freely expressed majority position taken into consideration by its addressees if such position runs counter to the constitutionally established territorial order.

This "taking into consideration", understood in a legal sense, generates obligations for the public authorities, obligations which are not only compensations in response to the exercise of a basic individual freedom or of a right of participation, but rather which flow from the configuration of the right to decide as a basic element shaping our political system, inasmuch as this right safeguards the possibility of controversy and of change in a democratic State, which is more an activity than a final permanent condition.

All these obligations of the public authorities can probably be summarised by a key concept of the Spanish Constitutional Court Judgement CCJ 42/2014, which the Catalan Parliament's Resolution 5/X regulates in the notions of *dialogue* and *negotiation.* Within the framework of the right to decide, these two notions are founded on three points: firstly, although Catalonia may not invoke a right of self-determination or of unilateral secession in this process (that is to say, I must insist, it may not do so within the Spanish constitutional framework), neither can the Spanish constitutional order remain indifferent to the clear and unequivocal majority expression of the will of a part of Spain not to continue to form part of Spanish territory. Secondly, dialogue and negotiation must be present in all the phases of the process: specifically, in both the phase of preparation for the generation of the proposal, and in the phase of concretising the proposal's result. Thirdly, if a majority result is obtained that is favourable to secession, the negotiation would then be between two legitimate majorities that would

have to conciliate rights and interests within the framework of the procedures for reform of the Spanish Constitution.

Obviously, from these general obligations flows in turn the obligation not to create obstacles or to carry out actions that would hinder the process of formulating the proposal for secession, or hinder the process of providing citizens with the necessary legal instruments to endow with unity and political significance the sum of wills which wish to express themselves in this respect.

Many more issues remain to be considered in the legal construction of the right to decide. We have not dealt with the type of constitutional reform that would have to be followed; that is to say, the short form (Art. 168 SC), which involves a binding referendum of the Spanish citizens as a whole, or the simple form (Art. 167 SC), which only provides such a referendum as a possibility. This issue may be of major importance since a referendum of constitutional reform put to the Spanish people as a whole would become, *de facto*, a sort of right of veto of the secession proposal of the citizens of Catalonia.

We have not made reference either, for example, to the reactive channels that would be open to the holders of the right to decide if this right were to be infringed by the public authorities through noncompliance with their obligations. In short, neither have we considered the matter of the extent to which the majority result of a consultative referendum does not have binding effects with respect to the final decision that is to be made by the public authorities. Indeed, this is an issue that has been brought up by some authors, who hold that a consultative referendum does not stand in contraposition to a non-binding referendum but rather to a ratifying or sanctioning referendum.

However, this is perhaps not the time to consider such fine details because we are still in a phase in which the Spanish Government – and most of the political forces of the Spanish State – are radically denying the existence of the right to decide, understood in the terms set out above. An insurmountable barrier has been built around democratic dialogue, a barrier based on the incessant unwavering repetition of the idea that a consultation of the citizens of Catalonia on their political future is unconstitutional, even though, just as the Spanish Constitutional Court has clearly stated, such an idea lacks legal support.

In conclusion, no constitutional impediment exists in Spain to prevent the citizens of Catalonia from voting on whether they wish to be a new independent State.

The only impediment is of a political nature, reflecting quite possibly the scant solidity of Spain's democratic culture.