English

The consultation on the political future of Catalonia

Report number 1

Barcelona,
25 July 2013

Generalitat de Catalunya
Government of Catalonia

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Contents

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1. Introduction

The present report analyses the de facto situation and the juridical, political and procedural elements involved in organising a referendum or consultation by which the citizens of Catalonia can decide their political future. The document is structured in a series of analytical sections and some final conclusions.

First of all, it studies the support for holding the consultation, on the basis of figures provided by opinion polls and of the electoral support obtained in the last elections to the Parliament of Catalonia by parties for and against convening the consultation. More specifically, and on the basis of the votes obtained by each party, it analyses the regional distribution, presenting a series of maps showing how support for the consultation is distributed over Catalan municipalities. Finally, it combines the information from opinion polls with elections results, through a statistical estimate, so as to find out the scale of support for the right to decide and its regional distribution by municipalities. The study shows widespread support from the Catalan population for holding the consultation (Section 2).

Next, it illustrates the main arguments legitimating the implementation of this type of consultation, those of a historical nature as well as those pertaining to liberal democracies (democratic, representative, civic and participative nature of the consultation; 'liberal' protection of individual and collective rights of citizens; egalitarian and inclusive approach; coherence with the principles of plurinational federalism, advanced cosmopolitan concept of democracy; peaceful and functional nature as a way out of the current political impasse; coherence with Catalan political culture; international visibility of Catalonia). The analysis also includes the perspective of the practices of direct democracy to be seen in comparative politics today (Section 3).

Thirdly, it explains the juridical strategies the Government of Generalitat of Catalonia would

have to use to give effect to a legal consultation via the channels foreseen in internal law. It asks the specific question of how many procedures we would have to try and apply and which ones and in what order it would have to be done. The Government of the Generalitat already has an extensive report drawn up by the Institut d'Estudis Autonòmics (IEA, Institute of Autonomic Studies), which identifies up to five procedures in internal law under which a consultation could be legally convened so that the citizens of Catalonia can express their opinion regarding their collective political future[1]. The Advisory Council for the National Transition adopts the guidelines of this report and to avoid repetition this document will only analyse those issues surrounding the consultation not looked at in the IEA's report (Section 4).

Fourthly, in prevision of Spanish state opposition to holding the consultation via the channels available under internal law, the report analyses whether international and European law establishes a specific legal procedure for convening the consultation or enshrines some right or principle that can be brought before a court of law or that establishes some kind of active juridical situation in favour of the Generalitat or, finally, whether it enshrines some right or principle from which we can conclude that holding the consultation via alternative channels and putting the results into effect, including the constitution of an independent state, does not constitute an international illegality with the consequences arising from this fact (Section 5).

Fifth, the report looks at the various elements that shape popular consultations as well as the criteria that must preside the institutional campaign by the Generalitat and stakeholders with a legitimate part to play in the consultation. More specifically, it analyses the criteria to be applied in formulating the question from the threefold perspective of clarity and neutrality, the

[1] These five channels are regulated referendums convened by the State under Article 92 of the Spanish Constitution; delegation or transfer of powers under article 150.2 of the Spanish Constitution; referendums foreseen under Catalan Law 4/2010; consultations under the proposed Catalan law of popular non-referendum consultations currently going through the Parliament of Catalonia and, finally, the reform of the Constitution. The report of the IEA concludes that there are plenty of solid juridical arguments to defend the legality of these channels, so that a hypothetical rejection on the part of the State of a consultation like the one demanded by a majority in Catalonia could be attributed to strictly political reasons (a lack of political will) rather than legal reasons. See *Tres Informes* by the Institut d'Estudis Autonòmics on the fiscal compact, duplication and popular consultations. Pages 395 to 448. Institut d'Estudis Autonòmics. Barcelona. 2013.

The report can also be consulted on:

http://www20.ggencat.cat/docs/governacio/IEA/documents/assessorament_govern/Informe%20consultes%2011.03.2013.pdf

formulation of one or several questions, and the reference or not to the need to put the results of the consultation into effect through legal channels currently in force. It also studies the criteria that should be taken into account in setting the date for the consultation, and the advantages or otherwise of establishing a minimum quorum for participation or qualified majorities for considering the results of a consultation as valid. Finally, in the case of non-referendum consultations, it considers the political and technical problems involved in establishing an electoral roll, especially in a scenario of non-collaboration by the Spanish state or by certain local bodies, and the problems surrounding the logistics and the material means for holding the vote. Special attention is given to election administration and, more specifically, to the possibility of establishing an Electoral Syndicate of Catalonia, and also to the regulation of institutional and informative campaigns for the consultation (Section 6).

Sixth, it lays out the legal and political consequences that could arise when it comes to implementing the results of the consultation, especially in the case of a result in favour of an independent state, from the point of view both of what actions the Generalitat would have to take and what actions would be down to the Spanish state. The answer to this last question depends on the extent to which the results of the consultation are considered legally and politically binding. Whatever the case, if the Spanish state is opposed to implementing the results or if it had previously opposed the possibility of holding a legal consultation, the Generalitat would have the chance of looking for alternative channels for finding out the wish of the citizens of Catalonia as regards their collective political future and for putting the results into effect (Section 7).

Seventh, the report shows various alternative procedures or scenarios the Generalitat could use for sounding out the feelings of the citizens of Catalonia as regards their collective political future or for expressing their wish to form an independent state. In particular, it considers the possibility of holding ‘extralegal’ consultations under the auspices of the public authorities or by private organisations with the indirect support of the public authorities; the convening of plebiscite elections; a unilateral declaration of independence, which could be used after plebiscite elections or as a stance by the Parliament to be ratified subsequently through consultation; or European or international mediation (Section 8).

Finally, the last section analyses the hypothetical legal instruments the Spanish state might try to use to oppose the steps taken by the Generalitat towards convening a consultation or putting the results into effect (Section 9).

The document ends with the summary and the main conclusions of the report (Section 10).

2. Analysis of support for holding the consultation

2.1. Introduction

This section analyses the actual support there is for convening a referendum or consultation to decide whether Catalonia should become a new state. It analyses those opinion polls published up to May 2013 that have included a question about convening a referendum. It also analyses the electoral support received by parties for and against convening a referendum/consultation in the elections to the Parliament of Catalonia. Regional distribution of support for or opposition to the consultation is visualised through a series of maps of municipalities. Finally, the information culled from opinion polls is combined with the election results, through a statistical estimate.

2.2. Support for the right to decide: what the opinion polls tell us

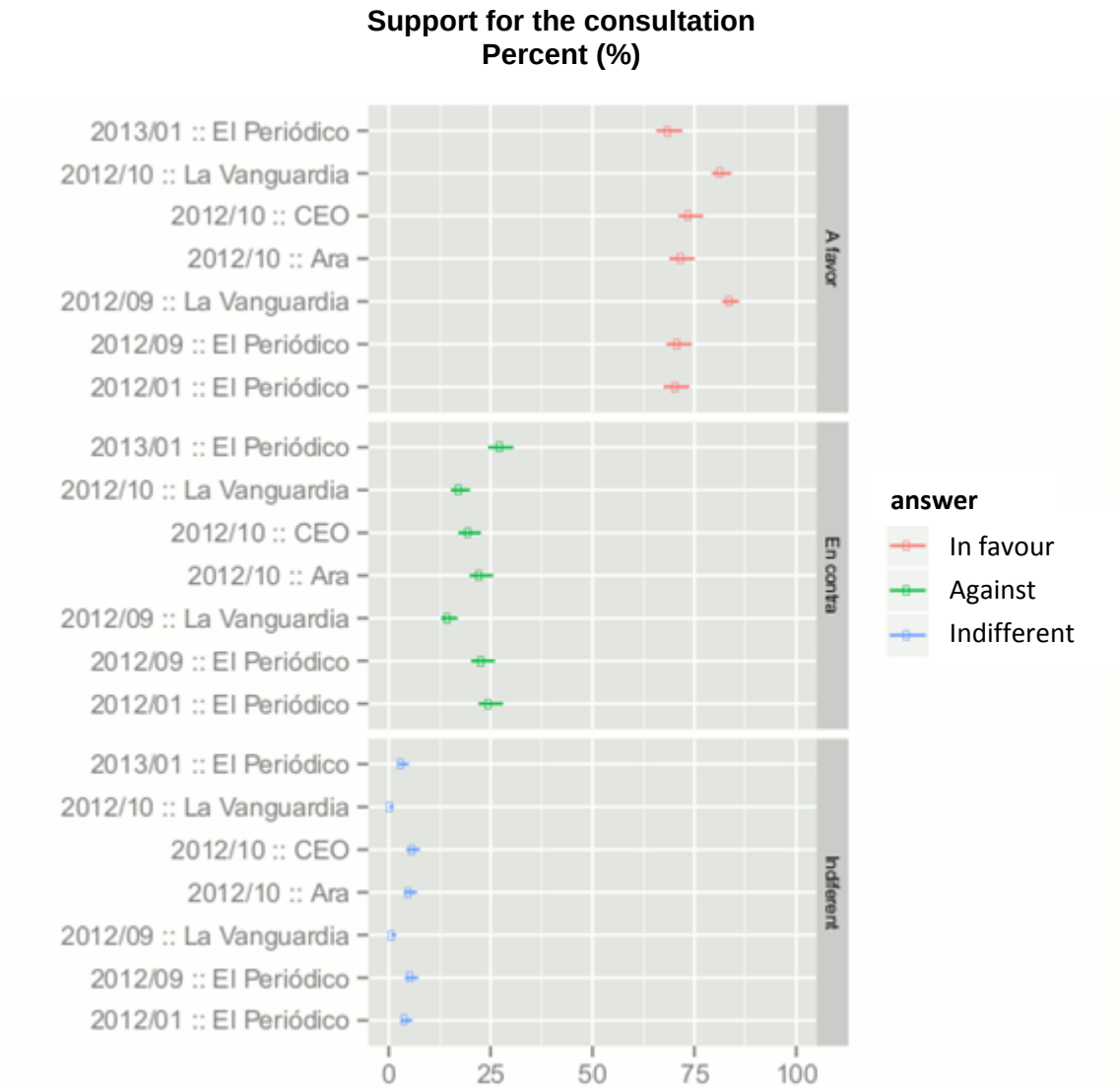
Various political indicators and events show a change in outlook in a large part of Catalan society following the sentence passed by the Spanish Constitutional Court (2010) on the Catalan Statute of Autonomy. This was the context in which a clear demand arose for a referendum/consultation on the political future of Catalonia. Since January 2012, different public and private institutions have carried out various opinion polls that included a question about support for or opposition to a referendum on Catalonia's possible independence. All together, seven polls have been identified. (Annexe I includes details of the different polls: dates of the field work, a sample, the organisation responsible, the medium it was published in and how the question was put).

Diagram 1 shows the results obtained in the different opinion polls. As usual, the polls always

include a certain margin of accuracy. In this respect, the specific estimate (represented by a point) has been included for each of them, with their respective margin of error.

Diagram 1

Support for the consultation on statehood in the different polls published[2]



[2] The percentages given here vary slightly from those published by the different newspapers and institutions. This is because the results have been normalised according to the sample in each poll. The respective confidence intervals have been included.

Analysis of the diagram leads us to the following conclusions:

- In all seven polls a majority support the consultation: approximately three out of four citizens are in favour of holding it.
- If we compare the different polls, the lowest level of support is that recorded by the poll in El Periódico (January 2013) (68.9%) and the highest level of support is in the poll in La Vanguardia (September 2012) (83.9%).
- Nevertheless, the question asked affects the result: when people are simply asked if they agree that Catalonia should be able to convene a referendum (polls in La Vanguardia), the percentage registered was very high.
- In general terms, the percentage of people who are against holding a consultation is between 20 and 28%. The lowest figure was recorded in September 2012 in the opinion poll published in La Vanguardia (14.9%) and the highest was in the one published in El Periódico in January 2013 (27.5%).
- The percentage of Catalans who are indifferent about convening a consultation is about 5%.
- The percentage of citizens in favour of convening a referendum remained fairly constant between January 2012 and January 2013 (first and last polls published). The differences between polls are not, in this sense, statistically significant.

2.3. Support for the right to decide: what the election results tell us

This section analyses the support for holding a referendum/consultation based on the information provided by election results. Here the attention focuses on the votes received by those parties in favour of holding a consultation, as well as on the electoral support for parties opposed to it.

To find out if parties are for or against holding a consultation an analysis has been made of the respective election programmes with which the parties took part in the last elections to

the Parliament of Catalonia (November 2012). In those cases in which the electoral programme made no mention of it, either for or against, they have not been included in the calculations (this happens, in particular, with parties without parliamentary representation).

The resulting classification is as follows:

a) Parties in favour of holding a consultation: CIU, ERC, (PSC) [3], ICV, CUP and others[4] .
b) Parties opposed to holding a consultation: (PSC), PP, C's and others[5].

2.3.1. Electoral cross-section of support for holding the consultation

According to the votes obtained in the last elections to the Parliament of Catalonia:

- The parties in favour of holding the consultation (including the PSC) got a total of 2,682,733 votes, which amount to 73.99% of the total number of votes cast.
- The parties in favour of holding the consultation (excluding the PSC) got a total of 2,159,196 votes, which amount to 59.55% of the total number of votes cast.

Next we follow the same procedure, shown regionally by municipalities, but this time taking the electoral roll into consideration. The percentage support for parties in favour of a consultation is calculated on the basis of the electoral roll for two reasons: first, because it means we can discard the effect of participation, which is not uniform in all Catalan municipalities, and second, because it means we can make comparisons between elections (in this case, with the 2010 elections).

[3] In the case of the PSC, the stance taken in its electoral programme is as follows: 'We undertake to promote the necessary reforms to allow the citizens of Catalonia to exercise their right to decide through a referendum or legally agreed consultation'. All the calculations made in this section take into account two scenarios: the first includes the PSC in the pro-consultation bloc; the second includes the PSC in the anti-consultation bloc.

[4] The category of others in this section, according to the respective electoral programmes, include the following parties without parliamentary representation: SI, Pirates and SiR.

[5] The category of others in this section, according to the respective electoral programmes, include the following parties without parliamentary representation: UPyD and PxC.

- In the percentages of the total electoral roll, and as a consequence of the fact that participation has increased everywhere, the balance between the 2012 and the 2010 elections is always positive.
- Counting votes for the PSC in the bloc in favour of the consultation, in 2010 45.22% of registered voters supported pro-consultation parties. In 2012 the proportion was 51.03%, an increase of 5.81%.
- On the other hand, if we count votes for the PSC as votes against the consultation, in 2010 34.31% of voters voted for pro-consultation parties. In 2012 the proportion was 41.07%, an increase of 6.76%.
- If we include the PSC among those in favour of the right to decide, in 2010 there was a total of 2,364,881 votes in favour of a consultation (75.97% of valid votes). The 2,682,733 votes in 2012 represent an increase of 317,852 votes, but out of the total of valid votes it represents a drop of 1.98%.
- If we include votes for the PSC in the group opposed to the consultation, in 2010 there were 1,794,476 pro-consultation votes (57.65% of valid votes). The 2,159,196 votes in 2012 represent an increase of 364,720 votes and a percentage increase of 1.90%.
- If we map the 2010-2012 electoral variation of the parties in favour of the consultation (including the two scenarios for the PSC), we see how this option has increased throughout the country, with very few exceptions (basically in parts of Vall d'Aran and Terres de l'Ebre) (Maps 1 and 2).

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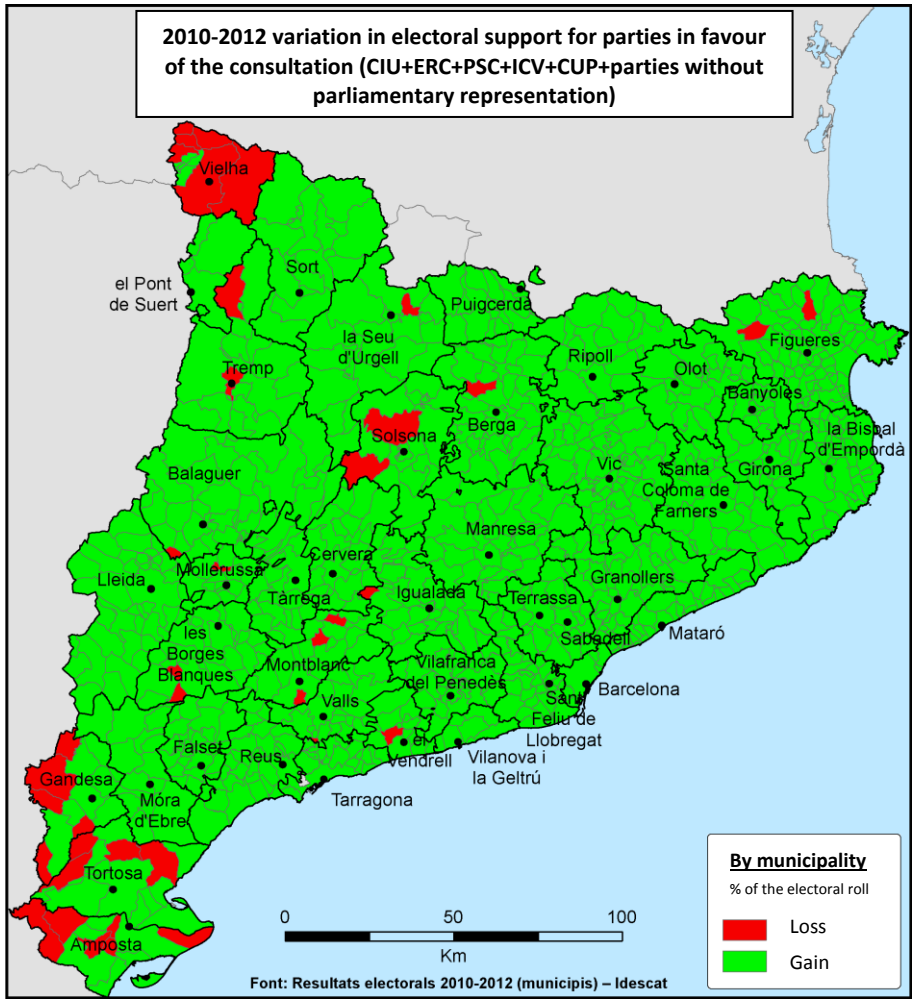
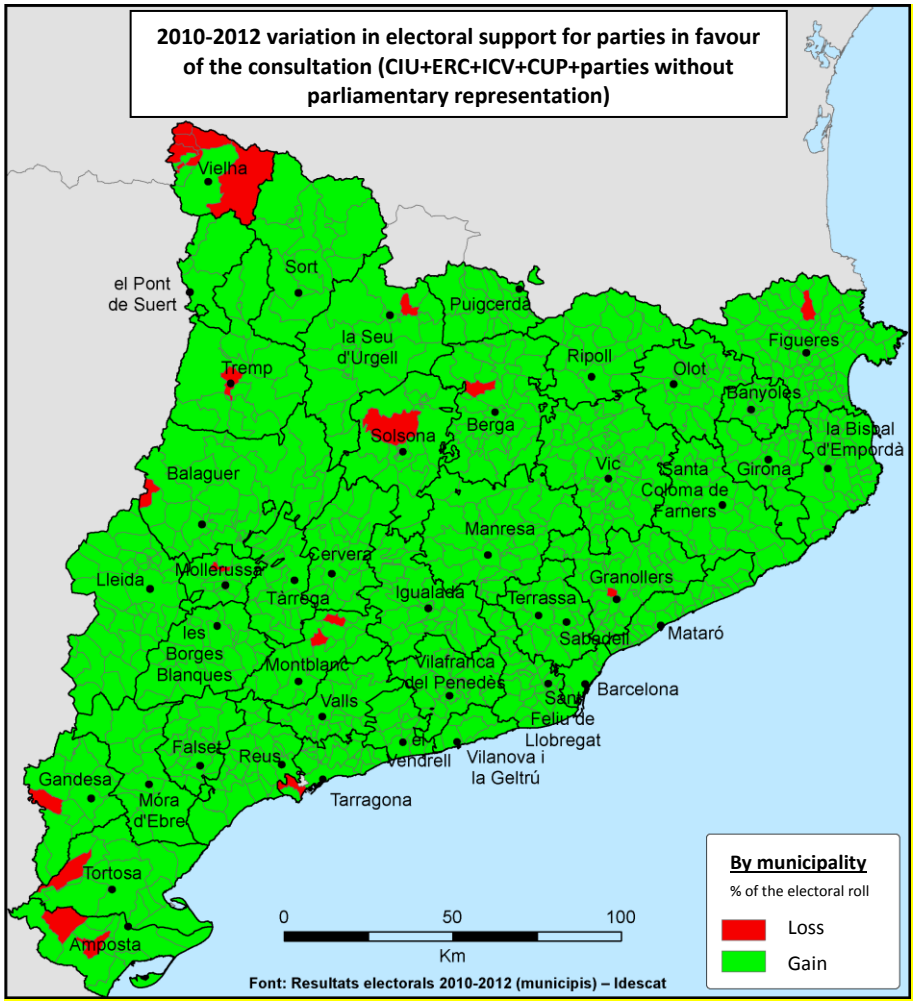
Map 1



Map 2

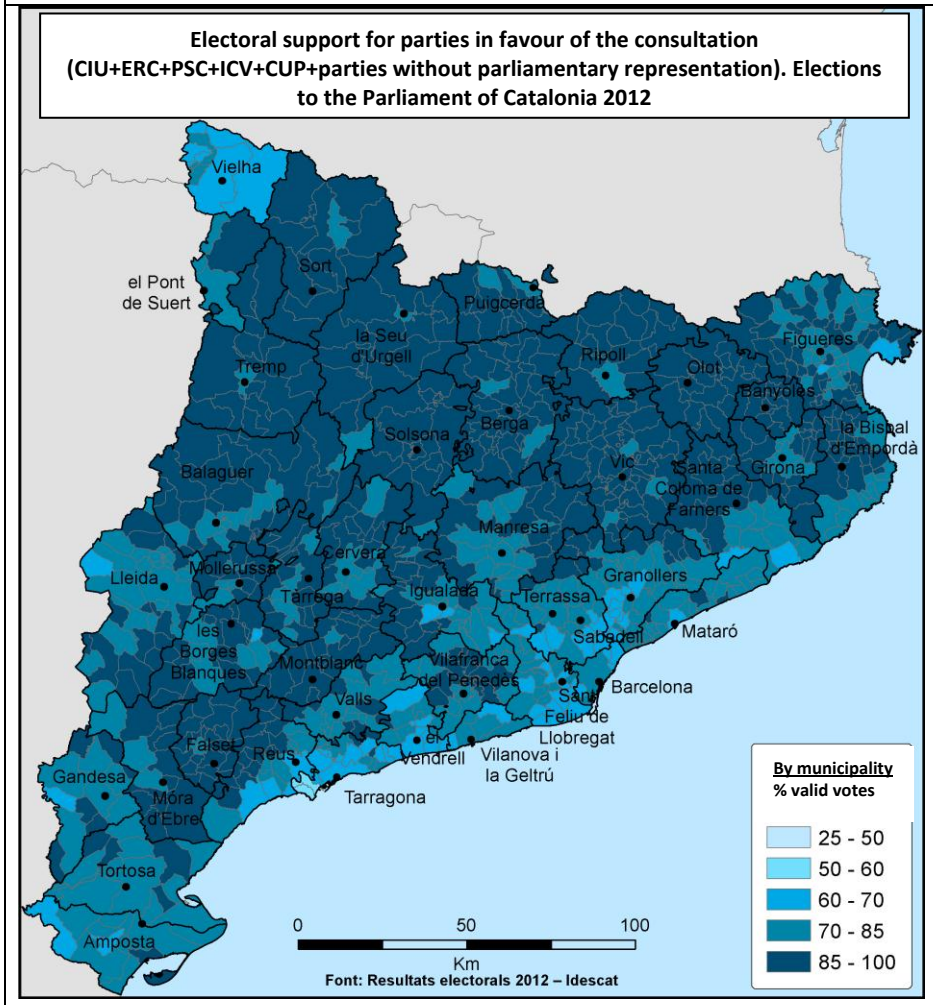


Maps 3 and 4 show the accumulated vote for those parties in favour of holding a consultation. In this case, being an analysis of a single election, the percentage has been calculated on the basis of the total valid vote (in other words, votes for political parties plus blank votes). The calculations do not therefore include invalid votes or votes for political formations not explicitly supporting (or opposing) a referendum[6].

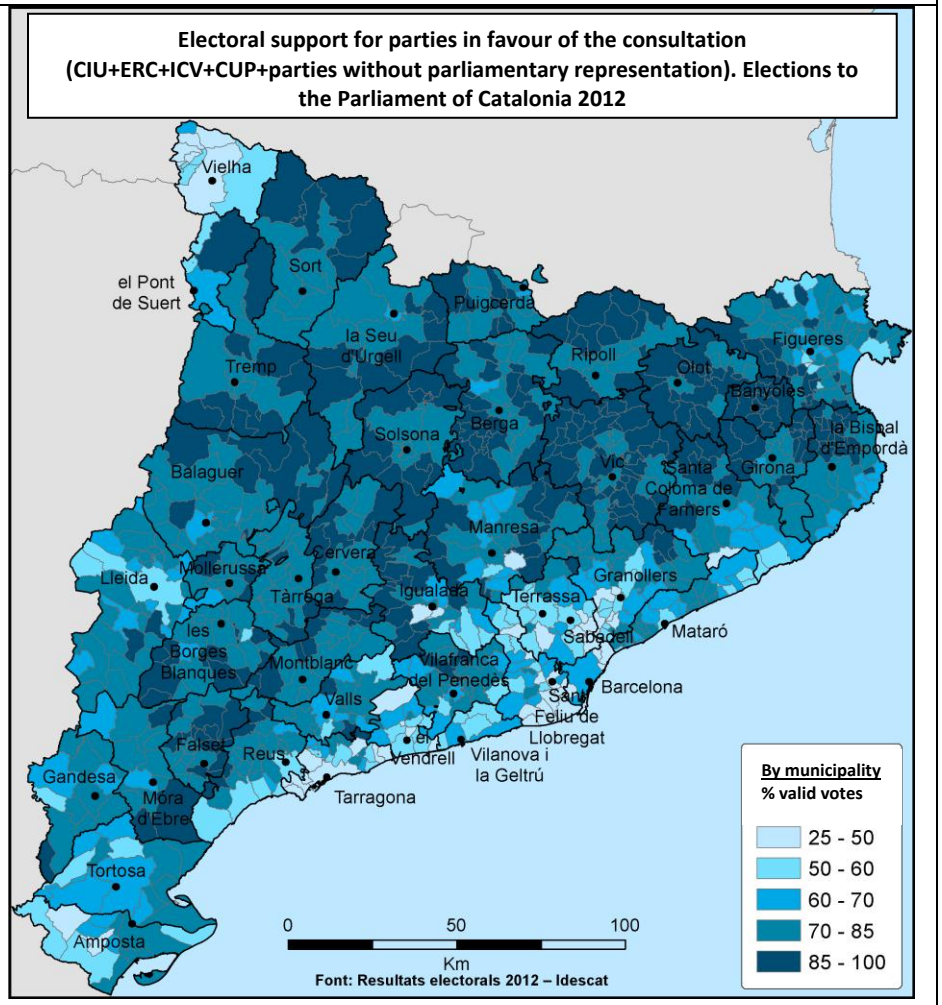
- In the northern half of the country, and in the south-west (inland) corner, the accumulated vote exceeds 70% and, in many cases, 85%. The minimum accumulated vote for parties in favour of the consultation is always more than 55%. (Map 3, including the PSC).
- By way of comparison, Annexe II includes the same maps but based on the election results for 2010. In other words, the votes received in 2010 by parties currently in favour of a consultation (and by those opposed) have been added up and are shown by municipality.

[6] For this reason, if we compare and add together the maximum percentages obtained on the maps in favour and against, the total does not reach 100%.

Map 3


Electoral support for parties in favour of the consultation (CIU+ERC+PSC+ICV+CUP+parties without parliamentary representation). Elections to the Parliament of Catalonia 2012
Vielha
Sort
el Pont de Suert
Puigcerdà
la Seu d'Urgell
Tremp
Ripoll
Olot
Figueres
Banyoles
Solsona
Berga
la Bisbal d'Empordà
Balaguer
Vic
Santa Coloma de Farners
Girona
Manresa
Cervera
Lleida
Mollerussa
Tàrrega
Igualada
Terrassa
Granollers
les Borges Blanques
Sabadell
Mataró
Montblanc
Vilafranca del Penedès
Barcelona
Valls
Sant Feliu de Llobregat
el Vendrell
Vilanova i la Geltrú
Falset
Reus
Gandesa
Móra d'Ebre
Tarragona
Tortosa
Amposta
0
50
100
Km
Font: Resultats electorals 2012 – Idescat
By municipality
% valid votes
25 - 50
50 - 60
60 - 70
70 - 85
85 - 100

Map 4


Electoral support for parties in favour of the consultation (CIU+ERC+ICV+CUP+parties without parliamentary representation). Elections to the Parliament of Catalonia 2012
Vielha
Sort
el Pont de Suert
Puigcerdà
la Seu d'Urgell
Tremp
Ripoll
Olot
Figueres
Banyoles
Solsona
Berga
la Bisbal d'Empordà
Balaguer
Vic
Santa Coloma de Farners
Girona
Manresa
Cervera
Lleida
Mollerussa
Tàrrega
Igualada
Terrassa
Granollers
les Borges Blanques
Sabadell
Mataró
Montblanc
Vilafranca del Penedès
Barcelona
Valls
Sant Feliu de Llobregat
el Vendrell
Vilanova i la Geltrú
Falset
Reus
Gandesa
Móra d'Ebre
Tarragona
Tortosa
Amposta
0
50
100
Km
Font: Resultats electorals 2012 – Idescat
By municipality
% valid votes
25 - 50
50 - 60
60 - 70
70 - 85
85 - 100

2.3.2. Electoral cross-section of opposition to holding the consultation

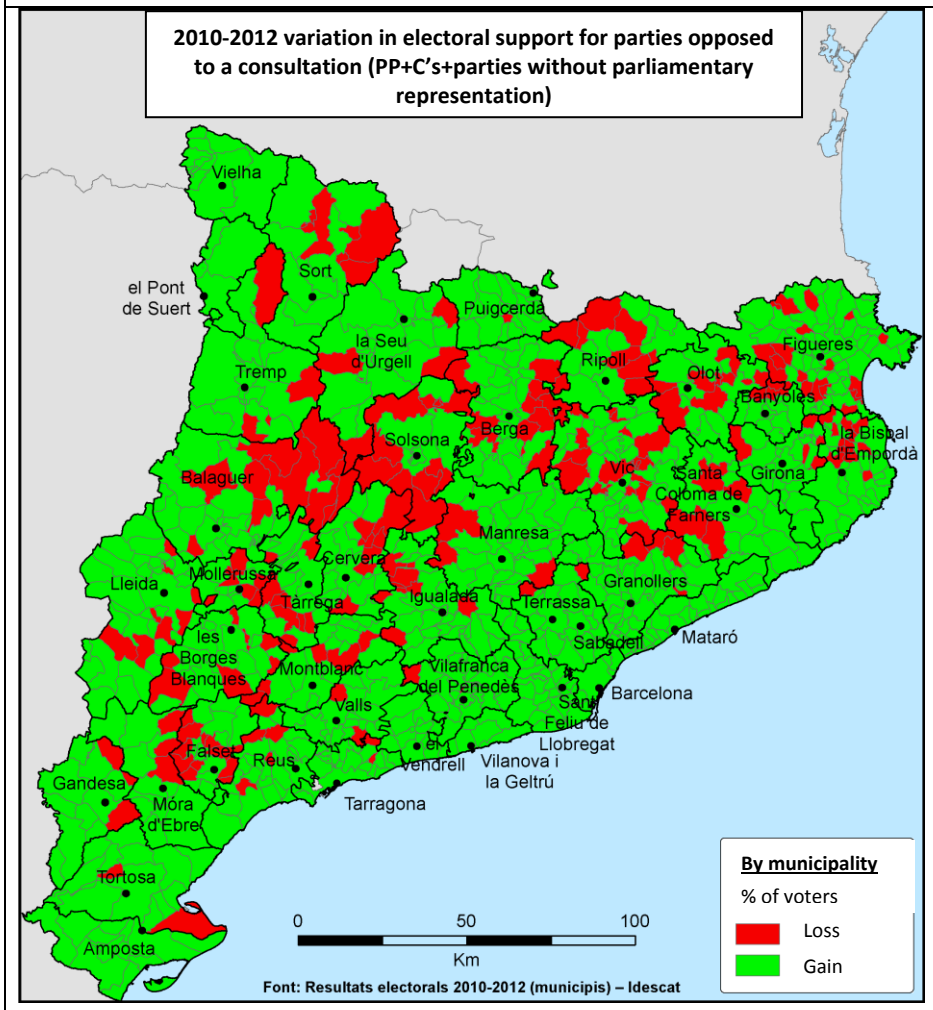
According to the votes obtained at the last elections to the Parliament of Catalonia:

- The parties opposed to holding the consultation (not counting the PSC) totalled 820,027 votes, which represents 22.62% of the total votes cast.
- The parties opposed to holding the consultation (not counting the PSC) totalled 1,343,564 votes, which represents 37.06% of the total votes cast.

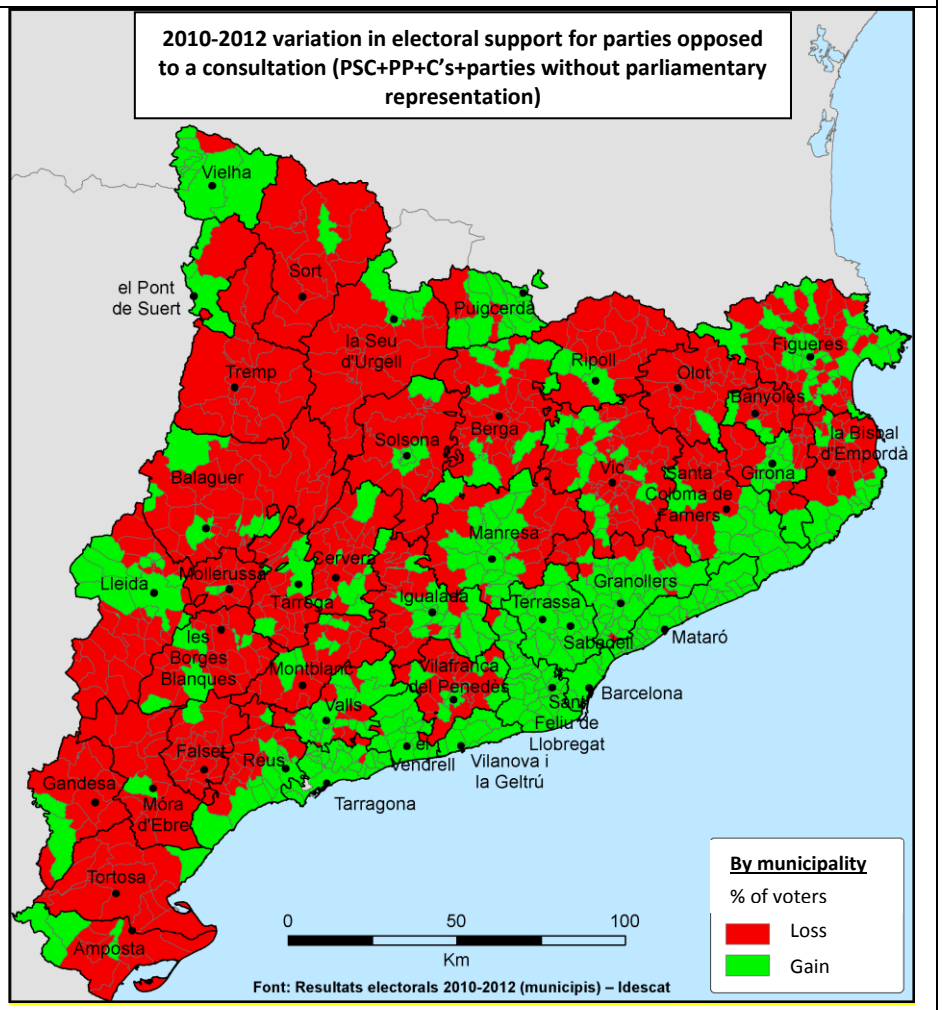
Once again, the same procedure used above is applied. The votes received by the parties opposed to the consultation are taken into consideration and illustrated regionally by municipalities (Maps 5 and 6). The following results are observed:

- The figures show that as a result of the increase in participation, the proportion of the total of registered voters supporting parties in favour of the consultation and parties opposed to it has increased. However, the increase in those in favour of the consultation is higher in percentage points in both of the scenarios considered.
- If we count votes for the PSC as votes in favour of holding a consultation, in 2010 10.91% of registered voters voted for parties opposed to the consultation. In 2012 the proportion was 15.6%, an increase of 4.69%.
- If, on the other hand, we count votes for the PSC as votes against the consultation, 21.82% of the total of registered voters supported this bloc in 2010, while in 2012 the figure was 25.56%, an increase of 3.74%.
- The next map shows how in the great majority of municipalities the proportion of votes for parties opposed to the consultation has increased, with exceptions in Central Catalonia, the interior of Camp de Tarragona and the Lleida plain.

Map 5


2010-2012 variation in electoral support for parties opposed to a consultation (PP+C's+parties without parliamentary representation)
Vielha
el Pont de Suert
Sort
Puigcerdà
la Seu d'Urgell
Tremp
Ripoll
Olot
Figueres
Banyoles
Solsona
Berga
la Bisbal d'Empordà
Balaguer
Vic
Santa Coloma de Farners
Girona
Manresa
Cervera
Mollerussa
Lleida
Tàrrega
Igualada
Terrassa
Granollers
les Borges Blanques
Montblanc
Sabadell
Mataró
Vilafranca del Penedès
Barcelona
Valls
Sant Feliu de Llobregat
el Vendrell
Vilanova i la Geltrú
Falset
Reus
Gandesa
Tarragona
Móra d'Ebre
Tortosa
Amposta
0
50
100
Km
By municipality
% of voters
Loss
Gain
Font: Resultats electorals 2010-2012 (municipis) – Idescat

Map 6


2010-2012 variation in electoral support for parties opposed to a consultation (PSC+PP+C's+parties without parliamentary representation)
Vielha
el Pont de Suert
Sort
Puigcerdà
la Seu d'Urgell
Tremp
Ripoll
Olot
Figueres
Banyoles
Solsona
Berga
la Bisbal d'Empordà
Balaguer
Vic
Santa Coloma de Farners
Girona
Manresa
Cervera
Mollerussa
Lleida
Tàrrega
Igualada
Terrassa
Granollers
les Borges Blanques
Montblanc
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Barcelona
Valls
Sant Feliu de Llobregat
el Vendrell
Vilanova i la Geltrú
Falset
Reus
Gandesa
Tarragona
Móra d'Ebre
Tortosa
Amposta
0
50
100
Km
By municipality
% of voters
Loss
Gain
Font: Resultats electorals 2010-2012 (municipis) – Idescat

Maps 7 and 8 show the accumulated vote for those parties opposed to holding a consultation. Once again, the proportion has been calculated on the basis of the total number of valid votes (in other words, votes for political parties plus blank votes).

- Without counting the PSC, the highest level of support for parties opposed to holding a consultation is around 40% (of valid votes). The municipalities in which combined support swings between 31 and 40% are generally in Barcelonès, Vallès Oriental, Baix Llobregat, Garraf, Tarragonès and Vall d'Aran.
- If we count all the votes for the PSC in the anti-consultation bloc, the highest support received is 63%, but only in certain municipalities in the central coastal area of Catalonia and in Vall d'Aran.
- Annexe II also includes the same maps but based on the results for the 2010 elections.

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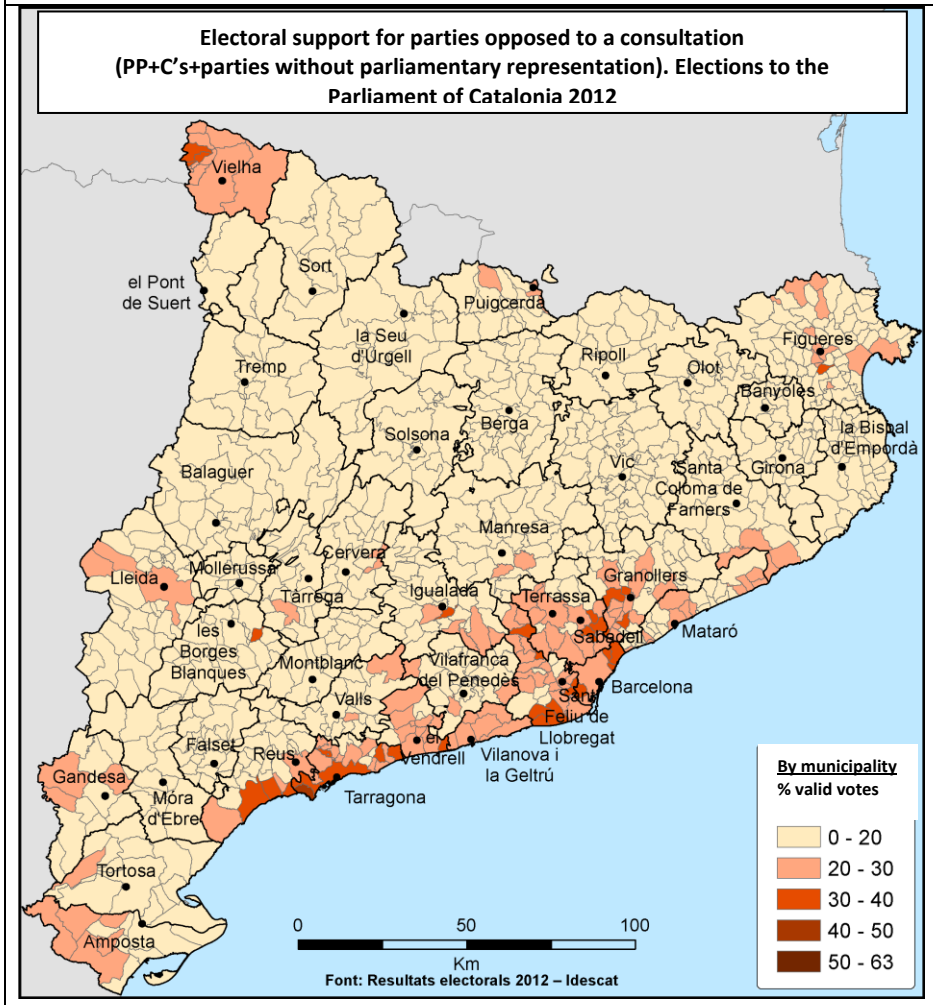
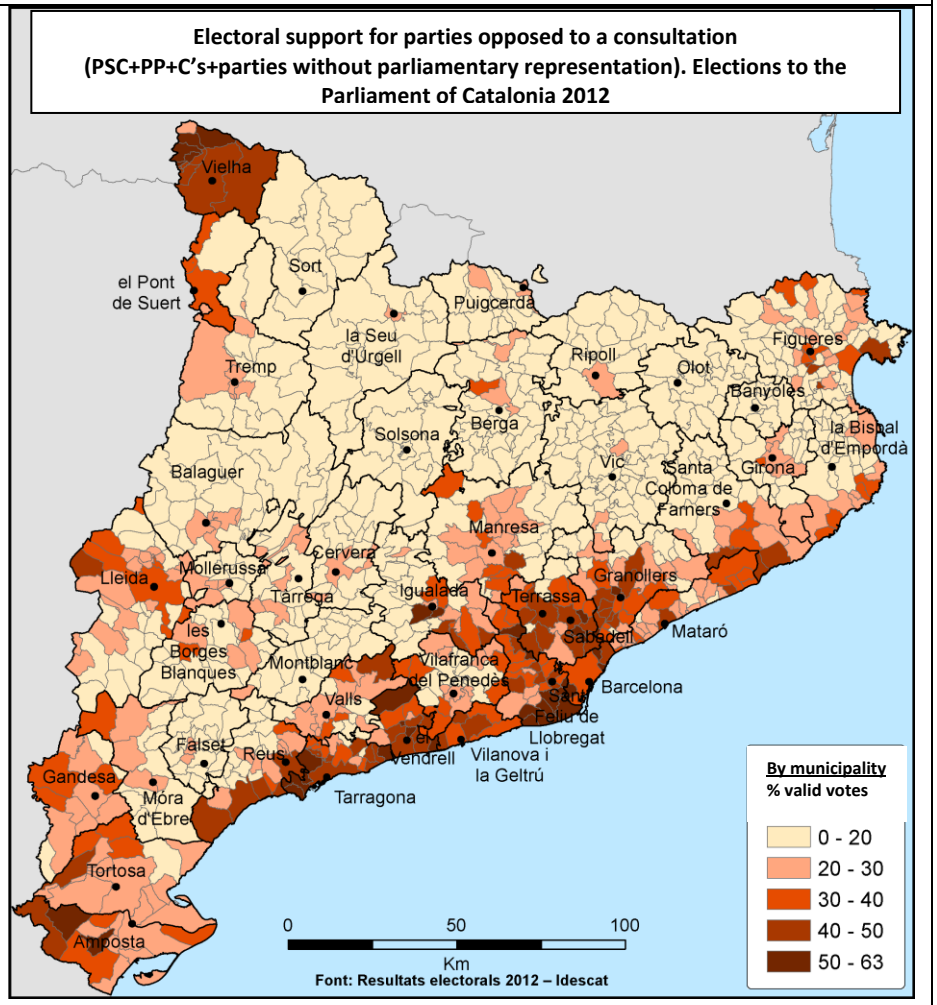
Map 7



Map 8



2.3.3. Electoral cross-section: the difference between those for and against holding the consultation

Maps 9 and 10 show the difference in votes received by those parties in favour of holding a consultation and votes for parties opposed to it. The calculations on these maps are based on the electoral register. Once again the point of reference is the electoral register, so as to take into account the overall number of citizens and not just those who voted in the 2012 elections.

- The difference between votes for parties in favour of the consultation and votes for parties opposed is clearly positive in the two scenarios under consideration.
- In the more restrictive scenario –that is, considering all the votes for the PSC as being opposed to the consultation–, the difference is only negative in some municipalities, concentrated in Vall d'Aran, Terres de l'Ebre, Baix Llobregat and southern Vallès Oriental and Vallès Occidental.
- If the calculations are based on valid votes (maps not included), there is no substantial difference from the previous conclusions. Whether counting valid votes or the electoral register, in most comarques the difference between supporters of and detractors from the consultation is more than 50%.

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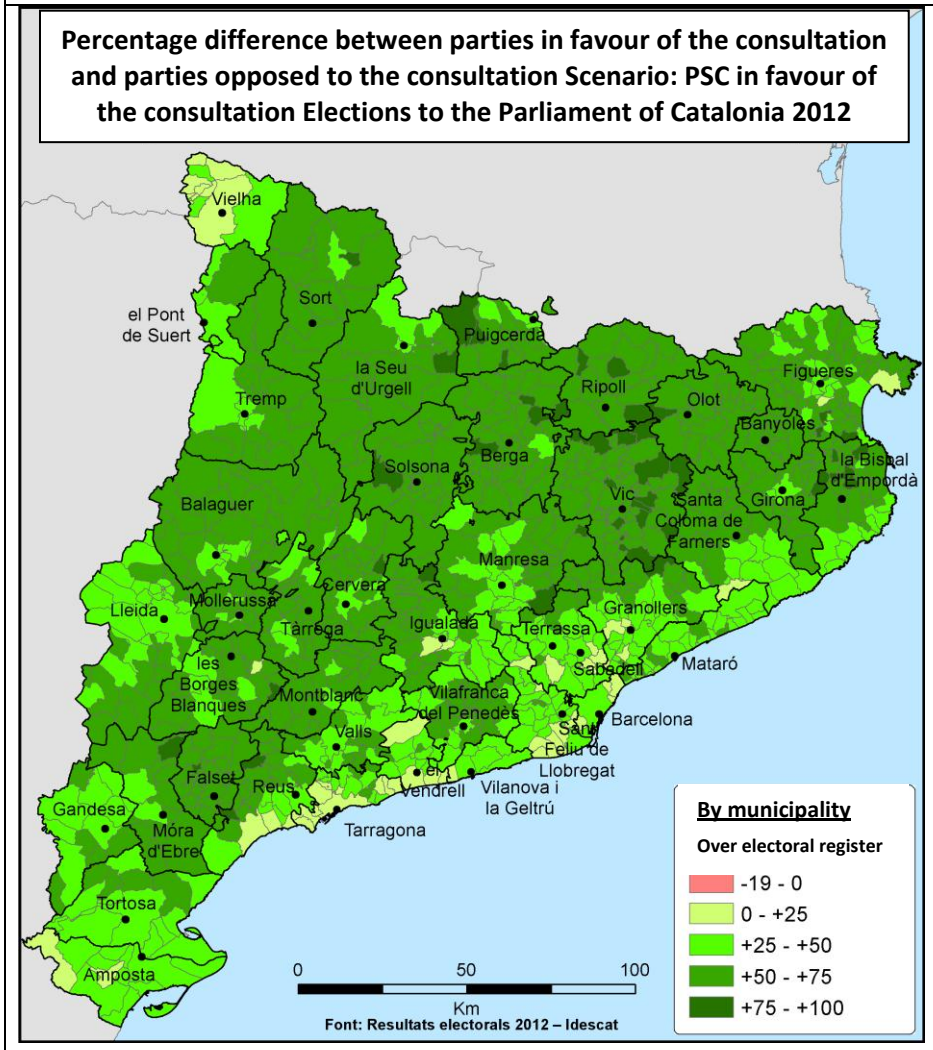
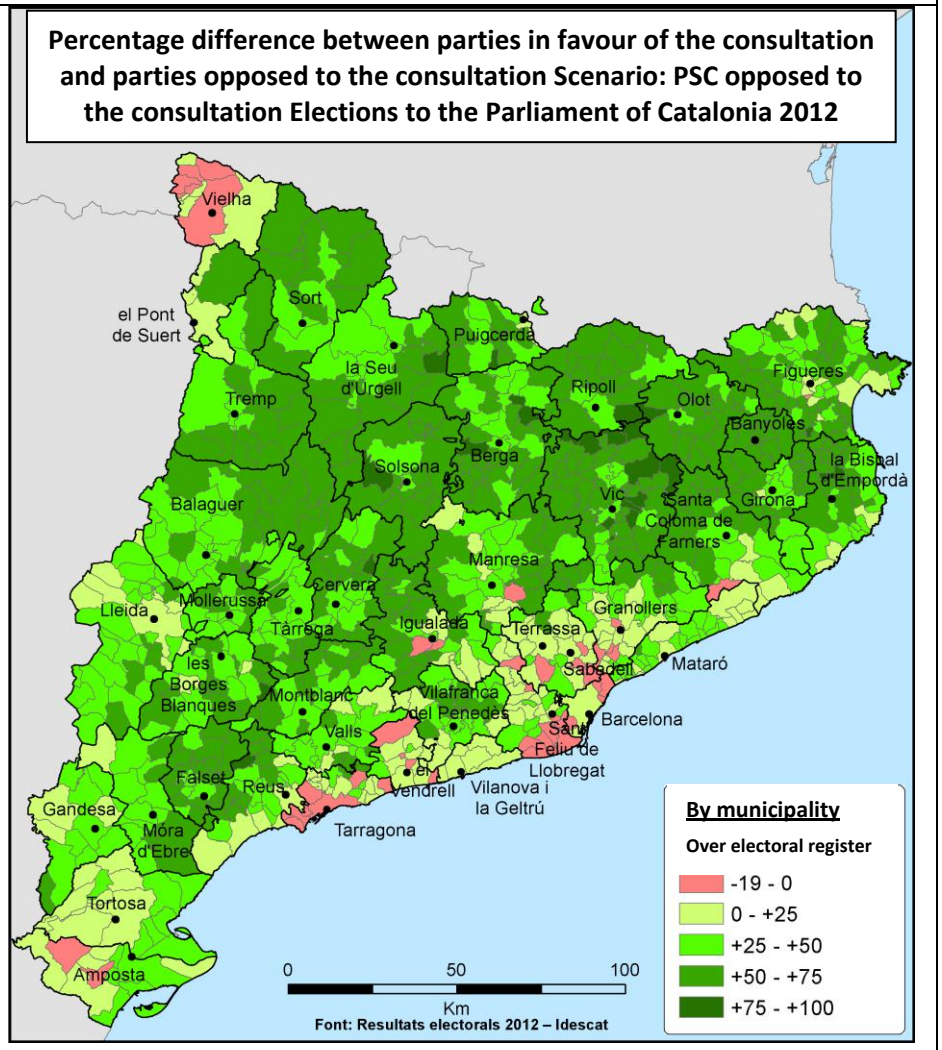
Map 9



Map 10



2.4. Support for the consultation based on a combination of opinion polls and election results

Section 2.2 analysed the support for holding a consultation on the basis of opinion polls. Section 2.3 illustrated regional support for parties in favour of and against holding the consultation on the basis of the votes received at the elections in 2012. Both approaches, though, only show part of the picture. Whereas opinion polls indicate an expressive wish, election results do not tell us whether all the voters of a particular group share the same opinion. For this reason, combining the two sources gives a more accurate picture of the facts.

It's worth pointing out, as detailed at the end of this report (Annexe I), that two models have been applied: a contextual one and an individual one (which means we can define the likelihood that people will be for or against a consultation on the basis of different socio-demographic or political variables). Essentially, the model classifies the percentage of votes at the elections in 2012 for each of the parties as either for or against holding the consultation. To calculate what percentage of the total vote for each party to assign for or against the consultation, we have estimated what probability each person has of choosing one of these options, on the basis of their political behaviour, what municipality they live in and a series of socio-demographic and attitudinal variables.

We have therefore proceeded to 'map' support for the consultation all over Catalonia, alongside opposition and positions of indifference. These three maps can be found in Annexe II.

Next, for each municipality, we proceeded to calculate the relationship between the proportion of votes in favour of the consultation and the proportion of votes against. So if, for example, 65% of people in a municipality are in favour of the consultation and 25% are against it (according to the model applied), the ratio between votes for and votes against is of 2.6[7] . This means that, in this hypothetical municipality, for every person opposed to the

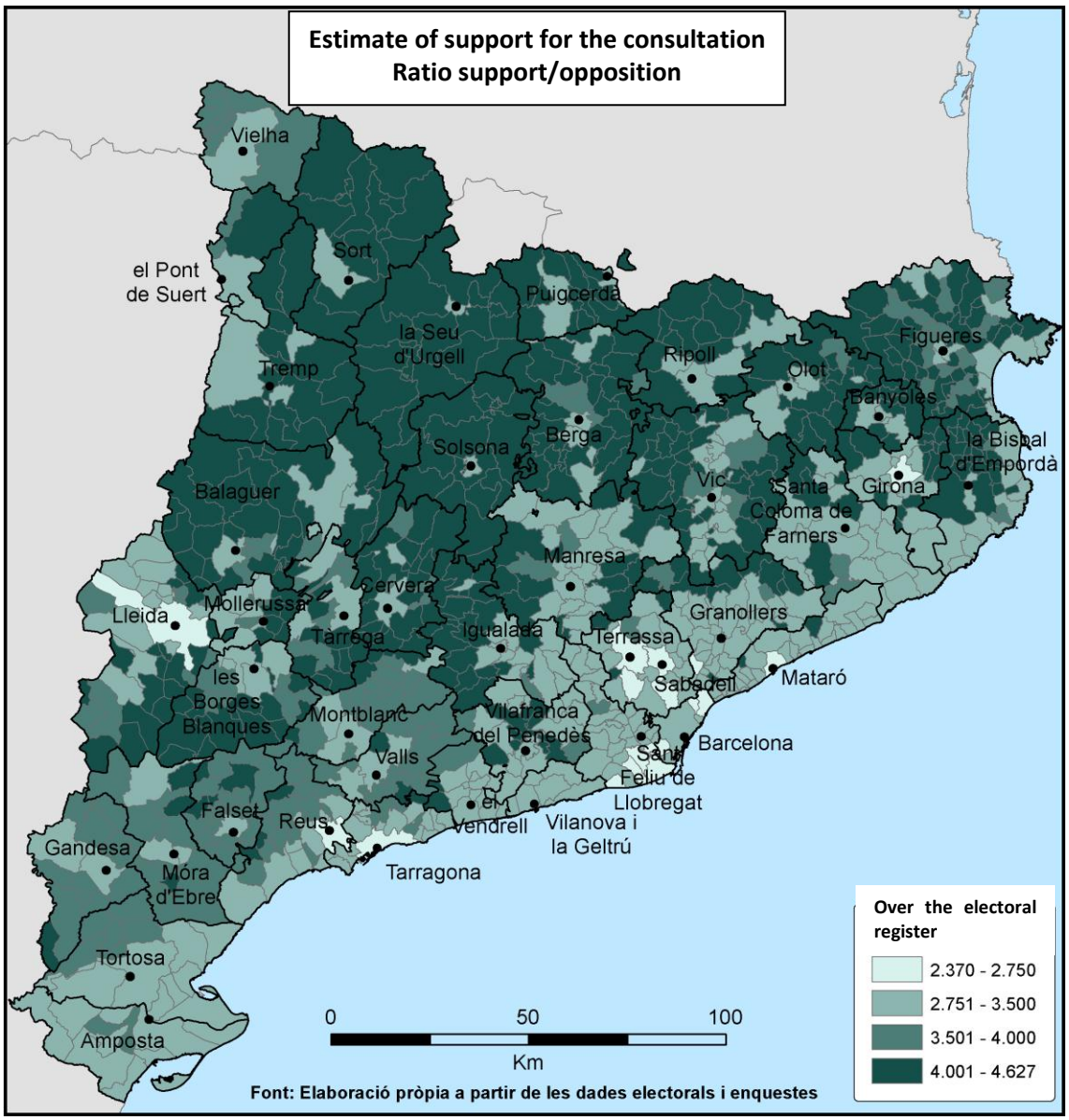
[7] 0.65/0.25=2.6

consultation there are 2.6 in favour.

The following map shows this ratio for the different municipalities in Catalonia.

- In all Catalan municipalities the proportion in favour of holding a consultation is higher than the proportion against.
- In general, the difference is higher in the inland municipalities of Barcelona, Girona and Tarragona provinces and in the municipalities of Lleida province. On the other hand, it is smaller on the Catalan coast, in the city of Lleida (and the surrounding area), in Terres de l'Ebre and in Vall d'Aran.

Map 11: Ratio of support to opposition for holding a consultation by municipalities according to the calculation model (in %)



As we said earlier, we have also carried out a statistical analysis to establish a profile of people in favour of holding a consultation and people against it. The information has been taken from opinion polls published up to now (once again, the reference for the method and the polls can be found in Annexe I).

According to our results, the type of person least in favour of holding a consultation is a female over 60 living in the Barcelona area, with primary education or no schooling, in a

municipality of between 10,000 and one million inhabitants, born outside Catalonia and with parents also born outside Catalonia.

For people matching this profile the chances of supporting the consultation is of 49%, while the probability of being against it is of 44% and of being indifferent is of 7%. In other words, the ratio between support and opposition is 1.1 (1.1 people support the consultation for each person against it), or 10% more.

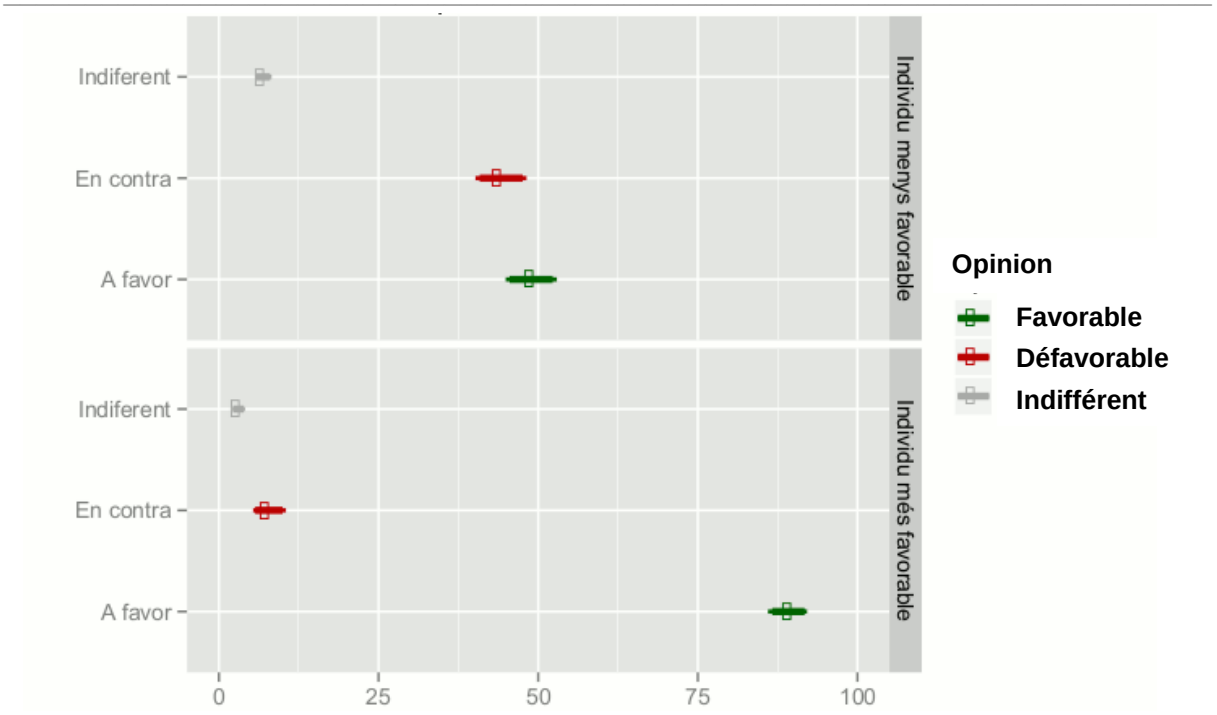
The personal profile most in favour of holding a consultation is a male below 30 living in the Girona area, with a university education, in a municipality of less than 10,000 inhabitants, born in Catalonia and with both parents also born in Catalonia.

For people matching this profile support is estimated at more than 80%, while opposition is estimated at just under 10%.

Diagram 2 illustrates these two scenarios. The upper section shows the probability of voting for and against according to the profile least favourable to the consultation. The lower section shows the probability of voting for and against according to the profile most favourable to the consultation. For each option (for, against and indifferent) a precise estimate and the confidence intervals are included.

Diagram 2

Support for the consultation on statehood among people least in favour of the consultation and those most in favour



According to the statistical model used, the main factor differentiating between those supporting a consultation and those not supporting it is the place of birth. Citizens born in Catalonia are more than 2½ times as likely to support a consultation as they are to oppose it.

The second most important factor is the place of origin of the parents, which multiplies the probability of supporting the consultation over rejecting it by more than 1½ times (compared with people whose father and mother were born outside Catalonia).

The third factor is a regional one related to the size of the municipality: living in a small municipality multiplies the probability of supporting the consultation by 1.5.

The remaining factors play a smaller part and with the present figures it is difficult to distinguish if the relation is strong enough to be considered outside the margin of statistical error. Even so, it's worth pointing out that living in the constituency of Girona and having university studies multiplies the probability by 1.4.

Leaving aside all these factors, the age or sex of citizens make little difference.

2.5. Conclusions

The principal conclusions to be drawn from these analyses are as follows:

- The figures show that a great majority of the citizens of Catalonia are in favour of holding a consultation on independence. According to the data used, about 75% of Catalans are in favour of convening the consultation, 20% are opposed and 5% are indifferent.
- Support for holding a consultation is high or very high in the northern quadrant of Catalonia and is lower in the central coastal zone (where it is still nevertheless a majority).
- The profile most in favour of holding a consultation is a male under 30 in the constituency of Girona, with university studies, living in a municipality of less than 10,000 inhabitants, born in Catalonia and with mother and father also born in Catalonia.
  For this profile, support is estimated at more than 80%, while rejection is estimated at little less than 10%.
- Rejection of a consultation is low all over Catalonia. In practically all municipalities, even the most populated, estimates show that a majority supports holding a referendum.
- Opposition to the consultation is relatively higher on the coast, especially in some municipalities in Barcelonès and Baix Llobregat. It is also relatively high in Tarragonès, in some municipalities in Vallès Oriental and Vallès Occidental, in Terres de l'Ebre and in Vall d'Aran.
- The type of person least in favour of holding a consultation is a female over 60 in the Barcelona constituency, with primary studies or with no schooling, living in a municipality of between 10,000 and one million inhabitants, born outside Catalonia and with parents also born outside Catalonia.

- For people matching this profile the probability of supporting a consultation is of 49%, while the probability of opposing it is of 44% and indifference is around 7%. So even for the profile least in favour of holding the consultation the difference between the two options is in favour of holding the consultation.

3. Arguments that legitimate holding the consultation

3.1. Historical legitimacy

Processes of political legitimation in the liberal democracies are practical phenomena which in part always refer to specific empirical facts. In terms of legitimacy, history matters. Below are some brief historical references that personalise the case of Catalonia as one of the oldest differentiated national groups in Europe.

Catalonia developed its juridical and political structure after its emancipation from the Carolingian Empire by its counts (987). The *Constitucions de Pau i Treva* and the *Usatges de Barcelona* were the founding documents for Catalonia's civil constitution, which was extended and perfected in subsequent centuries. The Court of 1283 (known as the *Cort general per als catalans*, or 'General court for the Catalans'), one of the most firmly established parliaments of medieval Europe, institutionalised the role of an assembly of 'estates of the realm' and the co-legislative role it shared with the king. This Court consolidated the monarchy at the same time as it established a compact with the king, foreshadowing the political concept –later developed by political liberalism- originally founded on the sovereign's respect for law and the country's respect for the sovereign. In addition, a system of relations was established between the different units of the kingdom also based on a territorial compact. The 'Diputació del General' (representing the commoners) was set up in 1359 to collect taxes, eventually becoming the government of the country and the institution that had to ensure respect for the law.

This is how the Catalan nation developed, with common cultural and linguistic features and

ties of solidarity, as well as a state, which became consolidated by Mediterranean growth in the 13th and 14th centuries. In 1422 the first compilation of laws was completed, which gathered the 'Usatges de Barcelona', the Catalan constitutions and the *capítols de cort* in force, and which later gave rise to the official compilation of the *Constitucions i altres drets de Catalunya* (1589).

Following the union between the crowns of Aragon and Castile in 1479, the two territories shared a king, although each had its own juridical and political structure within a compound monarchy. The imperial leanings of the Hispanic monarchy created growing tension with Catalonia as it demanded men and resources for the war without the necessary authorisation from the Catalan institutions, as laid out in the *Constitucions*. The policy of compacts was notably weakened. More than a decade of confrontations and of questioning by the Spanish monarchy of Catalonia's system of juridical and political guarantees led to the outbreak of the 'War of the Reapers' (1640), also known as the 'War of Catalan Separation'. Led by the President of the Generalitat, Pau Claris, Catalonia became, first of all, an independent republic which, later, came under the protection of the King of France (1641). When the war ended with victory for the Castilians, Philip IV respected the Catalan institutional system, though it imposed control over who could accede to the 'Diputació del General' or to Barcelona's 'Council of One Hundred', and extended the monarchy's powers of taxation in Catalonia. Furthermore, in 1659 he signed the so-called Treaty of the Pyrenees with France, which meant that Catalonia lost part of its territory when the Counties of Rosselló and Cerdanya were ceded to the French king. In that conflict, Catalan patriotism identified with the laws of the country and national feeling grew more vigorous.

Early constitutionalism in Catalonia responded to the object of limiting the powers of the king and organising the *res publica,* reaching its peak at the Court of 1701-1702 and 1705-1706. The latter approved measures limiting the power of the king and his ministers as much as possible with the object of preserving fulfilment of the law. Apart from sanctioning the feudal privileges that were a feature of society under the Old Order, the Catalan Court, like the English Parliament after the so-called Glorious Revolution (1689), had managed to limit the power of the monarch in matters of taxation, military affairs and legal guarantees. The Constitutions protected social benefits for the majority in the spheres of taxation, war, justice, the economy and individual safeguards. Shortly before being abolished, the Constitutions showed they were an efficient instrument for answering to the demands of society. In turn,

the institutions had acquired remarkable political power in the context of European parliamentarianism. The system was based on political representation of the 'estates of the realm' and allowed significant representation of the *common man* in the municipalities.

In about 1700, Catalonia was on the brink of making a qualitative leap in its consolidation as a nation. A specialised economy was beginning to take shape, one oriented towards production and trade that laid the foundations for growth in the following centuries, backed by a dynamic society that had access to political representation in its institutions. This arrangement helps to understand its wager in the War of Spanish Succession. The Catalan leaders saw this international conflict as an opportunity to make real progress towards a constitutional model, along with an economic project that was favourable to trade and to its own production. Furthermore, in face of the absolutist French model, the Austrian candidate was a better guarantee for the Catalan institutions. Hence its alignment with the maritime powers (England and the Dutch Republic) in favour of the Archduke Charles III and against Philip V. The War of the Spanish Succession, though, would turn out to be a deathblow for Catalan sovereignty.

With the Treaties of Utrecht (1713), which recognised Philip V as King of Spain, and with the final defeat of Catalonia on 11 September 1714, following England's withdrawal and after months during which the city of Barcelona was besieged by Castilian and French troops that were far superior in numbers and fire-power, the king of the Bourbon dynasty appealed to the 'fair right of conquest' to get rid of the Catalan institutions and set up a 'Junta Superior de Gobierno del Principado de Cataluña' (Higher Governing Body of the Principality of Catalonia), which took over control of the country. It was the end of the Catalan state, as well as of the compound monarchy. The destruction of Catalonia's constitutional rights were put into effect by the 'Decreto de Nueva Planta' (Decree of New Beginning, 1716), which totally wiped out Catalonia's juridical and political structure. A hierarchic, homogenising and militarised New Beginning took the place of the policy of compacts and the system of political representation in force until then. Castilian became the sole language of the administration.

With the Decreto de Nueva Planta, Philip V betrayed Article XIII of the Treaty of Utrecht, which recognised the rights of Catalans. This article reads as follows:

‘Whereas the Queen of Great Britain has continually pressed and insisted with the greatest earnestness, that all the inhabitants of the principality of Catalonia, of whatever state or condition they may be, should not only obtain a full and perpetual oblivion of all that was done in the late war, and enjoy the entire possession of all their estates and honours, but should also have their ancient privileges preserved safe and untouched; the Catholic King, in compliance with the said Queen of Great Britain, hereby grants and confirms to all the inhabitants of Catalonia whatsoever, not only the amnesty desired, together with the full possession of all their estates and honors, but also gives and grants to them all the privileges which the inhabitants of both Castiles, who of all the Spaniards are the most dear to the Catholic King, have and enjoy, or may hereafter have and enjoy.’

The Bourbon victory also brought with it harsh repression, culminating in the construction of the Ciutadella fortress, which involved demolishing a sixth of the city (the neighbourhood of La Ribera). With this defeat, Catalonia suffered its first great political exile.

The Constitution of Cádiz (1812) brought a certain degree of freedom but confirmed a unitary Spain, not at all given to the political accommodation of its inner pluralism. During the 19th century, periods of freedom were brief and recognition of Catalonia’s national identity non-existent. Following the death of Ferdinand VII, who repressed liberal sectors and the disturbances that broke out in Catalonia, Catalan demands in favour of differentiated treatment in the political, economic and juridical spheres multiplied. These demands, which were often stifled by military means with systematic bombing of Barcelona (1841, 1843 and 1870), crystallised in various political protest movements, first through the revolutionary juntas of the 1830s and 1840s and in Carlism, then through moderate provincialism or republican federalism and, finally, with the Catalan home-rule movement of the late 19th century. The consolidation of industrialisation, with an active civil society, at the same time as it was conflictive, stressed the different nature of the Catalans in Spain as a whole and reinforced a collective conscience that was differentiated from the other societies around it.

Particularly worth noting was the struggle of Catalan industrialists and traders to reduce the state’s fiscal pressure, especially after Spain’s loss of Cuba. The protest spotlighted the ‘tax on the utilities of capital and of work’ and the one on the *cédula personal*, applied at a higher rate in Barcelona than in Madrid. In 1899 a delegation of businessmen suggested to the Spanish Government the possibility of an economic agreement. Following the negative response, the Catalan ‘Lliga de Defensa Industrial i Comercial’ (Industrial and Commercial

Defence League) planned the movement known as the 'Tancament de Caixes', or closure of establishments to avoid paying taxes. The Spanish Government likened the closure to an act of sedition and declared war, imprisoning the traders and closing hundreds of shops.

The move in favour of self-government reached its first landmark in 1914 with the creation of the 'Mancomunitat de Catalunya', led by Prat de la Riba, two centuries after the loss of statehood. But Primo de Rivera's dictatorship in the 1920s brought an end to this incipient form of government, which made important achievements despite the political modesty of its institutions and its small budget. The proclamation of the Republic (1931) opened the way to re-establishing the Generalitat (President: Francesc Macià, of Esquerra Republicana de Catalunya, ERC) and the approval of a Statute of Autonomy (1932) allowing a certain level of home rule. On 6 October 1934, Lluís Companys (ERC), the new President of the Generalitat, proclaimed the Catalan Republic in the framework of the Federation of Iberian Republics. The reaction of the central government led to repression and the imprisonment of the whole of the Government of the Generalitat, the members of the Catalan Parliament and Barcelona City Council. Companys, Mayor Pi i Sunyer and President of the Parliament Joan Casanovas were imprisoned along with the rest of the deputies, officials and councillors. All together, about 4,000 people were put in gaol. The Statute of Autonomy was suspended and a number of publications were banned. More than 100 town halls governed by ERC were also dissolved. Many of those arrested were to remain in gaol until the Popular Front victory in the 1936 elections.

After the Spanish Civil War (1939), a new dictatorship, this time under General Franco, put an end to autonomy and to democratic freedom and exercised systematic repression of Catalan culture. However, the vitality of the civil society and the spirit of resistance of some cultural elites ensured the survival of the national collective identity.

The democratic struggle during the Franco regime for political freedom and national recognition for Catalonia culminated in the formation of the Assemblea de Catalunya (Catalan Assembly, 1973), which brought together political forces -right and left-, trade unions and a variety of social movements, achieving widespread popular mobilisation, including that of immigrants from other parts of Spain who had arrived mainly in the 1960s and 1970s, around four main points: democratic freedom, amnesty, statute of autonomy and recognition of the right to self-determination.

With the recovery of democracy following the death of the dictator (1975), the Constitution of 1978 opened the way to the so-called 'State of autonomies', including the concept of 'nationalities' in its articles. The 1979 Statute of Autonomy of Catalonia meant a return to the political institutions of the Generalitat, co-official status for the Catalan language, a level of home-rule and the longest period of political autonomy since 1714. Nevertheless, given the practical political and economic shortcomings that characterised the implementation of the Constitution over the next three decades, a process began to reform the Statute, finally approved in referendum by the citizens in 2006. However, the 2010 sentence by the Constitutional Court on this second statute in practice marked a break with the spirit of consensus which had been the foundation for the Constitution of 1978. That consensus, though, had been reached in a political context that was unstable in democratic terms and its juridical offspring, the Constitution (1978), paid the price of very ambiguous wording in regional matters, which could be developed politically in very different and even contradictory ways. Recognition of Spanish society's plurinational nature was not dealt with in legal terms, and the development of self-rule in Catalonia and Euskadi, the real reasons for setting up the 'State of Autonomies', were regulated in a way that was technically efficient and politically consistent with the actual reality of Spain's national pluralism. In practice, the ambiguities in the constitution have subsequently leaned towards centralist interpretations using different procedures (base laws, uniform interpretation of rights, market unifications, etc.). Finally, the sentence by the Spanish Constitutional Court on the Statute of Catalonia (2010) amounted to a real regression towards centralism and Spanish nationalism in the sphere of political, cultural and economic self-government and in the recognition of a differentiated national character in Catalonia. The 2010 sentence by the Constitutional Court marks a before and after in the rules of the political game of relations between Catalonia and the Spanish State. The massive demonstrations in Barcelona in July 2010 –against the sentence by the Constitutional Court on the Statute of Autonomy– and on 11 September 2012– in demand of an independent state for Catalonia–, and the stand taken by a majority in the Parliament of Catalonia in the form of declarations of sovereignty (2013) brought Catalanism before a new political and democratic paradigm in favour of its political emancipation.

To sum up, over the ages Catalonia has shown a clear and uninterrupted historical legitimacy as a differentiated national society, which has materialised in a repeated wish to have political structures allowing its recognition and its international showcasing on the basis of its own collective personality. For centuries, Catalonia developed what can be considered a

state framework of its own, first within the Catalano-Aragonese confederal monarchy and subsequently under the personal union of the Hispanic Monarchy. Its Constitutions, Government and laws were seized from it by force of arms at the beginning of the 18th century in the context of an international war for Succession to the Spanish Throne. Catalonia, without any manner of consensus, became part of the Spanish state. Nevertheless, Catalonia has managed to preserve its national and cultural collective personality over the last three centuries. During this time, all attempts to reach an agreement with the Spanish State in fair and stable terms of national recognition and political accommodation have failed, as have the attempts to obtain real political power and sufficient financing in keeping with the wealth the country generates. As its Parliament has repeatedly expressed over the last few decades, Catalonia has built up one of the oldest-established national collective personalities in Europe, which, through the exercise of the right to self-determination, legitimates the consultation on the constitution of an independent state which will situate and highlight the country in the concert of the world's states if its citizens so decide.

3.2. Legitimating arguments in the liberal democracies

The following arguments are based on political analyses concerning the various aspects of the political legitimacy of the consultations that take place in liberal democracies[8]. These aspects have been selected, combined and prioritised in various ways by today's different political trends and theories in their legitimation of contemporary democracies. This section is not, therefore, a 'field guide' to practical politics, but a collection of the main argumental frameworks in which to place the specific messages addressed to the different audiences for holding a consultation in Catalonia on the constitution of an independent state.

[8] The legitimating values and perspectives of liberal democracies can be summed up on the basis of nine 'legitimating bases' that include specific values and aims, chosen as political priorities, and which different political trends and theories set out to articulate in part. These are the liberal, democratic, socio-economic, national, cultural, federal or territorial, functional, post-materialist and security bases. No contemporary political trends or theories, not even the most complex and sophisticated, combine more than four of these legitimating bases. This point is made in F. Requejo, Multinational Federalism and Value Pluralism, Routledge, London-New York 2005, ch. 1.

3.2.1. The consultation conforms to democratic, representative, civic and participative principles

State borders have not usually been established by democratic or consensus processes, but through acts such as violent territorial annexations, wars, etc., far removed from liberal-democratic values and practices. Although 'democracy' is not an absolute principle or value in today's liberal democracies, but coexists alongside other values –such as constitutionalism or recognition of the protection of minorities–, especially in plurinational contexts the question is to establish what regulation of rights, procedures and institutions allows recognition and fair and stable political accommodation of the state's inner national pluralism.[9]

The consultation is a democratic response to a demand repeatedly voiced by a growing a sector of Catalan society and its political representatives, a demand which has eventually become a majority standpoint: the ability to express oneself democratically on the country's political future. In this respect, we must not forget that the great mobilisations for 'the right to decide' go back to the demonstration of 18 February 2006 (in what must be stressed was a context of economic growth and increased social expenditure) convened by the 'Plataforma pel Dret de Decidir' (PDD, Platform for the Right to Decide), when hundreds of thousands of people took part; a subsequent second demonstration, in which even more people took part, also convened by the PDD in defence of the right to decide on infrastructures and supported

[9] A currently well established type of analysis divides theories about legitimate secessions into two main groups. Remedial Right Theories tie the legitimacy of independence (secession) to the existence of a 'just cause'. In other words, these theories understand secession as a legitimate remedy before specific 'injustices'. Secession is not seen here as a 'right' of certain collectives, but as a legitimate remedy when faced with situations such as military conquest, territorial annexation by force, violation of basic rights on the part of the state, genocide, permanent negative discrimination in terms of redistribution or socio-economic development, non-fulfilment of collective rights or agreements on the part of the state, etc. On the other hand, Primary Right Theories understand independence as a primeval right of collectives who satisfy certain characteristics or conditions, regardless of their treatment by the state they form part of. This is an inalienable right in an advanced liberal democracy. These theories are normally subdivided into ascriptive theories (basically of a national type) and associative theories (plebiscite or 'democratic' theories) based on the individual right of association, in theory without reference to national components. Thus the classic 'right to self-determination' belongs to theories of a national ascriptive type, whereas the 'right to decide' combines elements from these and from plebiscite theories as a right and, in some cases, additional elements from just cause theories that legitimate their exercise. All of these conceptions have their strong and their weak points, and some are more important than others depending on the empirical case being analysed. Whatever the case, though, what today seems no longer defensible are the traditional conceptions of liberalism and of constitutionalism which in all cases deny the possibility of secession in a democracy. These are now obsolete conceptions of liberal democracy in an increasingly globalised world more concerned with protecting the national and cultural pluralism of the citizens involved.

by the majority of political parties; the popular ballots on independence organised by the civil society and held all over the country between 2009 and 2011; and finally, the two large demonstrations also organised by the civil society, one in July 2010, organised by Òmnium Cultural in response to the sentence by the Constitutional Court on the Statute of Autonomy which whittled away much of its content, and the demonstration in September 2012, organised by the Assemblea Nacional Catalana (Catalan National Assembly) under a slogan explicitly in favour of sovereignty. All these mobilisations, in which hundreds of thousands of people took part, had a common element in the defence of the right of the citizens of Catalonia to decide their own political future. This constant public mobilisation is one of the key factors that have led to the formation of the present majority in society and in parliament in favour of holding the consultation on statehood.

Submitting a political decision of this importance to the popular vote is not, therefore, the whim of a minority of the population or of politicians, so much as the result of continuing popular mobilisation and of the democratic mandate granted by citizens at the last Catalan elections (November 2012). The programmes of the majority of parties at these elections – 107 of the 135 seats in the Parliament of Catalonia– included the pledge to convene a consultation on Catalonia's political future. This pledge translates as the responsibility of these parliamentary parties and of the government formed by them to put into effect the public consultation that has been at the heart of public debate during the last few years and at the last parliamentary elections. At a moment when liberal democracy is suffering a certain crisis of legitimacy, largely due to the growing rift between society and politics, asking citizens their opinion on vital topics through democratic consultations is an instrument at the service of fomenting participation and of civic virtues. What the consultation does is to place in the hands of citizens the decision, or at least the ability to autonomously express their wishes on a topic which is currently the subject of a profound and cross-cutting debate throughout Catalan society: the possibility of an independent Catalonia.

3.2.2. The consultation conforms to liberal principles: it protects the individual and collective rights of citizens

The institutions and the policies of recognition and political accommodation for national

pluralism, along with respect for and protection of the collective rights of minority nations, make up one of the main sources of legitimation for plurinational democracies today.[10]. Catalonia has for centuries been a minority and minoritised nation within the Spanish state. Demands and attempts to shape state politics in plurinational terms through ample self-government have never been accepted. In the few periods in contemporary Spanish history when there has been debate on the constitutional articulation of the state in democratic terms, Catalonia has always defended recognition of its differentiated national reality through forms of territorial self-government that have never resolved the underlying tension of Spain's plurinational make-up. The Spanish State has displayed a chronic refusal to establish effective constitutional procedures for protecting the national minorities who cohabit in it. Consultation is a tool for the citizens of Catalonia to exercise the individual and collective rights allowing them to express their wishes with regard to their political future, as well as protecting the rights, values and interests of the citizens of this differentiated national reality before the frequently arbitrary political, economic, linguistic and cultural decisions brought to bear on it by central government and state institutions.

3.2.3. The consultation conforms to principles of equality and inclusion

The whole of Catalan society is called on to take part in the consultation, regardless of place of birth, sex, religion or ethnic group. The consultation would allow Catalonia's future to be decided by the whole of Catalan society. The whole of the society will be called on, not just to vote on its political future, but also to take part in the prior debate to discover the possible consequences of constituting Catalonia as an independent state and contribute opinions and suggestions.

[10] The complex regulation of today's democracies, especially in relation to the nationalising function carried out by all states, even democratic ones, includes pluralism of values, interests and identities, as well as pluralism of theoretical and analytical perspectives. Inside democratic liberalism this twofold pluralism is resumed in the perspectives of so-called liberalism 1 and liberalism 2 (C. Taylor, M. Walzer). The second perspective criticises, amongst other things, interpretations of individualism, equality, citizenship, universalism, statism and the unresolved tension between demos and demoi inherent in plurinational democracies associated with traditional liberalism as they are biased in favour of majority national groups.

3.2.4. The consultation is possible within current constitutional legality

As laid out in the report by the Institut d'Estudis Autonòmics referred to in Section 4 of this document, there are various ways the consultation can be organised in line with several current legal frameworks. See this report for the arguments on this point.

3.2.5. The consultation is in keeping with the principles of plurinational federalism

The principles of plurinational federalism include the requirement that the national units constituting the different types of federal agreement, including federations, should, for one thing, have their collective rights recognised and protected through a series of institutions and procedures (ample self-government including the international sphere, financial sufficiency, right of veto, opt-in and opt-out policies, etc.), and, for another, should be able to express and, if they wish, modify their political status through the constitutional framework they are part of. In this respect, federalism is one of the four principles invoked by the Supreme Court of Canada –along with democracy, constitutionalism and the protection of minorities– in its well-known 'Opinion' on the case of a possible secession by Quebec (*Secession Reference*, 1998). More in general, a normative foundation of plurinational federalism is the idea of a voluntary compact between different national entities. Catalonia has never in the whole of the contemporary period had the chance to freely express its wish to remain part of the Spanish State or not and has none of the procedures associated with plurinational federalism.

3.2.6. The consultation is part of an advanced and cosmopolitan concept of democracy

The values, rights, institutions and procedures of a legitimating nature in liberal democracies have evolved over time. At different moments, references of a representative nature were introduced first, subsequently suffrage was gradually extended and later social rights and welfare services were incorporated as the basis for legitimating democracies. Nowadays,

respect and recognition, along with formulas for the political accommodation of national and cultural pluralism also play a part in the legitimation of democracies[11]. In this respect, acceptance of the right to decide is a formula already recognised in some democracies to extend the basis for the legitimation of plurinational liberal democracies. Holding a consultation on statehood is something that forms part of a conception of democracy on a level with the age we live in. Far from being an act of withdrawal into one's own collective identity, holding a consultation of this nature becomes an exercise in keeping with the values of cosmopolitanism, which relativises its borders and conceives them in a fundamentally instrumental sense. A democratic consultation which aims at being perceived and explained abroad brings the citizens of Catalonia closer to the international community over and above relations between states, as in the cases of Scotland and Quebec.

3.2.7. The consultation is functional: it provides a way out of the present political impasse

The history of territorial disputes in the world is full of confrontations and resolutions exacting a high cost on the well-being of those affected. It is up to the democracies of the 21st century to find the right procedures for solving this kind of situation. In the Spanish case, the 'Autonomic State' has not solved the problem of a viable and stable accommodation for Catalonia within the state, an issue unresolved throughout the contemporary period. The latest episode was the failure of the reform of the Statute of Autonomy. Although it was approved by 89% of members of the Parliament of Catalonia, it underwent modifications on its way through the Spanish Parliament, and subsequently, though supported in a referendum by the citizens of Catalonia, it was interpreted from a centralist perspective and one of homogenising nationalism by the Spanish Constitutional Court. This situation has in practise led to a political impasse, an institutional dead end. Consulting the citizens of Catalonia on their political future constitutes a functional, efficient and peaceful procedure for resolving this issue. A consultation with a clear question and negotiation foreseen in 'good faith' –as happened recently between the United Kingdom and Scotland or as planned between Canada and Quebec–, would not only reveal the wishes of the people affected, it would also open the way to a new political and constitutional scenario, whatever the result of

[11] United Nations, Human Development Report, 2004.

the consultation, unblocking the previous political situation.

3.2.8. Citizens' consultations are a common procedure in democracies on an international level

Exercising the right to decide in matters of special importance that have an institutional or constitutional impact is usual in the liberal democracies around us, at both state and sub-state levels. In particular, if we focus on the group of states formed by Germany, Belgium, Canada, Denmark, France, Ireland, Italy, United Kingdom, Switzerland and Sweden, since 1995 99 referendums have been held that had an institutional or constitutional impact, of which 45 involved reforming the state's institutional design or surrendering sovereignty[12]. The subject of these consultations range from the surrender of sovereignty to the European Union to modifying the constitutional status of a nation or region within a state (See table Annexe IV). If we focus on referendums for independence since 1990, these have been held in Quebec, Bosnia Herzegovina, Slovenia, Estonia, Latvia, Lithuania, Macedonia, Montenegro, and the Ukraine. The Scottish referendum is foreseen for 2014 (18 September).

The principles of the right to decide which the International Court of Justice established in a statement in July 2010 find a suitable, almost exemplary application in the case of Catalonia: in Catalonia the situation is not violent; the entire process towards the consultation on statehood is being carried out in an impeccably democratic spirit; and the channels for negotiation with the state have been exhausted on every possible front –failure of the reform of the Statute of Autonomy, refusal to establish a fiscal compact.

3.2.9. The consultation is in keeping with historical tradition and Catalan political culture

Catalonia's political tradition has been very predominantly based on dialogue and compact, as a result of the historical balance its institutions were founded on from the start, when a division of power was established between the monarch and society. Unlike other traditions,

[12] Updated figures (May 2013) based on the study by J. López and F. Requejo, Análisis de experiencias de democracia directa en el ámbito internacional (1995-2007), IVAP, 2008. The updating excludes cases outside the western world (such as East Timor or South Sudan). See Annexe IV.

royal power in Catalonia was never unlimited or absolute, but was founded on the need for constant agreement on government between the monarch and the representatives of society. This political tradition of its own allowed the development of a legal corpus, founded on constitutions by agreement, which analysts have considered an expression of protoliberal guarantees. These characteristics were destroyed by the decrees of Nueva Planta (1716) after the War of Spanish Succession. Today, the exercise of the right to decide and its materialisation in the form of a consultation with the citizens is consistent with Catalonia's political history prior to those decrees.

3.2.10. The consultation highlights Catalonia on the international scene and identifies it as a political actor

A plebiscite on independence, whatever the result, brings Catalonia before the international actors as a political subject able to make its own differentiated decisions. The process of consultation, therefore, regardless of the result, has an added benefit for Catalonia in terms of foreign policy. Furthermore, faced with the refusal of the central State Government to negotiate a solution to the question of Catalonia's political accommodation or fit, this dispute becomes visible on the international level. Organising a consultation, with all this involves in terms of organisation and for society, is an excellent opportunity to make known Catalonia's demands and the answers it has received on the part of the Spanish State over the course of history and in recent times. Pushing towards holding the consultation means working to present our country to the world, with its demands for national recognition and political accommodation in the international sphere of states and, when all is said and done, confers on it the status of a differentiated political subject.

4. Juridical strategies for convening a legal consultation in keeping with internal law

As we said in the introduction, the Government of the Generalitat already has an extensive report drawn up by the Institut d'Estudis Autonòmics, in which up to five procedures are identified in internal law through which a consultation could be legally convened for citizens to express their wishes regarding their collective political future.

On the basis of the interpretative demands arising from the joint application of the principles of rule of law and democracy –enshrined in the Constitution and in international and European Union (EU) law–, the report mentioned analyses the juridical viability of these five alternatives and reaches the conclusion that there are very good juridical arguments to defend the legality of these channels, so that a hypothetical ban on the part of the state from convening a consultation of the sort demanded by a majority of Catalans would have to be put down to strictly political motives —a lack of political will— rather than legal motives.

These five legal channels are as follows:

- referendums regulated and convened by the state under SC Article 92
- devolution or transfer of powers under SC Article 150.2
- the referendums foreseen under Catalan law 4/2010
- consultations of the proposed Catalan law of popular non-referendum consultations currently going through the Parliament of Catalonia
- and, finally, the reform of the Constitution.

The Advisory Council for the National Transition adopts the main points of this report and to avoid repetitions the present document will only analyse questions relating to the consultation not looked at in the IEA's report.

4.1. Goals to be reached and criteria for designing a strategy

When it comes to deciding which and how many legal channels of consultation should be used and in what order, we need to bear in mind that the first, fundamental aim of the Generalitat ought to be to ensure that a consultation can effectively be convened and secondly, if this were not possible, to make it as clear as possible that it is the Spanish state who is refusing to allow it, for political and not legal reasons. This twofold objective is important with a view to the citizens of Catalonia as well as to the international community.

Next it must be made clear, also before the citizens and the international community, that the Generalitat intends to abide by the rule of law and reach agreements with the Spanish state, though without letting the consultation process go on any longer than is strictly necessary.

Finally, one last objective is that the legal channels used should allow greater protagonism by the Generalitat and by Catalan social and political actors and less involvement by the Spanish state –so as not to force it to take measures that could represent an unnecessary political cost.

To achieve the first twofold goal mentioned above, the basic criterion to bear in mind is that of promoting the application of those legal channels that raise fewest problems of constitutionality.

The second objective requires that, should channels of discreet+ negotiation that can be articulated become exhausted without success, the possible legal channels felt to be most suitable should be publicly and ‘officially’ and with as much support as possible from society proposed to the state in sufficient number to make it clear that the Generalitat wishes to reach an agreement with the state, but at the same time sufficiently limited so as to prevent the process going on too long. In short, a balance needs to be found between, on one hand, the number of attempts needed to make it absolutely clear that the Generalitat wishes to reach an agreement and, on the other, the need to avoid giving the citizens of Catalonia the feeling it is an unnecessary waste of time or that the process is being prolonged artificially.

Finally, to ensure that the Generalitat is given as much protagonism as possible, preference must be given to those legal channels that ensure it greater freedom when it comes to

convening the consultation and a greater influence in establishing the elements shaping consultations –the question, the date etc.-. From this point of view we must also weigh up the fact that there are channels designed and approved by the Generalitat itself, while others correspond exclusively to the state. As regards the part played by Catalan social and political actors, the applicable legal channels must be assessed from the perspective of the existence or not of juridically formalised channels that can take part in convening the consultation (for example, the existence or not of juridical mechanisms to urge the consultation), though we must not discard the possibility, in channels that do not explicitly foresee these participation mechanisms, of using other instruments to demonstrate popular support, such as the right of petition or motions in support of the consultation by town halls and other local bodies.

In short, the main variables to be remembered when it comes to choosing the channels to use, their order of preference and the number of them are: the scale of the constitutional problems they might pose; the delay that applying them might involve; the degree of juridical protagonism attributed to the Spanish state, to the Generalitat and to Catalan social and political actors and the ability to convey to the international community the wish, expressed in various resolutions by the Parliament of Catalonia, to keep this process, as far as possible, within the legal framework in force and work for an agreement with the state.

In the next section we shall analyse the five legal channels just mentioned from the perspective of the six variables indicated above.

4.2. Analysis of the five legal channels from the perspective of the criteria just mentioned

4.2.1. Autonomous referendums under Article 92 of the Constitution

If, as we believe should be so, it is accepted that referendums on the regional level of the autonomies are implicitly recognised in this article of the Constitution, the state could convene them and establish the question or questions and the procedure for holding them. Nevertheless, in the royal decrees convening them some kind of participation by the

Generalitat could be foreseen. The Generalitat could urge the state to convene the consultation –and in fact would have to–, even though this possibility is not expressly foreseen in the law. Convening and holding the referendum could be fairly quick. In fact, this is theoretically one of the procedures that would take less time.

Furthermore, this is one of the options which, in theory, would pose least constitutional objections, as the IEA argues in its report. Nevertheless, it would call for considerable involvement by the state, as it would have to be responsible for convening the consultation. Correlatively, the Generalitat would see its protagonism reduced –although, as we saw, the state could increase it slightly through the decree. Participation by citizens in this convening phase would also be juridically insignificant as it would not take place through juridically formalised processes.

If, despite the opinion of a large part of the doctrine on public law, referendums at autonomic level are not considered implicit in SC Article 92, the Parliament of Catalonia would either have to urge the State Government or the Cortes Generales to reform the Organic Law Regulating the Several Forms of Referendum (LORMR) so as to include this type of referendum in the law or else accept the convening of a referendum directed at all state citizens.

The first of these two options, along with the way of constitutional reform, is the one that could rouse least objections of unconstitutionality. Furthermore, the LORMR could foresee greater participation by the autonomous communities in convening and regulating these autonomic consultations, although until Article 149.1.32 of the Constitution is reformed, authorisation for these referendums would still be the responsibility of the state. Participation by the citizens of Catalonia in the consultation would carry little juridical weight. The chief problem with this kind of procedure would lie in the fact that it could considerably slow down the consultation process, unless it were politically guaranteed that the reform could go through as quickly as some previous reforms of the LORMR –for example, the one in 1981, which was completed in three months. Whatever the case, if after a sensible lapse of time the reform had failed to make progress, the Generalitat might consider this channel closed and, in this case, might begin proceedings via a second, alternative channel.

The option of holding the referendum in the whole of Spain has very important disadvantages even though it would certainly provide reliable information on the wish of the citizens of

Catalonia regarding their collective political future; apart from which, seen in another light, the fact that all Spanish citizens were called to vote could lead to increased participation and radicalise the way the Catalans voted. It has, however, the fundamental disadvantage that it might encourage the idea that the final decision on Catalonia's political future does not in the end lie with the Catalans but with Spanish society as a whole –in other words, it might suggest that the political subject legitimated to take this decision is the Spanish people as a whole and, on these grounds and applying the democratic principle to this subject, the state might try to make the result obtained in the whole of the country politically and even legally binding.

Obviously, in practice, if the results in Catalonia were clearly different from those of the rest of Spain, both at home and abroad this would speak for the existence of a serious problem regarding Catalonia's place in the Spanish state and obviously, also, perfectly sound juridical and political arguments could be put forward by Catalonia, based on rules and principles of both international and internal law, whereby the state should respect the majority wish democratically and peacefully expressed by the people of Catalonia. Even so, it's true that in this case, by applying this referendum to the country as a whole, the underlying debate on the political subject legitimated to take the decision on Catalonia's future would be inescapably thrown open, something it seems best to avoid.

On a separate note, the procedure under SC Article 92 could be applied quickly and does not raise significant juridical problems. Nevertheless, it would force the state to get more deeply involved and, in contrast, it would reduce the protagonism of the Generalitat and of the juridically formalised support of the people of Catalonia during the convening phase.

4.2.2. Delegation or transfer of powers under Article 150.2 of the Constitution

Devolving or transferring the power to hold a referendum like the one proposed by a majority in Catalonia from the state, has the advantage of simplicity, clarity and possibly speed. Furthermore, despite all the differences, this is the same procedure used by the United Kingdom in the case of the Scottish referendum and it would therefore be internationally recognised thanks to this illustrious precedent in democratic terms.

It requires fairly intensive involvement by the state, but on the other hand it also ensures considerable protagonism by the Generalitat. This procedure does not pose juridical problems other than those that could arise from SC Article 92, although, from a practical point of view, we must admit that the fact that Catalonia has tried to apply it on four occasions and it has always been turned down by the Cortes Generales could have negative effects. Nevertheless, as the IEA explains at length in its report, the reasons put forward by the Cortes to reject the proposals were either so tautological that they were practically non-existent or else so weak that repeating the request would be perfectly justifiable. In fact, on this subject we need to remember that previous requests for devolvement –except in just one case- received very little political support. In short, it would be easy to give the request greater solemnity and therefore more effective institutional and public support.

4.2.3. Referendums under Catalan Law 4 / 2010

As we saw above, this is one of the channels that could give the state most room to allege, with some basis, constitutional problems. In fact, this is what it did when it contested the law before the Constitutional Court, with the argument that regulating referendums is constitutionally the reserve of the state. If the aim is to use the law as an instrument to stop the consultation, instead of using it as the legal channel for the demands of a majority of Catalans, the state might try to argue that a referendum like the one being proposed exceeds the powers of the Generalitat and that all Spanish citizens should be convened and only as the final step in a constitutional reform. The IEA's report provides counter-arguments to refute these allegations, in particular the fact that the term *competències* (powers) does not refer only to the list in Title IV of the Statute of Autonomy but also to all of the Generalitat's powers, but we must not forget that the state has already challenged the law and the appeal is awaiting sentence -although the Constitutional Court has lifted its suspension 'with preventive precautions'.

Practical application of this procedure would force the state to take the highly significant step of authorising the Generalitat to convene the referendum.

On the other hand, on the positive side we must emphasise the speed with which it could be applied –despite the effect that the state could take its time in coming to a decision. The protagonism of the Generalitat throughout the process must also be seen in a positive light –

the role of the state would be reduced to giving authorisation- and, in particular, the most important aspect is the part that could be played by Catalan society as a whole in the early stages, as this procedure could be initiated simultaneously, as the law foresees, by citizens, local bodies, the Government and the Parliament of Catalonia.

4.2.4. Popular consultations under the bill of law currently going through the Catalan Parliament

If the state opted for the political strategy of using the law to juridically channel majority demands in Catalonia instead of using it try and prevent it, this procedure would have the advantage, from the point of view of the state, that it would not have to adopt an active stance and convene, delegate or authorise the consultation, as it would be enough not to contest the law or the subsequent consultation by the Generalitat in application of the specified legal text.

From the point of view of the constitutional problems this channel might raise, it should be noted that the new law would solve one of the two problems usually attributed to this sort of consultation as it expressly limits them 'within the scope of the powers' of the Generalitat. That means that if the state had the political will to channel the consultation using this procedure, from the point of view of the constitutionality of the future law it would only have to accept that the criteria used to characterise popular consultations and differentiate them from referendums –electoral roll, instruments and bodies to guarantee and control security and transparency in voting and, especially, the differences as regards who is convened to vote- are significant enough to accept that they are not undercover referendums. And as regards the act of convening a consultation like the one intended, under the new law this would demand an effort of interpretation by the state to accept a broad concept of 'power' that can include not only those attributes listed under Title IV of the Statute of Autonomy but also those activities or faculties the Generalitat is legally empowered to take on.

There are numerous cases in which the state has made much greater 'efforts of interpretation' in this same subject. In short, hypothetical problems of unconstitutionality can also be worked around here if the state has the political will to do so, although objectively these problems could give the state the chance to refuse this channel for constitutional reasons with rather more foundation than can be alleged under SC Article 150.2 and,

especially, SC Article 92.

On the other hand, however, we must take into account that this channel has important advantages: the protagonism falls exclusively on the Generalitat as the state does not intervene at any stage. It can be carried out very quickly. It could have ample juridically formalised popular and institutional support as the bill of law foresees the possibility of citizens and the President of the Government of the Generalitat requesting the consultation simultaneously.

4.2.5. Reforming the Constitution

If the state alleges grounds of unconstitutionality to turn down the Generalitat's proposals, the latter can still press for a reform of the Constitution which, *by definition*,[13] could in no case be turned down for the same reasons. A hypothetical refusal of the proposed reform would therefore respond to exclusively political motives, something which would be incontrovertibly made clear. This is one of the great advantages of this procedure.

It does, however, have the disadvantage that, according to how it is approached, it could be the start of a long and complex process in which the Catalan forces would always be in the minority. It's important, though, to distinguish between two different scenarios: if the only goal pursued is to have referendums on the regional level of the autonomies included in the Constitution, with the possibility that the autonomous communities should regulate them –in aspects not requiring an organic law– and authorise them, then a non-aggravated reform (as laid out in Article 167) of SC Article 92 and, if necessary, of SC 149.1.32 would suffice. This procedure, assuming there is political will on the part of the two main Spanish parties, could be as streamlined as the one in the summer of 2011 that allowed a reform of Article 135 of the Constitution, though it must be accepted that, at least juridically, once the reform process has begun, the Generalitat's ability to directly influence the process is certainly very limited. On the other hand, it should be noted that if the state opposes the reform for political reasons, this opposition will in all certainty show itself the moment the Parliament proposes that the State Government should adopt the corresponding draft law or in consideration of

[13] It is well known that the Spanish Constitution does not contain intangibility clauses that prevent a reform of certain articles and the majority doctrine, as well as that of the Constitutional Court, is that there are no implicit tangibility clauses either.

the bill of law by Congress if Parliament chooses to submit it directly in an articulated text (SC Art. 87.2). In short, the danger of delay this channel could pose is very relative.

If the object is that the Constitution should include the possibility that the Autonomous Communities could convene referendums on questions which, depending on the result of the consultation, could call for a constitutional reform, things get more complicated, because without constitutional engineering[14], it would be necessary to use the aggravated reform mechanism (SC Article 168), which is very long and complicated. However, in this case also, there is a very high chance that the state will block the initiative and, as in the previous case, this would manifest itself very soon.

4.3. How many of the procedures for consultation analysed should be applied and which ones? In what order?

The answer to the first of these three questions must be guided by two of the aims laid out above: the need to put the Generalitat's wish to reach an agreement with the state on record and not to prolong this stage of the process more than necessary to achieve the first objective.

From this perspective, we need to think of the possibility of using more than one procedure, but on the other hand there is obviously no need to try them all. On the other hand, the possibility of proposing them simultaneously or almost simultaneously can not be discarded either –in other words, going through two channels either at the same time or else successively but without waiting for the completion of one procedure before starting another if the Generalitat notes that one procedure is being artificially or excessively prolonged.

As regards the question of what procedures should be proposed, the first criterion must be to apply through those channels offering most guarantees of constitutionality.

From this perspective, as we argued above, the procedures that could raise least objections

[14] As put forward, for example, by a minority of experts, who claim that the procedure in SC Article 167 can be used to modify the aggravated procedure foreseen in SC Article 168.

are the ones under SC Article 92 –especially if the reform of the LORMR is interposed-, and SC Article 150.2 and, of course, a constitutional reform which, as has been said, can not be unconstitutional almost 'by definition'. On the other hand, consultation by referendum under Catalan Law 4/2010 and consultation not by referendum under the bill of law going through the Parliament of Catalonia pose more problems.

Nevertheless, the criterion of reducing objections of unconstitutionality to a minimum must of necessity be completed with the criterion of maximum protagonism by the Generalitat and the citizens of Catalonia in convening the consultation, along with the criterion of maximum possible speed. And these aims are best achieved through 'Catalan laws' –Law 4/2010 and the bill of law currently going through Parliament– rather than under SC Articles 92 and 150.2 or through a constitutional reform.

In view of what has just been said, to make the various alternatives compatible, one possible solution would be to use one of the two procedures foreseen in 'Catalan legislation', which would be a guarantee of speed and of protagonism by the Generalitat and by citizens, and one of the forecasts 'foreseen in the SC', like the one under SC Article 92, which raises fewer problems of constitutionality and would show up the political nature of a hypothetical refusal on the part of the state. Whatever the case, if the intention is to reach this goal definitively, a proposal to reform Article 92 of the Constitution could be made –which would foreseeably get a swift and clear initial response.

The order of preference of the various procedures could be as outlined above. In fact, from the point of view of juridical logic, it would seem that the first thing to do would be to try and apply the 'Catalan channels' and then, if the state vetoes them on the grounds that the matter falls outside the powers of the Generalitat, to propose that the state should convene the referendum under Article 92, or, if it prefers, that it should delegate this measure under SC Article 150.2. The inverse process would not make much sense because if the state claims that it lacks the power to convene or to delegate the convening of the consultation without a prior reform of the Constitution, it seems logical that the Generalitat must have even less power to do so, even applying 'Catalan legislation'. From the perspective of political or institutional logic, it also seems obvious that an attempt should be made first of all to apply those legal instruments established by the Generalitat itself and to resort to the state's instruments if it vetoes 'Catalan channels'.

However, it's quite true that we can not discard out of hand that political circumstances might arise in the future –for example, an agreement with the state– which might make it advisable to alter the logical order mentioned above and which, in consequence, would reveal the advantage of first going the way of SC Articles 92 or 150.2.

4.4. Conclusions

In short, apart from unforeseeable circumstances, it seems that first of all applying Catalan Law 4/2010 should be tried or, as an alternative, the future Catalan law of non-referendum consultations, and secondly, as another alternative, either SC Article 92 or SC Article 150.2. If, politically, one wished to show incontrovertibly the exclusively political motives for a hypothetical refusal by the state to convene the consultation, after trying these two options one could press for the reform of Article 92 with the object of extending it to include referendums on the regional level of the autonomies.

5. The consultation in the framework of European Union law and international law

5.1. Phrasing the question

In the debate on the consultation one question that often arises is, if the state prevents the use of the legal channels existing in the internal legal system, are there any international legal procedures in European Union (EU) law and/or international law for convening a consultation like the one demanded by a majority in Catalonia? The question also is whether there are laws and principles applicable to the case and what effects they could have for holding the legal consultation and putting its results into effect, as well as for the 'alternative channel' the Generalitat could use in the case that legal channels were blocked by the state.

These are the two questions we shall analyse briefly in this section, as the reports by this Advisory Council on relations with the European Union and with the international community will deal at length with many of the questions posed here. In particular, in this section, as regards European and International rights and principles, we shall try to identify them, see if these rights and principles are legally enforceable –ie can their fulfilment be demanded before a court of law–, and finally we shall analyse the juridical effects they might have in the two spheres mentioned: holding legal consultations and putting the results into effect and in alternative channels such as plebiscite elections, unilateral declarations of independence (UDI) or extralegal or unofficial consultations which, in theory one might try to hold should legal channels be blocked[15].

5.2. Are there procedures under the EU or international legal frameworks for convening the consultation or rights and principles that can be applied to internal legal channels or to alternative channels? Reference to the democratic principle, to the right to self-determination and to the principle of protection of minorities

The answer to the first question is 'no'. In keeping with its nature and its objective, neither EU law nor international law include any provision foreseeing a procedure available to the Generalitat convening a consultation of the sort demanded by a majority of Catalans. International law and EU law both consider this to be a matter to be solved internally, within each state.

Nevertheless, these two legal systems include rights and principles that can reinforce the legality and the legitimacy of convening a legal consultation or of using alternative channels.

[15] Section 8 of this report analyses the characteristics, procedures and strategies for applying the pros and cons of these alternative channels.

This is the case of the democratic principle, of the right of peoples to self-determination and, though on another level, of the principle of the protection of minorities. The scope of these three rights or principles is different in EU law and in international law. For this reason, although we shall analyse them in parallel, we shall differentiate between them.

The **democratic principle**, and the rights coming under its scope of protection, are very important in the sphere of EU law. In fact, as we know, in the various reforms of its constituent treaties, the EU has gradually reinforced its shared principles and values and its commitment to respect for fundamental human rights and freedom, with one very important landmark: since the coming into force of the Treaty of Lisbon (2009), the Charter of Fundamental Rights of the EU (CFREU) has full legal effects at the level of primary law. In this respect, in the preamble to the Treaty on European Union (TEU) and the CFREU, the EU confirms its endorsement of the principles of freedom, democracy and respect for human rights and fundamental freedom, as well as respect for the democratic rule of law. Furthermore, Articles 1 and 10 of the TEU include the principle that European construction is based on a union in which decisions will be taken more openly and as closely to citizens as possible. In addition, Article 2 of the TEU defines and includes for the first time the values that unite members of the EU. These common values on which the EU and its member states are founded are respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These common values on which the EU and its member states are founded are respect for human dignity, freedom, democracy, equality, the rule of law and human rights, including the rights of people belonging to minorities. Similarly, TEU Article 11 foresees that institutions should allow citizens and representative associations the chance to publicly express and exchange their opinions in all fields of action of the Union. The articles mentioned –and other related ones that could be added, are without doubt applicable –in a way we shall be making clear– to the consultation and to the alternative channels analysed here insofar as they are part of the basic democratic principles and democratic values of the Union and its member states. The democratic principle is a shared value that shapes the entire legal system and all the political commitments and that therefore legitimates the right of citizens to take part in those political decisions affecting them.

The democratic principle is also included in various important instruments of international law –such as the Universal Declaration of Human Rights of 10 December 1948, which states that

the wishes of the people are the basis of the authority of government, Article 21.3– and has implications in international practice, though not on the same scale and as decisively as in the European sphere.

The right to self-determination, on the other hand, is more important in the sphere of international law than in the EU. Two contents or sides tend to be distinguished in this principle: an internal one, referring to the right of certain political communities to govern themselves within a state; the other, external one, which includes the right to separate from this state in certain circumstances. International law recognises this double content of the right to self-determination as a general structural principle of its laws, expressed in numerous instruments and international treaties [16], as well as in resolutions by international organisations, in pronouncements by the International Court of Justice (ICJ) and in the specific practices of states. In the sphere of EU law this principle is not expressly stated so it can only be considered partly and implicitly included in the democratic principle.

As for who is the subject of the right to self-determination in international law, an important development can be observed. The principle of the self-determination of nations was originally recognised unquestionably in two circumstances: that of nations under colonial and, by extension, foreign domination; and that of oppressed nations. Nevertheless, in the last few decades, a certain shift of this new right can be seen towards new standards according to the context and the political framework of each situation, which has allowed the existence of certain doctrinal positions which, with reason, defend new possibilities which have not yet materialised in positive law. One example is the pronouncement by the Canadian Supreme Court on the situation in Quebec[17], which has much in common with the Catalan case. The sentence by the Canadian Supreme Court refers to peoples who are prevented from explicitly and usefully exercising their right to self-determination within the state they form part of (right to internal self-determination). In this case, one could make an evolutionary interpretation of the exception of the principle of non-intervention laid out in Resolution 2625 of the United Nations General Assembly, in the case of oppressed peoples within a developed, democratic state. Therefore, taking the line of the Canadian Supreme Court, one

[16] Such as the United Nations Charter –which formulates it as the principle behind Articles 1.2 and 55–, the International Covenant on Civil and Political Rights –Article 1.1–and the International Covenant on Economic, Social and Cultural Rights –Article 1.1.

[17] Sentence by the Supreme Court of Canada of 20 August 1998 (para.134)

might say that a people who wish to exercise the right to external self-determination (right of secession) on these grounds can do so if they reliably demonstrate to the international community that they are pursuing a legitimate cause, if they manage to persuade the largest possible number of states of the existence of substantial specific injustices and, finally, if they clearly demonstrate that they have unsuccessfully used every means at their disposal to try and solve the conflicts with the mother state beforehand.

Whatever the case, the International Court of Justice ruled in the case of Western Sahara (1975) that, regardless of the channel chosen, the fundamental element of the exercise of this right is the population. Independence, free association, integration, even autonomy within a decentralised state, are ways of exercising this right, so long as the first is one of the options included in the popular consultation, which would have to be held through universal suffrage.

Finally, the **principle of protection of minorities, including national minorities,** is profusely enshrined in both EU and international law[18]. The scope of its protection is different, as an essential component of European and international protection of the rights of minorities is the fight against discrimination with regard to the protection of the linguistic, cultural and religious rights of certain social and cultural minorities living in the territory of the states. Nevertheless, this principle, which has a long and complex tradition as regards the way it has been included in various international and European instruments and also in its effective application through a fluctuating, casuistic international practice, has recovered greater vigour[19] since the early 1990s, taking advantage of the fact that certain problems persist

[18] Among other things, as regards international law, the Framework Convention for the Protection of National Minorities, drawn up in Strasburg on 1 February 1995 -an instrument for ratification published in the BOE (Spanish government gazette) no.20, of 23 January 1998- and the Declaration by the United Nations General Assembly on the rights of individuals belonging to national or ethnic, religious or linguistic minorities -approved by Resolution 47/135, of 18 December 1992. In a more general and cross-cutting dimension, we might mention the 1990 Charter of Paris for a New Europe, which states that the identity of national minorities will be protected, and that conditions for the promotion of that identity will be created and that questions related to national minorities can only be satisfactorily resolved in a democratic political framework. The Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights of 25 June 1993, confirms the duty of states to ensure individuals belonging to minorities can enjoy full and efficient exercise of human rights and basic freedoms without any discrimination and in conditions of total equality before the law.

[19] Leaving aside remote precedents, it's well known that the immediate forerunners of the principle of the protection of national minorities can be found in the period immediately following the First World War, in the context of the League of Nations and Wilsonian theories. After the Second World War the principle materialised in

regarding its concept and contents[20].

In our opinion, then, we can not rule out the possibility of alleging this principle in relation to the consultation and the alternative channels, with the limitations we shall see in a moment, taking advantage of the fact just mentioned that in practice international legal instruments (especially in the field under discussion in this report), without the literal tenor of their precepts having been altered, have very often been interpreted and applied by states and international organisations flexibly and changeably, with considerable pragmatism, according to the varying historical circumstances and the specific characteristics of each case.

Nevertheless, and to end this discussion, we should be aware that, although when it comes to justifying the consultation –and the alternative channels- the Generalitat could, within the limits and the requirements we shall now analyse, allege the European and international rights and principles just mentioned, the democratic principle is currently and unquestionably the one that could have the greatest practical virtues.

However, when it comes to clarifying the scope and the legal effects of a hypothetical allegation of these rights and principles, the first issue we need to analyse is whether they are genuine rights in the sense that they can be upheld before international or European legal institutions so that these can declare, if pertinent, the existence of legal obligations that are binding on the Spanish state or other states or on international organisations.

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essentially individual rights and, at least as regards national minorities, lost much of its force, which it nevertheless recovered in the 1990s with the end of the Cold War.

[20] The fact that there is no internationally agreed definition of the concept of national minority, for example, was underlined in a 2010 report by the Office of the United Nations High Commissioner for Human Rights, or another report by the Council of Europe explaining the Framework Convention for the Protection of National Minorities. There is no agreement, either, on the rights or faculties included in the principle of protection and the general right to non-discrimination, more specifically on the right to decide the political future of the national minority. Nevertheless, as we have just seen, it can be noted that since the 1990s different international actors -notably, states and international organisations- stress the condition of 'national minority' of a regional group as a factor which, in its maximum expression, helps to justify its eventually taking the form of a new state.

We could also mention the recognition dispensed by two leading international actors -the European Union and the United States- to the new states that emerged from the USSR and Yugoslavia; these new states were characterised, among other aspects, by being based on the prior existence of a national minority -forming part of one of the two states mentioned- which achieved self-determination and was constituted as a new member of the international community.

5.3. Are these rights legally enforceable?

The answer to this question has to be no, despite the nuances we shall be introducing in the coming paragraphs. First of all, because the three 'rights and principles' mentioned are enshrined in jurisprudence as values and principles rather than as rights in the strict sense of the word, and secondly, because procedures are not foreseen in either the European or international spheres for channelling hypothetical demands based on these principles and directed at demanding that legal consultations be convened or to justify the use of alternative channels. To start with, the Generalitat would have problems of legitimation in bringing a lawsuit. Furthermore, we must bear in mind that the procedures that could be used are almost exclusively not jurisdictional.

In particular, if we look at the regulatory framework for the International Court of Justice (Statute and Rules) we shall see that neither the institutions of the Generalitat of Catalonia nor the citizens of Catalonia can legitimately bring before the Court a case concerned with the violation of a right tied to the wish of the Catalan institutions to consult citizens as regards their collective political future. The situation is the same as regards the European Court of Human Rights and the Court of Justice of the EU.

It can reasonably be claimed, though, that in the spheres both of international law and of EU law, these rights and principles could support actions by the Generalitat in defence of holding the consultation and putting its results into effect. However, these actions are not directed at genuine courts of law and do not have the practical prominence of demands for rights that can be brought before a court of law, although their political effects can be far from insignificant.

In the sphere of the EU, for example, and in relation with the democratic principle, to try and apply this 'value' proclaimed in Article 2 of the TEU, there is no procedure before the Court of Justice of the EU that can impose a specific obligation on the Spanish state in relation to the issues just mentioned. The only channel, and not a jurisdictional one, the Generalitat could possibly use would be to try and find allies in order to resort to the procedure foreseen in Article 7 of the TEU[21], alleging the risk of a serious violation by Spain of this fundamental

[21] This procedure, as we saw, is not jurisdictional but political and foresees the pronouncement of the European institutions in the case of serious violations the values outlined in TEU Article 2.

value and of the correlative European fundamental rights. We must bear in mind, however, that initiating this procedure requires a third of the member states in the European Parliament or the Commission[22] and, after a long procedure, the express announcement of an effective violation must be unanimously adopted in the European Council, with the prior approval of the European Parliament; subsequently it would be the Council who, by a qualified majority, would be able to sanction the state and decide on the suspension of certain rights. Therefore, if we consider this specific procedural rule and also the substantive rule, we can say it is very unlikely that an initiative of this sort by the Generalitat would prosper, although the mere suggestion of initiating this procedure would undoubtedly have important political effects (visibility and discussion on a European level) in publicising and manifesting the existing conflict.

In the international sphere and in relation to the right to self-determination –and, *mutatis mutandis*, the principle of protection of minorities-, the question can be approached in slightly different terms. In particular, it would be worth weighing up the advantages of using the non-jurisdictional channels foreseen in the Optional Protocols of the International Covenant on Civil and Political Rights[23] and of the International Covenant on Economic, Social and Cultural Rights[24], as both include the rights of peoples to free determination. These Protocols foresee that the Human Rights Committee and the Committee on Economic, Social and Cultural Rights can receive reports from people or groups of people under the jurisdiction of a member state who claim to be victims of a violation by this state of any of the rights enshrined in these covenants. Should the reports be accepted for investigation, an adversarial procedure is opened against the state, which culminates in a declaration with a series of recommendations (International Covenant on Economic, Social and Cultural Rights) or in observations (International Covenant on Civil and Political Rights), which are conveyed to the interested parties (state and reporting people or groups). Although the opinions the two committees might release are not binding for the state receiving them, which is only obliged

[22] At this moment the Council would have to declare by a majority of four fifths of its members, prior to approval by the European Parliament, in order to verify the existence of a serious risk of violation of this principle by a member state.

[23] Instrument of 17 January 1985 for Spain's endorsement of the Optional Protocol for the International Covenant on Civil and Political Rights (BOE no. 79, 2 April 1985).

[24] Instrument ratifying the Optional Protocol for the International Covenant on Economic, Social and Cultural Rights (BOE no. 48, 25 February 2013).

to give them due consideration and to inform the committee of the measures it adopts in this respect (International Covenant on Economic, Social and Cultural Rights), it's important to note that this channel, well managed, could help draw international attention to the wish of the Catalan institutions and the citizens of Catalonia to be able to freely decide their collective political future. It must be said, though, that in order to use it all internal resources must first be exhausted. Furthermore, we must remember that complaints must come from individuals and refer to violations by the state and there are not yet precedents in our country.

However, saying that the three rights or principles analysed are not really rights that can be brought before a court of law is in no way the same as saying they can not have juridical effects in relation to the legal channels for consultation and for alternative channels. This is what we shall be looking at in the next section.

5.4. Juridical effects of the rights and principles mentioned on the legal channels for consultation and on alternative channels. Reference to international legality of alternative channels

The European Treaties do not foresee that the EU, on the basis of the rights and principles analysed so far, could legally oblige any state to apply the legal channels for consultation that exist in the internal rules of states or to implement the results obtained, should one be held. This is considered an internal power of the state and, by the same reasoning, the EU can not oblige acceptance of the use of alternative channels by a specific community established in the territory of a member state. The same goes for international law.

However, as regards holding a legal consultation, it's quite obvious that, as has already been pointed out and as the report by the Institut d'Estudis Autonòmics mentioned above lays out at length, these three European and international principles, which the Spanish Constitution (SC) integrates in internal law, have, especially in this case the democratic principle, a very considerable juridical effect; especially insofar as it has to be applied, along with the value of

the Rule of Law, as an inevitable criterion when it comes interpreting and applying the articles of the Spanish Constitution and the internal laws governing the referendums and consultations through which citizens can take part in political decision-making. To put it another way, the principles of European law and of international law, especially in this case the democratic principle, incorporated into internal law by Article 10 of the SC, obliges the Spanish state authorities to interpret the precepts regulating referendums and popular consultations in such a way that, respecting the principles and rules that govern the democratic state, the right to political participation by citizens, including the right to direct political participation, is made to extend as far as possible.

With regard to the implementation of the results of legal consultations, these principles, and especially the democratic one, also have a transcendental effect because, as we shall see at greater length in Section 7 of this report, they can help qualify the merely 'advisory' nature the Constitution grants this sort of referendum and consultations. In this respect, we must once again remember the Sentence by the High Court of Canada which infers from the democratic principle, on which the Canadian Constitution is based, the obligation of the Federation and the Provinces to negotiate with Quebec should separation be the result of a referendum on the province's political future. The agreement signed in Edinburgh on 15 October 2012 between the United Kingdom and Scotland also stipulates this, though it pragmatically avoids discussing the legal or political bindingness of the referendum results, while at the same time clearly establishing the obligation of the two governments to work together, constructively, to put the results into effect.

But these principles could also have an influence in relation to the application of alternative channels and in the implementation of its results. As we shall see, for example, in Section 8, the democratic principle plays a decisive role when it comes to juridically legitimating plebiscite elections and, more specifically, in opposing any attempt to forbid them on the grounds that they are a fraud against the goal elections should have.

Whatever the case, apart from these direct legal effects, these principles, and especially the democratic principle, can also produce far from negligible effects such as helping to politically legitimate the use of alternative channels for legal consultations, including UDI, and the implementation of the effects, including independence. Basically, they can help by contributing to the fact that the use of these channels and the implementation of these results should not be considered contrary to international law. This is the same as saying, first of all,

that the Generalitat can, from the international point of view, legitimately request recognition as a new state in line with the rules and principles governing international law[25] and, at the same time, that states and international organisations can, if this is their political decision, recognise the consultations and their results without contravening international law.

Similar reasoning could also be applied to the case of EU law and, especially, to the reference contained in Article 4.2 of the TEU, which states that the Union 'will respect the essential functions of the state, especially those whose object is to guarantee its territorial integrity, maintain law and order and safeguard national security', which can not be interpreted as a veto by the EU of the possibility of internal segregation within the respective states, so long as the whole process respects the rules governing international public law.

In relation to these questions, one undoubtedly very important point is the 'Advisory Opinion' issued by the International Court of Justice on 22 July 2010, on the conformity with international law of the unilateral declaration of independence by Kosovo, in which the International Court of Justice states that general international law does not forbid unilateral declarations of independence.

However, this is not the place to for an exhaustive account of recent international law and practice on this issue. Suffice it to say that the idea is now taking root that, by virtue above all of the democratic principle, any political community with its own population, territory and public authority effectively exercised over this population and within this territory can, if it manifests a wish for self-determination, including the wish for secession, and so long as it does so democratically and peacefully and respecting the rights of citizens and especially that of minorities, go ahead without this being a violation of international law. In consequence, neither the principle of territorial integrity of the mother state, as enshrined in international law[26], nor the supremacy of the Constitution can be used as arguments to internationally delegitimate unilateral declarations of independence if they respect the requirements mentioned above.

[25] The Declaration of the Twelve (Council of the European Community), of 16 December 1991, on guidelines referring to the recognition of new states in Eastern Europe and the Soviet Union, is significant. It bases this recognition on the fact that the new states are constituted on a democratic basis, accept international obligations and show a bone fide commitment to a peaceful and negotiated process.

[26] The Advisory Opinion on the conformity to international law of the declaration of independence of Kosovo points out that the principle of territorial integrity is circumscribed to the sphere of relations between states.

Note, therefore, that in this case the three European and international principles analysed act as legitimators of the application of these alternative channels and as necessary requirements for obtaining this legitimation.

Whatever the case, since Catalonia has its territory, its population and its public authority, and insofar as this power is effective and the process of separation has been carried out respecting the international requirements demanded -peaceful, democratic nature, etc.- there are sound legal arguments for not calling the alternative channels and their results international violations and for recognition of these results by the international community, including independence, although this is a necessary legal condition for recognition but not enough by itself because, as everyone knows, the question of the recognition of states is essentially a political question which is facilitated by the legitimacy of the process and which the Advisory Council for National Transition will analyse especially in the report on relations with the international community.

6. The elements shaping the consultation and the criteria regulating electoral campaigns

6.1. The question

The way the question is put is undoubtedly one of the most complex and delicate issues in any popular consultation. In the case in hand there are three fundamental aspects that must be applied cumulatively: first of all, the demands for clarity and neutrality, included both in international law and practice and in internal law;[27] secondly, the matter of whether the

[27] By way of example, the Code of Good Practice on Referendums adopted by the Venice Commission (Council of Europe) refers to the requirements of clarity and neutrality, establishing that the question put to the vote must be clear, it must not be misleading and it must not suggest an answer. See rule 3 and point 15 of the explanatory memorandum on this rule.

In the internal sphere, both Law 4/2010, of 17 March, on popular consultations by referendum, and the bill of law on non-referendum consultations going through the Parliament of Catalonia (BOPC no. 50, of 27 March 2013),

question should offer the voter two or more alternatives and, finally, whether or not the question should explain that in implementing the results of the consultation the legal channels in force will be followed. However, as well as these elements, when the political decision on the phrasing of the question is taken, the political context in which the decision is taken will also have to be taken into account.

Before analysing these three issues we must remember that it is up to the organisation empowered to convene the referendum or consultation to clarify these matters. For that reason, if the referendum were convened under SC Article 92, the question would have to be set by the state, although the convening decree could foresee mechanisms for the Generalitat to take part in the phrasing of the question. If the channel used was delegation or transfer under SC Article 150.2, according to the Organic Law on the Transfer of Powers the state could reserve the right to set the question or else look for shared formulas, or simply delegate it to the Generalitat, as has happened in the Scottish case. In the case of the 'Catalan laws' on referendum and non-referendum consultations it would be up to the Generalitat to decide -though in the first case it would need the authorisation of the state.

6.1.1. Clarity and neutrality

As we have just seen, according to requirements arising from international law and practice as well as from internal law, the questions asked at a popular consultation must fulfil, first of all, the condition of clarity, in two senses: on one hand, the meaning must be easily understood by voters and its phrasing must not be misleading, it must be 'to the point', as the report by the Electoral Commission mentioned above says, and must not be ambiguous as regards the sense of the vote so that the result is as univocal as possible.

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demand that the question be phrased clearly, concisely and unequivocally (Art. 7.a of Law 4/2010 and 8 of the bill of law).

On these matters the report issued by the Electoral Commission at the request of the Scottish Government in January 2013 with the title *Referendum on independence for Scotland. Advice of the Electoral Commission on the proposed referendum question.*

http://www.electoralcommission.org.uk/__data/assets/pdf_file/0007/153691/Referendum-on-independence-for-Scotland-our-advice-on-referendum-question.pdf

The second requirement is that of neutrality: the question must not encourage or favour any of the proposed alternatives; in other words, it must not lead the voter to vote in favour of one of the possible answers[28] or include terms that could have negative connotations as regards one of the options.

To help in drafting the question in the light of this twofold requirement, it might be useful to list a significant number of the questions that have been posed from 1980 until the present day in independence referendums (table 1).

Table 1

Phrasing of questions in independence referendums, 1980-2014

Process	Question
Quebec, 1980	'The Government of Quebec has made public its proposal to negotiate a new agreement with the rest of Canada, based on the equality of nations; this agreement would enable Quebec to acquire the exclusive power to make its laws, levy its taxes and establish relations abroad — in other words, sovereignty — and at the same time to maintain with Canada an economic association including a common currency; any change in political status resulting from these negotiations will only be implemented with popular approval through another referendum; on these terms, do you give the Government of Quebec the mandate to negotiate the proposed agreement between Quebec and Canada?
Slovenia, 1990	'Should the Republic of Slovenia become an independent and sovereign state?'
Georgia, 1991	'Do you support the restoration of the independence of Georgia in accordance with the Act of Declaration of Independence

[28] See the report by the *Electoral Commission*, p. 1

	of Georgia of May 26, 1918?'
Croatia, 1991	Two ballots, a blue one for independence and a red one to remain in Yugoslavia as a federal state.
Estonia, 1991	'Do you want to restore the sovereignty of the state and the independence of the Republic of Estonia?'
Latvia, 1991	'Are you in favour of a democratic and independent Republic of Latvia?'
Lithuania, 1991	'Are you in favour of the idea that the Lithuanian state should be an independent democratic republic?'
Ukraine, 1991	'Do you support the Act of Declaration of Independence of Ukraine?'
Eritrea, 1993	'Are you in favour of Eritrea becoming an independent, sovereign State?'
Quebec, 1995	'Do you agree that Quebec should become sovereign after having made a formal offer to Canada for a new economic and political partnership within the scope of the bill respecting the future of Quebec and of the agreement signed on June 12, 1995?'
East Timor, 1999	'Do you accept the proposed special autonomy for East Timor within the unitary state of the Republic of Indonesia?' ACCEPT or 'Do you reject the proposed special autonomy for East Timor, leading to East Timor's separation from Indonesia?' REJECT
Montenegro, 2006	'Do you want the Republic of Montenegro to be an independent state with a full international and legal personality?'
South Sudan, 2011	Voting forms with two options: 'unity' and 'separation'
Puerto Rico, 2012	First question: Do you agree that Puerto Rico should continue to have its present form of territorial status? YES/NO"

	Second question: 'Which of the following non-territorial options would you prefer: Statehood, Sovereign Free Associated State, Independence?'
Scotland, 2014	'Should Scotland be an independent country?'

Source: The authors, based on Ridao, Joan, 'Podem ser independents? Els nous Estats del segle XXI', RBA, 2012, and online data.

As we see from Table 1, the questions asked have in general been very careful about their neutrality, though in the case of the two referendums in Quebec our opinion is that they are probably the least successful examples in terms of neutrality. The same goes for the clarity, though they share this shortcoming with other cases like those of Georgia, Latvia, Lithuania, East Timor, Montenegro and Puerto Rico.

Whatever the case, Table 2 shows an evaluation of the questions analysed in the light of the two criteria originally mentioned.

Table 2

Evaluation of the questions posed by independence referendums (1980-2014) from the point of view of clarity and neutrality

Process	Clarity	Neutrality
Quebec, 1980	☒	☒
Slovenia, 1990	☑	☑
Georgia, 1991	☒	☑
Croatia, 1991	☑	☑
Estonia, 1991	☑	☑
Latvia, 1991	☒	☑

Lithuania, 1991	☒	☑
Ukraine, 1991	☑	☑
Eritrea, 1993	☑	☑
Quebec, 1995	☒	☒
East Timor, 1999	☒	☑
Montenegro, 2006	☒	☑
South Sudan, 2011	☑	☑
Puerto Rico 2012	☒	☑
Scotland, 2014	☑	☑

Source: The authors.

In fact, from the evaluation of the questions used, we can single out six processes as potential points of reference for the Catalan case from the point of view of clarity and neutrality. All of them fulfil this condition, although there are semantic differences between the different questions (Table 3).

Table 3

'Model' questions from the point of view of clarity and neutrality

Process	Question
Slovenia, 1990	"La République de Slovénie devrait-elle devenir un État indépendant et souverain?"
Estonia, 1991	"Voulez-vous la restauration de la souveraineté de l'État et l'indépendance de la République d'Estonie?"

Ukraine, 1991	"Soutenez-vous la déclaration d'indépendance ukrainienne?"
Eritrea, 1993	"Souhaitez-vous que l'Érythrée soit un pays indépendant et souverain?"
South Sudan, 2011	Bulletin avec deux options: "unité" et "sécession".
Scotland, 2014	"L'Écosse devrait-elle être un pays indépendant?"

Source: The authors, based on Ridao, Joan, 'Podem ser independents? Els nous Estats del segle XXI', RBA, 2012, and online data.

Although as has been said, these six formulae fulfil the requirements of clarity and neutrality, the one that will be used in the Scottish referendum in 2014 is the easiest for voters to understand, the least ambiguous as regards the sense of the vote and the one that has least influence on voting intention.

6.1.2. Two or more alternatives

Insofar as the right to 'decide freely' on the future of self-government in Catalonia has taken shape in political debate and, especially, in the resolutions by Parliament, the object of the consultation is to find out the wish of the citizens of Catalonia as regards what has been called 'their collective political future'.

To find out what this wish is, then, the question can be put in two different ways. One is to ask voters which of the many forms of self-government that exist they prefer, or, at least, which out of the many forms of self-government defended by the main parties, or, more specifically, by the parties represented in the Parliament of Catalonia. The other is to ask whether or not they want to Catalonia to become an independent state, bearing in mind that, getting 'to the point', this is the question which has in fact centred the political, electoral and parliamentary debate since the beginning of 2010, when Parliament began to insist on the right of the people of Catalonia to freely decide its future and began to advocate the constitution of Catalan statehood.

Approaching the matter in this light, we must analyse the advantages and disadvantages of

the two models, both of which are foreseen under the legislation in force[29]. The model with various alternatives has the advantage that it reveals voters' political preferences more accurately, but on the other hand the question and the implementation of its results are more complex and less clear.

First of all, in this hypothetical scenario, the question ought to include at least four alternatives, in keeping with the positions expressed by the main parties with parliamentary representation: preservation of the *status quo*, federal state, confederal state and independent state. In addition, to the problems inherent in the plurality of options must be added the fact that in this case the content of most of the alternatives allows very different practical materialisations and is therefore more difficult for voters to identify. This happens with the naked reference to the federal or the confederal state, but also even in relation to preserving the *status quo*, as defenders of this alternative tend to advocate changes or 'improvements' –for example, in the sphere of funding– which are also wide open to confusion. To make these alternatives more precise, their basic characteristics would need to be explained during the election campaign; even so, voters would find it difficult to fully understand the final content of these alternatives, as it would not depend exclusively on the future Catalan Government but would depend on an agreement with the future federal state, or with the other confederated states or, in the case of preserving the *status quo* with improvements, on the decision of the unitary Spanish state[30].

Practical implementation of the results also raises problems as the foreseeable fragmentation of the resulting options would make it more difficult to draw operative conclusions. The final result of the consultation would be like that of an opinion poll, certainly very valid and with possible effects that would not be insignificant from the political point of view.

The two-alternatives model and, more precisely, the one referring to the constitution or not of an independent state, has the advantage of greater clarity in the question and ease in identifying the result of the vote and the measures the Generalitat would have to take to

[29] Art. 7 of Catalan Law 4/2010 refers only to 'the question' but lets voters decide 'between different options or between yes and no'. Article 8 of the bill of law of non-referendum consultations mentions the possibility of consultation 'on different alternative proposals, although according to the same law this is an "exceptional" possibility, and the Organic Law on Referendums speaks of 'the question or questions'.

[30] In this respect, remember that the Code of Good Practice of the Venice Commission, in its Explanatory Memorandum, states that the question asked must not be an open one necessitating a more detailed answer.

implement it. The fact is, as we shall see in Section 7 of this report, that if the result were in favour of independence and the process could take place through legal channels, the Generalitat would have to negotiate the terms of separation with the state and this introduces a certain degree of uncertainty as to how the final result materialises[31]. However, the level of vagueness can be considered lower than in the concepts of federalism or confederation as it does not affect the structural characteristics of the political organisation, but only how certain points are specified that do not in themselves alter the essential content of state independence.

The disadvantage of this alternative lies in the fact that it does not let all voters express their first choice of a model of self-government and, in addition, that the negative vote of those in favour of options that do not include independence but against the *status quo* 'merges' with the vote of those in favour of preserving it. A question which, while not centred on the independent state, revealed how many people are in favour of a considerable change in the *status quo,* could use the phrase *Estat propi* ('own state') instead of *Estat independent* ('independent state'), as the ambiguity or polysemy of this expression would allow the inclusion both of an independent state and a member state of a federation or confederation. However, this very ambiguity would make the question and the identification and implementation of the results less clear.

In theory it's possible to shape the consultation question in such a way that voters can choose between various possibilities and at the same time produce a single political result. The first alternative would consist in making a system of successive or 'branching' questions: voters are asked to choose between an independent state or not and then, assuming a victory for no, among the other alternatives (federal state, confederal state, *status quo*). This consultation could be split over two rounds (and separate days) or at the same consultation. In the latter case, voters would answer the second question without knowing the outcome of the first.[32] Whatever the case, this first alternative does not solve the problems posed when it comes to asking a question allowing a direct choice between four options: if there were a

[31] The Electoral Commission analyses this on page 6 of its report.

[32] This solution must not be confused with a consultation (like the one held in Puerto Rico in November 2012 and reproduced in Table 1) where the first question would ask for the voter's opinion for or against making Catalonia an independent state and the second question would offer voters opposed to independence the chance to vote for either federation, confederation or status quo. This branching structure is identical to the option of offering all citizens four choices from the start.

majority in favour of independence it would indeed be easy to identify its meaning and put it into effect; however, if that majority was not forthcoming, the result of the second question would still be unclear and its political management doubtful (for the reasons looked at above). A second alternative might consist in asking citizens to order their preferences (out of the four options mentioned)) and use some system of transferrable vote until a winning option is obtained. For example, in a system of alternative vote, each voter would order the options from best to worst. If one option obtained more than half of the first choices it would be declared the winner. If none received more than half, the votes in favour of the option with least first choices would be eliminated and their second choices would be shared between the three remaining options. The process would be repeated until a winner was found. This system of consultation would let voters make their position clear with respect to all the political options and would produce one specific political solution. However, as we know from social choice theory, the transfer mechanism chosen can alter the final result. What's more, this system makes things especially complicated for the average voter. Finally, if independence were not the winning option we would still not know what sort of alternative framework the voter preferred due to the lack of precision of terms like federalism. For this very reason, it's not surprising that this alternative has hardly ever been used in referendums.

In short, from the point of view of the clarity of the question and the ease of implementation of the outcome of the consultation, it seems obvious that the formula with most guarantees is that of the direct question on the vote for or against Catalonia becoming an independent state. Questions with multiple alternatives or on the benefits of Catalonia having a state of its own pose problems of clarity and of how to implement the results.

6.1.3. Reference or not to the need to implement the results through legal channels

Obviously Catalan independence –or any other radical change in the model for the regional organisation of power– is not compatible with the Spanish Constitution and subsequently, from the legal point of view, for it to take place under the constitutional rules in force the Constitution would first have to be reformed. To put it another way, if the outcome of the legal consultation –and, more specifically, the constitution of Catalonia as an independent state- is to be put into effect according to current legality, as the Parliament has repeatedly declared,

the Constitution needs to be reformed before Catalan independence is proclaimed.

In relation to the consultation question, this premise raises the question of whether this circumstance should be expressly stated, by adding a comment to the question of whether Catalonia should become an independent state –or a federal or confederal state–, acknowledging this and specifying that it will become an independent or federal or confederal state 'via the corresponding reform of the Constitution' or, more generically, 'in keeping with the relevant legal procedures' or posing the question as a mandate directed at the Parliament of Catalonia for it to 'begin the process to make Catalonia an independent state'.

Two weighty arguments can be brought to bear in favour of a negative answer to this alternative. First of all, the general rule, repeated by the Constitutional Court in numerous sentences, though in another context, according to which we must always assume that the actions of the authorities take place and will in future take place according to current legality and consequently there is no need to add to everything it does what the court calls 'safety clauses' for constitutional and legal rules in force. Secondly, another point in favour of this alternative is the simplicity and clarity of the question: the material object of the question –the underlying issue: the goal the person voting wants to achieve– is not mixed up with the instrument or the formal procedure by which the outcome of the question would have to be put into effect.

In fact, the alternative to having safety clauses for legality included in the question or to phrasing it like a mandate directed at the Parliament of Catalonia introduces uncertainty into the question and confuses voters, not just because the primary aim of the question is mixed up with the procedure for implementing the results, as explained, but also because there is a considerable degree of uncertainty about the legal means that would have to be applied to comply with the mandate –even if it pointed to a reform of the Constitution– but, above all, because it fails to make clear what would happen if the state opposed the necessary legal or constitutional reforms for Catalonia to become an independent state, if the consultation gave this result. As a consequence of this uncertainty and as an example of the confusion these formulae can create in electors it's enough to point out that people in favour of Catalonia becoming an independent state might vote against this option because they opposed the introduction of safety clauses or mandates to Parliament on the grounds that these formulae recognise the power of the state to block the implementation of the result of the consultation.

Even so, the alternative of including safety clauses and, especially, the formulation of the question as a mandate to Parliament are better guarantees of the question's constitutionality and leave an explicit record for the citizens of Catalonia and the international community of the wish of the Generalitat to carry through this process, as far as possible, respecting current legality and aiming for agreement with the state. The importance of this fact, both legally and politically, must not be underestimated. What's more, including safety clauses formulating the question as a mandate helps to make it clear that if the state is opposed to holding the consultation even though the question states that the result will be implemented by legal means, this refusal is not based on legal grounds but essentially on political motives: on the determination to prevent the free and democratic expression of the wishes of the citizens of Catalonia.

Whatever the case, we must bear in mind that, whether or not this is made explicit in the question, the results will have to be put into effect, as far as possible, in accordance with state and via existing legal channels. In the same way, whether or not it is made explicit in the question, a hypothetical move by the state to block the implementation of the results would not amount to a definitive freeze on the process and the invalidation of the results of the consultation. It would merely amount to irrefutable public confirmation that the process can not be completed through legal channels and therefore, as we shall also be analysing in Section 8 of the report, from the political point of view the alternative channels would be legitimately open.

These considerations, which might favour the adoption of alternatives that 'guaranteed' the constitutionality of the question, take on special importance in the light of one fact –analysed *in extenso* in the report by the Institut d'Estudis Autonòmics mentioned above– that must not be overlooked: sentence 103/2008 by the Constitutional Court on the so-called *Ibarretxe Plan*, which indirectly bases the declaration of unconstitutionality of the consultation, among other reasons, on the fact that the question to be submitted for consultation did not make it clear that the results would be implemented via the procedure of reforming the Constitution.

In short, as for this third variable, we can conclude that the alternatives offering most guarantees of constitutional viability are the ones that include legal safety clauses in the question and, above all, those that are formulated as a mandate to Parliament to begin the process to put independence into effect, should this be the result of the consultation, even though these options pose more serious problems of clarity in the question and how the

result is implemented and could be more confusing for voters.

Whatever the case, if the alternative chosen is the inclusion of a constitutional safety clause, we have to remember that the formula that poses least problems is the clause 'in keeping with the relevant legal channels' –this clause if used would have to be separated from the object of the question by a comma. Even then this clause could be felt to confuse the primary object of the question (the wish for Catalonia to become an independent state or not) and the procedure implementing the results. For this reason, a solution preserving the explicit wish of the Generalitat to use existing legal channels would have to include this clause, not in the actual question, but in a preamble. In this formulation, the question would have the following structure: 'Within the framework of the existing legal procedures, the Generalitat of Catalonia convenes the citizens of Catalonia to vote on the following question: ...'

6.1.4. Conclusions

From the point of view of clarity and of the ease of implementing the results, the most appropriate formulation is the direct question on the vote for or against Catalonia becoming an independent state.

If the Government or the Parliament, taking into consideration other elements, decided to use a multiple question, the most suitable formula out of the possible alternatives is the one that lets citizens choose from various options and at the same time generates a winning option, as the body of the report analyses at length.

In relation to the need to include constitutional safety clauses or mandates directed at Parliament with this goal, we must bear in mind that this inclusion is not strictly necessary from the legal point of view and can involve a loss of clarity; nevertheless, in the present circumstances it might be advisable to formulate the question in the way that best guarantees its constitutionality. In this case, the formula likely to pose least problems is the clause 'in keeping with the relevant legal channels' set out in a preamble.

6.2. The date

6.2.1. Elements to be considered in fixing a date

When it comes to taking the political decision of fixing a date for the consultation, there are four basic points to be born in mind. First of all, the existence of periods of time when holding referendums is legally vetoed, as well as the advantage of not holding the consultation on a working day; secondly, the political neutrality of the date chosen, as required by the international community; thirdly, the need to avoid delaying the consultation more than necessary and fulfilling the general rule contained in the agreement between the two main parties in Parliament to convene the consultation before the end of 2014 –except in special circumstances and by common agreement–; and finally, the need to have time enough to take on the organisational problems arising from the consultation and for the promoting institutions and other legitimate subjects to carefully prepare their election campaigns. To these four points of a general nature must be added in the case being analysed here one last circumstantial but possibly important conditioning factor: the fact that the referendum for independence in Scotland is being held on 18 September 2014. For a certain time afterwards the results of this referendum could influence participation by the citizens of Catalonia and the way they vote.

But before venturing into an analysis of these four points, we must remember that, as we said in reference to the question, the level of protagonism of the Generalitat in fixing the date depends on the legal channel used in holding the consultation. If SC Article 92 is used, it will be up to the state to fix the date, although the convening decree could foresee mechanisms for participation by the Generalitat. If it was done by delegation or transfer under SC Article 150.2, the state could look for shared formulas in the Organic Law on the Transfer of Powers for fixing the date. In the case of the 'Catalan laws' on referendum and non-referendum consultations it would be up to the Generalitat to decide –though in the first case authorisation by the state would be needed.

With regard to the period when referendums can not legally be convened, we must remember, first of all, Article 4.2 of the Organic Law Regulating the Several Forms of Referendum (LORMR), according to which they can not be held during the 90 days before and 90 days after 'parliamentary elections' or general local elections or when another

referendum has been convened. In the context of this law, it would seem that the reference to 'parliamentary elections' includes elections to the Cortes Generals and to the European Parliament.

Article 44.4 of Catalan Law 4/2010 also mentions this time period but only applies it to elections to the Parliament of Catalonia and the Congress of Deputies in Madrid. The absence of a reference to the European elections may be because this law –which, as we know, has been brought before the Constitutional Court– considers that not referring explicitly to European elections allows a restrictive interpretation of Article 4.2 of the LORMR or else it is felt that the scope of the organic law does not cover this issue. Whatever the case, without entering into this legal debate, for all practical purposes, we must admit that the state, which has to authorise the referendum under Law 4/2010, is unlikely to let it coincide with European elections.

Finally, the proposed law of non-referendum autonomic consultations does not foresee any time limits of the sort included in the LORMR, possibly because it considers that this limitation affects referendums but not non-referendum consultations.

In short, as regards the three 'referendum channels', in practice the 'free periods' arising from the convening of European, Spanish or local elections are as follows:

1. *From today until 22 February 2014*, as the period between 23 February and 23 August is ruled out due to the elections to the European Parliament on 25 May 2014.
2. *From 24 August 2014 to 21 February 2015*, as the period from 22 February to 22 August 2015 is ruled out due to the municipal elections to be held on 24 May 2015.
3. *From 14 February 2016*, should the period between 17 August 2015 and 10 February 2016 be ruled out if elections to the Cortes Generales were held no later than 15 November 2015.

Apart from these periods, as we have said, when it comes to fixing the date of the consultation we must remember the problems that could arise for work and the economy if the consultation were held on a working day.

The neutrality of the authorities convening a referendum or consultation, something usually expected by the international community, also affects the decision about the date of the consultation. This is included, for example, in the recommendations or indications formulated by the Venice Commission [33]. Among other recommendations is one not to let the consultation fall on a day with a strong political and symbolical component as it could influence participation as well as the way people vote. The Generalitat will have to weigh up how this recommendation affects the possibility often mentioned by various political actors of having the consultation coincide with the date of 11 September, the Catalan National Holiday.

The organisational and logistics problems for holding the consultation, which we shall be looking at later, are a powerful conditioning factor when it comes to fixing a date, especially if the state is not collaborating in the consultation. We must not forget that, depending on what channel is chosen for holding the consultation, *ad hoc* bodies will have to be set up and material means the Generalitat does not currently have will have to be made available. The same goes for the need to hold the election campaigns with the efficiency and the rigour to be expected in a consultation as important as the one we are analysing here.

However, as a counterpoint to what has just been said, we must bear in mind the benefit of not delaying the consultation too much via the first of the channels chosen, among other things because of the possibility already looked at of trying to apply other legal paths which could in theory open up the application of alternative channels such as holding plebiscite elections as mentioned in Section 8 of this report.

Apart from these criteria and the one deriving from the Scottish referendum to be held on 18 September 2014, it is up to the Generalitat to fix or take part in or influence the choice of date for holding the consultation..

6.2.2. Applying the criteria analysed to the case of the consultation

From the point of view of the relationship between maximum speed and actual viability, the

[33] European Commission for Democracy through Law (Venice Commission) 'Code of Good Practice on Referendums' (2006).

best time for holding the consultation begins at the start of the second semester of 2014.

However, from the point of view of the exclusion of electoral periods, the requirement of neutrality, the problems arising from working days and the hypothetical effects of the results of the Scottish referendum, we must bear in mind that within this initial period the time from the beginning of the semester –1 June– until 23 August must be excluded as it is affected by the European elections. This limit may not be applicable to non-referendum consultations – or, much more improbably in practice, to referendum consultations under Law 4/2010. Of the period from 24 August to the end of the semester, in theory the date of 11 September would have to be excluded because of the problems of neutrality already mentioned. In addition, the possible effects for the Catalan electorate arising from the Scottish referendum do not advise holding the consultation between 19 September and the moment when these effects can be said to have worn off, something which might happen at the end of the semester or the beginning of 2015.

Assuming that the channel chosen for holding the consultation is that of non-referendum consultations, the favourable period would go from 1 June 2014 to 18 September, with the exclusions mentioned of 11 September and working days and with the possibility of reopening in December.

6.3. The electoral roll. Logistical problems involved in holding the consultation

Knowing who can and can not cast a vote in an electoral process becomes a key element which must be established with clarity. In the Catalan case in hand we must consider variations of the electoral roll according to the hypothetical characteristics of the future referendum, consultation or electoral process.

There are four scenarios where potential problems are almost non-existent. Whether we are talking about holding a plebiscite or convening the process under Law 4/2010, on popular consultations by means of referendum, or under Articles 92 or 150.2 of the SC, in view of the need of the Spanish executive to authorise, convene or delegate the referendum, problems to do with the electoral roll –and with the other elements of electoral logistics– are practically non-existent. Holding the referendum legally (with the relevant authorisation) means that the

Oficina del Censo Electoral (Electoral Census Office) would provide the Àrea de Processos Electorals i Consultes Populars Conselleria de Governació i Relacions Institucionals (APECP, Department of Electoral Processes and Popular Consultations of the Ministry of Governance and Institutional Relations) or the future Electoral Syndicate of Catalonia (Sindicatura Electoral de Catalunya, SEC) the updated version of the electoral roll as laid down in Article 4 of this law in reference to the electoral body, which would be made up of '*people entitled to vote in elections to the Parliament of Catalonia*' in view of the scope of the consultation by means of referendum.

Table 4 shows the figures relative to the electoral roll at the last Catalan elections, on 25 November 2012, the basis of projections for the total number of voters at the consultation.

Table 4

Electoral roll at the Catalan elections of 25 November 2012

Elections Parliament 2012	Electors resident in Catalonia	Electors resident abroad	TOTAL
Barcelona	3.921.353	120.459	4.041.812
Girona	490.291	11.791	502.082
Lleida	300.528	12.649	313.177
Tarragona	545.080	11.618	556.698
TOTAL	5.257.252	156.517	5.413.769

Source: *Electoral Census Office – Instituto Nacional de Estadística*

The scenario gets more complex should the consultation have to be held according to the planned legislation of the future law of non-referendum consultations, currently going through the Parliament of Catalonia. In this case Article 5 defines those people who are allowed to vote: 'people who have not lost their political rights, who are over 16 and who have the political status of Catalans, in keeping with the Statute of Autonomy of Catalonia, or are citizens of member states of the European Union other than the Spanish state or citizens of Iceland, Liechtenstein, Norway or Switzerland, and are duly registered as residing in one of

the municipalities of Catalonia'. In other words, apart from the important change in the minimum age requirement for exercising suffrage, this proposal also increases the electoral roll by including those residents who are nationals of European Union countries as well as nationals of Iceland, Liechtenstein, Norway and Switzerland[34].

As we can see, the electoral roll foreseen in the current drafting of the law on non-referendum consultations is very similar to that of local[35] or European[36] ones –except for the inclusion of people over 16– and therefore differs from the electoral roll for the elections to the Parliament of Catalonia. In fact, it takes its inspiration from the provisos of Catalan Law 1/2006 on popular legislative initiatives (PLI). But although the inclusion of citizens of other states who are resident in Catalonia could contribute to differentiate the electoral roll from non-referendum consultations and from referendums, the fact is that the object of the consultation on the political future of Catalonia has nothing to do with the object of municipal or European elections but with general elections, in this case on an autonomic level, or with referendums to approve or reform constitutions and statutes of autonomy. In these cases, the as yet unmodified constitutional tradition is to recognise the right to vote only for national and not foreign citizens. It's significant in this respect that SC Article 13.2 should recognise the right to vote for foreigners only in municipal elections and the EU law establishes the right of EU citizens to vote in the case of municipal and European elections. Neither regulation has anything to say about state or regional general elections or about referendums. Assimilation to the regulations for PLI, therefore, does not seem relevant in view of the different natures of a PLI and a referendum on independence.

[34] This law in progress makes no mention of the Catalans registered in the CERA (Censo de Españoles Residentes Ausentes) and from the wording of Article 5 it seems that Catalans living in other parts of Spain would not be able to vote either in a consultation convened within this legal framework. The law says nothing about managing postal votes either, making this a highly problematic element which could in both cases justify the option for remote electronic voting, something we shall be referring to below, and the creation of an ad hoc register for these electors. This situation has also already been highlighted by Catalans themselves living abroad, who through the Federació Internacional d'Entitats Catalanes (FIEC, International Federation of Catalan Bodies), wrote a letter to the members of the Parliament of Catalonia proposing amendments to the draught law to include them under Article 5 and add a new section to Article 14 to reinforce the procedure for their participation in consultations under this law.

[35] Although, unlike local elections, the bill of law does not include citizens from countries with reciprocity clauses with Spain (Ecuador, New Zealand, Colombia, Chile, Peru, Paraguay, Bolivia and Cabo Verde), it does on the other hand include signatory states to the Schengen Agreement who do not have reciprocity clauses with Spain (Iceland, Liechtenstein and Switzerland).

[36] Depending on the proposal, those called to vote differ from the European elections as they include Iceland, Liechtenstein, Switzerland and Norway.

Table 5

Estimate of new electors in a non-referendum consultation in keeping with the widening of the age range

Continuous register as of 1/1/12	Citizens between the ages of 13 and 17	'Spanish'	Foreign
Barcelona	245.469	206.966	38.503
Girona	36.353	27.451	8.902
Lleida	19.590	15.553	4.037
Tarragona	38.117	29.799	8.318
TOTAL	**339.529**	**279.769**	**59.760**

Source: *Instituto Nacional de Estadística-SIIS (Sistema Integrat d'Informació de Salut, Integrated Health Information System), CatSalut, 31/12/2012*

As regards the first variable (electors from the age of 16), based on the figures in the continuous register of the *Instituto Nacional de Estadística* (INE, Spanish National Institute of Statistics), Table 5 tells us that on 1 January 2012 there were almost 340 thousand people in the Principality of Catalonia aged between 13 and 17[37]. This means we have to add approximately 180 thousand citizens to the electoral roll, as well as an undetermined proportion of the almost 60 thousand foreigners registered in Catalonia. At this point, the estimated total electoral roll includes around 6 million voters (5,973,000).

If the present draft of the bill of law were maintained, to these 'new' electors qualifying by age we would also have to add European citizens as well as nationals of Iceland, Liechtenstein, Norway and Switzerland. An approximation to the number of potential voters resident in Catalonia (Table 6, drawn up on the basis of figures for 2011) shows that we would have to include almost 290 thousand new electors, which would put us above the six million mark (6,263,000). By number of residents, Romanian, Italian, French, Portuguese, Polish and

[37] Consultation of the continuous register took as its age group citizens between 13 and 17, as the first of these will be 16 in the hypothetical scenario of a consultation during 2014.

German nationals stand out.

If these estimates are correct, a scenario of a non-referendum consultation or one of plebiscite elections in which the government refused to provide the up-to-date version of the electoral roll would make it necessary for the APECP or the SEC to urgently update the latest available data, which would be those already mentioned for the last Catalan elections. To make this update possible, –in a setting of lack of collaboration, remember– would have to have the support of experts from the Institut d'Estadística de Catalunya (IDESCAT, Institute of Statistics of Catalonia) and the help of the local authorities.

Table 6

Estimated new electors in a non-referendum consultation based on extending the electoral roll to European citizens over 16

Age groups	15 to 29	30 to 44	45 to 64	65 and over	Total
Germany	3.139	6.870	5.649	3.155	20.330
Austria	337	606	347	100	1.467
Belgium	681	1.566	1.312	862	4.730
Bulgaria	2.772	4.916	2.889	183	12.009
Denmark	223	428	250	136	1.135
Slovakia	521	1.025	213	16	1.897
Finland	227	311	143	35	760
France	5.960	11.237	6.643	3.322	29.993
Greece	304	556	159	32	1.087

Hungary	360	649	136	13	1.271
Ireland	311	813	404	67	1.748
Italy	10.490	21.134	8.497	2.373	46.900
Latvia	195	254	86	7	614
Lithuania	773	951	379	27	2.412
Netherlands	1.228	3.059	2.677	969	8.732
Poland	3.730	5.026	2.212	89	12.424
Portugal	3.743	5.805	2.962	366	14.170
United Kingdom	2.652	6.038	6.135	2.345	18.911
Czech Republic	535	983	178	18	1.814
Romania	30.048	39.713	13.450	653	98.459
Sweden	1.115	969	434	151	2.821
Other EU countries	216	331	88	37	731
Norway	148	216	121	43	570
Switzerland	344	608	775	1.025	2.856
Total	70.052	114.064	56.139	16.024	287.841

Source: *The authors based on IDESCAT figures for 2011.*

This work of updating should not only make it possible to update the global values of the electoral roll of November 2012 but, very especially, with the collaboration of the staff of the APECP and/or the future SEC, to correctly assign these new electors to the corresponding

electoral sections. In addition, it might be deemed pertinent to establish a voluntary electoral register of Catalans living abroad. This register would have to allow corrections of the mistakes found in the present state register of the CERA census.

We should point out that, on top of the difficulty involved in having to update the electoral roll in a scenario of lack of collaboration on the part of the Spanish executive, we must add the difficulties of a logistical nature connected with the electoral process itself. That is to say, the present head of the APECP has stated that there are only about 300 ballot boxes, intended for lending to associations, professional organisations, political parties... because all the electoral paraphernalia (ballot boxes, voting booths, polling station signs, etc...) belong to the central executive and are on loan to the various Catalan local authorities. In a scenario of lack of support for the consultation we can assume that some local authorities –and their staff– would be unwilling to offer any help at all in setting up polling stations, either by providing the usual places for voting or by making ballot boxes and other logistical elements available to the Catalan electoral authority. The Catalan administration must therefore begin urgently to design a programme to supply electoral material, taking as its point of reference the usual logistical needs in local or autonomic consultations.

At the same time, we must not forget that there are more than 150 thousand Catalans living abroad, for whom the lack of collaboration on the part of the Spanish authorities would mean they were practically denied their right to vote, not only because of the non-cooperation by Spain's diplomatic missions around the world –as was largely confirmed at the last elections in November 2012– but also through a possible boycott by the Spanish postal service and its refusal to provide services. So, taking into consideration the difficulties arising from the Spanish foreign service and from the possible hostility on the part of the postal service and a foreseeable lack of support on the part of some Catalan local authorities, the idea of also including a system of remote electronic voting makes sense.

The traditional channel of the postal vote has shown itself to be inefficient for channelling the demand for participation by Catalans living abroad. Today's technological solutions for remote electronic voting –in which a Catalan company leads the world– are as safe as or safer than using traditional postal procedures. In fact, in an uncontrolled environment like remote voting –whether postal or electronic– the elector to a large extent undertakes an act of faith in the integrity of the electoral process and of safety mechanisms. If anything, it could be claimed that existing technological solutions guarantee a certain individual audit of the

vote cast that is not guaranteed in postal voting. However, when it comes to taking a decision on this matter, we may have to take into account criticism –founded or not– of remote electronic voting on the grounds of a lack of security which could contaminate the whole vote.

6.4. Quorum and majorities

6.4.1. Approaching the issue

One of the issues arising in relation to a consultation that could substantially change the *status quo* is that of the majority needed to consider that the option presented has won.

The first thing to say is that this possible requirement of a special majority only arises in the case of an option that alters the *status quo* (in general, the 'yes' option), which produces a certain asymmetry between the alternatives at stake. We could find ourselves before the paradox of a victory for the option for change, but without the sufficient pre-established majority to consider it the legal winner, in which case the conservative option would triumph, despite having received less votes.

Sometimes, in fact, there are additional requirements for considering that the proposed option ('yes') has won in legal terms, in the form of larger majorities and/or participation (which in fact are majorities with respect to the electoral roll), in view of the transcendence of the decision adopted, because it involves a substantial alteration of the *status quo* which would be difficult to reverse. In this respect, the requirement of larger majorities, both in terms of votes cast and of the electoral roll, would be in line with the requirements of larger parliamentary majorities before adopting certain measures of particular importance for the constitution (such as its reform) or even of legal and political importance (such as organic laws or a vote of no confidence, respectively, among others, under Spanish law). It should also be noted, though, that these requirements of large majorities are of an exceptional nature. In a democratic system, the general rule in taking a decision is the simple majority.

There is no doubt that the larger the majority in favour of a certain option is, the more legitimate it is. But the special requirements as regards majorities in a popular consultation (in terms of votes cast as well as of the electoral roll) poses some problems from the

democratic point of view, because the outcome can be that the minority option triumphs over the majority one. Something which on the parliamentary level can be justified, even if only exceptionally (special consensus for taking certain decisions), is more difficult to justify when it is the population who is to express itself directly, who is not called on to draw up a proposal or a decision, but normally votes on a dual alternative (yes/no) for a predetermined proposal.

This means that, in general, the requirement for popular consultations is a simple majority of votes cast. This is also the case in Spain, where an exceptional rule requiring an absolute majority of voters in the province (Article 8.2 LODMR) is established only for autonomic initiative referendums. However, this rule caused problems the first time it was applied and it was modified to adjust it to the real result.[38] In fact, all the other referendums foreseen in the Spanish legislation follow the rule of the simple majority (a majority of votes in favour over votes not in favour of the proposal being presented, without requirements as regards participation): constitutional reform referendums, referendums to approve or modify statutes of autonomy, and the advisory referendum under SC Article 92. Note that in the first two cases we are dealing with decisions with important effects for the constitution and, in the third, with decisions of particular political importance. The referendum to approve the Spanish Constitution of 1978 (held under Law 1/1977, of 4 January, of political reform, Article 3.3) was not subjected to any special requirements concerning majorities or quorums, either.

In the comparative panorama, and particularly in the sphere of referendums on secession, there are some cases where a special majority is required. In the Montenegro referendum of 2006, the European Union demanded 50% participation and 55% of the vote in favour to recognise the independence of Montenegro. This stance by the EU, which was accepted by the parties involved, can be explained by the particular conditions of the case of the Federation of Serbia and Montenegro, in the context of the conflict in the Balkans.

The case of Canada is more complex and is a good example of how the issue can become enormously troublesome. Until 1998, the majority required for the winning option was a simple majority. The Sentence by the Supreme Court of Canada on the secession of Quebec

[38] The rule was modified a few months after the LOSMR was approved to resolve the case of Almería in the autonomic referendum initiative in Andalusia, so that the initiative was considered ratified if it received an absolute majority of votes and the absolute majority of the electoral roll in the region, which was in fact the case in Andalusia on this occasion.

(1998) in fact established that in the case of a clear majority with respect to a clear question on secession by one province, the Federation would have to negotiate with that province. The (federal) Clarity Act (2000) included the requirement of this 'clear majority', though it did not define it in specific terms, but referred the decision of whether or not there was one to the House of Commons. This power granted to the federal Parliament was not recognised by Quebec, who in its own law on clarity stated that '*Aucun autre parlement ou gouvernement ne peut réduire les pouvoirs, l'autorité, la souveraineté et la légitimité de l'Assemblée nationale ni contraindre la volonté démocratique du peuple québécois à disposer lui-même de son avenir*' (Article 13). In the case of future referendums, we can be sure of a conflict.

It's important to note that in the case of the Scottish referendum to be held in 2014, neither the British legislation on parties, elections and referendums that will be applied as the legal framework nor the planned law on referendums currently going through the Scottish Parliament (bill of 21 March 2013) foresee any special majority or quorum.

6.4.2. Conclusions

The conclusion to be drawn from the previous considerations is that the rule on majorities normally applicable to popular consultations is that of a simple majority of votes cast, that this rule corresponds to the requirements of the democratic principle and that establishing special large majorities is a notable exception and, what's more, could lead to complex situations full of problems and hardly compatible with the democratic principle.

For these reasons, it seems advisable that the rule established for the consultation in Catalonia should be that of a simple majority of votes cast.

Nevertheless, if special guarantees are needed of the political legitimacy of the result, consideration could be given to the requirement of a quorum. The threshold for this quorum would have to be decided, if necessary, on the basis of a political assessment. Just as an indication, this minimum participation could be set at the majority of the electoral roll (50% + 1 vote).

At any rate, let me emphasise that the Code of Good Practices in matters of referendums drafted by the Venice Commission and adopted by the Council of Europe recommends not

stipulating either a turn-out quorum or an approval quorum[39]. In the first case, this is because it would assimilate voters who abstain to those who vote no, as a result of which it might even indirectly stimulate abstention, as for a voter opposed to the proposal abstaining could be more 'useful' than voting against it.

In the second case, because requiring an approval quorum could lead to a very complex political situation if voters for the majority option saw the less-voted option triumph because they had not reached the qualified majority.

6.5. The electoral administration and the advantages of setting up the Sindicatura Electoral de Catalunya (Electoral Syndicate of Catalonia)

It is well known that Catalonia does not have an electoral law of its own and this, among other things, means that the country has not got a specific Electoral Administration –that is, an Autonomous Community Electoral Board– or an Electoral Syndicate of Catalonia to give it a name more in line with the Catalan juridical tradition. This is not the place to discuss the reasons why, after 30 years of home rule, Catalonia has not yet got an electoral law of its own. We are aware there is a joint commission on Catalonia's electoral law in Parliament, but, even so, it seems reasonable to think it will not finish its work in a short space of time. Despite this situation, it is undeniable that our analysis here of the different procedural aspects involved in convening a referendum or a consultation of the people of Catalonia implies the need to reflect on the body that ought to oversee the logistics of the process and act as a guarantee of democratic electoral principles.

On the logistics side, electoral processes in Catalonia are currently organised through a small administrative unit of the Catalan Ministry of Governance and Institutional Relations, the Àrea de Processos Electorals i Consultes Populars (APECP, Department of Electoral Processes and Popular Consultations). The APECP depends hierarchically on the Secretaria General de la Conselleria (General Secretariat of the Ministry), the head of the APECP is called the

[39] This is contained in Rule 7 and points 50, 51 and 52 of the explanatory memorandum on this rule.

'Electoral Coordinator', and the permanent administrative personnel under her consists of just two officials of a technical-administrative nature. Its functions are: 'a) To coordinate and execute those administrative activities necessary for carrying out electoral processes and popular consultations. b) To provide organisational support for electoral processes and popular consultations. c) To draw up preliminary budgetary plans for elections and popular consultations corresponding to the Generalitat, their execution and management, and the relevant statement. d) To coordinate, organise, programme and supervise all electoral expenses and those of popular consultations. e) To prepare studies, reports and statistics in matters of elections and popular consultations. f) To undertake the interdepartmental technical coordination in any popular consultation held, coordinated or organised by the Generalitat of Catalonia. g) To provide support for the General Secretariat in the exercise of its duties when these do not correspond to other bodies in this managerial unit. h) Any other function of a similar nature entrusted to it.' (Decree 184/2013, of 25 June, on the restructuring of the Department of Governance and Institutional Relations – DOGC no. 6405). In this logistical section, we must also bear in mind the powers of the Spanish Ministry of the Interior, especially in Spanish general elections and in referendums convened by the state and taken on by the General Directorate of Domestic Policy, in keeping with Article 9 of Royal Decree 400/2012, of 17 February, and largely implemented with the intervention of the State Government Delegations to the Autonomous Communities (Royal Decree 605/1999, of 16 April, on the complementary regulation of electoral processes).

As regards the duties of supervising compliance with electoral rules and guaranteeing a transparent and democratic electoral procedure, which correspond to the Electoral Administration in Spain, the absence of an Autonomous Community Electoral Board in Catalonia forces us to consider various scenarios in relation to holding a referendum or consultation on Catalan independence.

If the referendum were convened by the state, under SC Article 92 and the LORMR, the competent bodies of the Electoral Administration, according to the LORMR (Articles 12, 13, 17 and 18, among others) and the LOREG, would be the Central Electoral Board, the Provincial Electoral Boards and the Area Electoral Boards. In this case, the existence of an Electoral Syndicate of Catalonia would not, in theory, change the powers of the Central Electoral Board. This is what the scheme followed on the occasion of the referendum to approve the new Statute of Andalusia in 2007 seems to suggest, since the Electoral Board of

Andalusia did not intervene at all, as illustrated by the Resolution of 8 March 2007 by the Central Electoral Board officially declaring the results of the referendum. In this scenario, if there were an Electoral Syndicate of Catalonia, a modification of the LORMR or the state's specific rules for convening the referendum would have to expressly establish intervention by this body in the Catalan Electoral Administration so that it could act as such during the referendum process.

If the Government of the Generalitat convened the referendum in the framework of Catalan Law 4/2010, this law (Article 46.2) refers to the 'competent electoral board' when it regulates higher institutional functions concerning legal and operational guarantees for holding the referendum consultation. This competent electoral board could be the Electoral Syndicate of Catalonia if, when this body is set up, the corresponding regulatory law attributes it the functions established under Article 46.2 of Law 4/2010. Attributing functions to the Electoral Boards of the Autonomous Communities that go beyond the electoral processes of autonomic elections is not forbidden by the LOREG so long as they do not affect the terrain of general, local or European elections. In this respect, two main scenarios can be found in comparative autonomic law: assigning the Electoral Boards of the Autonomous Communities to supervise proper procedure in collecting signatures when a popular legislative initiative is launched (among others, Article 9 of Andalusian Law 5/1988 and Article 13 of Catalan Law 1/2006); and assigning to the Electoral Boards of the Autonomous Community the duties of the Central Electoral Board in the case of municipal referendums (Article 12 of Andalusian Law 2/2001 and Article 161 of Catalan Legislative Decree 2/2003). So there do not seem to be legal obstacles to prevent the Electoral Syndicate of Catalonia acting as an Electoral Administration body in referendum consultations convened by the Government of the Generalitat under Law 4/2010. Obviously, if the Electoral Syndicate of Catalonia is not set up, the Electoral Administration for the consultation will be the Central Electoral Board, the Provincial Electoral Boards and the Area Electoral Boards, as we see in Article 46 of Law 4/2010.

If the consultation were to be convened by the President of the Generalitat in the framework of the bill of law, at present going through the Parliament of Catalonia, on non-referendum consultations, the proposed law establishes two specific bodies of what could be called an *ad hoc* electoral administration: the Monitoring Committee and the Control Committee. According to Article 2 of the bill of law, the Monitoring Committee '*is the body responsible in*

the first instance for ensuring the correct procedure in the consultation process, according to the principles of clarity, transparency and efficacy' and the Control Committee '*is the body responsible for supervising the actions of the Monitoring Committee and also the actions of the convening body*'. The Monitoring Committee would be appointed by the President of the Generalitat and would be made up of members of the Administration and social organisations (Article 10), while the Control Committee would be made up of six prestigious legal experts appointed in equal numbers by the President of the Generalitat and the Parliament of Catalonia (Article 13). This is not the right place to enter on a specific, detailed analysis of the system of guarantees established in the bill of law of non-referendum consultations. Nevertheless, we can make two quick considerations. For one, we must remember that, without prejudice to the advantage of better profiling during the passage through parliament of the present bill of law, the establishment of a specific system of guarantees for non-referendum consultations is a must for its legal viability based on the criteria distinguishing between referendums and non-referendum consultations established by the Constitutional Court's Sentence 103/2008 (FJ 2). For another thing, the need to regulate a system of guarantees for non-referendum consultations that is substantially different from the one for referendums is no obstacle for ultimately attributing supervision of the process to the Electoral Syndicate of Catalonia. Reasons of administrative simplicity and institutional respectability could make it advisable to adopt this measure. If this were the option chosen, the proposed law now going through Parliament would have to assign the functions of the Control Committee to the Electoral Syndicate of Catalonia with the proviso, if necessary, of a transitory institutional formula, if the law is approved before the law setting up the Electoral Syndicate. As has already been noted, there are precedents in autonomic law of cases in which the Electoral Boards of the Autonomous Community have been assigned supervisory duties at different election and referendum processes (for example, in the sphere of the popular legislative initiative) and therefore the solution put forward does not raise legal objections.

At this point, bearing in mind the symbolic, legal, social and political importance of the future consultation, it would obviously be a good thing to have, as soon as possible –and at the very least–, our own electoral authority, which in the report by the Committee of Experts was

called the *Sindicatura Electoral de Catalunya*[40]. In other words, if the Parliament can not in the short term approve the election law, it would be advisable to consider the approval, before convening the consultation on Catalan independence, of a law to regulate the make-up and duties of the Electoral Syndicate of Catalonia.

Electoral authorities, when all is said and done, are institutions created with the specific object and the legal responsibility of administrating the essential elements for holding electoral processes in the broad sense of the word: from 'traditional' elections to the basic instruments of direct democracy such as referendums, citizen initiatives or the repeal of a mandate if they are part of the legal mandate. The key element here is to look on the electoral process as a *cycle*, in which the election is not the only important moment. One must also differentiate clearly between the pre-electoral, electoral and post-electoral phases, each of them with elements that can be critical for the success of these processes. One of the examples that can be used as a reference is the *Direction Génerale des Elections du Québec* (DGEQ), although it would have to be adapted to the specific circumstances in Catalonia, which are part of a slightly different political culture.

The model applied by the DGEQ is obviously a wager for an independent, neutral, impartial and non-partisan electoral body with multiple functions, which in Spain are undertaken both by Government Administrations (Ministry of the Interior, Autonomic departments) and by the Electoral Administration bodies (the various Electoral Boards) which are not always as neutral and objective as one would wish. As for its main functions, it has several: the organisation and logistics of elections, registry of political parties, updating electoral legislation, the power to inform citizens when elections are convened and of the necessary steps and requirements for exercising the right to vote, as well as convening elections. In this respect, as well as functions of a domestic nature, we have to bear in mind that another of the duties undertaken by the electoral authorities is to manage programmes connected with international electoral monitoring and advice. The link between the future SEC and the international electoral advice and monitoring bodies –as in the case of the specialised units in the EU, the Council of Europe, or bodies like the Carter Center, the IFES or International IDEA– is something to be established and strengthened.

[40] See Various authors: Participació, representació, transparència. Informe per a la Llei Electoral de Catalunya. Barcelona, Departament de Governació i Administracions Públiques, 2007. Pages 117-129.

In addition, a review of the present situation in the Spanish autonomic sphere reveals that while the previsions contained in the LOREG in this respect have been normatively developed, this has not resulted in much –if any– *innovation* by the different Autonomous Communities, either in the electoral system or in the autonomic electoral authorities.

Table 7

Composition and powers of the Electoral Boards of the Autonomous Communities

Community	Composition	Powers
Andalusia	4 magistrates from the TSJC by turns 3 Jointly proposed experts	Resolving appeals Discipline of managers Sanctioning offences
Aragon	4 magistrates from the TSJ by turns 3 jointly proposed legal experts.	Resolving appeals Discipline of managers Sanctioning offences
Asturias	Remits to the LOREG	Resolving appeals Discipline of managers Sanctioning offences Announcing returns
Balearics	3 magistrates from the TSJ by turns 2 jointly proposed experts	Resolving appeals Discipline of managers Sanctioning offences
Canaries	4 magistrates from the TSJ by turns 3 jointly proposed experts	Resolving appeals Discipline of managers Sanctioning offences
Cantabria	3 magistrates from the TSJ by turns 2 jointly proposed experts	Resolving appeals Discipline of managers Sanctioning offences Announcing returns

Castilla la Mancha	4 magistrates from the TSJ by turns 3 jointly proposed experts	Resolving appeals Discipline of managers Sanctioning offences Issuing credentials
Castilla y Leon	4 magistrates from the TSJ by turns 3 jointly proposed experts	Resolving appeals Discipline of managers Sanctioning offences Issuing credentials
Extremadura	4 magistrates from the TSJ by turns 3 experts	Resolving appeals Discipline of managers Sanctioning offences Issuing credentials
Galicia	President of the TSJ. 4 magistrates from the TSJ by turns 3 jointly proposed professors	Resolving appeals Discipline of managers Sanctioning offences
La Rioja	President of the TSJ by turns 2 magistrates from the TSJ by turns 2 jointly proposed experts	Resolving appeals Discipline of managers Sanctioning offences Approving models for returns
Madrid	Provincial Board	Provincial Board
Murcia	President of the TSJ. 3 magistrates from the TSJ by turns 3 jointly proposed Professors of	Resolving appeals Discipline of managers Sanctioning offences
Navarre	Remits to the LOREG	Resolving appeals Discipline of managers Sanctioning offences
Basque Country	President of the TSJ 5 magistrates from the TSJ by turns 5 jointly proposed experts	Resolving appeals Discipline of managers Sanctioning offences Guaranteeing the exercise of freedom Guaranteeing free press coverage Issuing credentials

Valencia	President of the TSJ 3 magistrates from the TSJ by turns 5 jointly proposed Professors of Law from Valencian Universities	Resolving appeals Discipline of managers Sanctioning offences Determining the 5% threshold Guaranteeing free press coverage

Source: *AA.DD., 2007: 127-128.*

When we analyse the various autonomic electoral laws in depth, we see that, apart from formal differences of length (sic), their one common feature is their simplicity and absence of innovation in the regulation of the respective electoral authorities[41]. They stand out for their marked judicial bias, as in all the JEA –except for the Valencia– the magistrates from the respective Higher Courts of Law of the Autonomous Communities outnumber specialists in electoral matters (Table 7).

Whatever the case, this alternative to the SEC is the one formulated in the 'experts'' *Report* as regards its nature as a permanent body of the SEC and its make-up of two judges or magistrates designated by turns by the judicial authority and five experts of recognised prestige in electoral matters appointed by the Parliament by a three-fifths majority. As regards the powers of the SEC, the 'experts'' *Report* underlined the advantages of the radical innovation of setting up an independent electoral body in Catalonia, based, for example, on the Quebec model described above, as it would bring an added guarantee of impartiality in all electoral processes. Nevertheless, it also warned of the uncertainties of its possible implementation in Catalonia precisely because of the profound change it would mean in the institutional framework in force for years in these matters, which has not drawn criticism of the working of the government sphere. In this respect, the report points out that maintaining two separate bodies (the APECP and the SEC) in Catalonia would make it possible to satisfactorily emphasise different aims for each of them: efficacy in the body assigned to managing the logistical elements of the electoral process (the APECP) and impartiality in the one assigned to supervising fulfilment of electoral rules (the SEC). This seems to be the most suitable option, on the understanding that the powers of the SEC could go further than is usual in autonomous regulations, in particular when it comes to holding referendums and non-referendum consultations.

[41] An excellent analysis on the subject is the one by Joan Oliver Araujo: Los sistemas electorales autonómicos. Barcelona, Institut d'Estudis Autonòmics, 2011.

6.6. International electoral monitoring

Managing international programmes for electoral monitoring and advice has become common practice among electoral bodies and authorities. In the Catalan case, for the Catalan electoral authority –or the future SEC– to establish an international election monitoring programme for the consultation makes little sense in terms of needs or benefits, as elections in the Catalan and Spanish scenarios have been taking place with absolute normality ever since the recovery of democracy. International election monitoring missions of this sort take place essentially in scenarios characterised by weak democratisation or in societies in the course of democratic consolidation, for a period of time comprising the whole of the electoral cycle.

On the other hand, it is advisable that the future SEC should establish links with international electoral advice and monitoring bodies –as in the cases of the specialist units within the EU, the OSCE, the Council of Europe, or organisations such as the Carter Center, the IFES or International IDEA. In this respect it is also highly advisable to promote the exchange of knowledge and good electoral practices through, among other things, the figure of international visitors. It is usual, for example, during an electoral process, to hold institutional advisory and study visits by teams of experts from these institutions and organisations to monitor the process and, if necessary, issue recommendations aimed at improving the way electoral processes are run.

6.7. Regulating the institutional campaign

Dealing with the work of the institutions in a referendum campaign or consultation calls for separate analysis of two issues. One is what is referred to in current legality as an institutional campaign, whose object is for the organisers to inform citizens of the essential technical elements

of the referendum or consultation (the date, the wording of the question and the procedure for voting) and, if need be, to encourage participation. The other, legally known as an information campaign, with a noteworthy measure of ambiguity, as we shall see, or, in some cases, as a propaganda campaign, whose object is to allow the institutions convening the

referendum or consultation, and also other institutions and political and social actors, to explain the object of the consultation and their position on the question posed to citizens. In this section we shall deal only with the institutional campaign in the strict sense and the next section will look at the matter of the information campaign by the convening institutions and that of other government authorities and political and social actors. The explanation will look separately at the institutional campaign depending on whether the referendum or consultation is convened by the state under the LORMR or by the Generalitat under Law 4/2010 or the law of non-referendum popular consultations.

If the referendum is convened by the state in the framework of SC Article 92 and the LORMR, it would seem that the legal parameters of the institutional campaign can be found in this organic law. This in fact is not the case, as it can be seen that the LORMR says absolutely nothing about the institutional campaign for referendums. Only Article 3.2 of the organic law states that the decree convening the referendum must be published in the official publications and through newspapers, radio and television. From this absence of specific rules and the reference by Article 11 of the LORMR to the general electoral regime as regards the referendum procedure, it can only be understood that the legal regime for the institutional campaign is decided by the LOREG and by the Instructions and Agreements of the Central Electoral Board. In this sense, the key precept in the LOREG is Article 50.1.

This article covers three fundamental elements of the institutional campaign: who can run one; where it can take place; and what it can cover. The first two elements require no special comment: the institutional campaign can only be run by the institution convening the ballot and it must take place in the free sections of publicly owned media in the geographical area where the electoral process is taking place. The third element, on the other hand, has raised controversy on both the doctrinal and political level. The reason is that Article 50.1 of the LOREG contains a very restrictive concept of what an institutional campaign is. Literally speaking, the institutional campaign must be directed at '*informing citizens as to the date of the vote, the procedure for voting and the requirements and procedure for voting by post, without in any case influencing the voting intention of the electors*'. It can be seen that this legislation omits one of the possible elements of the institutional campaign, namely the promotion or stimulation of participation in an electoral process. The legislation in force in the LOREG contrasts with the earlier one, of 1994, in which one of the objects of the institutional campaign was to '*incentivise participation in elections'.*

In the light of this legislative evolution, it seems clear, then, that the wish of the legislator is to exclude messages aimed at fomenting electoral participation from the institutional campaign. This has been confirmed by decisions on this issue by the Central Electoral Board. These resolutions by the Central Electoral Board have not only provided general confirmation of the restrictive scope of the institutional campaign with the express exclusion of incentives to participation, but what's more, some have explicitly extended this limited reach of the institutional campaign to referendum procedures convened by the state or by the autonomous community and held in the framework of the LORMR. Among the former we find the Agreement of 13 May 1999 stating that institutional campaigns '*can not incentivise voting as abstention is as much a legitimate option for the elector as the effective exercise of the right of suffrage*' and Instruction 2/2011, which indicates that '*the possible object of these institutional campaigns does not include encouraging electors to vote, for which reason it must be understood that a campaign with that end is not allowed*'. For its part, among the resolutions of the Central Electoral Board extending the application of this rule and this doctrine to referendum procedures, we could mention the Agreements of 25 January 2005 and 24 May 2006. The latter, with regard to the referendum for the Catalan Statute of 2006, declares that '*Article 50.1 of the LOREG is directly applicable to the institutional campaign in the present referendum process, for which reason the campaign should be limited exclusively to providing information to citizens about the date of the poll, the procedure for voting and the requirements and procedures for voting by post*'. In short, so long as Article 50.1 of the la LOREG and the criteria for its application established by the Central Electoral Board remain in force, if the state convenes the referendum no-one else can run an institutional campaign and this campaign must be limited to purely technical information without trying to incentivise participation.

If the referendum is convened by the Generalitat under Catalan Law 4/2010, the legal regime of the institutional campaign presents certain particularities. However, we can foresee now that unless there are more substantial changes in the state legislation, promoting participation will remain outside the scope of the institutional campaign. In chronological order, the relevant legislation on this matter is as follows: first of all, Article 43.3 of the Statute of 2006 establishes a guideline directed at the Catalan authorities according to which institutional campaigns in electoral processes must have '*as their aim the promotion of citizen participation*'; second, Article 49 of Law 4/2010 regulating the institutional campaign for referendum consultations in Catalonia in very similar terms to those of Article 50.1 of the

LOREG, ie without mentioning the promotion of citizen participation; finally, the first additional rule (Part 2) of the LOREG imposing the application of Article 50.1 of the LOREG to autonomic electoral processes. To these legal facts must be added the Agreement of the Central Electoral Board of 31 October 2012 under which, paradoxically, institutional campaigns by the Generalitat to encourage participation in application of Article 43.3 of the Statute of Autonomy of Catalonia (SAC) must conform to Article 50.1 of the LOREG, which in fact says nothing about incentivising participation. What conclusion can we draw from the precedents just explained? Based on the fact that SAC Article 43.3 is a guiding principle, present in Catalonia's basic institutional ruling and not affected by the Constitutional Court's Sentence 31/2010, it can be argued that its normative content is obligatory for the Generalitat as the public authority in Catalonia over and above other normative provisions like the ones established in the first additional rule and Article 50.1 of the LOREG. However, as Article 39.3 of the Statute itself indicates, the bindingness of guiding principles depends on how they materialise in rules through the laws and other provisos that develop them. In the case in hand this developing legislation can be issued by the Generalitat of Catalonia. This even seems to be acknowledged by the Agreement of the Central Electoral Board of 31 October 2012 when it explains that the application of Article 50.1 of the LOREG is a transitory legal regime for want of an electoral law in Catalonia.

The problem in the case of referendum consultations convened by the Generalitat is that there is Catalan regulatory legislation, Article 49 of Law 4/2010, and that it does not include encouragement of participation when it establishes the legal regime for institutional campaigns.

The possible solutions to the problem could come in one of three ways, always taking SAC Article 43.3 as our basis and respecting the criterion that the institutional campaign must not influence electors' voting intention. The first is to include encouragement of participation in the regulation of the institutional campaign in a Decree by the Generalitat of complementary regulations for holding the referendum, a possibility which in addition would be made easier juridically by the fact that Article 49 of Law 4/2010 does not expressly exclude incentivising participation. The second would be to modify Article 49 of Law 4/2012 to include the mention of encouraging participation as the aim of institutional campaigns. The third would be, if we pay attention to the suggestion in another section of this report of setting up an Electoral Syndicate of Catalonia in the short term as an electoral administration body with power over

referendum consultations convened by the Generalitat, to assign to this institution the duty of running or supervising the institutional campaign, including encouraging people to take part.

If the consultation is convened by the Generalitat under the bill of law on non-referendum consultations currently going through the Parliament of Catalonia, regulation of the institutional campaign by the autonomic administration corresponds to the future Catalan law as in this case the procedure does not have to take into account the provisos of the LOREG or the LORMR. In this respect, the possibilities of the guiding principle of SAC Article 43.3, as regards encouraging citizen turn-out for a consultation, could be amply developed, always respecting the limit of not influencing electors' voting intention. However, for the time being the bill of law of non-referendum consultations makes no mention of the institutional campaign. There is just one brief mention of the information campaign (Article 9) which, as was pointed out above, is not quite the same as the institutional campaign. The suggestion is, therefore, that the future law of non-referendum consultations should include the regulation of the institutional campaign with an express reference to encouraging participation as one of its objectives.

6.8. Regulating the information or propaganda campaign

As we saw in the previous section, the object of an information or propaganda campaign in a referendum or consultation is for the convening institutions, other authorities and political and social actors to inform and explain their position on the object of the consultation, ie on the content of the question. Now we shall first of all look at the information campaign by the authorities, whether the convening body for the referendum or consultation or not, followed by that of the other political and social actors. First, though, we must underline one element common to all the legislation considered in this report: the decree convening the referendum or consultation has to establish the duration of the information campaign. On this point the LORMR (Article 15.1) and Catalan Law 4/2010 (Article 47.2) state that the information campaign may not last less than ten days or more than 20 and that it must end at zero hours the day before the referendum is to be held. For its part, the proposed law of non-referendum popular consultations (Article 9) includes the possibility of a longer duration as it states that the information campaign can not last less than 15 days or more than one month.

As regards the information campaign by the authorities in relation to the object of a referendum convened under the LORMR, we can see that the law mentioned does not regulate this issue. Consequently, it can in principle be taken that there is no prohibition preventing an institution from informing and explaining its position on the content of the referendum question. The Central Electoral Board has clearly underlined the difference between an institutional campaign and an information campaign on the object of the referendum which all the institutions can run, subjecting the latter to certain conditions and limits. In this respect, the Statement of 31 January 2005, announced on the occasion of the campaign on the referendum on the Treaty on the European Constitution, reads as follows: '… the public authorities, at state, autonomic and local levels, may hold an information campaign on this Treaty so long as it does no more than inform, objectively and with full respect for the principle of political neutrality, on its contents, eliminating value judgements or slogans of any kind ...'.

Other decisions by the Central Electoral Board on the occasion of the referendum on the Catalan Statute of Autonomy in 2006 take the same line. We can see that, while allowing the authorities to approve resolutions establishing their criterion on the referendum (Agreement of 1 June 2006), it still insists that institutional events must not include valuations on the object of the consultation, so as to preserve the institutions' political neutrality (Agreement of 15 June 2006). On the position of the Central Electoral Board in relation to the information campaign by the authorities in a referendum convened under the LORMR, there are three things to consider. First of all, we must positively value the distinction between an institutional campaign and an information campaign and therefore the admissibility that any institution, regardless of whether or not they are convening the referendum, can inform citizens about the object of the consultation. Secondly, it's obvious that it will not always be easy to comply with the requirement of informing objectively without in some way influencing electors' voting intention. Thirdly, it might be worth mentioning that the criterion of the Central Electoral Board on this point is stricter than the Code of Good Practice on Referendums approved in 2007 by the Venice Commission of the Council of Europe (Section I.3.1 and explanatory note, Section I.13). In this document we read that '*Contrary to the case of elections, it is not necessary to prohibit completely intervention by the authorities in support of or against the proposal submitted to a referendum. However, the public authorities (national, regional and local) must not influence the outcome of the vote by excessive, one-sided campaigning*' and that '*it is legitimate for the different organs of government to convey their viewpoint in the debate for or*

against the text put to the vote'. In short, the Council of Europe accepts that the authorities can take sides in the information campaign for a referendum without abusing their position and with the commitment to guarantee that at the same time voters receive information on the other points of view. In this way, in the opinion of this report, the Council of Europe establishes a possible and desirable guideline for modifying the rules of the LORMR or the evolution of the doctrine of the Central Electoral Board.

Catalan Law 4/2010 does not regulate the authorities' information campaign in the case of referendums convened under its terms either. The opposite might seem true when Article 47.1 states: 'The object of the information campaign is for the promoters of the popular consultation by referendum and the political parties to explain their position in relation to the popular consultation.' In this respect, if under Law 4/2010 (Articles 13, 15 and 21) a popular referendum consultation in the sphere of Catalonia has to be approved by Parliament at the initiative of the Government, or of one fifth of the Members of Parliament or of two of the parliamentary groups in the House, or of 10% of the municipalities of Catalonia in representation of at least 500,000 inhabitants, or by a popular initiative supported by at least 3% of the population, any of the institutions or subjects just mentioned could be understood to be 'promoters' under Article 47.1 of this law. However, if this article is looked at in the light of Articles 48.1 and 48.5 and also of the fifth additional proviso of Law 4/2010, then we must interpret the term 'promoters' in Article 47.1 as referring only to commissions for promoting referendums by popular initiative. In view, then, of the lack of regulation of the authorities' information campaign under Law 4/2010 and in view also of the nature of popular consultations under this law as referendums, with the consequent application of the decisions of the Central Electoral Board in these cases, we can say that the authorities in Catalonia can run an information campaign on the object of a referendum objectively and neutrally and trying to avoid value judgements. Obviously, the earlier considerations on these criteria are also valid here, especially the possible inspiration in the Code of the Council of Europe, already mentioned, to modify Law 4/2010 to include a ruling which, with respect to the principle of equality of arms, would allow the authorities to clearly establish their political position on the referendum.

With regard to the bill of law on non-referendum popular consultations, this text makes no reference to the authorities' information campaign either. It simply mentions (Article 9) that the decree convening the consultation must contain the characteristics of the information

campaign. Since this type of consultation does not have the nature of a referendum, the Catalan legislator, either in the final text of the law or in the complementary regulations for its deployment, is not obliged to follow the criteria of the Central Electoral Board as laid out above and could include the principles of the Council of Europe's Code, also mentioned above.

Going on to the information campaign by the political and social actors in a referendum convened under the LORMR, we can see how the organic law mentioned and the LOREG expressly grant almost exclusive protagonism to the political groups with parliamentary representation as the political subjects of the information campaign. In this respect, Article 11.2 of the LORMR, after amply referring to the general electoral regime as regards the regulation of referendum procedures, states the following: 'The powers attributed under said regime to parties, coalitions or groups of electors will be understood to refer to political groups with parliamentary representation, or to those having received at least 3% of valid votes cast in the area the consultation refers to, in the last general elections held for the Congress of Deputies'. For its part, Article 14 of the LORMR specifies, in an aspect of great political and social importance, that only groups with representation in the Cortes Generales are entitled to make use of the free coverage that the publicly owned media are obliged to make available for the propaganda campaign. The same Article 14 and the regulations under which each consultation is convened (for example, State Decree 7/2005, or the Generalitat's Decree 171/2006) specify the criteria for assigning free media coverage according to the representation obtained at the Cortes Generales as well as in the autonomous Parliament in the case of a consultation on the regional level of an Autonomous Community. These criteria have been interpreted strictly by the Constitutional Court in Sentence 63/1987, according to which the status of political group with parliamentary representation is only obtained by popular suffrage and can not be claimed by those political forces present in the chambers as a result of splitting off from a parliamentary party and without the direct support of the ballot box.

Does all this mean that other political formations and other social organisations are excluded from a referendum information campaign? As regards political groups without parliamentary representation, the decrees cited above, along with the Agreement of the Central Electoral Board of 19 January 2005, allow any formation, without the need for parliamentary representation, to run a propaganda campaign during a referendum and make use of the

sites reserved by local authorities for this purpose, in keeping with criteria established by the Area Electoral Boards. However, they must run the entire information campaign using their own resources and are not entitled to free coverage on public media. As regards social organisations other than the political parties, the LORMR makes no mention of them and they therefore have no specific legal recognition for intervening in a referendum information campaign. This legal silence is to be regretted as it is precisely in referendum propaganda campaigns that certain types of social organisation can play a prominent political role. We must remember, without leaving the subject of referendums held at the level of Spain as a whole, the part played by organisations like the *Plataforma Cívica para la salida de la OTAN* (Civic Platform for Leaving NATO) and the *Coordinadora Estatal de Organizaciones Pacifistas* (State Coordinating Body for Pacifist Organisations), in 1986, and the *Plataforma por el NO a la Constitución* (Platform for NO to the Constitution), in 2005. The decisions of the Central Electoral Board have done nothing to improve the position of these social organisations either, as initially they merely confirmed that '*they have no legal right to receive public resources for electoral campaigns'* (Agreement of 20 February 1986), due to the fact that they are not included in Article 11.2 of the LORMR, and implicitly accepted later that they can use public sites as decided by the Area Electoral Boards (Agreement of 31 January 2005). This legal framework establishes that these social organisations can take part in a referendum campaign using their own resources and only under the auspices of Article 50.5 of the LOREG –in other words, in terms of the exercise of freedom of expression established in Article 20 of the Constitution. Nevertheless, this hypothesis seems to be excluded by the Agreement by the Central Electoral Board of 16 February 2005, contradicting what it had to say in its Agreement of 31 January 2005.

This Spanish legal framework, which gives parliamentary political formations a markedly predominant role, contrasts with the consideration given to other political groups and social organisations as political subjects of a referendum information campaign in other legal contexts. Note, for example, that the Council of Europe's Code of Good Practice on Referendums, without prejudice to recognition of the role of political parties in the information campaign and the possibility of taking into account election results when it comes to modulating their intervention, puts the accent on the criterion of guaranteeing a balance in the various manifestations of the information campaign (in particular, in the public media) between 'supporters and adversaries' of the project submitted for consultation to citizens. It's worth noting that when the Council of Europe's Code speaks of 'supporters and adversaries'

it is not referring exclusively to political parties but is also including individuals and other subjects. In the same way, we could mention two examples of legal regulation in force regarding the subjects called to take part in a referendum information campaign: the Regulation of the AGCOM (Italian Authority for Communications Guarantees) of April 2011 directed at that year's Italian referendums, and the Scottish

Independence Bill of 2013 directed at a referendum in Scotland in 2014. In both cases it can be seen that, without prejudice to the differences in certain elements of the specific regulation, the 'political subjects' (Article 2 of the Italian Regulation) or 'participants' (Part 2, Schedule 4 of the Scottish Bill) in the information campaign for the respective referendums are set out with a considerable margin and openness. In the Italian case these are: the promoting committee, the political forces, and committees and associations with a specific interest in the consultation. In the Scottish case these are: political parties, individuals and social organisations of different types. Based on these precedents, inspiration can be found for the modification of Spanish legislation and for the evolution of the criteria of the Central Electoral Board.

The information campaigns for referendums under Catalan Law 4/2010, as we saw earlier, contain certain new elements, but do not stray far from the parameters of the regulation established under the LORMR and the LOREG. In fact, the only new aspect is the one in Articles 47 and 48 and the fifth additional proviso –that is the consideration that the commission promoting a referendum by popular initiative is a political subject of the information campaign and, as such, is entitled to make use of free space in the publicly owned media on the terms laid out in the fifth additional proviso mentioned above. Apart from that, the regulation, either expressly or by explicit reference to the LOREG, maintains the principal criteria of the Spanish legislation, among which we can single out this one: only those groups with parliamentary representation in the Parliament of Catalonia are entitled to make use of free space in the publicly owned media. In view of this legislative framework, a new configuration and a possible extension of the subjects of the information campaign, which would involve the extra-parliamentary political forces and social organisations, remains as a challenge for a possible modification of Law 4/2010 in line with the criteria of the Council of Europe's Code and of the regulations of other countries referred to above.

The treatment given the subjects of the information campaign in the bill of law on non-referendum consultations currently going through the Parliament of Catalonia is different. In

this respect, Article 10.3 establishes the following: 'At the moment of convening, a period not greater than 30 days must be opened, during which interested social or professional organisations must express their wish to form part of the consultation process'. The bill of law defines the profile of these social organisations and specifies some of their functions, such as forming part of the consultation's Monitoring Commission (Article 10.2). Without prejudice to the final wording of the law determining more exactly how these social organisations, as well as other political subjects such as the political parties, can take part in the information campaign (especially in the use of free space in the public media), we must place a positive value on the fact that the Catalan legislation looks at the legal treatment of the information campaign for a non-referendum consultation with explicit acknowledgement of the fact that in democratic processes of this type parties can not be the only political subjects, but, precisely on account of the special characteristics of consultations and referendums, other civic platforms and entities must also have a real part to play.

7. Implementing the results of the legal consultation: legal consequences of a victory for the ‘yes’ or ‘no’ options

The legal consequences that could arise from the result of the consultation depend, first of all, obviously, on the question submitted for consultation. As we explained in Section 4.1, insofar as the question asked in the consultation theoretically allows various possibilities, the consequences the result could have will now be dealt with according to these options, which are basically three in number: a direct question on independence; a question on initiating the legal procedure to allow independence, a multiple question with various alternatives. Similarly, insofar as we have also referred to the possibility of asking a question on 'the establishment of statehood', we shall also deal here with the consequences that would arise from a question phrased in these terms.

7.1. The consequences of a consultation with a question on Catalan independence

7.1.1. A hypothetical victory for ‘yes’

In the case of a victory for the 'yes' option to a direct question on Catalan independence, the first issue to arise as regards its consequences concerns the obligatory or binding nature of the outcome, since the consultation, whether held under SC Article 92 or through similar channels (directly convened by the state, convened by the Generalitat by delegation or transfer from the state or under the Catalan Law on referendums), or if it takes place by way of a Catalan law of non-referendum consultations, is advisory by nature.

This advisory nature is expressly recognised in the laws regulating the various forms of consultation by way of referendum (SC Article 92; Catalan Law 4/2010 Article 12) or by non-referendum means (very probably, in the future Catalan law[42],) which in principle could be used to hold the consultation in Catalonia. On the basis of this advisory nature, and according to the 'classical' doctrinal interpretation, the authorities would not, strictly speaking, be obliged to act or to base their decisions regarding the subject of the consultation according to the result. Another matter that also arises from this classical interpretation is that politically it would be very difficult to stray from the result expressed at the popular consultation. But the price of straying would be measured in political rather than legal terms. That is, political responsibilities might be generated (basically electoral or in terms of resignation) by any action contrary to the result of the consultation, but these actions or decisions could not be invalidated by a court of law for this reason (unlike what would happen in the case of a binding referendum, as for example a referendum to reform the Constitution or the Statute).

This interpretation, however, is questionable. Without the need to analyse *in extenso* the arguments that could be put forward to cast doubt on it or even contradict it, it should be

[42] The Law of Non-referendum Consultations is currently going through the Parliament of Catalonia, so we can not say for sure what consideration will be given to these consultations. It is, however, foreseeable that they will also be acknowledged as having advisory status.

mentioned that, in the case of a popular consultation on a given decision, the democratic principle which is the basis for the working of the state and which legitimates its institutions and the decisions they take necessarily leads one to acknowledge that the people's wishes expressed directly in a specific matter must prevail over the possible criterion of representative bodies and must guide their action in this matter. In fact, when the people's wishes are expressed directly in a system of representative government, they take precedence over the ones government bodies may form on their own account, but these get their legitimacy precisely on the basis of representing the population. The direct decision of the people must prevail over that of the political institutions, because the former is closer to the source of sovereignty than the latter. The other option (precedence of the decision of the representatives over the directly expressed decision of those represented) is unacceptable from the point of view of the democratic principle, even in the framework of a system of representative democracy. The exceptional nature of a direct pronouncement by the people in this system is precisely what strengthens the primacy it must be given over the ordinary actions of the representative institutions.

This is one of the basic ideas underlying the Sentence by the Supreme Court of Canada in 1998, in which it maintains that a clear majority in favour of secession for Quebec, even though the Constitution does not foresee this possibility or recognise the right of secession, would oblige the Federation and the other provinces to take this wish into account and negotiate with Quebec, because this option would have a democratic legitimacy that the Federation would have to acknowledge and respect.

It can therefore be claimed that, despite the formally advisory nature of the consultation, a victory for the answer 'yes' to a direct question on Catalan independence or on the constitution of its own state would create legal obligations or consequences for the authorities and force them to act accordingly.

From here on we have to distinguish between the consequences for the Generalitat and those for the state. The Generalitat, on one hand (Parliament and Government), would be obliged to present the plan for secession to the state. A result in favour of independence would not automatically come into effect, but would mark the start of a process which would have to lead towards this end-result.

In this respect, the Generalitat would have two main options in submitting the matter to the

state: to present an initiative for constitutional reform, under SC Article 168, making use of the powers recognised in the Constitution itself (SC Article 166 in relation to SC Article 87.2); or else propose direct negotiation with the state, separately, at least at this stage, from the constitutional reform procedure, on the grounds that this would in fact be a new constituent moment. In the first case, the demand for independence would be channelled via the foreseen legal procedure, in terms of a constitutional revision, which would follow the procedure foreseen in SC Article 168 (and, correspondingly, in Articles 146 and 147 of the Rules of the Congress of Deputies and Articles 158 and 159 of the Rules of the Senate). This is undoubtedly the chief virtue of this channel: the scrupulous respect for current legality. Offsetting this advantage is the fact that under this procedure the state has a power of decision throughout, which could, from the outset, lead to a refusal to deal with the initiative of the Generalitat (a debate in the Plenary Session of the Congress of Deputies and in the Senate to approve the principle of reform, by two thirds of the members of the two chambers) and afterwards, should the initiative prosper at this early stage, to decide on the proposal's final content (approval by Parliament of the constitutional revision, by two thirds of the new chambers elected) and finally, to ratify it so that it comes into force (state-wide referendum). At these three moments, the state, through various procedures, can refuse to process the demand brought by the Generalitat, can unilaterally give shape to the content of the reform and can refuse to ratify the result of the constitutional reform approved by the Parliament. Faced with this possible blockade on the part of the state, action could be taken along the same lines as in the case of the state's refusal to negotiate, something we shall be looking at below.

A second possibility, the demand that the result of the consultation be put into effect would be put to the state outside the legal channels currently foreseen. This option could be a result of the belief that constitutional revision is not the right channel for this demand and that in fact what we have is a new constituent process, which can not be constrained by the provisions of the present constitution as these are not conceived for this situation. The downside of this extra-legal channel is precisely the fact that it lies outside the law, something which could affect the level of acceptance and legitimacy with which the process is perceived, both at home and on the international scene. Bear in mind, though, that the fact that a procedure is *extra legem* does not necessarily imply it is *contra legem*. In this case, negotiations between state and Generalitat could be channelled via a procedure with a new format not currently provided for in Spanish legislation, in keeping with the fact that the

possibility of secession is not foreseen either, without prejudice to the final result being submitted to the requirements demanded by internal and/or external legality[43]. In this case, the state also has the power to block it, which need not be expressed through specific measures or at particular points in the proceedings and which, furthermore, could be based on the fact that the demands of the Generalitat did not conform to the relevant legal procedure.

In both cases, the Generalitat would have to initiate proceedings and, through one channel or another, press for negotiations with the state towards independence and, if this were to fail, it could open unilateral channels such as UDI.

From the point of view of the state, and once the Generalitat has presented the plan, the state would be obliged to begin the procedure corresponding to the path taken by Catalonia: constitutional revision or direct negotiation with the Generalitat. In the first case, the procedure would begin automatically and the Congress of Deputies would have to deal with the matter at a plenary session and decide whether or not it approved the revision (by two thirds). If the revision is approved, it gets sent to the Senate, where the same happens, and if the Senate also approves it, the Cortes are dissolved, new elections are held and the new chambers debate and approve (by two thirds) the constitutional revision, which must eventually be submitted to a state-wide referendum. The process gets under way automatically, but the state can stop it in its initial stages by not approving the principle of revision in the plenary sessions in the two chambers. If this were to happen, or if there were a blocking manoeuvre or a refusal on the part of the state to reach a satisfactory solution in line with the outcome of the consultation, the scenario facing us would be that of refusal by the state, which is dealt with next.

In the second case, that is the demand for direct negotiations between Generalitat and state to implement the result of the consultation, and in the likely case that there is no pre-established procedure to follow, it would also have to be the object of negotiation between the two parties to decide when it should begin, the schedule for it to follow, its format and procedure and the agenda of topics to be covered. These talks to shape the negotiation

[43] A constitutional revision (where the problem could lie in the final referendum, which would be obligatory and binding and would have to be held across the state) and international recognition of the birth of the new state.

process to apply the result of the consultation could present certain difficulties according to the level of agreement by the state in holding the consultation, but they are essential for shaping the process.

Should the state not agree to begin this negotiation process, denying any binding value to the consultation, not acknowledging the result, believing that a different legal procedure should be followed or directly on account of basic issues, the problem that arises is essentially one of a political nature, rather than a legal one, and would therefore have to be solved by political rather than legal means, though we must not discard the possibility of resorting to legal instances, if necessary, at an international level. Among the political means, the resort to international mediation could carry a lot of weight, so that certain states and/or international or supranational bodies could be called on to take action before the state (and the Generalitat) to facilitate the start of talks as well as their progress, in face of the difficulties that might arise, without excluding as a last solution unilateral channels like UDI.

This same solution, in general terms, could be applied in the case of a state blockade or refusal to advance in the revision of the constitution and reach a satisfactory solution in line with the result of the consultation, if this is the channel followed. It would not be acceptable for the result of the consultation to be considered accomplished merely with the start of the procedure for revising the constitution, which could be broken off almost immediately with its rejection by the Congress of Deputies or the Senate in the opening debate. In this case and in others following this procedure, in which the state can refuse to reach a satisfactory solution agreed with the Generalitat and in line with the outcome of the consultation, we would in fact be faced with a refusal to negotiate on the part of the state. This would create a political problem equal to the one arising with the other possible channel and to which the same sort of solutions would have to be applied, including in the final instance UDI.

At the same time as talks with the state begin, through one channel or another, and apart from the specific steps that may have to be taken to obtain international mediation to make this happen, if necessary, a victory for the 'yes' vote would involve a series of moves by the Generalitat in the international sphere, directed at obtaining recognition for the result of the consultation, acceptance and presence in the international community and support for the process of negotiation with the state, which in all likelihood, and even if it began in a positive atmosphere, would raise problems it might only be possible to overcome by calling in third parties. Moves by the Generalitat in this direction and possible moves by international actors

will be dealt with in the reports on relations with the international community (Report n. 3) and on internationalisation of the process (Report n. 19).

At the same time, the Generalitat would also have to take action before the European Union institutions to determine the Union's position on Catalan independence and facilitate admission as a new member of the community or, as applicable, to determine Catalonia's status with regard to the Union. Since the position of the Union is decided on the basis of talks between its institutions, specific and probably different actions would have to be taken with respect to the Parliament, the Commission and the Council (member states and President). And all of this would have to happen before even holding the consultation, so that it can take place with a knowledge of the Union's position. These issues will be dealt with in the report on relations with the European Union (Report n. 2).

7.1.2. A hypothetical victory for ‘no’

In the case of a victory for the answer 'no' to a direct question about Catalan independence, the direct and immediate consequence would be to dismiss this alternative and therefore to discard any initiative by the Generalitat in this direction.

This result, though, can not be interpreted as an option in favour of maintaining the *status quo*, although this would be the most immediate effect, and, of course, neither can it be understood in a way that excludes future modifications or reforms of the current model, which can not be carved in stone.

This outcome at the consultation, then, can not stop further reform projects from being considered, other than the one rejected in the actual consultation. But even this rejected option can not be banned for ever, but just excluded for a reasonable period of time. In fact, there is nothing to prevent the same question being raised in the future, but it would be unreasonable to do so before a certain time had gone by. The only reference available for comparison on the recent panorama is that of Quebec, where the second referendum was held 15 years after the first one.

In deciding what this 'reasonable time' is, there are at least two factors to be taken into account: the result of the consultation (the closer the result, the more chances of repeating the consultation in a relatively near future) and the majorities or quorums that may have been

required (if the result was a victory for 'yes' that was nevertheless not enough according to the rules established for majorities and/or quorums, the chances and the legitimacy of repeating it in the near future increase).

On the other hand, there is nothing to prevent other plans for reform from being proposed, with a different content from that rejected at the consultation, via consultation or through other procedures. The sense of these other reform plans, and the channels for proposing them, is of course a political matter which would have to be evaluated by parties and institutions on the basis of their existing content and the various demands being dealt with. It would be advisable for the political forces in favour of independence to have these alternative proposals ready in case the main proposal subjected to consultation did not succeed, to avoid as much as possible the uncertainty that might arise after a consultation with this result. Of course, this does not mean these alternative proposals or the strategy for handling a possible adverse result have to be made public.

One last point worth making is that in the case of a victory for 'no' in the consultation, consequences of a political nature would probably be considered, both for the Government and for the forces behind the losing option, whose scale and form would depend largely on the specific results of the consultation. It's easy to imagine that these political consequences would be considered by the political forces that had won the consultation as well as by the losing forces, internally and at their own initiative.

7.2. The consequences of a consultation with a question on Catalan independence with a safety clause

7.2.1. A hypothetical victory for ‘yes’

In the case of a favourable response at the consultation to a question on Catalan independence with a legal safety clause or in terms of beginning the legal process for achieving an independent state, the immediate consequence would be the obligation of the Parliament of Catalonia to present an initiative to revise the Constitution in order to form an

independent state.

From here on, the terms of the previous section as regards a favourable response to a direct question on independence if the first of the channels mentioned (constitutional revision) were followed would be applicable. The only difference is that some people might feel that the result of the consultation was fulfilled simply by presenting the initiative to revise the Constitution and with the subsequent formal start to the process, even if it were blocked immediately afterwards, when Congress and/or the Senate failed to approve the revision.

This formalist interpretation, though, can not be seriously sustained. In fact, it would still constitute a fraud and it would be seen as such at home and abroad if a pronouncement in favour of independence by a majority of the population of Catalonia at a consultation which furthermore has been very difficult to bring about were brushed off with a simple 'no' by the state at the outset, closing the issue for good. It's obvious, over and above the specific phrasing of the question, that the consultation is essentially concerned with Catalan independence. This is the real issue under debate, and it obviously takes precedence over procedural aspects. Even in the hypothetical case of a complex and confusing question, it's very likely that the choice of 'yes' or 'no' would become identified with positions for or against independence, so that in the end the vote would actually be between two simple and clear alternatives. In the case of a question in terms of beginning the process, one that is neither complex nor confusing, this association is more than likely and the expression of the people's wishes arising from the consultation would also be quite clear in its intention and would be centred on the issue of independence. The pressure of this result would make itself felt, no doubt, throughout the procedure, which could not be just brushed off by the state with a simple rejection of the reform initiative. If this were the case, the situation would have to be handled in the same way as the scenario of refusal to begin talks, and a suitable remedy would have to be applied, one that was essentially political with a strong international component.

The same goes for the case where the blockade appears at a later stage of the revision procedure. The fact of initiating the procedure does not necessarily mean it will lead to a result that will satisfy the state and the Generalitat, in keeping with the wishes expressed at the consultation. If it is impossible to reach a satisfactory agreement under the procedure for constitutional revision, this attempt would be considered to have failed and, in that case, direct negotiation could be begun, on the understanding that this was a new constituent

moment. In fact, this is the same situation as arises in the other circumstances examined in the previous section, with the same difficulties and problems, but with a prior attempt to implement the result of the consultation by way of a constitutional reform.

For this reason, and also to confront the difficulties and the blockades that would foreseeably arise during the process of constitutional revision, the Generalitat would also have to begin to take action internationally and before the European Union and its member states, in the form indicated in the previous section.

With this in mind, we can only conclude that there are no essential differences between the consequences of a 'yes' in a consultation with a direct question on independence and another question formulated with legal safety clauses or in terms of beginning the process to reach the same goal.

7.2.2. A hypothetical victory for ‘no’

In the case of a victory for 'no' in a consultation with a question formulated in terms of beginning the process leading to independence, the immediate and direct consequence is that the Generalitat would not be able to submit the constitutional reform initiative to the Congress of Deputies.

In this case we return to the considerations made for the hypothesis of a 'no' with respect to a direct question on independence, as there are no differences between the two cases.

7.3. The consequences of a consultation with a multiple question

In a hypothetical consultation with a multiple question, the first issue that arises, in a case like the present one, is how to decide which option has won, if none of them obtains an absolute majority of the votes cast. This is because in our case, as we explained in the previous section, the options that would be presented are not symmetrical and homogeneous, so that the combination of results in favour of each of them may not reflect a clear wish on the part of the people on basic decisions about the form of the political model being proposed for the

future.

In fact, if the four options being consulted were: (i) preservation of the *status quo*, (ii) a federal state, (iii) a confederal state and (iv) independence, at least two types of problem emerge. First of all, there are alternatives that can take more than one specific form (especially, federal state and confederal state). Even the option for preserving the *status quo* would not be seen as preventing certain reforms or changes in today's autonomic state. This means that a victory for one of these options would be very difficult to materialise in subsequent proposals. To avoid this problem, each of these main options would have to be accompanied by a minimum programme specifying at least the guidelines for the reforms to be undertaken, which makes the consultation enormously complex, as we have seen.

And secondly, certain combinations of votes in favour of the various options could make the outcome of the consultation politically unviable. Think, for example, of a hypothetical situation in which the option to preserve the *status quo* wins in numbers of votes, but the total of the other three is higher. This result (and any other in which the total number of votes for the winning option is less than the total for the other options) would be unmanageable and would render the consultation completely useless and even destabilising. Other combinations of results could also make it enormously difficult to express the wish of the people clearly, thwarting the basic object of the consultation, which is to give the people of Catalonia a chance to decide on their political future. The only way to avoid these difficulties would be if one of the options received an absolute majority of the votes cast. For one thing, though, it's impossible to foretell if this will happen, and, for another, making this majority a legal requirement in order to consider that the option has won is not advisable, as we saw in Section 4.4.

Whatever the case, a victory for one of the options other than independence or preservation of the *status quo* (ie the options in favour of a federal or confederal state) would be an expression of support for the start of a process of reforms (probably of a constitutional nature, according to the scope of the initial proposals each one materialised in), whose result would be decided precisely through this process, basically through negotiation between the different political parties on the Spanish and Catalan sides, and which would probably have to be submitted to referendum afterwards (if the reform involved modifying the Statute of Autonomy of Catalonia or the Constitution). If the result of the consultation were in favour of independence (with the difficulty of deciding what constitutes a 'victory' for one option, a

problem shared by all the alternatives, as we have seen), the consequences would be those examined in the hypothetical case of a question with only two options.

The way to avoid, at least in part, the problems posed by a consultation with a multiple question but maintaining the possibility of several options is to use a system like the alternative vote, which allows voters' preferences to be added together in the terms looked at in Section 4.1.3. In this case, if the option for independence won, we would be looking at the scenario looked at in the previous section. If any other option won, we would be looking at the scenario indicated for the case of the multiple question, characterised by the difficulty of interpreting and applying the outcome as necessary. Furthermore, these options affect the political wishes not only of the Catalans, but also of all Spanish citizens, who would not have been asked whether or not they agreed with the winning option.

7.4. The consequences of a consultation with a question on statehood

What we have said so far is applicable to the option of constituting Catalonia as an independent state. Now we must look at the hypothetical case of a consultation containing a similar direct question on constituting Catalonia as 'its own state'. There are important shades of meaning between the two options which could affect the consequences arising from a hypothetical victory in favour of one or other of these alternatives.

In fact, if the question were directly about 'independence', the expression of the wish of the people if this option won would be clear and there would be no doubt that what they wanted was an independent state. If the question were framed in terms of 'constitution of a state of our own', a victory in favour would imply a demand for a profound change in Catalonia's present *status quo* (an Autonomous Community within the present autonomic state, designed by SC 78 and SAC 06), but would leave the door open to different alternatives: an independent state, a state in a confederation with Spain, and even a federal state in a Spanish Federation. Two observations should be made here: on one hand, perhaps, a majority pronouncement in favour of statehood would involve a demand for profound changes with respect to the present model and the requirement to begin a process of negotiation with the state, leading to one of the three scenarios mentioned. A simple change

in nomenclature (for example, from 'autonomous community' to 'state'; or the formal denomination of the present constitutional regional structure as a 'federal state'), would make no sense and would not be acceptable, as it would be perceived, and rightly so, as a fraud. Profound reforms with regard to the current model would therefore be necessary, significantly increasing the quality and scope of Catalan self-government and its state structures. In this negotiation process, the same considerations apply as in the option for an independent state discussed above, although in this case the international dimension could be significantly reduced or even disappear.

On the other hand, and although the three scenarios described (independent state, confederal state and federal state) could be considered possible and consistent with a result in favour of the creation of an 'own state', it's important to emphasise that in Spanish and Catalan political culture, the term 'own state' is understood more in terms of 'independent state' than 'federal state' or even 'confederal state', so that if in the end the solution was one of the last two, at least one sector of those voting 'yes' to the 'own state' could feel cheated or not finally acknowledged in the option they voted for. To implement either of these two solutions, though, a referendum on constitutional revision would be required as the end point of the process (as applying these models involves a profound modification of the Constitution, very probably by way of revision under SC Article 168), and in this referendum voters would all be able to express their position again.

7.5. Conclusions

The consequences of the consultation depend first of all on the question submitted to voters.

A victory for the 'yes' option in a consultation with a direct question on Catalan independence, although from the legal point of view referendums and consultations are 'advisory', not only spawns undeniable political consequences, but also legal obligations or consequences in relation to the authorities involved. As regards the Generalitat, it would be obliged to submit the plan for secession to the state. It could do this by presenting an initiative for constitutional reform or else by proposing direct negotiation with the state outside the procedure for constitutional reform. The first alternative has the political and legal advantage of scrupulous respect for current legality; it has the disadvantage that the state can block the process,

which would make it necessary to find political solutions, including international mediation, and would open the way to the possibility of using alternative channels, such as a UDI. If the Generalitat feels that the way of constitutional reform is not the most suitable and that in fact what we have is a new constituent process, it could press for talks with the state through a process with a new format. However, in this case there is also the question of whether the result should or can take shape via the existing legal channel (a reform of the Constitution). If it is materialised through a constitutional reform, the problem lies in the final obligatory and binding referendum, which would have to be held throughout the state.

Whatever the case, the Generalitat would also have to promote a series of measures in the international sphere and the European Union, aimed at obtaining support for the process of negotiation with the state, including the willingness to submit to possible mediation, acceptance and presence in the international community and the admission of Catalonia as a new member of the European Union or, if need be, to determine Catalonia's status until it joins.

The Spanish state, for its part, in the case of a victory for the 'yes' option, would have to agree to open the negotiation process. In the case of a refusal, or of an initial rejection or blockade if the way of constitutional reform is taken, the problem that arises is one of an essentially political nature and would have to be resolved by political means, including international mediation.

A victory for the 'no' option in this same type of consultation can not be interpreted as a straightforward choice for preserving the *status quo*, which must not be carved in stone. This result could not prevent the consideration of further constitutional reforms and even, after a reasonable length of time, of new plans for a consultation on the creation of an independent state.

In a consultation with a question phrased with legal safety clauses or with a mandate directed at the Parliament of Catalonia to initiate the process for constituting Catalonia as an independent state, the immediate consequence of a victory for the 'yes' option would be that the Parliament would be obliged to present an initiative of constitutional revision to achieve this objective. From here on what has been said concerning the direct question in the scenario of negotiation according to the existing legal channel would be applicable. The difference lies in the fact that some people might feel that the result of the consultation is

fulfilled by simply presenting the initiative to revise the Constitution, which could be rejected at the outset by Congress and/or the Senate. This formalist interpretation is not seriously sustainable and would be perceived as a fraud, both at home and on the international scene. In the case of a refusal by the state to initiate the negotiations or of a subsequent blockade throughout the process, we would be facing the same blockade scenario we dealt with in respect to the direct question and the same solutions would be applicable.

Whatever the case, one important point is that over and above the specific shaping of the question, the consultation would essentially be dealing with Catalan independence, clearly giving primacy to the substantive question over and above the procedural question. If it proved impossible to reach a satisfactory agreement under the constitutional revision procedure, this attempt would be deemed to have failed and, in that case, direct negotiations could be opened, on the understanding that this was a new constituent moment. This is in fact the same situation as would arise in the case of the direct question, with the same difficulties and problems, but with a prior attempt to implement the result of the consultation by way of a constitutional reform.

In a consultation with multiple answers, the results, unless there is an absolute majority in favour of one of the options, can be very difficult to interpret and, consequently, implementing them can prove very problematic.

If the question referred to statehood and this term was considered as including federal and confederal formulas, implementing the 'yes' option would call for a reform of the Constitution, very probably by way of an aggravated reform and, therefore, with a new referendum in which voters could vote again

8. Alternative channels should the legal consultation not be possible

8.1. Consultations by means of voting via alternative channels

The report on the consultation, drawn up by the Institut d'Estudis Autonòmics in March 2013, states that if the state refused to convene, authorise or hold a consultation, it would leave the way open for the Generalitat to make use, legitimately from a political perspective, of alternative channels for convening consultations, through unofficial consultations or plebiscite elections, which could be implemented by means of unilateral declarations by Parliament.

The Generalitat, with the support of the majority of local authorities in Catalonia, could organise a consultation outside of the legal provisions of state or Generalitat (if the latter had been suspended by the Constitutional Court at the request of the central government). It would be a question of applying Catalan law even though it was suspended.

One possible alternative would consist in having the consultation organised exclusively by civil society bodies, but with indirect support from the Generalitat and local authorities.

The disadvantages of these scenarios are obvious: a head-on confrontation with the state if the first of the channels mentioned is used, an easy smear campaign on the part of actors and institutions opposed to a consultation they see as 'pointless' (and presented as illegal and anti-constitutional), foreseeably low or insufficient turn-out, delegitimation of the results –in the international sphere as well–, logistical problems for organisation, etc.

The disadvantages described here advise against this alternative scenario.

8.2 Plebiscite elections

It should first of all be pointed out that the concept of plebiscite elections is a political rather than legal one. In other words, what makes an election a plebiscite is not the legislation so

much as the political circumstances and the position taken by the actors with a part to play in the election, especially the institutions and political parties. In this respect, a plebiscite election is one whose main object, in political terms, is to discover the opinion of the electorate on a specific political proposal of great general importance. In the present political context in Catalonia an election can be a plebiscite if once convened by the President of the Generalitat the political parties approached it in their programmes and in the election campaign with the fundamental political goal of obtaining a clear statement from the electorate on Catalan independence.

In fact, if it is incontrovertibly shown that it is impossible to hold a referendum or consultation on Catalan independence via the legal channels laid out above as a consequence of a reiterated stand against it by state institutions, the alternative channel of a plebiscite election emerges as the most appropriate way for citizens of Catalonia to make known their position as regards their collective political future. To this end, arguments of legality, efficacy and respect for the democratic principle can be alleged.

Starting with the reasons of legality, there is not the slightest doubt that the President of the Generalitat, in keeping with Article 75 of the Statute of Autonomy, has the power to convene elections whenever he feels it appropriate under his sole responsibility and with the only requirement of prior deliberation by the Government and of refraining if a vote of no confidence has been put to Parliament and if less than a year has passed since the last time the chamber was dissolved prematurely. Apart from this, then, there are no limits to the power of the President of the Generalitat to convene elections and he can use it freely in political terms, even with the intention of making the election a plebiscite. Whatever the case, the convening decree would have to be identical to the one for the previous ordinary elections, as in legal terms there are only ordinary elections, and in this respect it would have to be limited in substance to dissolving Parliament, fixing the date of the election (between 40 and 60 days from the moment it is convened) and recording the prior deliberation by the Government. Due to its legal nature, compared with the way of extra-legal or unofficial consultations, this alternative channel has the advantage that it respects the law, as demanded by Parliament's Resolution 5/X, guarantees its practical viability and participation by all citizens without any kind of technical difficulty and rules out the possibility of delegitimating the results.

The alternative of a plebiscite election also seems potentially more efficient than international

mediation as a way out of the dead end resulting from the state's refusal to allow a consultation on sovereignty to be held in Catalonia. On the other hand, holding a plebiscite election would be an immediate, simple and quick method of knowing the wishes of the people of Catalonia on their collective political future.

Finally, respect for the democratic principle also advises giving priority to plebiscite elections as an alternative channel in face of the impossibility of holding a referendum or a consultation. In this case, a preference for the way of a plebiscite election is opposed to the way of a direct and immediate resort to a Unilateral Declaration of Independence (UDI) by the Parliament of Catalonia elected on 25 November 2012. On this matter, the first thing to note is that the report by the IEA on the consultation at no time considers UDI by the Parliament as an alternative to plebiscite elections. On the contrary, the report feels that UDI by the Parliament must, if necessary, be the instrument by which, following the plebiscite elections, the people's wishes expressed in the election results are formalised or implemented.

However, the political and media debate has sometimes placed a UDI by Parliament as a possible first alternative before the unviability of convening a referendum or a consultation and it is therefore pertinent to deal with this issue here. It does not, in principle, seem that the present Parliament, elected on 25 November 2012, without prejudice to the observations at the end of Section 8.3, has the democratic legitimacy to take a decision with such far-reaching implications as a UDI, as an initial alternative channel before the impossibility of holding a referendum or consultation. The reason for this is clear: the elections of 25 November 2012 were not a plebiscite in the terms described above. In fact, although one of the main topics of the election campaign was the collective political future of Catalonia, the fundamental political aim of the election was not to ask citizens for a clear pronouncement on Catalan independence. What's more, plans for the future on the so-called national side of the campaign expressed a diverse plurality of options among the parties in favour of some kind of exercise of Catalonia's right to decide which ranged from out-and-out separatism to a demand for statehood with a less well-defined conceptual profile and including various shades of federalist constitutional reform. In short, although we can say that there is currently a clear majority in Parliament in favour of exercising Catalonia's right to decide (107 deputies, counting CiU, ERC, PSC, ICV and the CUP) and an absolute majority in favour of sovereignty (74 deputies, counting CiU, ERC and the CUP), the precedents described of the elections of 25 November do not support the idea that the voters issued the Chamber with a

mandate for a Unilateral Declaration of Independence. It's significant in this respect that the Parliament's declaration of 5/X does not anticipate the final outcome of exercising the right to decide, but states that it will be whatever 'is determined by the expression the people's wishes' in a framework guaranteeing 'plurality and respect for all the options'. This framework would be a plebiscite election and for this reason this alternative, out of respect for the democratic principle, would be the necessary first step towards a UDI by the Parliament.

8.3 Unilateral declarations of independence (UDI)

As we have just explained, and with the reservation of what we shall say later, a UDI by the Parliament of Catalonia, in the opinion of this Council, has an instrumental nature as the culmination of the alternative channel opened up by a plebiscite election returning a majority of political forces in favour of Catalan independence. Having established this element and reaffirmed the democratic legitimacy of the Parliament of Catalonia to approve a UDI after a plebiscite election, held as an alternative to the impossibility of holding a referendum or a consultation and in a framework of total freedom to defend any option, it's time to analyse this figure's legal grounding.

Before that, though, we need to make a brief reference to the parliamentary instrument and the procedure for approving the UDI in the Parliament of Catalonia. There could be two instruments: a proposal for resolution presented jointly by all the parliamentary groups in favour of a UDI (Articles 145 and 146 of the Regulations), and the bill presented by the Government or the planned law presented jointly by all the parliamentary groups in favour of the UDI (Articles 100 et seq. of the Regulations). The enacting terms of the UDI need not be too long as basically it must only reflect the wish to constitute Catalonia as an independent state, bearing in mind, furthermore, that the UDI will have to be accompanied the same day or during the days immediately afterwards by various parliamentary decisions about the legal framework of the transition (provisional constitution, succession of rules, among others). The advantage of the proposal for resolution is that it can be dealt with quickly at a single plenary session at which in little more than one hour the Government and all the parliamentary groups can intervene to establish their position regarding a UDI. The disadvantage of the proposal for resolution is that the outcome is a resolution which, strictly speaking, does not

have legal effects as its approval is an exercise in Parliament's promoting role. For this reason, it seems advisable to opt for processing the UDI as a legislative initiative, as this gives it a formal and normative value (approval as law) which proves necessary for a step with such far-reaching consequences as a declaration of independence. Treating it as a bill of law would allow the use of the quickest procedure of a single reading in the Plenary Session (Article 126 of the Regulations), but would reserve the initiative for the Government alone and then the other parliamentary groups in favour of the UDI would lose protagonism in the presentation of the proposal. On the other hand, treating it as a proposal for law would make it possible for all the parliamentary groups in favour to present it together. The procedure might be slightly longer as the single reading would almost certainly not be feasible because the Regulations call for the unanimity of the parliamentary groups. Nevertheless, the emergency procedure could be applied (Article 96 of the Regulations) and the UDI could be approved in a week or so. Finally, we must consider the issue of the majority needed to approve the UDI. If it is dealt with as a proposed resolution, it could be approved by a simple majority as the Regulations do not foresee special majorities in these cases. If the legislative procedure were used, it would, for obvious reasons, be a type of law not specifically foreseen in the Regulations and the Parliamentary Bureau would first have to decide (Article 29.3.a of the Regulations) on the type of majority, which, considering the criteria laid out above in the case of the referendum or consultation, could be either a simple or an absolute majority.

Going on to the issue of the legal grounding, little effort is required to show that a UDI by the Parliament is not in line with the provisions of Spanish constitutional legislation. In several sections of this report we have already stated that the SC, essentially on the basis of Articles 1 and 2, does not recognise any other sovereign subject than the Spanish people, for which reason a UDI with a normative vocation implies the existence of the people of Catalonia also as a sovereign subject and this leaves the UDI completely outside the Spanish constitutional framework.

As regards the protection or compatibility of the UDI with either international or European law, it has also been shown that neither international law nor European law contain express provisions allowing for approval of a UDI by the Parliament of Catalonia. Nevertheless, the International Court of Justice (Advisory Resolution of 22 July 2010 on the UDI by the Parliament of Kosovo of 2008) established –especially in points 79, 81 and 84 of the

resolution– a doctrine of great interest in the case of Catalonia which could help in international recognition of the Parliament's UDI. Summing up, the Resolution by the International Court of justice contains one fundamental statement: UDIs are not forbidden under international law if they contain no serious infringement of general International Law, in particular of the rules of a peremptory nature (ius cogens), as in the case, for example, of the illicit use of force.

In short, UDIs are not contrary to international law if they are the result of a democratic pronouncement carried out in a peaceful context, that is without the use of force or violence. Certainly the political and institutional context (intervention by the United Nations) that made the Kosovo UDI possible is not comparable to the one in Catalonia, but the principles arising from the Resolution of the International Court of Justice have a potential that goes far beyond the framework of the specific case in which they arose. For this reason they can be a point of reference to be borne in mind and invoked by Catalonia in its search for the international recognition it will need after UDI.

As a corollary or final consideration for this section on UDI, it might be worth noting that, in keeping with the configuration of a UDI as the implementation of a plebiscite election, the only two admissible circumstances in terms of democratic legitimacy for a UDI not dependent on a plebiscite election would be, first of all, that this type of plebiscite election could not be held. In fact, if the state made use of legal instruments to avoid a plebiscite election, then the Parliament of Catalonia elected on 25 November 2012 could consider a UDI as an alternative solution. It's difficult to predict this scenario arising (the arguments of the state seem weak, as laid out in another section of this same report) or how possible procedures begun by the state could develop over time and materially, but the UDI by the Parliament should never be a hasty reaction and should contemplate a possible scenario of subsequent ratification by the citizens of Catalonia. Whatever the case, the elements on procedure and legal grounding for a UDI laid out above are also applicable in this case. The second scenario envisages a hypothetical blockade by the state when it comes to implementing the results of a legal consultation, a situation we looked at in Section 7 of this report.

8.4 International or EU mediation

Faced with a practical blockade situation once the internal legal channels have been exhausted, there would be the possibility of promoting mediation or, if necessary, arbitration by some international institution or organisation, such as the United Nations, or by the EU. Both parties would have to agree to the procedure on the basis of agreed rules and the legitimacy of the final outcome of the process.

This could be a way out of the situation and could involve holding a consultation, either at the start of the process or at the end, to ratify the proposed solution. This option offers the advantage that it internationalises the political demands underlying the proposal under consultation. However, apart from the unlikelihood that the state would accept mediation or arbitration of this type and the complexity of the whole process, this proposal has the basic disadvantage that it would foreseeably take too long, to judge from experiences in other processes of this sort. In the report by this Advisory Council on relations between Catalonia and the international community, we shall be looking carefully at the question of international mediation which has only been touched on here.

9. Legal instruments available to the Spanish state (or other legitimate bodies) for opposing measures taken by the Generalitat to convene a consultation or to implement its results

In the case of four of the legal channels looked at in this report (referendum under SC Article 92, referendum consultation under Law 4/2010 of the Parliament of Catalonia, delegation or transfer of powers under SC Article 150.2 and constitutional reform), the state could make its opposition manifest, as we have explained, by refusing to convene –or to regulate and convene– in the case of referendums under SC Article 92; or by impounding the law –as it has already done– and denying authorisation, in the case of referendums under Catalan Law

4/2010; turning down the application for delegation or transfer (SC Article 150.2) or not accepting the request for a constitutional reform or opposing it at each stage of its processing.

In consequence, this last section of the report will simply look at the possible legal reactions by the state in relation to the non-referendum popular consultations that could be convened under the auspices of the law now going through Parliament and in relation to the alternative channels looked at above: a plebiscite election, popular consultations not foreseen by law (public and private) and a unilateral declaration of independence subsequent to or prior to these elections or consultations.

9.1 Instruments in the face of non-referendum popular consultations

When it comes to defining and evaluating the possible reactions by the state in relation to non-referendum consultations, it is important to distinguish between the regulations that will apply to non-referendum consultations and the measures for applying these regulations (in other words, the decree or resolution to regulate and convene a consultation).

The future law could be the object of a recourse of unconstitutionality presented by the President of the Government of the State, who could make use of the powers foreseen in SC Article 161.2, leading to automatic suspension of the law. This suspension would have to be confirmed or lifted by the Constitutional Court within the space of five months.

We must bear in mind, though, that even if the President of the Spanish Government did not file a recourse of unconstitutionality, it would still be possible for other subjects legitimated to this effect to do so (50 deputies, 50 senators or the Ombudsman). In this case, though, the law would not be suspended automatically, as the powers under SC Article 161.2 are only attributed to the State Government.

As regards the impugnability of measures to develop and apply the law of non-referendum consultations, more specifically related with regulating and convening a particular consultation, in principle the jurisdictions before which actions could be brought are two: the Constitutional Court and the administrative litigation.

On the assumption that the consultation would be convened and regulated through orders and deeds without the status or the force of law, there are two instruments the state could use before the Constitutional Court, according to how it interpreted the object of the infringement, which could either refer to certain constitutional values or principals –such as the rule that national sovereignty lies with the Spanish people– or else the articles that establish the regime for distribution of powers.

In the first of these hypotheses, the state might go the way foreseen in SC Article 161.2 (developed in Title V of the Organic Law of the Constitutional Court) which allows the State Government to impugn any decision without the rank or force of law (regulatory provisions, resolutions and others) that might be taken by any institution of the Generalitat of Catalonia (President, Government, Parliament...) if it considers it violates the constitutional order for reasons not to do with powers[44]. This route involves automatic suspension of the autonomic measures during the constitutional process, which must be lifted or confirmed within a maximum of five months.

In the second of these hypotheses, the Government of the State could interpose a positive conflict of powers (LOTC Articles 62 to 67), with the argument that no-one else can convene and regulate a consultation with the object of making known the wish of the citizens as regards the level of self-government they want. In this case, the state could also ask for the autonomic action to be suspended (LOTC Article 64.2 in relation with SC Article 161.2) during the constitutional process, in the terms outlined above.

The second legal path is that of administrative litigation, which would be applied to the measures taken by organs of the Generalitat, subject to administrative law and connected with convening and regulating the consultation.

The action could be brought by the state administration as well as by anyone claiming that a legitimate right or interest held by them is affected by the Generalitat's actions. In fact, in view of the object of the actions the Generalitat might carry out (in relation to the collective political future of the citizens of Catalonia), we can assume that the range of possible subjects who

[44] In some circumstances the Constitutional Court has agreed that, by way of SC Article 161.2, formal complaints of invasion of powers can be brought (Constitutional Court's Sentence 184/1996, of 14 November).

could legitimately go the way of administrative litigation would be quite wide (associations, political parties, individuals...).

Filing an appeal via administrative litigation would not necessarily halt execution of the measure being challenged while the appeal was being heard, but the organisation or person who brought it could request suspension if putting the measure into practice or applying the ruling might mean that the appeal lost its legitimate object.

The possible scale on which administrative litigation could be used, though, will depend on the way in which measures are applied in connection with the consultation, especially from the point of view of the subject or institution empowered to approve them or put them into effect. By way of example, we can assume that if a central role in the consultation is given to the President of the Generalitat, the Government or the organs of the autonomic administration, the potential scale of impugnment under administrative litigation could be quite considerable, as the actions of these subjects and institutions are subject to administrative law.

On the other hand, if the institution carrying out the necessary actions for the consultation to be approved and carried through were the Parliament, administrative litigation would lose force as Parliament's actions in the exercise of its functions as the body representing the people are not subject to administrative law.

One of the main differences between the two channels for impugnment (constitutional and administrative litigation) can be found in the fact that the former involves automatic suspension of the autonomic action, while under the latter this measure is not automatic, though it can also be adopted. In addition, no-one can say for sure which of the two paths would resolve the issue quicker. Although it's true that the Constitution Court suffers from a chronic delay in resolving constitutional lawsuits concerning the transfer of powers, we must not forget that when it has felt the need it has resolved certain controversies with extraordinary speed. We saw this, in fact, in the case of the popular consultation convened in the Basque Country by the Basque Parliament's Law 9/2008, of 27 June, which was declared unconstitutional and void by Constitutional Court’s Sentence 103/2008, of 11 September. One last point to be made is that administrative litigation would mean the potential initiation of different legal instances (High Court of Justice of Catalonia, Supreme Court and Constitutional Court), whereas the constitutional route would be exhausted in a single step.

Above all, we must also remember that those who have legitimate recourse to administrative litigation are far more numerous –and uncertain– than those who can take the constitutional route.

9.2 Instruments in the face of a plebiscite election

As regards a plebiscite election, it's clear, in principle, that the convening decree would not refer to it explicitly as a plebiscite. This fact would be made clear in the electoral programmes of some political parties, coalitions or electors' groups, who would declare that their sole –or at least priority– objective was to obtain Catalan independence by means, for example, of a UDI by the Parliament returned after the elections. If the case where to arise, declarations by members of the Government or by representatives of the political parties or the agreements reached in Parliament, among others, could be cited as indications of the nature of the election as a plebiscite.

Well, a hypothetical appeal against a plebiscite election could only be brought against the act of calling it and not because of its content –which in principle is innocuous– but as a consequence of the election programmes presented by some of the candidates or by declarations and decisions by the Government or Parliament. The procedural route for impugning the call to elections would either consist of an appeal under administrative law or impugnment before the Constitutional

Court as foreseen under SC Article 161.2. The courts would have to cancel the elections not because of the explicit content of the convening decree but as a result of actions alien to the call occurring after it or at the same time.

The arguments that would presumably be used would be the supposed *fraude a la loi* (fraudulent evasion of stautory provisions) deriving from the fact that some of the parties with ample representation in the dissolved Parliament, instead of offering voters alternatives for government in all the issues affecting the political community, would focus entirely on just one issue without mentioning others and this would violate the right of citizens to take part in public affairs, the supposed unconstitutional nature of the *plebiscitary object* insofar as it could be understood to presuppose the sovereignty of the Catalan people to decide (in

violation of SC Article 1.2) or that it was a potential attack on Spanish unity (SC Article 2). These are obviously weak arguments, especially if we bear in mind that the electoral offer of parties, coalitions and electoral groups is one of the culminating points of democracy, in which freedom must be guaranteed by all the public authorities (SC Article 23.2) more carefully than at any other moment in the country's democratic life.

If the state decided not to challenge the plebiscite election before the courts, as a last possibility it would still have SC Article 155. Remember that this article states that if an autonomous community does not fulfil the obligations contained in the Constitution or in other laws or acts in a way that seriously contravenes the general interests of Spain, then the Spanish Government, following an unsuccessful summons to the President of the autonomous community and with the backing of an absolute majority in the Senate, can take whatever measures are necessary to ensure these obligations are fulfilled by force or to protect the general interest as mentioned.

The way in which the Constitution foresees the circumstances in which SC Article 155 can be applied is so vague that it is very difficult to define *a priori* what specific actions escape its possible application. Or, to put it another way, the power of the state to include the most diverse scenarios is legally very difficult to limit: there are no legal criteria to provide security when it comes to judging whether a particular act, in this case a plebiscite election, can justify applying this article, which could have devastating effects for the autonomy of the autonomous community affected.

Nevertheless, it does seem that it can be peacefully accepted that this coercive route is a constitutional defence mechanism which the Government of the State can only make use of as an absolute exception since it would affect the community's right to political autonomy recognised in the Constitution (SC Article 2). It could only therefore be used as a last resort, once other, less costly channels, such as the procedure under SC Article 161.2 or administrative litigation, had failed.

Neither does the Constitution establish what measures the Government of the State can apply under SC Article 155, for which reason we once again enter the realm of interpretations. Doctrine considers that the measures should perhaps be adapted to principles of necessity, proportionality, suitability to the case in hand and lesser damage to autonomic rights, as what is affected is the regime of political self-government of an

autonomous community endorsed by the Constitution and approved by an Organic Law of the Cortes Generales. This is why the majority doctrine sustains that SC Article 155 can not be used to 'suspend' autonomy and even less to dissolve the autonomous community, but that it could, if anything, operate by replacing the autonomous community's political organs with state organs. Nevertheless, the vagueness of the constitutional precept means we can not rule out its application to suspend autonomy or to take measures such as dissolution of the autonomic Parliament, which would, *de facto*, leave it almost devoid of content.

In the procedure for applying SC Article 155 before the Senate (Article 189 of its Regulations) we shall single out the fact that it foresees a hearing of the autonomic president and the possibility of the Senate establishing conditions or modifications in relation with the measures planned by the Government of the State.

In addition, neither in the Constitution itself nor in any other law are instruments foreseen for the autonomous community affected to oppose the measures hypothetically applied to it. In consequence, the only mechanisms available to the autonomous community are those foreseen in general in the legislation to react against action by the state –such as filing a claim of unconstitutionality or one for a conflict of jurisdiction–, though without knowing the nature of the measures adopted by the state it is not possible to determine exactly to what extent these mechanisms are applicable.

9.3 Instruments in the face of consultations using procedures not foreseen in law

A consultation of this sort, not held under of the laws regulating the regime of consultations or referendums, could in theory be organised directly by the authorities or else by institutions or private individuals.

In the case that these *informal* consultations were organised by the authorities, their regulation and convening would presumably have to take place through decisions of their own and the channels or mechanisms the state could use would, theoretically, be the exercise of actions via the route of administrative litigation, impugnment before the Constitutional Court under SC Article 161.2, a somewhat forced application of SC Article 155 and, finally, the exercise of criminal actions, which could be brought not only by the state, but

also by private individuals through the presentation of lawsuits or accusations, a possibility that should not be underestimated.

The first three possibilities have already been commented above. We now need to look at the resort to criminal law. The object is to see if any type of offence exists under which it might be interpreted that the acts of institutions like the Generalitat could be included if they launched a consultation not directly supported by the regulations for consultations.

One first element to be taken into account can be found in the very development of the Penal Code. In fact, remember that under Organic Law 20/2003, of 23 December, the Penal Code was modified to outlaw the convening of popular consultations in referendum by an authority or public official not empowered to do so (Articles 506 bis, 521 bis and 576 bis). Therefore, this modification –which was subsequently repealed by Organic Law 2/2005, of 22 June– showed that the Cortes Generales considered that the remaining categories of offence in the Penal Code did not include this sort of act as punishable, otherwise there would have been no point in introducing this reform[45].

As we have already pointed out, this offence does not currently exist, which suggests, in principle, that no other category of offence expressly includes an act of this sort which was previously in force –convening of a popular consultation without the power to do so–, which means that a hypothetical move to apply criminal law could only be founded on those precepts which could be understood as outlawing certain formal aspects to do with holding the consultation. In particular, it might be thought that the person or institution convening it is manifestly devoid of authority to do so; this might lead one to consider that those criminal precepts apply that in general outlaw certain acts by the authorities or public officials supposedly not conforming to law[46]. There are three types of offence that could be deemed applicable: infringement of powers, perversion of justice and disobedience.

As regards the first offence –infringement of power–, we have to go to Chapter III of Title XXI

[45] A proposed organic law was presented in the Congress of Deputies to reform the Penal Code and reinstate the offence of illegal convening of elections or of popular consultations by way of referendum (Official Gazette of the Cortes Generales-Congress of Deputies. Series B. No. 95-1, 15 October 2012).

[46] Before going on, the analysis that follows notes the types of offence that could be deemed applicable, but certainly the main difficulty for this analysis is the fact that, for one thing, hypotheses must be formulated with respect to what acts the institutions of the Generalitat of Catalonia would carry out and, for another, there are no precedents to shed light on the application of the type of offence we shall now be looking at.

('Offences against the Constitution'), which regulates offences against state institutions and the separation of powers. More precisely, the second section of this chapter regulates infringement of powers, including the acts of an authority or public official who, without being empowered to do so, passes a general ruling or suspends its execution. In this case, the punishment would be a prison sentence of one to three years, a fine of six to twelve months and a special ban on holding public office for a period of six to twelve years (Article 506 of the Penal Code). This offence could only be considered applicable if the consultation was convened, even if only with a partial or complementary nature, through the approval of a general ruling.

The second offence is perversion of justice, regulated in Chapter I ('On the perversion of the course of justice by public officials and other unjust conduct') in Title XIX, which deals with Offences against the Public Administration. In particular, Article 404 of the Penal Code states that the authority or public official who, with knowledge of the injustice, passes a wrongful resolution in an administrative matter will be punished with a special ban on holding public office for a period of seven to ten years. This offence could be deemed applicable if it were argued that a resolution adopted in relation with the process of holding a consultation had wrongful content –supposedly because it was passed outside the law– with the full knowledge of the person or official who passed it. Whatever the case, it would seem that the actual act of convening a consultation does not constitute an administrative matter, but a political or government act that can not be subsumed in the offence of perverting justice.

The third offence is disobedience, which is dealt with in Chapter III ('On Disobedience and Denial of Assistance') in Title XIX mentioned above. In this respect, Article 410.1 states that those authorities or public officials openly refusing to comply with court rulings, decisions or orders from a higher authority, passed in the field of their respective powers and complying with legal formalities, will incur a fine of three to twelve months and a special ban on holding public office for a period from six to two years.

As we see from the content of Article 410.1, for the offence to be applicable there would have to be alternative concurrence of either of the two prior circumstances foreseen by this precept. One of these could be the existence of a previous court sentence –such as a precautionary measure adopted in administrative litigation or even a constitutional process forbidding a consultation from being held when its convening had been impugned.

The second of the prior circumstances needed for an offence to apply is the existence of a decision or order from a higher authority which has been disobeyed. This scenario seems, *a priori*, difficult to apply because in the autonomic state the relations between administrations are not governed by hierarchical principles –which seem to be what the reference to a 'higher authority' suggests–, but by the principle of competence, for which reason a hypothetical sentence by an organ of the state –such as, for example, the Central Electoral Board– ordering the Generalitat not to take certain actions in relation to the consultation could not, in principle, be a prior condition for classifying it as an offence. It can not be ruled out, though, that an interpretation of this article could be stretched to include possible acts by the Generalitat.

As regards participation by private individuals in these consultations initiated by the authorities –in acts of electoral propaganda, at polling stations, in the instances monitoring voting, etc.–, criminal law does not expressly outlaw any of these conducts and only problems of disobedience could arise if a court passed a sentence explicitly prohibiting the consultations.

In the case of *informal* consultations initiated by private bodies, the state's channels for replying would be more restricted as, in principle, it would not have recourse either to the exercise of administrative litigation nor to the Constitutional Court, as *informal* consultations would not be initiated by the authorities. Criminal law in this case does not expressly forbid holding private individuals from holding a citizens' consultation either, or, to put it another way, participation by private individuals in these consultations is of no relevance in law.

What the state could do is to go the way of administrative litigation or of constitutional jurisprudence, as necessary, to impugn those actions by the authorities –local or autonomic– that gave support to these private initiatives. In fact, we must remember that this was the stance taken by the state when, before the consultations on Catalan independence held between 2009 and 2011, it turned to administrative litigation to impugn the material and logistical support provided by several town halls for holding these consultations. Neither can we rule out the possibility that this support from the administration could be pursued in criminal law on the grounds that it constitutes a case of perversion of justice (Article 404 of the Penal Code), that it is a misappropriation of public funds (Article 433 of the Penal Code) or even that it constitutes a case of revelation of secrets if information is given about the people who might be taking part in the consultation (Article 198 of the Penal Code).

To end this section, it's important to note that, in principle, holding consultations via procedures not foreseen in law could not be grounds for justifying the application of two exceptional mechanisms for defending the Constitution: the declaration of the state of exception or the state of siege. In the next section, we shall look at what actions could, according to certain interpretations, ever justify the use of these two mechanisms.

9.4. Instruments in the face of a unilateral declaration of independence (UDI)

Should the Catalan institutions make a UDI, the state could in theory resort to the following mechanisms in reply: SC Article 161.2; recourse to the mechanism foreseen in Article 155 of the Constitution; criminal actions as we saw in reference to *informal* consultations and the declaration of a state of exception or a state of siege.

We have already looked at the possibilities under SC Articles 161.2 and 155. On the other hand, we need to complete our study of the way of criminal proceedings; in this respect, we must bear in mind that certain criminal offences may be applicable, not now for 'formal' reasons –lack of qualification of the authority making the declaration–, but for 'material' reasons, on the grounds that the object of the UDI, to constitute an independent Catalan state, is an act against the legislation in force which is described under Title XXI of the Penal Code regulating 'Crimes against the Constitution' and, more specifically, in Chapter I, which foresees the crime of rebellion applied among others to anyone rebelling violently and publicly to declare the independence of part of the national territory (Article 472.5 of the Penal Code).

However, according to the description of the offence, if the unilateral action by the institutions of the Generalitat of Catalonia is not accompanied by some form of violence, in principle there would not be the necessary conditions for applying the said legislation –which requires that the declaration of independence should involve *violent* public rebellion–, unless the term *violence* is understood in the broadest sense contained in the Dictionary of the Spanish Royal Academy, in reference to any action that is counter to regular practice or without

reason or right[47].

On a lower level, we must mention Chapter I ('Rebellion') of Title XXII ('Felonies against public order'). In particular, Article 544 of the Penal Code states that anyone is guilty of sedition who, though not involved in the crime of rebellion, publicly and tumultuously rebels to prevent, by force or outside the legal channels, the application of the law by any authority, official body or public official, the legitimate exercise of their duties or the fulfilment of their commitments or of administrative or judicial sentences[48]. However, it would also be difficult to apply this offence because, although on one hand implementing a unilateral declaration in favour of a regime of self-government characterised by a note of sovereignty could mean that laws were not applied or also that certain commitments or administrative or judicial sentences were not fulfilled, on the other hand there does not seem to be *tumultuous* practice –at least necessarily– , if we take *tumult* to mean the confusion, rioting or disturbance produced by a crowd of people.

Whatever the case, the applicability of these types of crime depends on forcing or stretching the way the law is interpreted, as the precepts mentioned do not expressly include the acts which the UDI would, *a priori*, consist of and which, furthermore, as mentioned in Section 5 of this report, would not constitute an offence against international law.

We shall go on to look at the legal channel consisting in declaring the state of exception or the state of siege, regulated under Organic Law 4/1981, of 1 June, on States of Alarm, Exception and Siege. The state of exception is foreseen for those cases where the free exercise of citizens' rights and freedoms, the normal operation of the democratic institutions, that of the essential public services to the community or any other aspect of law and order is so severely disrupted that the exercise of normal powers is not enough to restore and preserve it. It's arguable, though not unthinkable, that a UDI could be a supposition of fact justifying the declaration of a state of exception, unless the interpretation of the effects involved in a UDI is stretched, and the normal operations of the democratic institutions are

[47] The Penal Code also includes the action of officials who carry out their duties under the authority of the rebels and states that officials who continue to exercise their duties under the command of the rebels will incur the sentence of a special ban on holding public office for between 6 and 12 years (Article 483 of the Penal Code).

[48] In this case, Article 483 of the Penal Code, reproduced in the previous note, is also applicable (Article 549 of the Penal Code).

considered to have been severely disrupted.

The state of siege is foreseen for those cases where there is a real or threatened insurrection or act of force against Spanish sovereignty or independence, Spanish territorial integrity or the constitutional order which can not be resolved by other means. In this case, though, its application would be based on a vague, stretched interpretation of the concept of the regulating precept, as a UDI in itself does not constitute an insurrection or an act of force, but is closely bound up with the democratic principle insofar as it ought to culminate or precede a profoundly democratic process to consult the citizens of Catalonia. What's more, it has always been interpreted that the threats that could give rise to a state of siege are exterior threats.

9.5. Other possible measures

To end, we must mention the Transparency, Access to Public Information and Good Governance Bill (Official Gazette of the Cortes Generales-Congress of Deputies, Series A, No. 19-1 of 7 September 2012), which regulates a regime of sanctions applicable in all the public administrations.

Some of the disciplinary offences regulated there could be interpreted in such a way as to include acts by the Generalitat of Catalonia tending to unilaterally holding the consultation; specifically, two very serious ones: non-fulfilment of the duty of respect for the Constitution and the Statutes of Autonomy (Article 26.1.a) and the adoption of manifestly illegal decisions causing grave prejudice to the administration or to citizens (Article 26.1.c), and one serious one: the adoption of manifestly illegal decisions causing prejudice to the administration or to the citizens, and not constituting a severe offence (Article 26.2.c). However, we need to bear in mind that the preliminary hearing for the corresponding disciplinary proceedings and the sentencing is assigned to those organs decided by the autonomous communities, for which reason we can presumably discard a possible application of these offences.

On the other hand, there is a series of very severe offences in matters of economic and budgetary management (Article 25, sections *f* to *o*) which the state could try to apply in order to justify disciplinary proceedings whose initiation, preliminary investigation and sentencing would be up to the state administration (Ministry of Economy and Treasury). These

proceedings could eventually lead to the removal from public office of the person in the service of the autonomic administration having committed the offence, as well as a ban of between five and ten years for holding any of the posts included under Article 22 of the law (senior posts and similar, according to the autonomic legislation), as stated in Article 27.2, sections *b* and *d*. However, the type of offence that could give rise to the initiation of disciplinary proceedings is tied to non-fulfilment of the laws on budgetary stability (Organic Law 2/2012, of 27 April, on Budgetary Stability and Financial Sustainability)[49], for which reason, in principle, it can not include any move the Generalitat might make with a view to holding the consultation nor other initiatives of a unilateral nature it might adopt. Nevertheless, we can not rule out the possibility that the state might force the application of these disciplinary proceedings as an indirect answer to these actions by the Generalitat.

[49] Article 25. Offences in matters of economic and budgetary management.

The following constitute very serious offences: (...)

f) Deliberate non-fulfilment of the obligations established in Articles 12.5 and 32 of Organic Law 2/2012, of 27 April, of Budgetary Stability and Financial Sustainability.

g) Carrying out credit transactions and issuing debt in contravention of the provisions of Organic Law 2/2012, of 27 April.

h) Not adopting the necessary measures foreseen in Article 19 of Organic Law 2/2012, of 27 April, to avoid the risk of non-fulfilment.

i) Subscribing to a collaboration agreement or granting a subvention to a public administration without a favourable report from the Ministry of the Treasury and Public Administrations as foreseen in Article 20.3 of Organic Law 2/2012, of 27 April.

j) Failing to draw up the financial and economic plan required under Article 21 of Organic Law 2/2012, of 27 April.

k) Failing to submit the rebalancing plan required under Article 22 of Organic Law 2/2012, of 27 April or failing to launch it within the stipulated time.

l) Deliberate and unjustified non-fulfilment of the obligation to provide information or justification of deviations in the fulfilment of measures and plans foreseen in Organic Law 2/2012, of 27 April.

m) Deliberate non-fulfilment of the corrective measures foreseen in the economic and financial and rebalancing plans foreseen in Articles 21 and 22 of Organic Law 2/2012, of 27 April.

n) Failure to adopt the declaration of unavailability of credit or failure to constitute the deposit foreseen in Article 25 of Organic Law 2/2012, of 27 April.

ñ) Failure to comply with the Government request foreseen in Article 26 of Organic Law 2/2012, of 27 April.

o) Failure to comply with the necessary measures to guarantee the obligatory execution of the measures adopted by the Government as foreseen in Article 26 of Organic Law 2/2012, of 27 April.

Whatever the case, it is as well to mention that the bill of law is still going through parliament and important amendments have been submitted that affect the content of the sanctioning precepts looked at here, for which reason we shall have to wait for the final terms in which it is passed as law before drawing conclusions.

10. Summary and conclusions

1. Introduction

2. Analysis of support for holding the consultation

The figures show there is a large majority of citizens in Catalonia in favour of holding a consultation on the political future of Catalonia. About 75% of Catalans are in favour of convening the consultation, 20% are against and 5% are indifferent. Rejection for holding a consultation is low throughout Catalonia. In almost every municipality, even in the most populated, estimates show that a majority support holding a consultation. This support is high or very high in the northern quadrant of Catalonia and not so high in the central coastal region (where it is still, nevertheless, a majority).

3. Arguments that legitimate holding the consultation

3.1. Historical legitimacy. Catalonia's existence as a differentiated national reality through the ages gives it a highly legitimate profile in historical terms in relation to other cases in comparative politics. The fact that for centuries it had its own state institutions and that these were suppressed militarily, along with its repeated wish to have its national identity recognised and to have an ample degree of self-government –goals that have never been achieved fairly and effectively in its relations with the Spanish state in the last

three centuries– open up an important channel for legitimation in the international sphere as well.

3.2. The consultation conforms to democratic, representative, civic and participative principles. The consultation is a civic and participative practice corresponding to an advanced democracy insofar as it gives citizens of Catalonia's national *demos* the key to decide on their collective political future. The consultation represents a democratic response to a demand repeatedly raised by a growing sector of Catalan society and of its political representatives.

3.3. The consultation conforms to liberal principles: it protects the individual and collective rights of citizens. The consultation constitutes a tool for the citizens of Catalonia to express how they want to protect and exercise their individual and collective rights before the frequently arbitrary political, economic, linguistic and cultural decisions that have been thrust on them by central power and state institutions.

3.4. The consultation conforms to principles of equality and inclusion. All the citizens of Catalonia will be called on to take part in the consultation, regardless of their place of birth, sex, religion or ethnic group. The whole of society will also be called on to take part in the prior debate, where people will be informed about the possible consequences of the alternatives under consideration, including the possible constitution of Catalonia as an independent state, and will be able to put forward their opinions and suggestions.

3.5. The consultation is possible within the current constitutional legality. There are plenty of sound legal arguments for defending that current legislation includes five procedures through which a consultation could be legally convened for the citizens of Catalonia to express their wishes about the future of Catalonia.

3.6. The consultation is in keeping with the principles of plurinational federalism. One of the principles of plurinational federalism is the voluntary compact between different national entities. A renewable compact according to the democratic majorities in these entities. In this respect, federalism is one of the four principles invoked by the Supreme Court of Canada –along with democracy, constitutionalism and the protection of minorities– in its well-known 'Opinion' (statement) on the case of possible secession by

Quebec (*Secession Reference*, 1998).

3.7. The consultation is part of an advanced cosmopolitan concept of democracy. The consultation is consistent with the values of cosmopolitanism, which relativises borders, especially when these have been imposed by force.

3.8. The consultation is functional: it provides a way out of the present political impasse. A consultation with a clear question and negotiation it is foreseen will be 'in good faith' –the same as the recent talks between the United Kingdom and Scotland or as foreseen by law in Canada– will not only make it possible to know the wishes of the people affected, but will also open the way for a new political and constitutional scenario, whatever the result of the consultation, and break the present political stalemate**.**

3.9. Citizens' consultations are a common procedure in democracies on an international level. Since 1990, referendums have been held on sovereignty and independence in Quebec, Bosnia and Herzegovina, Slovenia, Estonia, Latvia, Lithuania, Macedonia, Montenegro and Ukraine. The Scottish referendum is planned for 2014 (18 September). Direct consultation of the population affected is therefore an amply acknowledged democratic procedure for solving this sort of situation, allowing a solution in keeping with international parameters of non-violence and democratic clarity.

3.10. The consultation is in keeping with historical tradition and Catalan political culture. Historically, Catalonia developed a legal corpus based on negotiated Constitutions of a proto-liberal nature. Those Constitutions were abolished by the Decrees of Nueva Planta (1716). Today, exercising the right to decide is consistent with Catalonia's political history before these decrees.

3.11. The consultation highlights Catalonia on the international scene and identifies it as a political actor. The consultation brings Catalonia before international actors as a political subject with the wish and the power to take its own differentiated decisions. Its conflict with the state becomes visible.

4. Juridical strategies for convening a legal consultation in keeping with internal law

4.1. Strategic objectives. When it comes to deciding which and how many legal channels of consultation should be used and in what order, we need to bear in mind the following fundamental aims: to ensure that a legal consultation is convened and, if the state opposes this, to make it clear that this refusal is for political rather than legal reasons. In addition, the Generalitat's wish to reach an agreement with the state must be made clear to the citizens of Catalonia and the international community, proposing as many legal channels as necessary but not letting the number of proposals give the citizens of Catalonia the feeling that time is being wasted unnecessarily or that the process is being artificially drawn out. Finally, the legal channels used must be the ones that allow greatest protagonism by the Generalitat and Catalan social and political actors and least involvement by the state –so as not to force it to take actions that could represent an unnecessary political cost for it.

4.2. Criteria to be taken into account to reach the goals established. In deciding which channels to use, the following need to be analysed: the scale of the problems of constitutionality that might arise; the time it would take to apply them; the degree of legal protagonism they give the state, the Generalitat and Catalan social and political actors and their power to convey to the international community the wishes expressed in various declarations by the Parliament of Catalonia: to carry out this process, as far as possible, within the legal framework in force and in agreement with the state.

4.3. The legal channels offering most guarantees of constitutionality. Of the five channels that could be used (SC Articles 92 and 150.2, Catalan Law 4/2010 on consultations by way of referendum, the bill of law of non-referendum popular consultations and the reform of the Constitution), the ones that most clearly fit the Constitution are: that of SC Article 92 –especially if accompanied by the reform of the LORMR–, that of SC Article 150.2 and, of course, a constitutional reform which, almost 'by definition', can not be unconstitutional. On the other hand, referendum consultations under Catalan Law 4/2010 and non-referendum consultations under the bill of law now going through the Parliament of Catalonia could pose more problems.

4.4. Legal channels that give most protagonism to the Generalitat and the citizens of Catalonia and speed the process up. If we bear in mind the criterion of maximum protagonism for the Generalitat and the citizens of Catalonia in convening the consultation and in its development, as well as the criterion of maximum celerity, these two goals are best reached through the 'Catalan laws' –Law 4/2010 and the bill of law currently going through Parliament–, rather than via SC Articles 92 and 150.2 or the Constitutional reform. Nevertheless, we can not rule out the possibility that the use of other channels could be accompanied by an expression of popular support, either directly (for example, through the exercise of the right of petition), or else through the town halls and other local bodies (motions of support for the consultation).

4.5. How many channels should be tried? From this perspective, we need to consider the possibility of using more than one procedure, but, on the other hand, they obviously can not all be used. In addition, we can not rule out the possibility of proposing them simultaneously or partly simultaneously, ie pressing for two or more procedures at the same time or else successively but without waiting for one procedure to end completely before beginning another if the Generalitat feels one procedure is being artificially or excessively prolonged.

4.6. Conclusion from the combined perspective of constitutional guarantees, the protagonism of the Generalitat and the citizens of Catalonia and speed. From this triple perspective, one possible solution would consist in using one of the two procedures foreseen in 'Catalan legislation', which would guarantee speed and the protagonism of the Generalitat and the citizens, and one of the procedures 'foreseen in the SC', such as SC Article 92, which, having a clearer fit with the Constitution, will show up the political nature of a hypothetical rejection on the part of the state. Whatever the case, if one wanted to definitively achieve this goal, one could propose a reform of Article 92 of the Constitution, which foreseeably could receive a quick, clear response.

4.7. Order of preference among the different channels. As regards the order of preference among the various channels, it seems clear that not only juridical logic but also political or institutional logic advises using first the 'Catalan channels' and then the 'state channels'. Nevertheless, it's quite true that we can not in the first instance rule out the appearance of unexpected political circumstances –such as, for example, an agreement with the state– which would make it advisable to alter the logical order just

mentioned and, in consequence, would highlight the advantages of first of all going the way of SC Articles 92 or 150.2.

4.8. Conclusions. Barring unexpected circumstances, it seems best, first of all, to try and apply Catalan Law 4/2010 or else, as an alternative, the future Catalan law of non-referendum consultations and then, as another alternative, either SC Article 92 or SC Article 150.2. If politically one wanted to demonstrate incontrovertibly that a hypothetical refusal by the state to convene the consultation had an exclusively political motivation, after all the attempts mentioned above, one could press for the reform of Article 92 so that it included referendums at the autonomic level.

5. The consultation in the framework of European Union law and international law

5.1. Legal procedures for convening the consultation. Neither EU law nor international law contain any clause allowing for a procedure the Generalitat could use to convene a consultation like the one demanded by a majority in Catalonia. International law and EU law both consider that this sort of thing is basically an issue to be settled internally, within each state.

5.2. Rights and principles of EU law and international law applicable to the consultation, and to the implementation of its results and to 'alternative channels'. Are they legally enforceable? What legal effects do they have for the legal channels for consultation and alternative channels? Reference to the international legality of the alternative channels. These two legislations include rights and principles that can back up the legality and the legitimacy of convening a legal consultation or of using alternative channels. One example is the democratic principle of the right of peoples to self-determination and, though on another level, the principle of protection of national minorities.

However, none of these three 'rights and principles' can be brought before a court of law, in the sense that they can be enforced before international or European legal institutions to declare the possible existence of legal obligations binding on the Spanish state or other states or international organisations. There are various reasons for this. First of all,

because the three 'rights and principles' mentioned are included in legal instruments and in jurisprudence more as values and principles than as rights in the strict sense of the word. Secondly, because there are no procedures foreseen in either the European sphere or the international sphere allowing for hypothetical claims based on these principles and directed at demanding the convening of legal consultations or to justify the use of alternative channels. In addition, the Generalitat would have problems of legitimation when it came to making legal claims and, finally, the procedures that could be used are almost exclusively non-jurisdictional.

Even so, the fact that they are not legally enforceable does not mean they can not have legal effects. In particular, as regards holding a legal consultation, it's quite obvious that these principles, especially the democratic principle, have an important legal effect as an unavoidable criterion for interpreting and applying the articles of the Spanish Constitution and of the internal laws that regulate the referendums and consultations through which citizens can take part directly in political decision-making. To put it another way, the principles of European law and of international law, especially the democratic principle, integrated in the internal legislation by Article 10 of the SC, oblige Spanish state authorities to interpret the precepts regulating referendums and popular consultations in such a way that, respecting the principles and rules that govern the democratic state and bowing to the democratic principle, the rights of citizens to take part in politics, including the right to direct political participation, are extended as far as possible.

In relation to the implementation of the results of legal consultations, these principles, and especially the democratic principle, can also have a very considerable effect in qualifying the merely 'advisory' nature the Constitution assigns to this sort of referendums or consultation. In this respect, remember the ruling of the Supreme Court of Canada, which deduces from the democratic principle underlying the Canadian Constitution that the Federation and the Provinces are obliged to negotiate the separation with Quebec in the case that this was the outcome of a referendum on the province's political future.

These principles can also affect the application of alternative channels and the implementation of the results. By way of example, the democratic principle plays a decisive part when it comes to juridically legitimating plebiscite elections and, more precisely, in opposing any attempt to forbid them on the grounds that they are a fraud on the aims elections are intended to fulfil.

Whatever the case, apart from these direct legal effects, these principals, and especially the democratic principle, can also have other, far from negligible effects, such as helping to politically legitimate the use of alternative channels to legal consultations, including a unilateral declaration of independence (UDI), and implementing the effects, including independence. Essentially, they can help by backing up the fact that the use of these channels and the implementation of these results can not be considered contrary to international law. This is the same as saying, first, that the Generalitat can request recognition as a new state in keeping with the rules and principles governing international law and, secondly, that states and international organisations can, if they politically so decide, recognise the consultations and their results without falling foul of international law.

6. The elements shaping the consultation and the criteria regulating election campaigns

6.1. The question

6.1.1. Elements to be considered in posing the question. There are two elements to be taken into account in posing the question, as follows: the internal and international requirements of clarity and neutrality; the issue of whether the question should offer the voter two or more alternatives and, finally, whether or not the question should make clear that the legal channels in force will be used when it comes to implementing the results of the consultation. However, in taking the political decision about the phrasing of the question, not only these elements, but also the political context in which the decision is taken will have to be considered.

6.1.2. The requirements of clarity and neutrality. The requirement of clarity has a twofold content: it calls for a question whose meaning is easy for voters to understand, which is not misleading and which gets 'to the point', and it must not be ambiguous as regards the intention of the vote so that the result is as univocal as possible.

The requirement of neutrality materialises in the need not to incentivise or favour any of the alternatives proposed –in other words, not to induce the voter to vote for any one of the possible answers.

6.1.3. A question with two or more alternatives. Advantages and disadvantages. In view of the political debate now taking place in Catalonia, there are two possible solutions when it comes to deciding the alternatives the question should contain: to pose a choice between the opinions for and against Catalonia becoming an independent state or to offer the voter four possible alternatives: preservation of the *status quo*, a federal state, a confederal state or an independent state. The first alternative has the advantage that the question is clear, the outcome of the vote and the actions that need to be taken to implement the outcome of the consultation are easy to identify. The second gives a more reliable picture of voters' preferences as regards Catalonia's model of political organisation, but raises more problems from the point of view of the question's clarity, identifying the precise meaning of the answers and implementing the results.

If the political circumstances make the second alternative advisable, to avoid breaking up the vote into four options, references to a federal state, confederal state or independent state could be replaced with the expression 'own state' (*Estat propi*), which encompasses all three. However, this is obviously a highly ambiguous expression as regards its meaning and one that is difficult to implement as regards its results. One alternative is to formulate successive or 'branching' questions and offer voters an initial choice between an independent state or not, and, as a second option, the possibility of choosing between *status quo*, federal state or confederal state (this second option would only be taken into account if the majority result of the first question was 'no'.). Finally, in the interests of clarity and ease of implementing the results, citizens could also be offered the possibility of choosing between the four options mentioned using a system like the alternative vote, which allows voters' preferences to be added together to reach a winning option.

6.1.4. Inclusion or not of formulas in the question to show that the process will, as far as possible, take place within current legality. The body of the report analyses, first of all, the formula for the question with a mandate directed at the Parliament of Catalonia to initiate the process to make Catalonia an independent state –or a federal or confederal one, depending on the result of the consultation. Secondly, it studies two variations of constitutional safety clauses. The first consists in adding a comma after the actual question, followed by the words ‘in line with the relevant legal

channels'. The second includes the safety clause in a preamble along the lines of 'within the framework of the relevant legal procedures, the Generalitat of Catalonia convenes the citizens of Catalonia to vote on the following question'.

There are two powerful arguments against these three alternatives. First of all, there is a general rule, repeated by the Constitutional Court in a number of sentences, according to which it must always be assumed that the action of the authorities takes place and will take place in future within the current legality and consequently there is no need to add what the court calls 'safety clauses' to safeguard constitutional and legal regulations in force. Secondly, these formulas pose severe problems of lack of simplicity and clarity and could cause confusion in voters because of they mix up the material object of the question –the goal the person voting wants to achieve– and the instrument or formal procedure by which the result of the question is to be put into effect, as well as doubts over the consequences of a possible freeze by the state when it comes to implementing the results through the relevant legal procedures. These problems are especially important in the case of mandates to Parliament. In fact, a situation could arise in which people voted against an option they were in favour of because they were not in favour of introducing these clauses or mandates to the legislator on the grounds that these formulas acknowledged the state's power to block the implementation of the results of the consultation.

On the other hand, however, it's true that the alternative of including safety clauses and, especially, posing the question as a mandate to Parliament, guarantees that the question is constitutional and leaves an explicit statement before the citizens of Catalonia and the international community that the Generalitat wishes, as far as possible, that the process should respect current legality and aim at agreement with the state, as well as making it clear that if the state opposes the holding of a consultation even though the question states that the results will be implemented through legal channels this refusal is not based on legal reasons but essentially on political reasons: on the decision to prevent free and democratic expression by the citizens of Catalonia.

Certainly, these considerations, which could encourage people to adopt those alternatives including guarantees of the question's constitutionality, take on special importance in the light of one event that can not be ignored: Sentence 103/2008 of the Constitutional Court on the so-called *Ibarretxe Plan*, which indirectly based its

declaration of unconstitutionality of the consultation, among other things, on the fact that the question to be submitted to consultation did not make it clear that the result would be put into effect through the procedure of reforming the Constitution. If the choice is to include a safety clause, the most recommendable alternative is to include it in the preamble.

6.1.5. Conclusions. From the perspective of clarity and ease of implementing the results, the most suitable formula is the direct question for or against Catalonia becoming an independent state.

If the Government or the Parliament, taking other elements into account, decided to use a multiple question, the most suitable formula out of the possible alternatives is the one that offers citizens the chance to choose from various options and at the same time results in a winning option. This is analysed at length in the body of the report.

In relation to the need to include constitutional safety clauses or mandates directed at Parliament to this end, we must bear in mind that this inclusion is not strictly necessary from the legal point of view and can get in the way of clarity. Nevertheless, the present circumstances might advise phrasing the question in the way that best guarantees its constitutionality. In this case, the formula that could cause least problems, from the perspective of confusion between the actual question and the procedure for implementing the result is the clause "in line with the relevant legal channels' formulated in a preamble.

6.2. The date

6.2.1. Elements to be considered in fixing a date. When it comes to taking the political decision of fixing a date for the consultation, there are four basic points to be born in mind. First of all, the existence of periods of time when holding referendums is legally vetoed so as not to coincide with European, state or local elections, as well as the advantage of not holding the consultation on a working day; secondly, the political neutrality of the date chosen, as required by the international community, which recommends not holding the consultation on dates with a powerful symbolic or political component such as 11 September; third, the need to avoid delaying the consultation more than necessary and of trying to fulfil the agreement between the two main parties

in Parliament to convene the consultation before the end of 2014 –barring exceptional circumstances agreed by common consent– and finally the need to have enough time to be able to deal satisfactorily with the organisational problems posed by the consultation and for careful preparation of election campaigns by promoting institutions and the other legitimated subjects. To these four points of a general nature must be added in the case being analysed here one last circumstantial but possibly important conditioning factor: the fact that the referendum for independence in Scotland is being held on 18 September 2014. For a certain time afterwards the results of this referendum could influence participation by the citizens of Catalonia and the way they vote.

6.2.2. Applying the criteria analysed to the case of the consultation. From the perspective of the relationship between maximum speed and actual viability, the most suitable period for holding the consultation starts from the second semester of 2014.

However, from the perspective of excluding election periods, the need for neutrality, the problems of working days and the hypothetical effects of the results of the Scottish referendum, we must bear in mind that within this initial period we must exclude the period from the beginning of the semester –1 June– to 23 August, as it is affected by the European elections. This limit might not be applicable to non-referendum consultations –and, far more improbably in practice, to referendum consultations under Law 4/2010. Between 24 August and the end of the semester, in principle we would have to exclude 11 September, because of the problems of neutrality already mentioned. In addition, the possible effects on the Catalan electorate arising from the Scottish referendum advise against holding the consultation from 19 September whenever these effects can be said to have faded, something which could begin to happen at the end of the semester or at the beginning of 2015.

Should the path chosen for holding the consultation be that of non-referendum consultations, the time available would go from 1 June 2014 to 18 September, with the exclusions mentioned above of 11 September and working days and with the possibility of a resumption in December.

6.3. The electoral roll and logistical problems

6.3.1. Using the state electoral roll. The problem of who is called to cast a vote in a consultation and how the electoral roll is drawn up to be able to exercise the vote only arises in the case of non-referendum consultations foreseen in the bill of law currently going through Parliament. In other cases the state census would be used, because it would be the state who convened or who authorised or delegated the act of convening, and those entitled to vote would be citizens of Catalonia over the age of 18.

6.3.2. People entitled to vote at non-referendum consultations. In the current draft of the proposed law, those people entitled to vote are practically the same as at local or European elections –except for the important inclusion of those aged 16 and over. This electoral roll is therefore different from the one for elections to the Parliament of Catalonia. Although the inclusion of citizens from other countries living in Catalonia could help differentiate consultations from referendums, it might be a good idea to modify the current wording of the bill of law as it seems obvious that the object of the consultation on Catalonia's political future is more closely related to elections to Parliament than to local or European elections. If this were changed, those called to vote would be citizens of Catalonia aged 16 and over. Catalan citizens living abroad should also be included on the electoral roll.

6.3.3. A strategy for preparing the drawing up of the electoral roll for non-referendum consultations. In drawing up the electoral roll for this consultation, the Àrea de Processos Electorals i Consultes Populars (APECP. Department of Electoral Processes and Popular Consultations) of the Catalan Ministry of Governance and Institutional Relations (or the future Electoral Syndicate of Catalonia) will have to update the census used at the last Catalan elections with the support of experts at the Institut d'Estadística de Catalunya (IDESCAT, Institute of Statistics of Catalonia) and the collaboration of the local authorities.

6.3.4. Logistical problems in the case of non-referendum consultations. In anticipation of a hypothetical lack of collaboration on the part of the state –and of some local authorities– and as the Generalitat has not got sufficient electoral material, the Generalitat ought to design a supply programme of this material based on the usual logistical needs at local or autonomic consultations.

6.3.5. Voting by Catalans living abroad. The remote electronic vote. In anticipation

of a hypothetical lack of collaboration on the part of the state authorities, it should be remembered that there are more than 150 thousand Catalans living abroad who might have problems voting. The current technological solutions for remote electronic voting –in which a Catalan company leads the world– are as safe as or safer than traditional postal procedures. In fact, in the uncontrolled environment of remote voting –whether postal or electronic–, the elector is to some extent carrying out an act of faith in the integrity of the electoral process and of safety mechanisms. If anything, it could be said that existing technological solutions guarantee a certain individual audit of the vote cast which postal voting does not. However, when it comes to taking a decision in this respect we need to bear in mind possible criticisms of lack of security in remote electronic voting –grounded or not– which could contaminate evaluation of the entire vote.

6.4. Quorum and majorities

6.4.1. Must a minimum turnout quorum and a qualified majority in favour be established? Although one of the questions usually asked about a consultation that could substantially alter a political community's *status quo* is whether a minimum turnout quorum and a qualified majority in favour of changing the *status quo* should be established, a comparative study shows that the general rule accepted as good practice by the Council of Europe is not to insist on a turnout quorum and to require a simple majority of votes cast. These rules satisfy the demands of the democratic principle and ensure clarity in the interpretation and implementation of the results. On the other hand, requiring special or qualified majorities is a considerable exception to the democratic principle and, what's more, could give rise to complex and problematic situations.

6.4.2. Conclusions. For these reasons, it's advisable that the requirements established for the consultation in Catalonia should be a simple majority of votes cast and no minimum turnout. Nevertheless, if it were necessary to make especially sure of the political legitimacy of the result, the requirement of a turnout quorum could be considered. The threshold for this quorum would have to be decided, in that case, on the basis of political evaluation. However, it seems advisable to make this minimum turnout a majority of the electoral roll (50 % + 1 vote).

Whatever the case, it must be emphasised that the Code of Good Practices on Referendums drawn up by the Venice Commission and adopted by the Council of Europe recommends not stipulating either a quorum for participation nor a quorum for approval.

6.5. The electoral administration and the need to set up the Electoral Syndicate of Catalonia

6.5.1. Absence of a specific Catalan Electoral Administration. It's well known that Catalonia has not got an electoral law of its own and this means, among other things, that the country has not got a specific electoral administration, ie an Autonomous Community Electoral Board or, to give it a name more in line with the Catalan juridical tradition, an Electoral Syndicate of Catalonia.

6.5.2. Electoral administration on referendums convened by the state. If the referendum were convened by the state, under SC Article 92 and the Organic Law Regulating the Several Forms of Referendum (LORMR), the competent bodies of the electoral administration would be the Central Electoral Board, the Provincial Electoral Boards and the Area Electoral Boards. In this case, the existence of an Electoral Syndicate of Catalonia would not, in principle, affect the powers of the Central Electoral Board, unless the LORMR were modified or the specific state legislation for convening the referendum expressly established the intervention of the Catalan electoral administration body so that it could act as such in the referendum.

6.5.3. Electoral administration in referendums under Catalan Law 4/2010. If the referendum were convened by the Government of the Generalitat in the framework of Catalan Law 4/2010, this law (Article 46.2) refers to the 'competent electoral board' when it regulates the higher institutional functions of juridical and operative guarantees for holding the referendum consultation. This competent electoral board could be the Electoral Syndicate of Catalonia if, once this body is set up, the relevant law assigns duties to it established in Article 46.2 of Law 4/2010. If the Electoral Syndicate of Catalonia is not established, the electoral administration for the consultation will be the Central Electoral Board, the Provincial Electoral Boards and the Area Electoral Boards.

6.5.4. Electoral administration in consultations under the proposed Catalan law on non-referendum consultations. If the consultation was convened on the basis of the bill of law on non-referendum consultations, it would be best if the duties of the Control Commission this law foresees were assigned to the Electoral Syndicate of Catalonia –with the precaution of establishing a transitory formula if the law on consultations were approved before the Electoral Syndicate were set up.

6.5.5. The Electoral Syndicate of Catalonia. Bearing in mind the symbolic, legal, social and political importance of the future consultation, it seems clearly desirable to establish our own electoral authority as soon as possible. This body could be called the *Sindicatura Electoral (de Catalunya)* –Electoral Syndicate (of Catalonia)– and could be based on the model of the *Direction Génerale des Elections du Québec* (DGEQ), though it would have to be adapted to the specific circumstances in Catalonia, which are part of a rather different political culture.

6.6. Regulating the institutional campaign

6.6.1. Content of the institutional campaign. The aim of the institutional campaign is for the conveners of the consultation to inform citizens of the basic technical elements of the referendum or consultation (date, text of the question and procedures for voting) and, if necessary, to encourage participation.

6.6.2. The institutional campaign in referendums convened by the state. If the referendum is convened by the state in the framework of SC Article 92, the LORMR and the LOREG, so long as the present text of Article 50.1 of the law and the criteria for its application established by the Central Electoral Board are maintained, only the state can run an institutional campaign, which must be limited to purely technical information without attempting to incentivise participation. However, the state could delegate or transfer the institutional campaign to the Generalitat by applying SC Article 150.2.

6.6.3. The institutional campaign in referendums under Law 4/2010. If the referendum were convened by the Generalitat in the framework of Catalan Law 4/2010 and there are no changes in the Catalan legislation, promoting participation would still fall outside the goals of the institutional campaign. Changes in the Catalan legislation could come via three channels, always grounded in SAC Article 43.3 (the guiding

principal for fomenting participation in elections by means of institutional campaigns by the authorities) and respecting the criterion that the institutional campaign must not influence electors' voting intention. The first channel would be to include fomenting participation in the rules for the institutional campaign via a Decree by the Generalitat of complementary rules for holding the referendum, a possibility which furthermore would receive legal backing from the fact that Article 49 of Law 4/2010 does not expressly exclude incentivising participation. The second would be to modify Article 49 of Law 4/2010 to include a mention of fomenting participation as the object of institutional campaigns. The third would be to set up the Electoral Syndicate of Catalonia in the short term as the electoral administrative body competent in referendum consultations convened by the Generalitat, and give this institution the role of running or supervising the institutional campaign including fomenting participation.

6.6.4. The institutional campaign in the consultations under the bill of law on non-referendum consultations. If the consultation were convened by the Generalitat in the framework of the bill of law on non-referendum consultations, currently going through the Parliament of Catalonia, the regulation of the institutional campaign the autonomic administration might deploy depends on the future Catalan law, as in this case the procedure would not be subject to the terms of the LOREG or the LORMR. In this respect, the possibilities arising from the guiding principle of SAC Article 43.3, as regards fomenting citizen participation in a consultation, could be amply developed, while still respecting the restriction of not influencing electors' voting intentions. It is therefore suggested that the future law of non-referendum popular consultations should include the regulation of the institutional campaign with an express reference to fomenting participation as one of its objectives.

6.7. Regulating the information or propaganda campaign

6.7.1. Content of the information or propaganda campaign. The aim of an information or propaganda campaign in a referendum or consultation is for the convening institutions, other authorities and political and social actors to be able to inform and lay out their position on the object of the consultation, ie on what is being asked.

6.7.2. The information campaign by the authorities in referendums convened by

the state. If the convening is done by the state, the decisions of the Central Electoral Board state that they can inform as to the content of the referendum but may not include any opinion of the object of the referendum so as to preserve the political neutrality of all the institutions –the ones convening and the rest. This stance contrasts with the one held in the Venice Commission's Code of Good Practices on Referendums, which accepts that the authorities should take sides in the information campaign for a referendum without abusing their position and with the commitment to guarantee that at the same time electors are informed on the other points of view. In this way, in the eyes of this report, the Council of Europe points to a possible, desirable modification of the rules of the LORMR or change in the doctrine of the Central Electoral Board.

6.7.3. The information campaign by the authorities under Law 4/2010. Catalan Law 4/2010 does not regulate the information campaign by the authorities in the case of referendums convened in the framework of its provisions. In view of this shortcoming and also of the nature of popular consultations governed by this law as referendums, with the consequent application of the decisions of the Central Electoral Board in this case, we can say that the authorities in Catalonia can run an information campaign on the object of the referendum from an objective and neutral standpoint and trying to avoid value judgements.

6.7.4. The campaign by the authorities in non-referendum popular consultations. As regards the bill of law on non-referendum popular consultations, the text contains no mention either of the information campaign by the authorities. Since this type of consultation is not of the nature of a referendum, the Catalan legislator, either in the final drafting of the law or in the complementary rules for implementation, is not obliged to follow the criteria laid out above of the Central Electoral Board and could include the principles, also mentioned above, of the Venice Commission's Code.

6.7.5. The information campaign by political and social actors. In relation to the information campaign by political and social actors, if the state does the convening, in application of the LORMR and the LOREG, the political parties with parliamentary representation will have a central part to play, in contrast with the other political and social actors and in contrast too with the provisions of the Venice Commission's Code of Good Practices on Referendums and other comparative experiences. This is also

the situation foreseen in Catalan Law 4/2010, with the sole exception that it considers the promoting commission for a public initiative referendum as a political subject of the information campaign. On the other hand, the text of the bill of law drawn up by the parliamentary joint committee on non-referendum popular consultations opens the way to the possibility of social or professional organisations forming 'part of the consultation process'.

7. Implementing the results of the legal consultation: legal consequences of a victory for the Ayes or the Nays

7.1. A victory for 'Yes' in a consultation with a direct question on independence. Consequences for the Generalitat. In a consultation with a direct question on independence, a victory for 'Yes', even though referendums and consultations are legally 'advisory', not only generates undeniable political consequences, but also legal duties or consequences for the authorities involved. In particular, as regards the Generalitat, it would be forced to submit the plan for secession before the state. To do so it could present an initiative for constitutional reform or propose direct talks with the state outside the procedure for constitutional reform. The first of these alternatives has the political and legal advantage of scrupulous respect for current legality; it has the disadvantage that the state could block the process, which would make it necessary to turn to political solutions, including, if necessary, international mediation, and would open the way to the possibility of using alternative channels, such as UDI. If the Generalitat feels the way of constitutional reform is not appropriate and that in fact what we have is a new constituent process, it could press for negotiation with the state through a different form of procedure. However, the question again in this case is whether the result of the process must or can materialise via the existing legal channel (reform of the Constitution). Should it choose to formalise the result by means of a constitutional reform, the problem lies in the final, obligatory and binding reform, which would have to be held throughout the state.

Whatever the case, at the same time as it opened talks with the state, the Generalitat would have to promote a series of measures in the International sphere and the

European Union aimed at getting support for the negotiating process with the state, including willingness to submit to possible mediation, acceptance by and presence in the international community, and Catalonia's admission as a new member of the European Union or, where relevant, deciding Catalonia's status until it acquired membership.

7.2. A victory for 'Yes' in a consultation with a direct question on independence. Consequences for the state. From the point of view of the state, once the Generalitat had proposed the project, it would be obliged to open the proceedings that corresponded to the route taken by Catalonia: constitutional revision or else direct negotiations with the Generalitat, in this case establishing a procedure which does not exist today.

Should the state not agree to begin this negotiating process or should it block the constitutional reform, denying the binding nature of the consultation, not acknowledging the result, believing a different legal procedure should be followed or for straightforward background issues, the problem arising is of an essentially political, rather than legal nature, and would have to be settled by political and not legal means, though without ruling out the possibility of resorting to international jurisdictional instances, if necessary. Among the political means, the recourse to international mediation could carry a lot of weight, as some states and/or international or supranational bodies would be called on to act before the state (and the Generalitat) to allow facilitate the start of talks and their progress, in face of the difficulties that might arise, without excluding unilateral channels like UDI as a last solution.

If the question referred to the creation of a state of our own, taken to include federal or confederal formulas, putting into effect a result in favour would call for a reform of the Constitution, very probably by means of an aggravated reform and therefore with a new referendum in which voters could vote again.

7.3. Consequences of a victory for 'No' in a consultation with a direct question on independence. In the case of a victory for 'No', apart from the consequences of a political nature, we must bear in mind that this result can not be interpreted as an option in favour of maintaining the *status quo*, even though this would be the immediate effect it would have. Neither, of course, can it be understood as excluding future modifications or reforms of the present model, which is not carved in stone. This result of the consultation, therefore, must not get in the way of new plans for reform, or even, after a reasonable

lapse of time, in the terms expressed in the body of the report, of new plans for a consultation on the creation of an independent state.

7.4. Consequences of a victory for 'Yes' or 'No' in a consultation with a question phrased with legal safety clauses or as a mandate directed at the Parliament of Catalonia. In these cases the immediate consequence would be the obligation of the Parliament of Catalonia to present an initiative for constitutional revision to constitute an independent state. From this point on, the same would apply as in the case of the direct question in a scenario of negotiation via existing legal channels. The difference lies in the fact that some people might feel that the result of the consultation had been fulfilled simply with the presentation of the initiative to revise the Constitution, which could be rejected outright by Congress and/or by the Senate. This formalist interpretation is not seriously sustainable and would be perceived as a fraud, both at home and on the international scene. In the case of a refusal by the state to initiate the negotiations or of a subsequent blockade during the process, we would be facing the same blockade scenario we dealt with in respect to the direct question and the same solutions would be applicable.

Whatever the case, it's important to note that over and above the exact wording of the question, the consultation would be based essentially on Catalan independence, clearly giving primacy to the substantive question over and above the procedural question. If it proved impossible to reach a satisfactory agreement under the constitutional revision procedure, this attempt would be deemed to have failed and, in that case, direct negotiations could be opened, on the understanding that this was a new constituent moment. This is in fact the same situation as would arise in the case of the direct question, with the same difficulties and problems, but with a prior attempt to implement the result of the consultation by way of a constitutional reform.

7.5. Consequences of a victory for 'Yes' or 'No' in a consultation with a multiple question. The consequences of a consultation with multiple questions is conditioned by the problems mentioned above regarding the exact meaning of the alternatives and implementing the results.

8. Alternative channels should the legal consultation not be possible

8.1. Consultations by means of a vote organised by the Generalitat outside the law with support from local authorities or by private organisations with indirect support from the Generalitat and the local authorities. These two types of consultation could reveal the wishes of the citizens of Catalonia on their collective political future, but they have obvious disadvantages, such as the head-on confrontation with the state if the first of these channels is used, an easy smear campaign on the part of actors and institutions opposed to a consultation they see as 'pointless' (and presented as illegal and anti-constitutional), foreseeably low or insufficient turn-out, delegitimation of the results –in the international sphere as well–, logistical problems for organisation, etc. These disadvantages would seem to advise against implementing this alternative scenario.

8.2. Plebiscite elections. if it is incontrovertibly shown that it is impossible to hold a referendum or consultation on Catalan independence via the legal channels laid out above as a consequence of a reiterated stand against it by state institutions, the alternative channel of a plebiscite election emerges as the most appropriate way to find out what the citizens of Catalonia feel as regards their collective political future. This type of election is characterised by the fact that, once the election has been convened by the President of the Generalitat, some political parties decide to offer voters the achievement of Catalan independence as the sole or main objective of their election programmes and campaigns. This independence could be the result of a unilateral declaration of independence (UDI) adopted by the Parliament returned by the election. In support of the political legitimacy of the plebiscite election, the arguments that can be brought are those of legality, efficiency and respect for the democratic principle described in the body of this report.

8.3. Unilateral declarations of independence. In theory, UDIs can come about as a consequence or a culmination of a plebiscite election, with the object of implementing the results, or else before the elections and without prejudice to its ratification *a posteriori* through a referendum or popular consultation. UDIs do not conform to the provisions of the constitutional law in force, although from the point of view of law and international

practice they do not constitute an international illegality. However, the political legitimacy of a UDI after a plebiscite election is based on the democratic legitimacy of the new Parliament returned by this election, held as an alternative to the impossibility of holding a referendum or consultation and in a framework of total freedom to defend any option. In the case of a UDI that is not the final stage of a plebiscite election, it can be considered politically legitimate if it is in answer to the state's use of legal instruments to prevent a plebiscite election or taking a stance to block implementation of the results of a legal consultation.

8.4. Parliamentary procedures for making a UDI. From the point of view of procedure, there are two instruments that could be used to approve a UDI: a draft declaration jointly presented by all the parliamentary groups in favour of a UDI or a bill of law presented by the Government or the bill of law presented jointly by all the parliamentary groups in favour of the UDI. The advantage of the draft declaration is that it can be dealt with quickly at a single plenary session at which in little more than one hour the Government and all the parliamentary groups can intervene to establish their position regarding a UDI. The disadvantage of the draft declaration is that the outcome is a declaration which, strictly speaking, does not have legal effects as its approval is an exercise of Parliament's promoting role. For this reason, it seems advisable to opt for processing the UDI as a legislative initiative, as this gives it a formal and normative value (approval as law) which proves necessary for a step with such far-reaching consequences as a declaration of independence. Treating it as a bill of law would allow the use of the quickest procedure of a single reading in the Plenary Session, but this procedure has the disadvantage that it reserves the initiative for the Government alone and requires a unanimity that would be difficult to achieve. On the other hand, treating it as a bill of law by the emergency procedure would make it possible for all the parliamentary groups in favour to present it together and also notably speed things up. Finally, we must consider the issue of the majority needed to approve the UDI. If its is dealt with as a proposal for declaration it could be approved by a simple majority as the Regulations do not foresee special majorities in this case. If the legislative procedure were followed, it would, for obvious reasons, be a type of law not specifically foreseen in the regulations and the Bureau would have to decide beforehand on the type of majority, which, given the criteria laid out earlier on the subject of the referendum or consultation, could be either a simple majority or an absolute majority.

8.5. Mediation procedures. Having reached a situation of practical blockade after exhausting internal legal channels, there would be the possibility of entering into mediation or, if necessary, arbitration by an international institution or organisation like the United Nations or the EU. The two parties would have to accept the procedure on the basis of agreed rules and the legitimacy of the final outcome of the process. This could be a way to unblock the situation and could include holding a consultation, either at the beginning of the process or at the end to ratify the proposed solution or not. It has the advantage of internationalising the political demand underlying the proposed consultation. However, apart from the fact that the state is hardly likely to accept a mediation of this type and the complexity of the whole process, this proposal has the basic disadvantage of its foreseeably excessive duration, in the light of experience in other processes of this type.

9. Legal instruments the Spanish state (or other legitimate bodies) could use to oppose measures taken by the Generalitat to convene a consultation or to implement its results

9.1. Instruments the state could use with regard to the legal channels needed to convene, delegate or authorise them. In four of the legal channels looked at, the state could manifest its opposition through the exercise of the functions attributed to it in each one. In particular, it could refuse to convene –or to convene and regulate– in the case of referendums under SC Article 92, impugn the law –which it already has done– and deny authorisation, in the case of referendums under Catalan Law 4/2010, refuse the application for delegation or transfer under SC Article 150.2 or turn down the application for constitutional reform or opposing it throughout the procedure.

In the other channels analysed in the course of the report (non-referendum consultations, plebiscite elections, informal consultations and UDI) the state has no function attributed to it (neither regulation, authorisation nor approval), for which reason the possible reactions by the state will have to be based on those legal instruments of a general nature which the legislation makes available to it.

9.2. Instruments that could be used in relation to the future law on non-referendum consultations and consultations convened with its backing. The future law of non-referendum consultations could be the object of an appeal by the President of the Government of the state on grounds of unconstitutionality, using the powers foreseen under SC Article 161.2 –suspension of the law for a minimum period of five months– or by other legitimated subjects (50 deputies, 50 senators or the Ombudsman).

The actions to develop and apply the law of non-referendum consultations, relating to the regulation and convening of a consultation, can be impugned before the Constitutional Court (by the state under SC Article 161.2 referring to conflicts of jurisdiction, which would involve the suspension of the measure impugned for a minimum period of five months) and through administrative litigation channels (in this case, legitimation corresponds to the Government of the State as well as to any person or entity claiming a right or legitimate interest affected by the actions of the Generalitat).

9.3. Instruments that could be used in the face of a plebiscite election. Faced with a plebiscite election, the state could only act against the act of convening, though not on the basis of its content –which would not include an explicit reference to its nature as a plebiscite, which the political parties could only give it *a posteriori*–, but as a consequence of the electoral programmes presented by some candidates or for declarations and decisions by members of the Government or the Parliament. The procedures that might be used to impugn the act of convening would be an administrative appeal and impugnment before the Constitutional Court foreseen under SC Article 161.2. Even so, the arguments that could be brought in support of impugnment are remarkably weak, especially bearing in mind that the freedom to decide on the content of an electoral programme is the most fundamental feature of democratic elections.

If the state chose not to impugn the plebiscite election in the courts, in theory there would still be SC Article 155 (as a last resource since this mechanism is an absolute exception), which allows the Government or the state to take whatever measures are necessary when an autonomous community does not fulfil the obligations imposed on it by the Constitution or other laws or acts in a way that constitutes a serious attack on Spain's general interests. In this case, too, the arguments the state could bring are notably weak, but the regulations in SC Article 155 are so vague, both as regards the circumstances justifying its application and with regard to the measures that can be adopted, that they

hand the state an instrument whose scope for impugnment is unclear, for which very reason it has potentially damaging effects for Catalan self-government.

9.4. Instruments that might be used in the face of 'informal' or 'extralegal' consultations. As regards consultations carried out via procedures not foreseen in law (*informal* or extralegal consultations), if organised by the authorities, the mechanisms the state could use are those already mentioned of bringing actions via administrative ligitation, impugnment before the Constitutional Court under SC Article 161.2 and the rather forced application of SC Article 155. To this must be added the exercise of criminal actions, which could not only be brought by the state but also by private individuals through the presentation of lawsuits or complaints**.**

As regards criminal actions, convening a popular consultation through procedures not foreseen in law is definitely not classed as an offence, so a hypothetical attempt to apply criminal law could only be grounded in those precepts of criminal law that apply in general to certain acts by the public authorities that are against the law. In particular, there are three types of offence which might in theory be considered applicable: infringement of powers, perversion of justice and disobedience. Even so, looking at the different types of criminal offence, it's clear that it would be difficult to apply them in the case of acts connected with the consultation, though we can not rule out a potential stretching of the way the relevant provisions are interpreted to include the actions the Generalitat might take.

As regards participation by private individuals in these consultations organisations by the authorities –in acts of electoral propaganda, in polling stations, in the control of voting, etc.–, criminal law does not expressly forbid any of these conducts and problems of disobedience could only arise if a court issued a ruling explicitly forbidding the consultations.

In the case of *informal* consultations organised by private organisations, the state would have less channels to respond through as it would not have recourse to the exercise of administrative litigation or to the Constitutional Court. Once again in this case criminal law does not expressly forbid private individuals from holding a citizens' consultation. What the state could do is to turn to administrative litigation or the Constitution to impugn the acts of local or autonomic authorities giving support to these private initiatives. The

possibility that these acts of support by the administrations could be pursued under criminal law can not be ruled out either, but once again in this case it would mean stretching the interpretation of criminal legislation.

9.5. Instruments that might be used before a unilateral declaration of independence. In the case that the Catalan institutions made a UDI, the state could appeal under SC Article 161.2 or under the exceptional mechanism of SC Article 155 or bring criminal actions as we saw in reference to informal consultations and the declaration of states of exception or siege.

As regards criminal proceedings, it can not be ruled out that the state might find the crimes of rebellion or sedition applicable, apart from the offences already mentioned, but an examination of the Criminal Code suggests that the applicability of the relevant legal provisions depends on far-fetched interpretations as they do not expressly include the acts which, *a priori*, would be involved in the UDI, which furthermore would not constitute an international illegality.

The last of these mechanisms is the declaration of the state of exception –applicable in the case that the free exercise of the rights and freedoms of citizens, the normal operation of the democratic institutions, that of essential services for the community or any other aspect of public order is seriously disrupted– and the state of siege –foreseen in those cases where there is a threat of insurrection or act of force against the sovereignty or independence of Spain, its territorial integrity or constitutional order that can not be resolved by other means. It seems that a UDI, as envisaged, is not something that can justify the state of siege, amongst other things because it has always been understood that the threats providing grounds for applying this law are exterior threats. It is also highly disputable, though not unthinkable, that a UDI could be grounds for declaring the state of exception, unless the interpretation of the effects of a UDI is stretched in the belief that the normal operation of the democratic institutions is being severely altered.

9.6. Other instruments that might be used. As one last point, it can not be ruled out that the state, in response to legal measures as well as other acts, might make biassed use of other instruments of coercion made available to it by the legislation, especially in the area of control of economic and budgetary stability (Organic Law on Budgetary

Stability and the future Law of Transparency, Access to Public Information and Good Governance).

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Annexes

Annexe I: Contextual model, individual model and databases used

Fact-sheet for the statistical model used in Section 2.4 (combined analysis of opinion polls and elections results): multinomial logistic model with undecided voters as the reference category. The covariables change in each case, and so does the sample. In particular, two models were made:

- Contextual model: the factors are the remembered vote at the last elections, the sphere of the regional plan of Catalonia and the size of the municipality. The sample is of 800 people according to the CEO opinion poll (CEO-703, October 2012).
- Individual model: the factors are those in the diagram below. The sample figure is of 4,000 people according to the polls for which individual microdata are available: *El Periódico* (3), *Ara* and CEO, each with a sample of 800 people. The data have been pooled. The estimate of missing values is made according to percentages observed in the sample.

In both cases the estimate of the model is made using Bayesian techniques and MCMC (Markov Chain Monte Carlo methods), with missing value treatment. Estimate made with JAGS and data treatment with the R statistics package. Variable to be explained: support for holding the consultation, in 3 replies (Abstention, No and Yes). Explanatory variables: party sympathy, size of municipality and territorial scope of the plan (grouped by *comarca*).

Diagram 3

Explanatory factors of support for the consultation (Undecided as reference category)

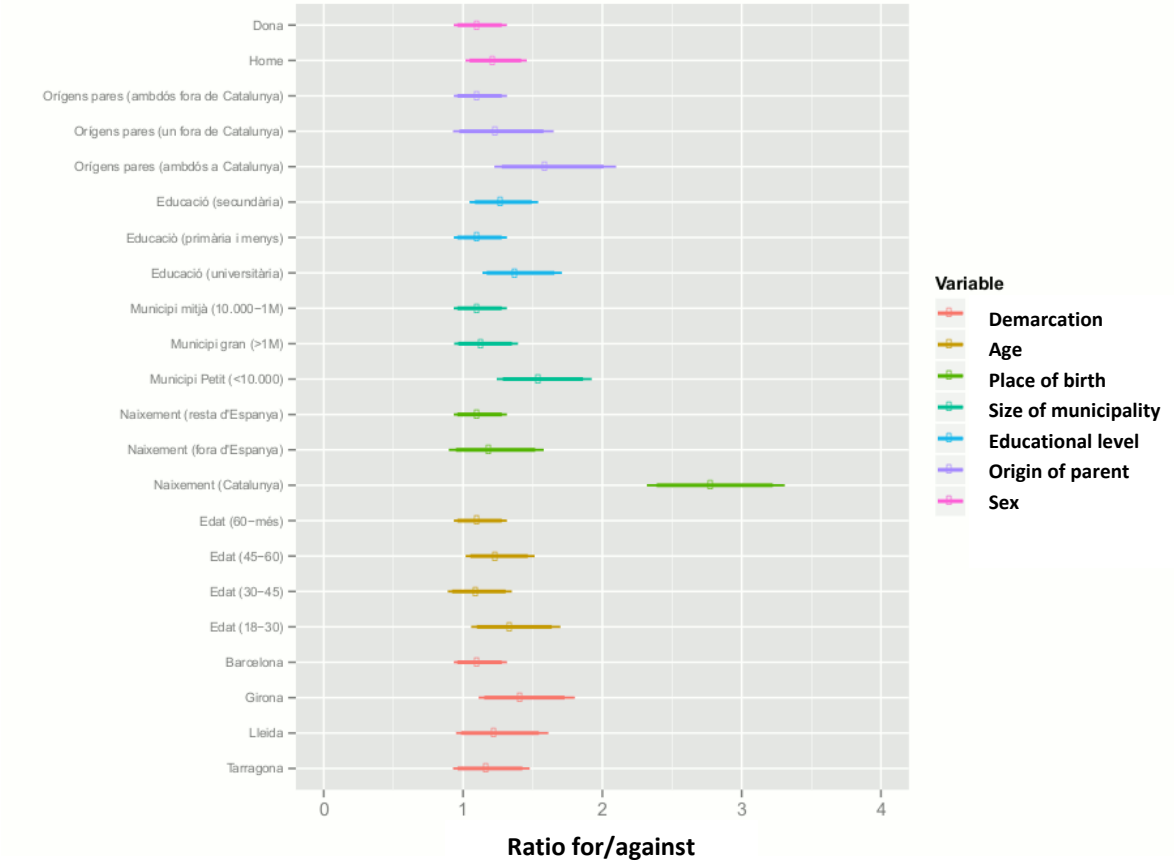


Table 8

Data bases used

Institute or person responsible for holding the poll	Reference	Dates of field work	Sample size
Centre d'Estudis d'Opinió	CEO, 703	27/09/2012 – 01/10/2012	800
GAPS	ARA, October 2012	25/10/2012 – 26/10/2012	800
Gabinet d'Estudis Socials i d'Opinió Pública	El Periódico, January 2012	16/01/2012 – 19/01/2012	800
Gabinet d'Estudis Socials i d'Opinió Pública	El Periódico, September 2012	26/09/2012 – 27/09/2012	800
Gabinet d'Estudis Socials i d'Opinió Pública	El Periódico, January 2013	14/01/2013 – 16/01/2013	800
Feedback	La Vanguardia, September 2012	21/09/2012 – 27/09/2012	1200
Feedback	La Vanguardia, October 2012	08/10/2012 – 11/10/2012	1000

Questions used in the surveys:

CEO – 703: Are you in favour of or against holding a referendum for the people of Catalonia to decide whether or not they want Catalonia to become a new European state? I'm in favour; I'm against; Don't know; No answer

GAPS, October 2012: Do you agree or disagree that during the next legislative session a referendum should be held so that the people of Catalonia can decide whether or not they want Catalonia to become a new European state? Agree; Disagree; Don't care; Don't know/No answer

GESOP, January 2012: Do you think it would be a good thing if the Spanish Government gave its support to holding a referendum on Catalan independence like the British government has done? Yes; No; Don't know/No answer

GESOP, September 2012: Would you be in favour of holding a consultation on Catalan self-determination during the next legislative session, even if it was not authorised by the state? Yes; No; Don't know/No answer

GESOP, January 2013: Also includes a consultation in 2014 to decide whether Catalonia should become a European state, are you more in agreement or more in disagreement with holding this consultation in 2014? More in agreement; More in disagreement; Indifferent/Don' care; Don't know/No answer

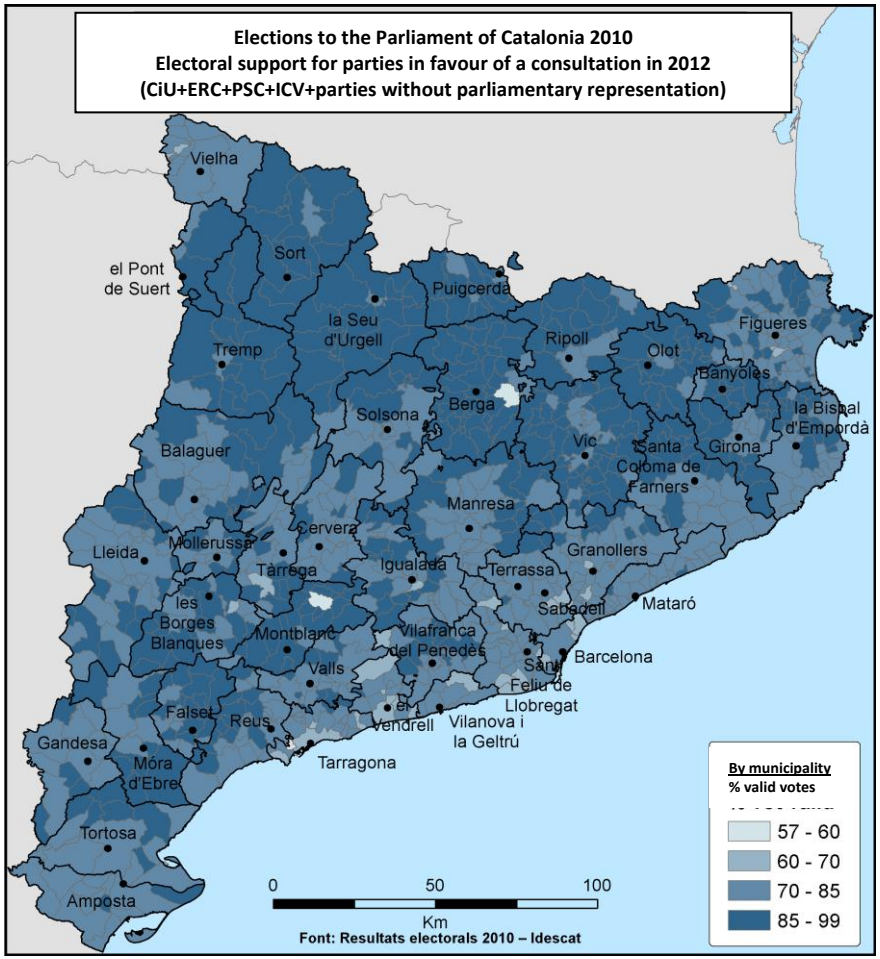
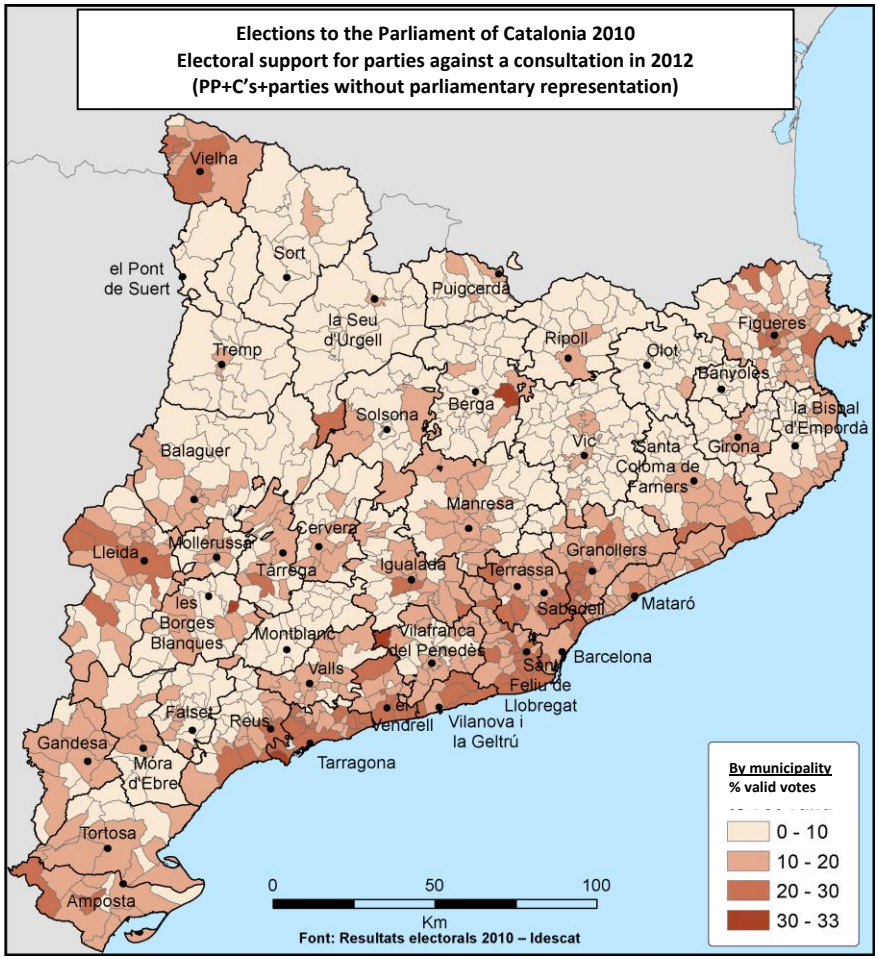
Feedback, September 2012: Are you in favour of or against holding a referendum for the people of Catalonia to decide whether or not they want Catalonia to become a new European state? Yes; No; Don't know/No answer

Feedback, October 2012: Do you agree or disagree that during the next legislative session a referendum should be held so that the people of Catalonia can decide whether or not they want Catalonia to become a new European state? Yes; No; Don't know/No answer

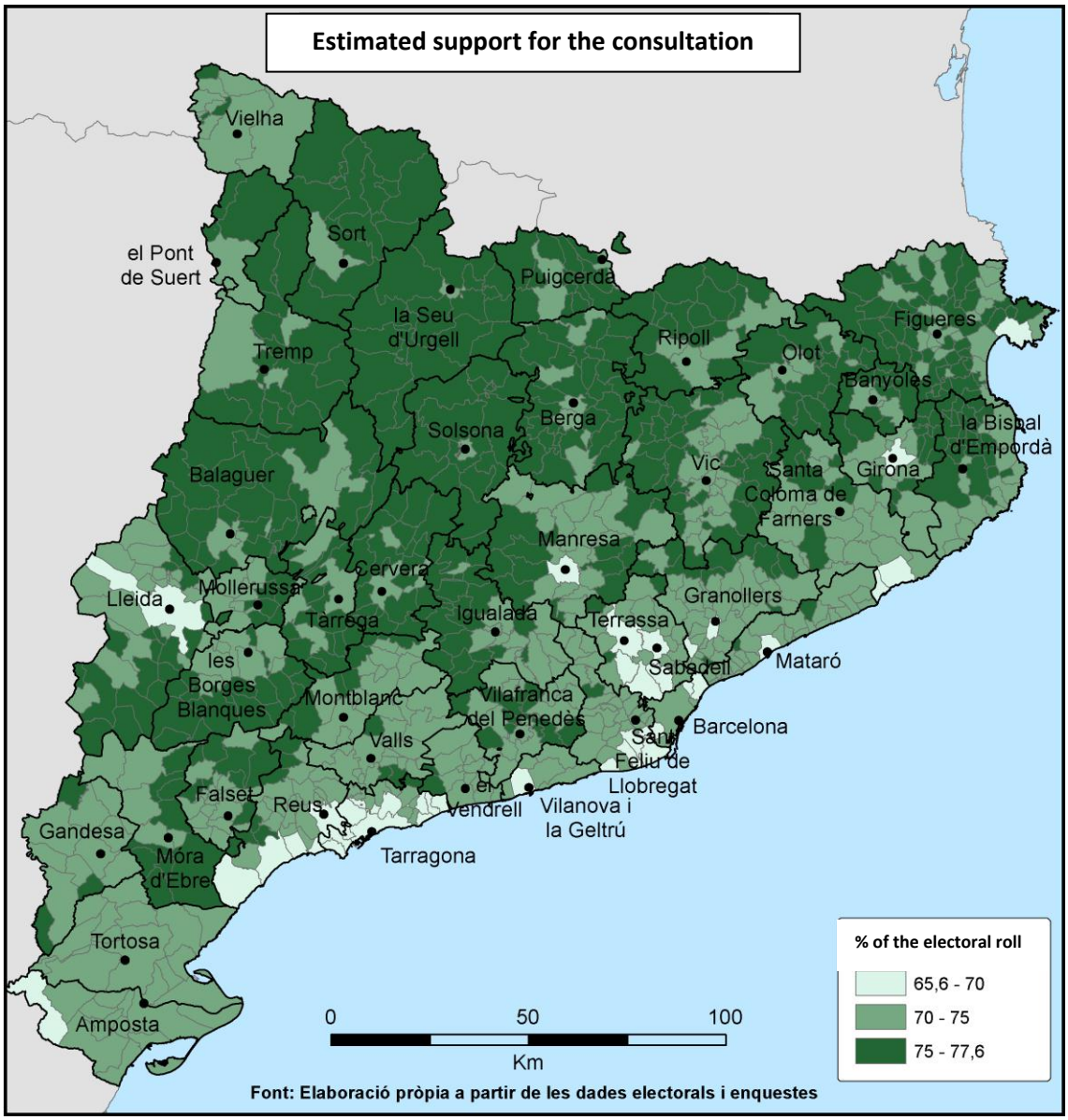
Annexe II: Complementary maps elections 2010. Synthetic maps of the results of the opinion polls and the 2012 election results

Below are included different complementary maps mentioned elsewhere in this section. First of all, we show a robustness analysis based on the results of the 2010 elections to the Parliament of Catalonia, which ratify the analyses included in the text and based on the 2012 election (to simplify this annexe and as it is not a decisive factor in the result, we are only showing the results considering the PSC version as a party in favour of the consultation (Maps 13 and 14). Secondly, we show the maps of citizens in favour of, against and indifferent to the consultation based on the results of opinion polls and elections (Maps 14, 15 and 16).

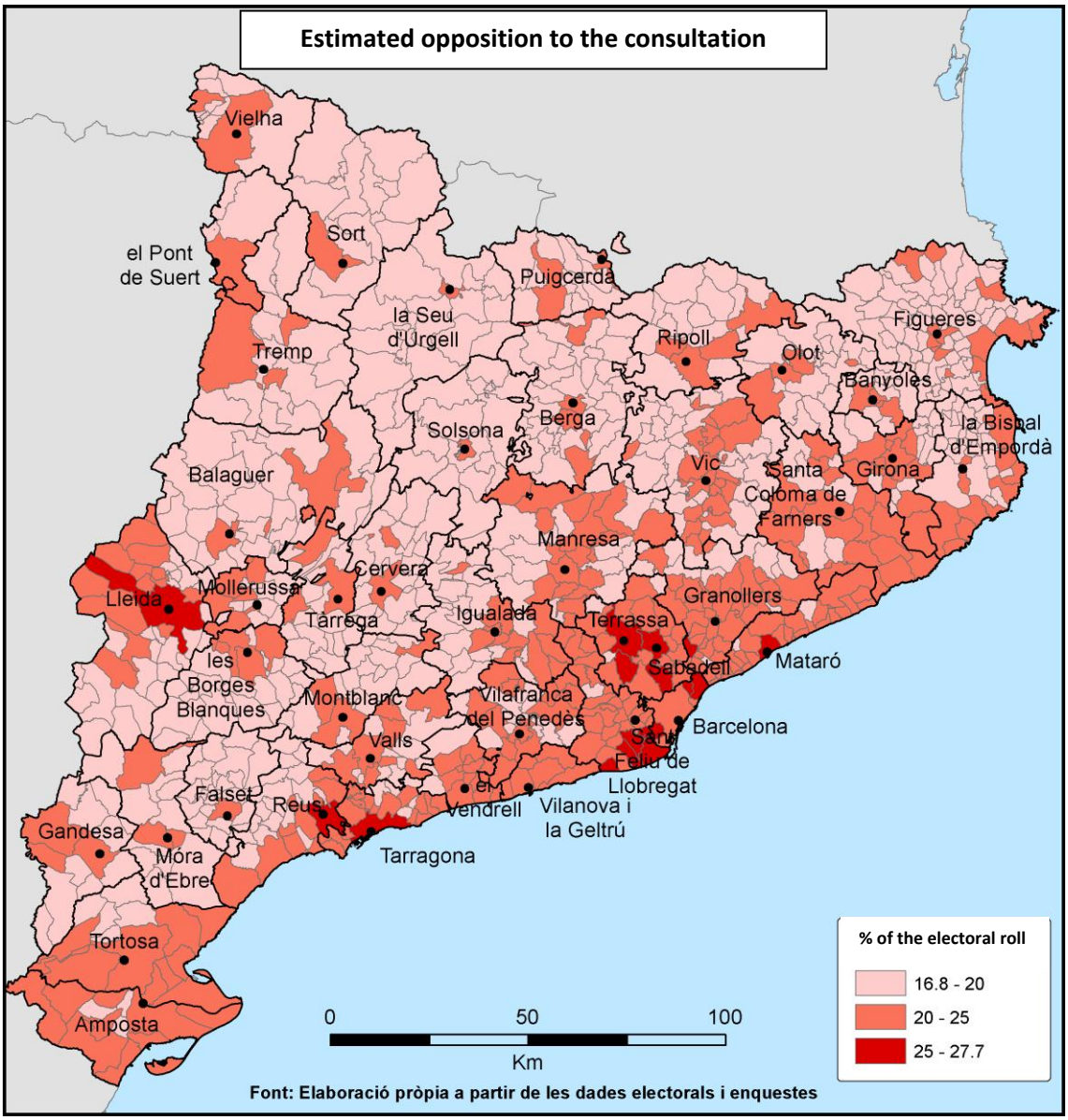
Generalitat de Catalunya
Government of Catalonia

Map 12	Map 13
	

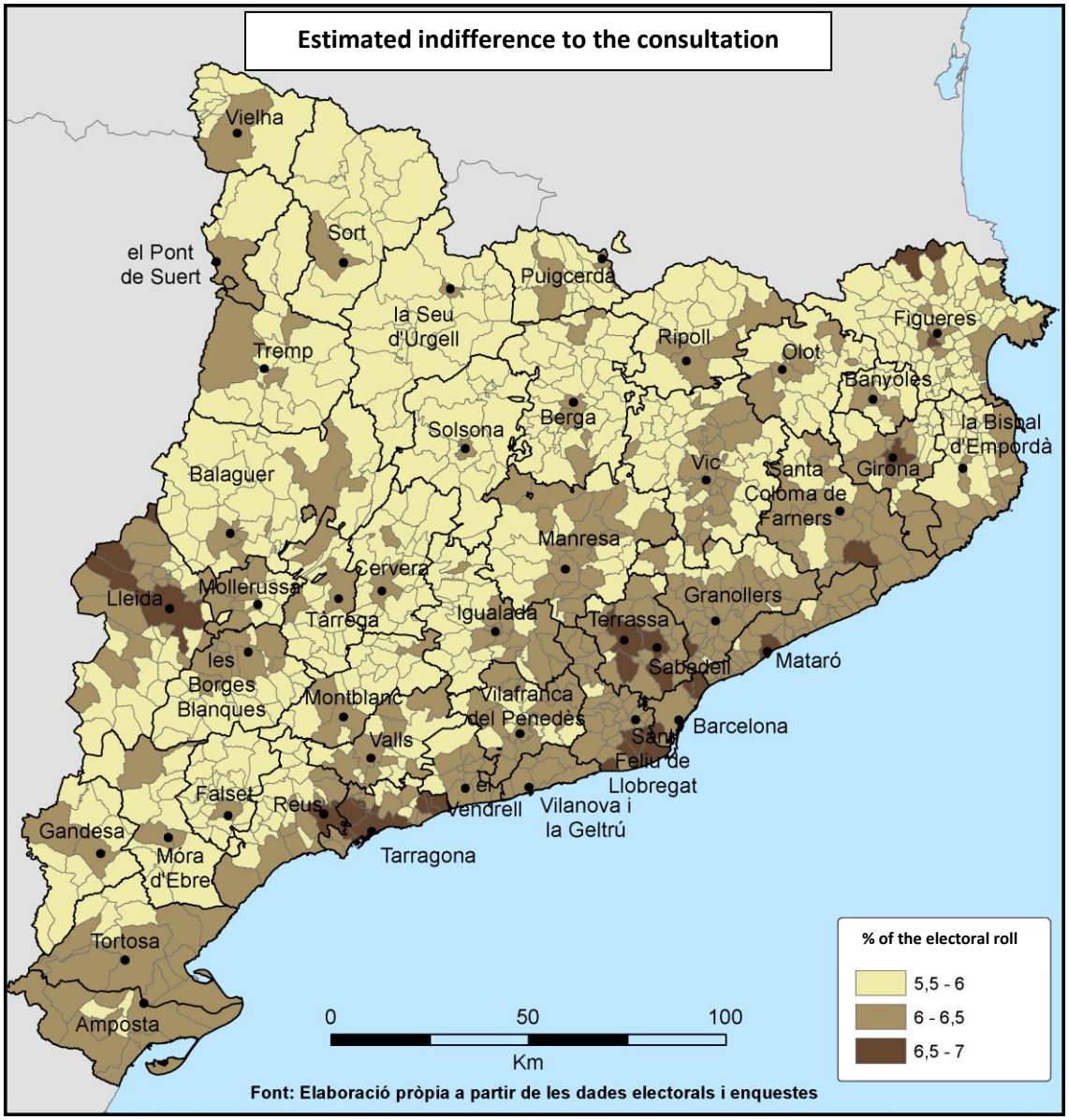
Map 14: Estimated support for holding a consultation by municipalities (2012)



Map 15: Estimated opposition to holding a consultation by municipalities (2012)



Map 16: Estimated indifference to holding a consultation by municipalities (2012)



Annexe III: Referendums with an institutional/constitutional impact held in 10 democracies (Germany, Belgium, Canada, Denmark, France, Ireland, Italy, United Kingdom, Sweden and Switzerland) (1995-May 2013). State and substate levels (Sweden: analysis of state level only)

Table 9

General summary (1995-2013)

Subject of consultation	State	Substate	TOTAL TYPES
1. Institutional structural reform	D1 F5 I7, I8 IT1, IT2, IT3 S7, S8	A1, A2 C1 F1 R1	**14**
2. Sovereignty/cession of powers /EU	D2, D3, D4 F2 I1, I2, I3, I4, I5, I6, I9 SE1	C2 F3, F4, F6, F7 R2, R3, R4, R5, R6, R7, R8	**31**

3. Enlargement/reduction rights (includes immigration)	i1, i2, i3, i4, i5, i6, i7, it1, it5, it9, it10 s4, s5, s6, s7, s8, s9, s10, s11, s12, s13, s14, s15, s16, s17, s20, s21, s22, s23	a3, a8 c2	**32**
4. Electoral system reform	it2, it3, it4, it6, it8, it11 r1	c1 r2	**9**
5. Development direct democracy and participation	it7 s1, s2, s3, s18, s19	a1, a2, a6, a7	**10**
6. Reform territorial limits	s24	a4, a5	**3**
			99 (45+54)

Summary of 45 cases of consultations on reforms involving a reform of institutional design or a cession of sovereignty (1995-2013)

- (A1) **Land: BAVARIA (Germany).** 08/02/1998. Revision of the Constitution: a country without a Senate.
- (A2) **Land: BAVARIA (Germany).** 08/02/1998. Revision of the Constitution: Government and Parliament.

- (C1) **Territory: NUNAVUT (Canada).** 26/05/1997. Equal representation in the Inuit assembly.
- (C2) **Province: QUEBEC (Canada).** 30/10/1995. Sovereignty
- (D1) **DENMARK.** 07/06/2009. Succession of either sex to the throne
- (D2) **DENMARK.** 25/11/2008. Referendum on the enlargement of self-government in Greenland (full sovereignty).
- (D3) **DENMARK.** 28/09/2000. On entry into the European single currency (EU).
- (D4) **DENMARK.** 28/05/1998. On the Treaty of Amsterdam (EU).
- (F1) **Region: ALSACE (France).** 07/04/2013. Single administration for the region.
- (F2) **FRANCE.** 29/05/2005. European Constitution.
- (F3) **Overseas territories: GUADELOUPE and MARTINIQUE (France).** 07/12/2003. Change of status of Guadeloupe and Martinique and creation of a single assembly
- (F4) **Region: CORSICA (France).** 06/07/2003. Modification of the island's status
- (F5) **FRANCE.** 24/09/2000. Reduction of presidential term of office from 7 to 5 years.
- (F6) **Overseas territory: MAYOTTE (France).** 02/07/2000. Paris agreements
- (F7) **Overseas territory: NEW CALEDONIA (France).** 08/11/1998. Nouméa Accord.
- (I1) **IRELAND.** 31/05/2012. Treaty on *Stability*, *Coordination* and *Governance* in the Economic and Monetary Union.
- (I2) **IRELAND.** 02/10/2009. Ratification of the Treaty of Lisbon.
- (I3) **IRELAND**. 12/06/2008. Ratification of the Treaty of Lisbon.
- (I4) **IRELAND.** 19/10/2002. Enlargement of the European Union, Treaty of Nice.
- (I5) **IRELAND.** 07/06/2001. Ratification of the Treaty of Nice.
- (I6) **IRELAND.** 07/06/2001. Endorsement of the International Criminal Court.
- (I7) **IRELAND.** 11/06/1999. Recognition of local authorities.

- (I8) **IRELAND AND NORTHERN IRELAND.** 22/05/1998. Irish authorities throughout the island / Ulster Peace Agreement
- (I9) **IRELAND.** 22/05/1998. Ratification of the Treaty of Amsterdam.
- (IT1) **ITALY.** 25/06/2006. Constitutional referendum: 55 articles.
- (IT2) **ITALY**. 07/10/2001. Amendment to Title V of the Constitution (part 2). Regional reform.
- (IT3) **ITALY**. 15/06/1997. Abolition of the Ministry of Agrarian Politics.
- (R1) **Nationality: WALES (United Kingdom).** 03/03/2011. Extensive powers to National Assembly
- (R2) **Region: NORTH-EAST ENGLAND (United Kingdom).** 04/11/2004. Single regional authority.
- (R3) **Former colony: GIBRALTAR (United Kingdom).** 07/11/2002. Shared sovereignty.
- (R4) **Former colony: ASCENSION ISLAND (United Kingdom).** 23/08/2002. Local autonomy.
- (R5) **Nationality: NORTHERN IRELAND (United Kingdom).** 22/05/1998. Belfast Agreement (*Good Friday Agreement),* also voted in referendum in the Republic of Ireland by constitutional reform.
- (R6) **Nationality: WALES (United Kingdom).** 18/09/1997. Creation of its own Assembly.
- (R7) **Nationality: SCOTLAND (United Kingdom).** 11/09/1997. Creation of its own Parliament.
- (R8) **Former colony: BERMUDA (United Kingdom).** 16/08/1995. Sovereignty.
- (SE1) **SWEDEN**. 14/09/2003. Adoption of the single European currency.
- (S1) **SWITZERLAND.** 08/02/2009. Federal decree of 13 June 2008 to approve extension of the agreement between Switzerland and the European Community and its member states on the free movement of persons, and the approval and application of the protocol to extend the agreement on free movement to Bulgaria and Romania.

- (S2) **SWITZERLAND.** 28/11/2004. Federal decree of 3 October on the financial composition and tax distribution between the Confederation and the cantons
- (S3) **SWITZERLAND.** 09/02/2003. SWITZERLAND. 09/02/2003. Federal law on adjusting cantonal contributions to hospital costs
- (S4) **SWITZERLAND.** 03/03/2002. Citizens' initiative: 'Switzerland joins the United Nations'
- (S5) **SWITZERLAND.** 04/03/2001. Citizens' initiative: 'Yes to Europe'.
- (S6) **SWITZERLAND.** 21/05/2000. Federal decree on the approval of the sectoral agreements on Switzerland and the European Community and/or its member states, or Euratom.
- (S7) **SWITZERLAND.** 18/04/1999. Federal decree on a new federal constitution.
- (S8) **SWITZERLAND**. 07/02/1999. Federal decree on the modification of conditions of eligibility for the National Council
- (S9) **SWITZERLAND.** 08/06/1997. Citizens' initiative: 'Public referendum on the negotiations for entry to the European Union'.

Summary of 54 cases of consultations on reforms not involving a reform of the institutional design or ceding sovereignty (1995-2013)

- (a1) **Land: HAMBURG (Germany).** 27/09/1998. A) Direct democracy in the districts
- (a2) **Land: HAMBURG (Germany).** 27/09/1998. B) Revision of the system of direct democracy
- (a3) **Land: BAVARIA (Germany).** 08/02/1998. Constitutional revision: fundamental rights and objectives of the Constitution
- (a4) **Land: BERLIN (Germany).** 05/05/1996. Merger Berlin and Brandenburg
- (a5) **Land: BRANDENBURG (Germany).** 05/05/1996
- (a6) **Land: BERLIN (Germany).** 22/10/1995. Reform of the Constitution

- (a7) **Land: BAVARIA (Germany).** 01/10/1995. More democracy in Bavaria: Popular Decisions at local level
- (a8) **Land: HESSE (Germany).** 19/02/1995. Constitution Article 75: right to be elected at age 18.
- (c1) **Province: British Columbia (Canada).** 17/05/2005. Electoral system
- (c2) Province**: British Columbia (Canada).** 15/05/2002. 8 questions on the aboriginal peoples
- (i1) **IRELAND.** 10/11/2012. The Rights of the Child
- (i2) **IRELAND.** 27/10/2011. Powers for parliamentary commissions.
- (i3) **IRELAND.** 11/06/2004. Irish citizenship
- (i4) **IRELAND.** 06/03/2002. Protection of Human Life in Pregnancy.
- (i5) **IRELAND.** 07/06/2001. Abolition of the Death Penalty.
- (i6) **IRELAND.** 28/11/1996. Refusing bail to suspects that could be dangerous.
- (i7) **IRLEAND.** 24/11/1995. Divorce laws.
- (it1) **ITALY.** 13/06/2011. Abolition of the duty of the holders of top state offices to appear before court.
- (it2) **ITALY.** 22/06/2009. Abolition of combined lists for elections to the House of Representatives.
- (it3) **ITALY.** 22/06/2009. Abolition of combined lists for elections to the Senate.
- (it4) **ITALY.** 22/06/2009. Abolition of multiple candidacy for elections to the House of Representatives.
- (it5) **ITALY.** 13/06/2005. Provisions referring to the aims of research, analogy between the rights of the individual and the foetus.
- (it6) **ITALY.** 21/05/2000. Eliminate a quarter of the seats in Parliament awarded by the proportional method.
- (it7) **ITALY.** 21/05/2000. Abolition of the reimbursement of referendum and election campaign spending.

- (it8) **ITALY.** 18/04/1999. Abrogation of a quarter of the Parliament elected by the proportional method.
- (it9) **ITALY.** 15/06/1997. Abolition of the right to enter private property while hunting.
- (it10) **ITALY.** 11/06/1995. Precautionary residence. Abolition of the power of the national antimafia prosecutor to force suspected Mafia members to live away from their places of origin.
- (it11) **ITALY.** 11/06/1995. Municipal electoral law. The object is to eliminate the two-round system for directly electing mayors in towns with more than 15,000 inhabitants.
- (r1) **UNITED KINGDOM.** 05/05/2011. Use of the 'alternative vote' in the electoral system.
- (r2) Former colony**: Falkland Islands (United Kingdom).** 11/12/2001. Change in constituency.
- (s1) **SWITZERLAND**. 27/09/2009. Federal decree of 19 December 2008 on abandoning the introduction of the general citizens' initiative.
- (s2) **SWITZERLAND**. 01/06/2008. Citizens' initiative: 'For democratic naturalisations'.
- (s3) **SWITZERLAND.** 01/06/2008. Public initiative: 'Popular sovereignty instead of government propaganda'.
- (s4) **SWITZERLAND**. 24/09/2006. Federal decree of 16 December 2005 on revising articles of the federal constitution referring to education.
- (s5) **SWITZERLAND**. 24/09/2006 Amendment of 16 December 2005 on the law of asylum.
- (s6) **SWITZERLAND.** 26/09/2004. Federal decree of 3 October 2003 on the acquisition of rights of citizenship by third-generation foreigners.
- (s7) **SWITZERLAND**. 26/09/2004. Federal decree of 3 October on the right conduct for naturalisation and on simplified naturalisation for young second-generation foreigners.

- (s8) **SWITZERLAND.** 08/02/2004. Popular initiative on 'life-long custody for non-curable, extremely dangerous sexual and violent criminals'.
- (s9) **SWITZERLAND.** 18/05/2003. Citizens' initiative: 'Equal rights for the disabled'.
- (s10) **SWITZERLAND.** 18/05/2003. Citizens' initiative: 'Health has to affordable (Health initiative)'.
- (s11) **SWITZERLAND.** 18/05/2003. Federal law on civil defence.
- (s12) **SWITZERLAND.** 18/05/2003. Amendment to the federal law on the army and the military administration.
- (s13) **SWITZERLAND.** 09/02/2003. Federal decree on amending the rights of citizens.
- (s14) **SWITZERLAND.** 24/11/02. Citizens' initiative: 'Against the abuse of the right of asylum'.
- (s15) **SWITZERLAND.** 02/06/2002. Amendment of the Swiss criminal code (termination of pregnancy).
- (s16) **SWITZERLAND.** 24/09/2000. Citizens' initiative: 'In favour of regulation of immigration'.
- (s17) **SWITZERLAND.** 24/09/2000. Citizens' initiative: 'More rights for people thanks to referendums with counter-proposals'.
- (s18) **SWITZERLAND**. 12/03/2000. Citizens' initiative: 'On speeding up direct democracy' (time limits for the handling of popular initiatives).
- (s19) **SWITZERLAND.** 12/03/2000. Citizens' initiative: 'For a just representation of women in federal authorities' (initiative of 3 March).
- (s20) **SWITZERLAND.** 13/06/1999. Asylum law.
- (s21) **SWITZERLAND**. 13/06/1999. Federal decree on urgent measures in relation with asylum and foreigners.
- (s22) **SWITZERLAND.** 07/02/1999. Citizens' initiative: 'House ownership for everyone'.

- (s23) **SWITZERLAND.** 01/12/1996. Federal decree on the citizens' initiative: 'Against illegal immigration'.
- (s24) **SWITZERLAND.** 10/03/1996. Federal decree on the affiliation of the community of Bernese de Vellerat to the canton of Jura.

Annexe IV: List of diagrams and list of maps

This report on "The consultation on the political future of Catalonia" was prepared by the Consell Assessor de la Transició Nacional, which comprises:

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