

# **CATALONIA'S LEGITIMATE RIGHT TO DECIDE**

## **PATHS TO SELF-DETERMINATION**

**A REPORT BY A COMMISSION OF INTERNATIONAL EXPERTS**

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## ACRONYMS AND ABBREVIATIONS

<b>AER</b>	Assembly of European Regions
<b>ANC</b>	<i>Assemblea Nacional Catalana</i>
<b>AVANCEM</b>	<i>Espai socialista</i>
<b>BL</b>	Basic Law
<b>C</b>	Constitution
<b>CDC</b>	<i>Convergència Democràtica de Catalunya</i>
<b>C's</b>	<i>Ciudadanos</i>
<b>CiU</b>	<i>Convergència i Unió</i>
<b>CoR</b>	Committee of the Regions
<b>CSQP</b>	<i>Catalunya Sí que Pot</i>
<b>CUP</b>	<i>Candidatura d'Unitat Popular</i>
<b>DC</b>	<i>Demòcrates de Catalunya</i>
<b>ICJ</b>	International Court of Justice
<b>ECHR</b>	European Convention of Human Rights
<b>ECtHR</b>	European Court of Human Rights
<b>ECJ</b>	European Court of Justice
<b>ERC</b>	<i>Esquerra Republicana de Catalunya</i>
<b>EU</b>	European Union
<b>ICV-EUiA</b>	<i>Iniciativa per Catalunya Verds-Esquerra Unida i Alternativa</i>
<b>IU</b>	<i>Izquierda Unida</i>
<b>JxS</b>	<i>Junts pel Sí</i>
<b>MES</b>	<i>Moviment d'Esquerrres</i>
<b>OC</b>	<i>Òmnium Cultural</i>
<b>P</b>	<i>Podemos</i>
<b>PDD</b>	<i>Plataforma pel Dret a Decidir</i>
<b>PP</b>	<i>Partido Popular</i>
<b>PSC</b>	<i>Partit dels Socialistes de Catalunya</i>
<b>PSOE</b>	<i>Partido Socialista Obrero Espanol</i>
<b>TEU</b>	Treaty on European Union
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>UCD</b>	<i>Unión de Centro Democrático</i>
<b>UDC</b>	<i>Unió Democràtica de Catalunya</i>

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## INTRODUCTION

### EXPLORING THE LEGITIMACY PATHS FOR THE RIGHT OF CATALANS TO DECIDE ON THEIR POLITICAL FUTURE IN EUROPE

Catalonia's decision to convene a referendum of Self-determination on October 1<sup>st</sup> 2017 constitutes a major challenge for Catalonia, as well as for Spain and the European Union. Scholars from all over Europe and beyond have been studying the recent self-determination trends that have their most salient expressions in Scotland (a self-determination referendum was held on 18 September 2014), the Brexit vote (23 June 2016) and Catalonia's claim for self-determination. Numerous conferences, workshops, articles and books flourish on the topic. However, contrary to the Scottish and British referendums, the legality of the Catalan referendum is heavily contested by Spain national authorities, raising a legitimacy issue; not about the outcome, but about the process itself. This is these legitimacy issues of the process itself, the question of the legitimacy of the exercise of a right to decide by a people without a State within the EU, that the present report explores.

## 1. The Working Method

The four international experts that produced the present report have been invited by the Minister of Foreign Affairs, Institutional Relations and Transparency of the Government of Catalonia, to examine the legitimacy of the call for a Self-determination Referendum by the Catalan Government before the end of 2017 (the date of 1<sup>st</sup> of October has been announced since). They worked intensively during the recent months to produce this report. It is based on their previous expertise as well as an evaluation of the available documents, statements and publicly known acts<sup>1</sup> of the different actors involved in the present situation linked to the claim by Catalan government to exercise the Catalans' Right to Decide about their political future.

The framework of this study is multilevel, as it examines the arguments of parties within the Catalan, the Spanish, the European and the International contexts. The reality of 21<sup>st</sup> century Europe does not allow for actors at either level, to act in isolation or without reference to the other levels. And as is often the case with self-determination processes, the relevance of the different levels is contested. Therefore the dispute deploys its arguments at several levels of discourse, simultaneously debating the respective relevance of the different legal corpus in which the applicable rules have to be found and implemented, and about the substance of the rights to be respected or promoted.

This is why, despite being composed of several law professors, the present study does not aim at giving a legalistic answer to the issues at stake. As the Courts which have been asked to examine similar cases (the Canadian Supreme Court about the secession of Quebec in 1998, and the International Court of Justice as regard Kosovo's unilateral Declaration of independence in 2010) have both expressed, this is not an issue that may be solved by a pure legal proceeding; it ultimately calls for a political solution. Nonetheless, the political solution will have to be framed within the limits of fundamental principles structuring liberal democracies such as respect for democracy, the rule of law and fundamental human rights, principally. The present Report shows in that respect that the sometimes conflicting rights and principles have to be weighted against each other. This is why, while conducting a thorough political and legal survey of existing situations and arguments, the experts focus on the legitimacy of the respective claims and behaviors, and not on the identification of a legally enforceable solution.

## **2. The Substance of the Issue**

Catalans constitute a European people without a State. In current international and European Law, "peoples" have the right to self-determination, meaning they can "freely determine their political status and freely pursue their economic, social and cultural development"<sup>2</sup> and thus choose for themselves a national project, which may lead to becoming a Nation-State. This right is recognized to "all peoples" and, contrary to a widely held belief, clearly not limited to people under colonial domination<sup>3</sup>. The States parties to the two 1966 UN Covenants on Human Rights "shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."<sup>4</sup> Spain, as all other members of the EU, has accepted these Covenants, and is therefore legally bound to respect the right for Catalans to exert self-determination. Therefore, the legalistic argument based on the 1978 Spanish Constitution, put forward by the current Government of Spain to refuse the exercise of the right to self-determination, is not valid and in clear contradiction with Spanish obligations under international and EU Law, that are binding on the Spanish national authorities according to sections 10 § 2 and 96 of the Constitution.

Catalans authorities are not claiming a right to self-determination, but rather the right to decide of their political future (see 2.1.5. below for the emergence of this concept). A political future that will indisputably be within the EU, and within or outside Spain, depending on citizens' choices and upcoming negotiations. Self-determination has been, since 1960<sup>5</sup>, considered within the framework of the UN as a right grounded on a just cause

(a form of remedial secession) for people under colonial domination. As we explore later in the report (see below point 2.2.3 on the ethics of the right to decide) this is only one of the ethical foundation of the right to decide. Political philosophy offers other justification for a people to claim the exercise for the right to decide. This is why, in the present report, we shall privilege the use of the right to decide over the right to self-determination, despite the fact that both concepts recoup in many aspects.

Further, the existence of such a Right in formal terms does however not exhaust the debate on the conditions under which its exercise may be legitimate. One of the well-known difficulties with the exercise of the right to self-determination as recognized in international law since the adoption of the UN Charter (1946), is that “peoples” “nations”, and even “States” are not properly defined under international law<sup>6</sup>. This is largely due to the different co-existing conceptions of “nationalism” that were forged between the late XVIII and the XXth Century. The international Law right to self-determination does not make specific reference to any given conception of nationalism; it is however important to precise that Catalans’ claim for the right to decide is grounded in the civic and liberal conception of a Catalan nation, and not an essentialist, “natural” or ethnic conception of the Catalan nation<sup>7</sup>, as is clearly demonstrated by the draft bill on the self-determination referendum presented by the Catalan government on 4<sup>th</sup> of July 2017. Such a democratic self-determination is the only type of national project that is in conformity with European values as enshrined in article 2 of the Treaty on the European Union (hereafter TEU).

With the civic liberal approach to a national project that Catalans promote for the exercise of their right to self-determination, the existence of a Nation is not a pre-existing sociological, historical and/or cultural fact – which once established (by whom is another question...) would then allow for the right to self-determination to be exercised (as a right of this pre-existing collective entity that would be an ethnic Nation) – but the result of a will to exert a national project, democratically expressed by the people which will, through this process, eventually constitute themselves as a sovereign nation. The most legitimate path to realize such national project is thus the organization of a referendum, based on a clear question that will allow for the Catalan people to decide on its own political future, by exerting self-determination.

Catalans have long shown their will to actively participate as a European nation to the peaceful development of Europe. Their contributions to the European project have been numerous, as shown below. Further, their contribution to the building-up and the stabilization of the democratic Spanish State following the regime of Franco is also undeniable. However, their current situation within Spain and EU, as a nation without a

State, does not allow them to fully participate, on an equal footing with other European nations, to the crafting of the future of Europe. The Catalan nation has an equal dignity with all other European nations, and the exercise of the right to decide is the legitimate exercise of this equal dignity.

Actually, art. 49 of the Treaty on the European Union (TEU) recognizes that “any European State which respects the values referred to in Article 2 [TEU] and is committed to promoting them may apply to become a member of the Union”. And as declared in the Preamble of the Rome Treaty establishing the European Economic Community (nowadays called the Treaty on the Functioning of the European Union) by the States members of the EU, they are “calling upon the other peoples of Europe who share their ideal to join in their efforts.”<sup>8</sup> This call to other peoples of Europe clearly concerns Catalans (as it did concern Croats, Czech, Estonians, Hungarians, Latvians, Lithuanians, Poles, Slovaks or Slovenes, and still address Basques, Catalans, Flemings, Norwegian, Scots or Swiss among others), but it requires for these people, in order to be able to answer the call, to first acquire their own State, in order to be able to become a full participant (member) of the EU, according to article 49 TEU procedure.

Thus current EU law actually encourages European peoples without their own State to first become a nation-state, in order to then fully participate to the European integration process as a member State of the EU. Some argue that EU should reform itself with a special procedure for dealing with case such as Catalonia's desire to become a full-standing EU member, without having to first become a European State outside EU in order to join, or even have a special enhanced regional status within the EU<sup>9</sup>. Such proposal does make sense and could be explored within the emerging framework of “earned sovereignty” (see sections 3.2.4. and 4.2.3. below); it would however be for the current EU institutions or member States to initiate a Treaty revision (under the procedures of art. 48 TEU<sup>10</sup>) to deal with such situation. Under current positive law, Catalonia may not initiate a Treaty change, and therefore has to follow existing EU procedures to be able to fully and equally participate to the EU project. Even though the EU treaties do not have a specific clause dealing with the claim of Catalonia for self-determination before joining the EU as a full-fledged member States, as we will show below, no EU provisions forbids the exercise of the right to decide by a European people, and further, there is a consistent EU practice of recognizing and the result of self-determination process.

Therefore the present report does, through a thorough academic analysis, show that the claim by the Catalan democratically elected authorities of their right to decide is legally and politically legitimate. The holding of a self-determination referendum on the 1<sup>st</sup> of October

2017, prompted by the persistent refusal of the Spanish authorities to envisage any other way of dealing with the legitimate claim of the Catalan people for exercising their right to decide, appears at the time of the writing of this report, as the most straightforward and democratically legitimate way to exert this right to decide. This does not however, if other actors (Spanish national Authorities or European Institutions) were to propose dialogue or negotiation, precludes Catalan Authorities to continue searching for a negotiated solution within the Earned sovereignty conceptual framework, within the EU institutional frame.

## **I. HISTORICAL, POLITICAL AND SOCIOLOGICAL BACKGROUND FOR THE CURRENT SITUATION IN CATALONIA**

Since the re-establishment of democracy in 1977, Catalan governments have repeatedly made demands of self-government. In spite of a federal and gradualist position assumed by Catalan parties in office between 1980 and 2010, concessions have been rather modest. Indeed, the growing resistance of the Spanish government to negotiate has become salient over the years, and reached its peak in 2010 with the Constitutional Tribunal ruling on the revised Statute of Autonomy of 2006.

In this chapter, we will illustrate the Spanish government's behavior in regard to the Catalan self-determination process. This section will be organized as follows. We will first present the Catalan party system and identify Catalan territorial preferences within Catalan political parties. We will then move towards particular aspects and moments of Catalan-Spanish negotiating process on the tortuous path to a legal referendum on the right to decide. Mapping Catalan political parties' territorial preferences will ease our understanding of the negotiating process that has taken place between the Spanish and Catalan governments since 1980.

Ultimately, this combined approach will allow us to confirm Spanish government's resistance in making concessions through time which has contributed to fuel the popular support towards political independence. As we shall see in chapter II, this bottom-up movement has grown rapidly with the release of the Constitutional Tribunal ruling in 2010. Furthermore, it has been reinforced in 2012 by the Spanish state's prohibition to hold a referendum as the CiU started to prioritize calls for a referendum on independence in reaction to the Spanish government's refusal to agree on a new fiscal pact for Catalonia.

In conclusion, we will posit that it is an increasing dissatisfaction towards the outcomes of the negotiating process between the Spanish and Catalan governments that has led Catalan pro-independence political parties into a patriotic political compromise moving beyond ideological divergences to argue for Catalonia's "right to decide".

### **1.1. Catalan Party System and Territorial Preferences within Catalan Political Parties**

The Catalan party system is structured in a bimodal axis of competition, including the classic ideological dimension (left-right) as well as center-periphery dimension, commonly known as the Catalan-Spanish nationalist debate.

Historically, in Catalonia there had been five main political parties achieving representation both in the regional and national parliaments. First, *Convergència i Unió* (CiU) was a federation of the center-right *Convergència Democràtica de Catalunya* (CDC) and the Christian-Democrat *Unió Democràtica de Catalunya* (UDC). The federation, headed by former leader Jordi Pujol, ruled the Catalan government uninterruptedly from the first Catalan elections in 1980 until 2003.

The political formation had largely favored a gradual system of increasing self-government, although since 2012 CDC geared in an undecided camp, balancing between the status quo and a confederation. The discrepancies between the two parties regarding the secession of Catalonia entailed, in June 2015, the dissolution of the federation and the decision of each party to compete separately in 2015.

The second party in importance has traditionally been the *Partit dels Socialistes de Catalunya* (PSC), a center-left and pro-federalist party, federated with the *Partido Socialista Obrero Español* (PSOE). The party has historically won the elections for the Spanish Parliament in Catalonia, while it has traditionally been the second force in the Catalan elections.

The *Partit Popular Català* (PP) is the regional branch of the Spanish *Partido Popular* (PP). It is a rightist party that is in favor of the status quo or even of recentralizing some powers granted to the regions. The national party was founded in 1989 as the heir of the former *Alianza Popular*, a party created by several leaders of the Francoist dictatorship. The party has never been in power in Catalonia although it provided support to the CiU government during the 1999-2003 legislature.

*Esquerra Republicana de Catalunya* (ERC) is a leftist and pro-secession party. Founded in 1931 before the Spanish second Republic, the party held the presidency of Catalonia from early 1931 until the Francoist coup d'état. During the dictatorship, ERC maintained the Catalan government in exile and it was not legalized until after the first general elections. At the dawn of democracy, the party embraced pro-sovereignty postulates, although it was not until 1989 that it assumed the objective of full independence in its manifesto. ERC formed part of the Government from 18 June 1984 to 27 February 1987, when Joan Hortalà was the minister for Industry and entered into government for the second time in 2003 with the tripartite coalition with PSC and ICV-EUiA. Very seemingly, in 2015, ERC entered once more into government within the pro-dependence coalition *Junts pel Sí* (JxS) - Together for Yes.

Finally, *Iniciativa per Catalunya Verds-Esquerra Unida i Alternativa* (ICV-EUiA) is a leftist, green and pro-federalist coalition of parties. ICV is a federation of communist and socialist



parties that came together in 1987. EUiA is a coalition of leftlist and communist parties split from the Spanish *Isquierda Unida* (IU) in 1997.

More recently, traditional parties were challenged by the entry of three new parties into the Catalan political arena – *Ciudadanos* (C's), *Candidatures d'Unitat Popular* (CUP) and *Podemos* (P). *Ciudadanos* ran for a Catalan election for the first time in 2006 when they won three MPs and kept them all in 2010. The party defines itself as anti-nationalist and constantly denounces the excesses and lies of Catalan nationalism, while arguing that Catalonia is, according to the Spanish Constitution, a nationality and already enjoys substantial self-government. According to C's, the independence debate is radically against the Constitution and they completely reject the 'right to decide' on the grounds that sovereignty lies with the Spanish people as a whole.

*Candidatures d'Unitat Popular* (CUP) is a left, pro-Catalan independence political party with a critical European stance that ran for the Catalan election in 2012. CUP has traditionally focused on municipal politics, and is made up of series of autonomous candidatures that run in local elections. Finally, *Podemos* – which in the case of Catalonia has a regional replication, the coalition *Catalunya Sí que Pot* (CSQP) - is a left party that was established in 2004. Although it precludes a popular consultation on the future of Catalonia, they do not assume a clear position in regard to their territorial preference for Catalonia.

## **1.2. Catalan-Spanish Negotiating Process and the Tortuous Path to a Legally Binding Referendum**

In this section, we will review the most relevant moments and strategic “options” made by Catalan governments over the years since the re-establishment of democracy in 1977. The purpose of this exercise is to identify key political actors who have contributed to Catalan self-determination process. Additionally, this will allow us to acknowledge how many times the Spanish government has rejected Catalonia's request to hold a legal binding referendum on political independence. In order to accomplish this task, we will go through the evolution of the agreements and disagreements achieved between the Catalan and Spanish governments through time.

For the purpose of clarity, we will argue that since the reestablishment of democracy negotiations have gone through three different types of negotiating strategies: the first one is popularly known as “fish in a bag”<sup>11</sup> strategy (1980-2003); the second one is called “hard ball” strategy (2003-2012) and the third one is called “chicken strategy” (2012-today). On the basis of this analysis, we will conclude that the political pay-offs have been increasingly

unsatisfactory on the Catalan side, leaving a strong sense of dissatisfaction among Catalan people which has contributed to fuel increasing demands of political independence since 2010.

### **1.2.1. Between 1980-2003: A “fish in a bag” strategy**

“Fish in a bag” strategy can be defined as a cooperative strategy where both parties agree to negotiate and to make concessions in order to reach mutual gains. This strategy denotes a situation when both sides of the dispute feel that they will benefit from the resolution of the conflict (win-win situation). In this type of negotiation, “mutual confidence” is key as well as the “willingness” to preserve the relationship. This type of strategy can be used to label the years that go from 1980 to 2003 when Catalan governments were presided by Jordi Pujol on the Catalan side, leader of the center-right moderate nationalist coalition CiU.

At the same time, the two-main national Spanish parties, either with right or left-wing orientation - *Partido Popular* (PP) and *Partido Socialista Obrero Español* (PSOE), respectively – were in charge of the Spanish governments. The presidents of the government were Filipe González (PSOE) from 1982 to 1996 and José María Aznar (PP) from 1996 to 2004. Between 1980 and 2003, irrespective of José María Aznar’s government (2000–2004) lack of response to demands for greater autonomy for Catalonia, the relationship was still based on trust and commitment.

#### **1.2.1.1. From 1980 to 2003: Majority Government of CiU**

Since 1979 the political scenario in Catalonia has always had some important differences with respect to Spain. From the first Catalan Parliament, held in 1980 to 2003, the regional Catalan government was in the hands of a long-term collation of two centrist moderate nationalist parties: *Convergència I Unió* (CIU) formed by *Convergència Democràtica de Catalunya* (CDC) and *Unió Democràtica de Catalunya* (UDC). Jordi Pujol, the leading figure of the coalition, was the president of the Generalitat for the whole period.

Jordi Pujol, once President of the Generalitat, focused his political strategy on the achievement of a rapid transfer of powers from the central government to the autonomous institutions, a process that to a great extent was facilitated by Adolfo Suárez, then Prime Minister of Spain and one of the main figures in the transition to democracy. This took place at a time when Suárez’s party, UCD (*Unión del Centro Democrático*) needed CiU’s support to secure a majority in the Spanish Parliament. However, the 1981 attempted *coup d’état* prompted a U-turn in central government policies. The newly appointed Prime Minister,

Leopoldo Calvo Sotelo, under pressure from the conservatives, halted to any further devolution of powers to the autonomous communities<sup>12</sup>.

Therefore, although this phase was characterized by permanent political and legal disputes about the jurisdiction of the Catalan and Spanish governments on all sorts of policies the distribution of fiscal revenues or the degree of devolution considered adequate, Pujol favored a strategy of permanent bargaining with the central government in order to gradually extract small concessions to increase the capacity of self-government of the Catalan institutions<sup>13</sup>.

Between 1980 and 2003, Catalan governments have been committed to the project of a federal Spain, while pursuing an agreement that could benefit Catalonia. Very seemingly, Spanish governments have been relatively engaged in negotiation but soon after the 2000 landslide victory of José M. Aznar's conservative Popular Party (PP), sympathy and understanding towards Catalan's demands for further autonomy and recognition were replaced by hostility.

### **1.2.2. Between 2003-2012: A "hard ball" strategy**

A "hard ball" strategy can be defined as a competitive strategy where parties find it difficult to reach a compromise because one of the parties is not interested in making any concessions. This strategy denotes a situation when only one side perceives the outcome as positive (win-lose situation). As a reaction to this offensive strategy, the other party reacts using all possible means to persuade and force the competitor to make concessions. This type of negotiation is highly competitive and it is based on suspicion and distrust. This negotiating strategy could be applied to the relationship established between the Catalan and Spanish governments between 2003 and 2012 as the revision process of the Catalan Statute of Autonomy was hampered by the Spanish government leading to a growing dissatisfaction with the degree of autonomy conceded.

#### **1.2.2.1. From 2003 to 2006: Tripartite Coalition of PSC-ERC-ICV-EUiA**

The pattern of nationalist hegemony was broken in 2003 by the election of a tripartite coalition led by the PSC under Pasqual Maragall, which also included ERC and *Iniciativa per Catalunya Verds – Esquerra Unida i Alternativa* (ICV-EUiA - Initiative for Catalonia Greens-United and Alternative Left). The new President of the Generalitat was Pasqual Maragall, the former socialist mayor of Barcelona. Once in power, Maragall was to propose the drafting of

a new Statute of Autonomy for Catalonia; an updated much more ambitious statute than that of 1979.

This *political élan* towards more self-government was supported by José Luis Rodríguez Zapatero, the leader of the Spanish Socialist Party (PSOE) and future Prime Minister of Spain, who during the election campaign of 2004 committed himself to supporting the new Statute. However, this turned out to be a much more complicated business than initially expected. Profound discrepancies emerged between Maragall and Rodríguez Zapatero (PSOE), who, once in government in 2004, proved unable, or unwilling, to stand up by his promise to support the new Statute of Autonomy to emerge from the Catalan Parliament.

Irrespectively of these major difficulties, a broad agreement was reached in the Catalan Parliament and on 30 September 2005, the Parliament of Catalonia passed its proposal for a new Statute of Autonomy. It was approved with the support of 120 MP's out of 135 and was sent to Madrid. The proposal to reform the 1979 Statue of Autonomy recognized Catalonia as a nation, preventing Madrid's interference in devolved powers, and giving Catalonia full control over a transparent and rational financial arrangement.

The CiU's pact with PSOE in 2005-2006 ensured the approval in Catalonia of a less ambitious text than the draft originally agreed upon by the tripartite coalition headed by Pasqual Maragall. The final text of the new Statute of Autonomy had been seriously watered down during the negotiation process to make it acceptable to the Spanish government and Socialist Party (the conservative party PP was opposed to it from start to end of the whole process). CiU's support for the eventual text of the reformed statute was crucial since this required a two-third majority in the Catalan parliament and then had a difficult passage through the Spanish parliament, where it was modified further.

The Statute that was finally approved in the Spanish Chamber of Deputies undermined many of the most ambitious competences recognized initially in the law passed by the Catalan Parliament. Despite this, a majority of the Catalan parties in the Catalan Parliament represented by CiU, PSC and ICV-EUiA accepted the agreement and the statue of Autonomy was brought back to Catalonia to be ratified in a referendum.

Finally, on the 18<sup>th</sup> of June 2006 the Statute of Autonomy was approved in a popular referendum in Catalonia with 74% of affirmative votes, but the turnout was relatively low (less than 49% of the electorate). Even though the level of self-rule that the new law granted for Catalonia was lower than the level bestowed in the original law voted by the Catalan Parliament, many people still considered that this was a significant improvement to fight for<sup>14</sup>. However, the climate remained calm only for a few weeks.

At the end of July 2006, the PP brought the approved Statute of Autonomy to the Constitutional Tribunal – arguing that some of its content did not comply with the Spanish Constitution. This generated a sense of outrage among Catalans who could not understand how the newly approved Statute - after following all the procedures and modifications as requested by Spanish political institutions and the Constitution - could still be challenged. The reaction from civil society came immediately in 2006 and became stronger in 2007 with massive demonstrations. Catalonia would have to wait until the 28 June 2010 for the Constitutional Tribunal to release its final decision.

#### **1.2.2.2. Between 2006 and 2010: PSC-ERC- ICV-EUiA**

A new election took place in November 2006. Although CiU was, again, the winner, the three-left-wing-party coalition was re-edited, now under the leadership of the new president of the *Generalitat*, José Montilla, a former minister of the Spanish Socialist government. Despite the approval of the new Statute of Autonomy, the political situation did not become less agitated<sup>15</sup> for two main reasons: first, the PP had made the decision to take important parts of it to the Constitutional Tribunal (as we have mentioned before) and second, things started moving at the level of Catalan civil society.

New organizations other than traditional political parties were being created to successfully mobilize citizens in defense of the right to decide of the Catalan people. These groups organized for example a series of local unofficial self-determination referendums in almost 60% of all municipalities of Catalonia between 2009 and 2011.

In June 2010, after four years of deliberations, the Constitutional Tribunal of Spain, by a 6 to 4 majority of its members, decided to give an interpretation of 41 articles of the Statute that downplayed the autonomy-strengthening dimension – mainly those relating to language, justice and fiscal policy – thus watering down even further the main tool for Catalonia's self-rule. It also deleted the reference to Catalonia as a "nation". On 10 July 2010, a massive demonstration was once more organized on the streets of Barcelona as a form of protest.

#### **1.2.2.3. Between 2010 and 2012: CiU**

In November 2010, there was a new election to the Catalan Parliament. The clear winner was again CiU and a new governance was formed under the leadership of Artur Mas, Jordi Pujol's heir since 2003. The controversial 2010 Constitutional Tribunal ruling not only led CiU to redefine its territorial aims, but also radicalized other actors' objectives, most notably sectors of Catalan civil society.

In terms of policy, Mas outlined two main objectives for his term in office. First, he aimed at economic recovery in a context of a deep economic crisis; and, second, he promoted a new fiscal agreement (*'pacte fiscal'*) for Catalonia with the Spanish government, involving the capacity of Catalan institutions to levy all taxes in Catalonia and also to reduce the indirect money transfers from Catalan tax-payers to other Spanish regions. This substantial fiscal demand was justified by CiU on account of a Constitutional Tribunal ruling on the 2006 reform of the Statute of Autonomy, which invalidated several articles and reinterpreted several others in a restrictive way.

The modification of a law that had been approved by Catalans in a referendum was viewed by CiU as totally unacceptable, and this led to a change in the discourse of main Catalan nationalism to the so-called 'right to decide' (*'dret a decidir'*) of the Catalans. The first implication of this new framework was, therefore, the capacity to decide on the taxes that Catalans pay, and CiU made its proposal for a new fiscal deal. In this context, the Catalan parliament endorsed the demand for a new fiscal agreement that would imply full fiscal autonomy for Catalan institutions and a reduction of the solidarity transfers from Catalonia to the other regions. After the parliament's vote, Mas intended to negotiate this demand with Spanish Prime Minister Mariano Rajoy and a meeting was scheduled for 20 September 2012.

However, Catalan civil society did not wait until the meeting took place and throughout the summer the *Assemblea Nacional Catalana* (ANC) called for a demonstration in Barcelona on Catalonia's national day, 11 September. Under the slogan *'Catalunya, nou estat d'Europa'* ('Catalonia, new state of Europe'). In September 2012, as Prime Minister Mariano Rajoy (PP) refused to offer any specific proposals in political or budgetary terms for Catalonia and on the 27 of September 2012, the last effective day of the then incumbent legislature, the Catalan Parliament declared itself ready *"to assume and develop the desires that the citizens of Catalonia expressed in a massive and peaceful way"*<sup>16</sup>.

Owing to the effervescence of civil society and the rapid growth of associations such as the ANC and *Òmnium Cultural* (OC), the then President of the *Generalitat de Catalunya*, Artur Mas, called for anticipated regional legislative elections with the argument that there was strong pro-secession pressure exercised by civil society, particularly after the official dialogue with the Spanish government on a new financing system for the region and the rest of Spain's<sup>17</sup> autonomous regions.

### **1.2.3. Since 2012: A “chicken” strategy**

A “chicken” strategy can be defined as a very competitive strategy which is characterized by a conflictual relationship. This strategy is defined by the absence of dialogue between parties after several attempts of unfruitful negotiations. This strategic option denotes a situation that is disadvantageous to all parties involved (lose-lose situation). On these particular cases, negotiators rely on the bluff tactic with a threatened action in order to force the other party to “chicken out” and yield to their demands. This strategy can be used to characterize the phase that started in 2012 as the escalation of the conflict between Catalan and Spanish governments led the Catalan government to prepare a referendum on political independence to be held on the 1 October 2017. This last strategic move was implemented with the attempt to bring the Spanish government back to negotiation.

#### **1.2.3.1. Between 2012 and 2015: Minority Government of CiU with the support of ERC**

On 25 November 2012, elections were held in Catalonia and secession became a salient electoral commodity for the first time since the transition to democracy in the second half of the 1970's. The result is that 80% of MPs in the new Parliament of Catalonia support the right to self-determination. The new Catalan Parliament had 107 out of 135 MPs supporting a self-determination referendum as the best way to find out what the majority of Catalans think about independence and as an effective way to channel the massive bottom-up pro-independence movement through the institutions.

At these regional parliamentary elections, CiU lost ground with respect of the previous regional elections (losing 12 seats in the Catalan Chamber) while ERC increased its constituency and added 11MP's to its previous parliamentary representation. ERC offered parliamentary support to a minority CiU government. The Agreement celebrated between CiU and ERC in December 2012 included the commitment to consult the Catalan people. Furthermore, on 23 January 2013, the Catalan parliament approved<sup>17</sup> and issued a *Declaration on the sovereignty and the right to decide of the people of Catalonia* with the support of 64% of the members of the chamber.

The declaration asserts:

*“(...) The people of Catalonia have, for reasons **of democratic legitimacy**, political and legal sovereign personality (...) The process of exercising **the right to decide** shall be strictly democratic and it shall especially ensure pluralism and respect for all options, through debate and dialogue within Catalan society, so that the*



statement resulting therefrom **shall be the expression of the majority will of the people**, which shall be the fundamental guarantor of the right to decide (...)”<sup>18</sup>.

The declaration was significant, first, because it was facilitated by agreement of the two main Catalan nationalist parties, *Convergència i Unió* (CiU – Convergence and Union) and *Esquerra Republicana de Catalunya* (ERC - Republican Left of Catalonia), which historically have been electoral and political rivals in Catalan politics<sup>19</sup>. Second, the declaration paved the way for the holding of an unofficial consultative referendum on Catalonia's constitutional status in relation to Spain on 9 November 2014. At the end of 2013, after long negotiation, the political parties CiU, ERC, ICV-EUiA and CUP, which altogether represented 64,4% of the seats in the Catalan Parliament, came to an agreement to hold the referendum on 9 November 2014.

Additionally, on 16 January 2014, the Parliament of Catalonia made a formal petition asking the Spanish Government to transfer the necessary powers to hold the referendum (as Westminster did with Scotland) but this was denied by the two largest parties (PP and PSOE) with 86% of the votes of the Spanish Parliament. As a reaction to this overwhelming rejection, instead of calling a referendum under Catalan Statute 4/2010, the Catalan government and the majority of the Catalan Parliament were inclined to use a non-referendary popular consultation<sup>20</sup>.

The decision for the referendum to be conducted was not free of political tensions. The Spanish government challenged it in the Constitutional Tribunal, which declared - the same week of 9 November, a Sunday - that the vote could not go ahead. However, the Catalan government claimed that it was organized by volunteers and the 'participation process' took place regardless. This action led the Spanish attorney general to indict President Mas and two other regional ministers on several charges and the judicial process is still unresolved.

The consultation took place on the 9 November 2014, despite its legal prohibition and political rejection by the Spanish state. Over 2,3 million Catalans voted in the participatory process. The result – 80,8% in support of Catalonia's secession from Spain, on a turnout approximating 35% - was one of the biggest demonstration of growing support for a radical change in the scope and operation of Catalan self-government. Yet, Mas had previously declared that this consultation would not have any legal effect, and therefore the 9 November vote was seen more as a symbolic victory for the pro-independence movement and a demonstration of its strength, than as an actual mandate for independence.

In response to a growing popular discontent, on 25 November 2014, President Artur Mas defended the right of the Catalan people to hold a legally-binding vote on independence. On



3 August 2015, Mas called early elections - to be held in September 2015 - which would be used as a *de facto* plebiscite on independence. The announcement followed an agreement between CiU and ERC, with the support of representatives from the main civil society organizations supporting self-determination (ANC and OC).

### **1.2.3.2. Since September 2015: Junts pel Sí Coalition**

At the elections of September 2015, the two main secessionist parties, CDC - *Convergència Democràtica de Catalunya* - and ERC, as well as DC (*Demòcrates de Catalunya*)<sup>21</sup>, the Democrats from the *Moviment d'Esquerrres* (MES) and the Socialists *AVANCEM-espai socialista*, and most importantly, a broad swathe of independents of all political colors and origins, representing all classes of grass-roots and civic movements – ANC and OC - have run together under the pro-independence list *Together for Yes (Junts pel Sí - JxS)*.

This single-issue coalition was established with the purpose to reinforce the 'plebiscitary' nature of the regional election. In terms of constitutional proposals<sup>22</sup>, JxS put forward a short roadmap to unilateral independence (to be achieved in less than 18 months), which would start following a victory of the pro-independence forces - JxS and the CUP – counted in seats, and not necessarily in votes. Raül Romeva, the current Minister for Foreign Affairs, Institutional Relations and Transparency headed the coalition.

In the non-secessionist camp, some calls were made by the PP to join forces with the PSC and C's but the PSC, traditionally a strong party in Catalonia now in decline, ruled out that option. Finally, ICV formed the coalition *Catalunya Sí Que Es Pot* (CSQEP) - *Catalonia Yes We Can* - with the emergent Spanish statewide party *Podemos*, which had been relatively successful both in the 2014 European elections and the May 2015 regional elections in Spain, along with other leftist parties.

The pro-independence coalition of JxS clearly won the election with 39.59% of the vote. Thus, the pro-independence parties obtained a majority with 72 seats: JxS had 62 seats, 6 short of a majority, while the CUP had 10 seats. Then pro-independence options obtained 47.80% of the votes. The parties against a referendum and against independence combined for a total of 52 seats: this included the second party in the new Parliament, C's, with 25 seats, and the traditional statewide parties, the PSC and the PP, which fell behind with 16 and 11 seats respectively. Finally, the 11 MPs of CSQEP supported a referendum but did not position themselves on the independence issue (see table 1 below).

The pro-independence majority in seats was seen by JxS as a democratic mandate to start a process of secession of Catalonia from Spain. The CUP, for its part, initially admitted that the

result of the pro-independence parties fell short of a majority in votes and therefore the plebiscite had not been won. Yet, the two parties jointly passed a resolution on 9 November 2015, a year after the symbolic consultation on independence, declaring the start of a process of disconnection from the Spanish state.

**Table 1: Election results in Catalonia by constitutional option**

Constitutional option	Party	Seats 2015	Seats 2012	Seats +/–	Seats by bloc	Vote % by bloc
<i>Pro-independence</i>	JxS	62	71	–9	72	47.80
	CIU	–	50	–		
	ERC	–	21	–		
	CUP	10	3	+7		
<i>Pro-referendum</i>	CSQEP	11	–	–2	11	10.06
	ICV	–	13	–		
	UDC	0	–	0		
<i>Against referendum, against independence</i>	C's	25	9	+16	52	39.11
	PSC	16	20	–4		
	PP	11	19	–8		
N/A	Others	0	0	0	0	1.12

Source: Departament de Governació i Relacions Institucionals (2015)

The resolution was passed with 72 votes, a majority of 5, but it was subsequently brought to the Constitutional Tribunal by the Spanish government and automatically suspended. Nevertheless, irrespective of the Spanish government's interference, since the Spanish Government has repeatedly proved his unwillingness to negotiate, the JxS is fully committed to the goal of political independence and to a legally binding referendum to be held on the 1<sup>st</sup> October 2017.

#### **1.2.4. Intermediary Conclusion**

In this chapter, we have looked at the evolution of the negotiating process between the Catalan and Spanish governments since the re-establishment of democracy in 1977 in Spain. By the means of a typology of three distinctive types of negotiating strategies – *fish in a bag strategy* (1980-2003); *hard ball strategy* (2003-2012) and *chicken strategy* (since 2012) - we have identified three phases of negotiation between the Catalan and Spanish governments throughout the years. The analysis of this negotiating process through time has allowed us to identify key moments of a deteriorating political relationship where the Spanish government – either led by PSOE or PP leaders - has gradually renounced to accommodate Catalan territorial demands. Very seemingly, the evolution of this relationship sheds a new light on the tortuous path towards the legally binding referendum on political independence to be held on the 1<sup>st</sup> October 2017.

## II. FOUNDATIONS FOR CATALONIA'S RIGHT TO DECIDE ITS POLITICAL FUTURE

In this chapter, we will discuss the foundations for Catalonia's right to decide since 2006. In order to do so, we will proceed in four moments: first, we will be looking at the emergence of secessionist popular demands since 2006; secondly, we will examine the role of organized civil society in Catalonia's right to decide and thirdly, we will discuss the evolution of Catalan public opinion since 2006. Finally, in the last section, we will conclude that the growing popular support for political independence had nothing to do with "nationalism" in the sense that it was not primarily driven by identity issues but rather by the political demand for Catalonia – hereby perceived as a collective identity - to have the right to decide on its own political future.

### 2.1. The Democratic Support for the Right to Decide: When a Referendum on Political Independence is the only way out

If anything characterizes and distinguishes social and political life in recent years in Catalonia, it is the emergence of the debate on sovereignty. That is, the idea that the citizens of Catalonia must be the ones to decide their own future. However, the intensification of the political process towards further demands of self-determination and "the right to decide" cannot be dissociated from the role of organized civil society, on the one hand, as well as from a growing dissatisfaction with the degree of autonomy on the part of Catalan public opinion, on the other.

In this section, we will examine the role played by popular demonstrations, civil associations and political elites in a widespread support for the independence cause and the "right to decide" since 2010. Additionally, we will present the evolution of Catalan public opinion regarding territorial preferences and we will posit that nationalism does not hold the (full) explanation for an increased demand of political independence. By doing so, we wish to demonstrate that the shift towards pro-independence is the result of a changing perception about the possibilities of a significant accommodation within the Spanish framework rather than a change in Catalan nationalism.

### ***2.1.1. The Emergence of Secessionist Popular Demands: A bottom-up and top-down Movement***

As the Constitutional Tribunal released its decision in June 2010, the Catalan secessionist movement became much more active<sup>23</sup>, gathering popular and elite support to the independence cause. In face of the political deadlock imposed by the Spanish government, an important part of the population – political elite and civil society - started to defend Catalonia's right to decide its own future, as well as the option to become an independent state. With a series of political events, protests and other massive rallies, a large amount of the Catalan population put pressure on politicians and followed the political process<sup>24</sup>. Since the attempt to reform the Statute of Autonomy of Catalonia and the tense process experienced by the Catalan population once the bill entered the Spanish Parliament, a vibrant and politicized civil society tried to progressively push the Catalan government and political parties into taking a stance on the issue of independence.

Some examples were the series of massive demonstrations organized since 2006 and the unprecedented popular referendums on secession organized between 2009 and 2011 in 552 towns in Catalonia. The massive demonstrations in 2006 and 2007 showed the incipient stages of what, a few years later, would turn out to be a vigorous and ideologically transversal active civil society supporting the right of the Catalans to decide their future. In this context, the decision of a Catalan municipality of 8.000 inhabitants near Barcelona to hold an unofficial non-binding referendum about the independence of Catalonia among its residents, and the fierce reaction of the Spanish government and the judiciary against it, portrayed a turning point in the recent history of the secessionist movement in Catalonia.

Additionally, in 2009 the local consistory of Arenys de Munt passed a motion in favor of holding a non-official referendum about the independence of Catalonia on 13 September 2009. In this regard, the Spanish vice prime Minister threatened the organizers with initiating legal proceedings, the public prosecutor lodged and appeal against the consistory's decision and a court eventually declared the collaboration of the local with the plebiscite illegal. With this popular initiative for "the right to decide", the phenomenon of unofficial referendums quickly started to snowball: on 13 December 2009, similar plebiscites were organized in 167 municipalities throughout Catalonia and in the months that followed several waves of referendum were held. Nineteen months later, 58,3% of the municipalities, representing 77,5% of the population, had held unofficial referendums. A total of 884.123 people voted with an overall turnout of 18,1%.

In 2010, the massive movements claiming independence reached the front lines and went on relentlessly organizing massive marches on 11 September for four successive years

between 2012 and 2015. After the 2010's Constitutional Tribunal decision on the Catalan's Statute of Autonomy, Barcelona hosted one of the biggest demonstrations in Catalonia since the transition to democracy in the late seventies. A human tide marched on 10 July 2010 under the slogan *"We are a nation. We have the right to decide"*. Although the demonstration was initially framed as a popular protest against the Constitutional Tribunal decision to curb some fundamental parts of the new Statute of Autonomy, it rapidly became a massive pro-independence claim.

In a similar line, on 11 September 2012, on the occasion of Catalonia National Day, another massive demonstration took place in the streets of Barcelona. The biggest demonstration in the history of Catalonia until then represented the highest peak of the first period of popular mobilization. The crowd marched on the streets of Barcelona under an explicitly secessionist slogan: *"Catalonia, new state in Europe"*. On 11 September 2014, also on the Catalan National Day, 1.8 million people demonstrated in Barcelona to support the non-binding referendum of 9<sup>th</sup> November, forming a big mosaic of Catalan flag and a giant letter V standing for "Vote" and "Victory".

More recently, on the 11<sup>th</sup> September 2015, nearly 1.5 million Catalans took to the streets of Barcelona on Friday to rally for independence, as the region's politicians launched their campaigns for a looming election billed as a make-or-break moment for Catalonia. More recently, on the 11<sup>th</sup> of September 2016, hundreds of thousands do people rallied across Catalonia declaring their support for the autonomous region's full independence from Madrid. Demonstrators marched down Meridiana Street in Barcelona waving independence flags. Turnout was estimated by local police at around 800.000 but the central government insisted that only about 370.000 people attended these demonstrations.

These massive demonstrations organized by civil society organizations five times in a row is in fact an unusual political event and one could argue that a group can self-organize as a politically effective movement only when individuals perceive that their potential benefits are higher than their individual costs. Therefore, grassroots organizations promoting independence have successfully mobilized large fractions of the population because their cause, Catalan independence, has emerged as a natural aspiration that would bring large economic and political benefits. And this has occurred at a time when the cost of popular mobilization has greatly decreased<sup>25</sup>.

Grassroots associations engaged in a constant and prolific organization of political rallies that were innovative and rapidly attracted media attention, both inside and outside Spain. Although their specific goals sometimes varied, the ultimate objective of these efforts was dual: to force Catalan political parties to accept and negotiate a referendum on

independence and, by convincing undecided individuals, to increase the pool of supporters for independence<sup>26</sup>.

On the elite side, intellectuals and cultural practitioners have always been a driving force in Catalanism throughout its history, the existence of autonomous political institutions since 1980<sup>27</sup> has largely contributed to overshadow their role. However, with the recent shift in emphasis towards demands for independence rather than autonomy, the role of the cultural elites has once again become central to the Catalan's renewed movement of self-determination. This group of intellectuals and cultural practitioners includes the educated middle classes who have inspired the birth of Catalanism in the nineteenth century and led Catalonia's cultural resistance to the Franco Regime. However, in its contemporary manifestation, it also includes a broad spectrum of media professionals, whose influence is much more far-reaching, especially when these cultural and media elites have a sophisticated understanding of the power of social media<sup>28</sup>.

This new Catalan mobilization upsurge also identifies a second shift in Catalan protest as political and civil nationalist groups used to be traditionally known for gathering forces to oppose the idea of a Catalan independent state since both groups have always concentrated their demands that would make it easier for Catalans to keep their distinctive character while still being part of Spain. According to the historian Jaume Vincens Vives, this longstanding hesitation throughout the years can be explained in the light of the Catalan's inability to grasp state power. However, in the contemporary independence movement, the combination of top-down and bottom-up mobilization for the independence cause clearly emerged as a protest against the way power has been exercised by the Spanish State.

In fact, these massive movements, together with the outcomes of the opinion polls showing an increased preference for independence and the overall political climate, were clear demands directed at political leaders waiting for a government's response. Once more, the increase of popular demands has certainly forced President Mas to react, which he did right after the demonstration of September 2012 on Catalonia's day, the *Diada*. His response was to call early elections in order to obtain a mandate to organize a popular consultation on the issue. At that particular moment in time, *Convergència i Unió* (CiU), and more particularly the first government headed by Artur Mas, lived a key moment when their political discourse shifted decisively to one drawn from an overt pro-sovereignty<sup>29</sup> lexicon under the direct influence of a massive popular mobilization.

Undoubtedly, exclusion from power after 23 uninterrupted years in office gave a spur to CiU to reconsider its earlier ideological positioning. However, only from that moment on, did CiU, and especially the *Convergència Democràtica de Catalunya* (CDC) – the more “radical”

partner in coalition -<sup>30</sup>, really prioritize calls for a referendum on independence, after central government had failed to meet the Mas administration's more limited demands for a new and special financing model, based on a fiscal pact, in recognition of Catalonia's history, economic situation and national status. Ultimately, and very directly, CiU was influenced by pressures from civil society.

As a result of the early elections, the Catalan Parliament was constituted by a large majority (79,2%) of members whose parties' campaign manifestos included support for holding a popular consultation over independence during the legislature. And most of the parties that formed this majority have since struggled to try to hold such a popular consultation. Indeed, the strength of the pro-independence claims expressed by relentlessly massive demonstrations and consistent support for a separate state in the polls, and the entry of three new parties into the Catalan political arena – *Ciudadanos* (C's), *Candidatures d'Unitat Popular* (CUP) and *Podemos* (P) -, faced the established five parties – *Convergència i Unió* (CiU), *Partit dels Socialistes de Catalunya* (PSC), *Esquerra Republicana de Catalunya* (ERC), *Partit Popular Català* (PP), *Iniciativa per Catalunya Verds-Esquerra Unida i Alternativa* (ICV-EUiA) - with a new electoral scenario led to a period of major changes in Catalan and Spanish politics.

Although a majority of parties seeking the referendum – CiU, ERC, ICV-EUiA and CUP – won the majority at the election of November 2012, with 87 seats out of 135 seats, far above the overall majority, popular mobilization did not end. In 2013, civil society constituted the National Pact for the Right to Decide, a civil platform that sought support for the organization of the referendum. More than 8000 associations signed the Pact, including the main trade unions and most business associations and professional organizations. In addition, during September and October 2014, up to 920 towns councils approved the declaration in favor of the referendum. Efforts increased when the popular consultation on independence was scheduled for 9 November 2014.

The grassroots organizations promoted massive mobilization by which a major switch in the political preferences of the Catalan electorate was structured. Their role in determining the political agenda turned them into the most relevant new actor in the political landscape. Ultimately this bottom-up structure caused political parties to react and as a reaction to this pressure, since the end of 2012, the Catalan government has effectively tried to find effective ways to allow Catalan citizens to vote in a referendum about the future political status of Catalonia. As a last resort, Artur Mas and his allies in the pro-independence camp decided to call a new early election on 27 September 2015 and frame it as a plebiscite on independence.



At these elections, the pro-independence parties jointly secured 72 seats. President Mas quickly remarked that this result represented a great strength and strong legitimacy to keep on with the idea to hold a referendum on political independence. Nevertheless, he was to face<sup>31</sup> a tortuous road ahead: a difficult negotiation to form a Catalan government and, above all, the frontal opposition of the Spanish government and main political parties to any move towards secession or even the holding of a proper referendum on independence. However, irrespective of these major difficulties, it is undeniable that these bottom-up and top-down movement played a significant role in the process as they have led to the first non-binding consultation of 9 November 2014 and they have triggered the elections to the Catalan Parliament of 27 September 2015.

### ***2.1.2. The Role of Organized Civil Society in Catalan's "Right to Decide"***

Between 2009 and 2014, among organized civil society<sup>32</sup>, two independent associations were the *prima facie* of the bottom-up movement claiming for political independence in reaction to the moderate position assumed by the Catalan government which, at that time, was led by Artur Mas (CiU). These organizations are the *Òmnium Cultural* (OC) and the Catalan National Assembly (The *Assemblea Nacional Catalana* - ANC). These associations are now supporting the current coalition in government - *Junts pel Sí* (JxS) - Together for Yes - a broad single-issue coalition that reinforced the 'plebiscitary' nature of the 2015 regional election<sup>33</sup>.

#### ***2.1.2.1. Òmnium Cultural***

*Òmnium Cultural*<sup>34</sup> was established in 1961 to promote the Catalan language and culture in the context of Francoist Spain. With over 65.000 members, OC is a cultural organization founded as a resistance to the dictatorship. Nowadays, it has mobilized thousands of volunteers and its aim is to expand the social majority in favor of independence. It has a national and 40 local branches, all of them ruled by elected volunteers for a period of 4 years. Public funds do not exceed 4% of the total budget and each member pays a fee which allows raising around 3 millions annually. Since 2010 it has been pushing for Catalan's right to vote their political future, and nowadays campaign for the independence of Catalonia.

In 2010, OC organized the first mass demonstration which brought together one million people against the ruling handed down by the Spanish Constitutional Tribunal against the Statute of Catalonia under the motto: "*We are a nation. We decide*". In 2012, the organization made a step forward and positioned in favor of the independence of Catalonia.



On 29 June 2013, OC organized a concert - "Concert for Freedom" - attended by 90.000 people. Since then, it has campaigned to back the Catalan society's wish to hold a non-binding referendum in 2014, which took place in 9<sup>th</sup> November 2014. "*Ara és l'hora*" – now it's time – is the campaign that has been promoted by OC – a joint organization with ANC - in favor of independence.

#### **2.1.2.2. The ANC - Catalan National Assembly**

The ANC was officially founded in March 2012 after preliminary discussions starting the previous year. Its name is deliberately <sup>35</sup> modeled on that of the *Assemblea de Catalunya*, which functioned in the 1970's as a coordinating body for Catalanist opposition to the Franco regime. Existing cultural associations, and connections made during the organization of unofficial votes on independence across Catalonia from 2009 onwards, provided a ready-made pool of potential supporters. By mid-2014 it had more than 30.000 full members and 15.000 "sympathizers" (who support its work but do not pay a membership fee). The person chosen to lead the association was Carme Forcadell I Lluís, a Catalan philologist with a background in both education and language planning. In the early 1990s, Forcadell was one of the founders of the *Plataforma per la Llengua*, whose aim is to promote and defend the use of the Catalan wherever it is spoken. She is also a member of *Òmnium Cultural* mentioned before. Not only does Forcadell have many years of experience and strong networks on which to draw, but she has also become an effective symbol for the civil movement, and one of its main voices. The current president of ANC is Jordi Sànchez I Picanyol as Carme Forcadell is now the President of the Catalan Parliament.

The ANC's first major activity was to organize a massive demonstration in Barcelona on 11 September 2012, as a call for Catalonia's politicians to work immediately for independence. Although attendance figures are disputed, it is estimated that as many as 1,5 million Catalans joined the march. Mobilizing so many people through an association that had just been formed is a remarkable feat, but many of the ANC's founding members were drawn from other associations or had relevant experience in local government, the media and business. The ANC worked closely with both political parties and other civil associations, capitalizing on their existing membership and networks rather than needing to create an entirely new one of its own. After the march itself, a group of delegates was received at the Catalan parliament to make a request on behalf of the demonstrators that it should start to do whatever was necessary to achieve independence for Catalonia.

The organization of the "Catalan Way" (*Via Catalana*) for 11 September 2013 was even more complex than the demonstration of the previous year, since the idea was to form an

unbroken human chain from the French border in the north of Valencia in the south. This would require a minimum of 400,000 participants<sup>36</sup>, divided between nearly 800 sections of the route. Participation was coordinated via a website, where people were asked to sign up to a particular section. Media coverage was closely coordinated by the ANC, with chosen journalists being given advance information not available to the public so that they would be in the right place to cover key surprise events on the day. In this event, the Catalan Way saw an estimated 1.6 million people taking part in the human chain and its associated activities. The culmination of the day's events was a speech given by the ANC's president, Carme Forcadell, surrounded by thousands of people in Barcelona's Plaça Catalunya. Forcadell looked tired and serious as she called for Catalonia's politicians to hold a referendum on independence without delay, saying that independence was the only way of guarantying Catalonia's future as a distinct nation. There was no triumphalism in her speech: it was heartfelt and emblematic which contrasted with the more self-interest and distant political discourse of Catalan politicians.

On May 29, 2014, the ANC, with other associations, presented at "El Born", the campaign "*El País que Volem*" (The Country we Want), an open participative process for citizens whose goal is to collect their proposals about how should Catalonia be when it becomes an independent state. Very seemingly, the ANC and OC organized the 2014 edition of the demonstration of the Catalan national day in Barcelona. This demonstration formed a huge Catalan flag all along 11 kilometers between *Gran Via de les Corts Catalanes* and *Diagonal avenue* forming a big "V" for will ("*voluntat*"), voting and victory. According to police there were 1.8 million and according to organizations 2.5 million people to demand for a poll on the 9th of November 2014.

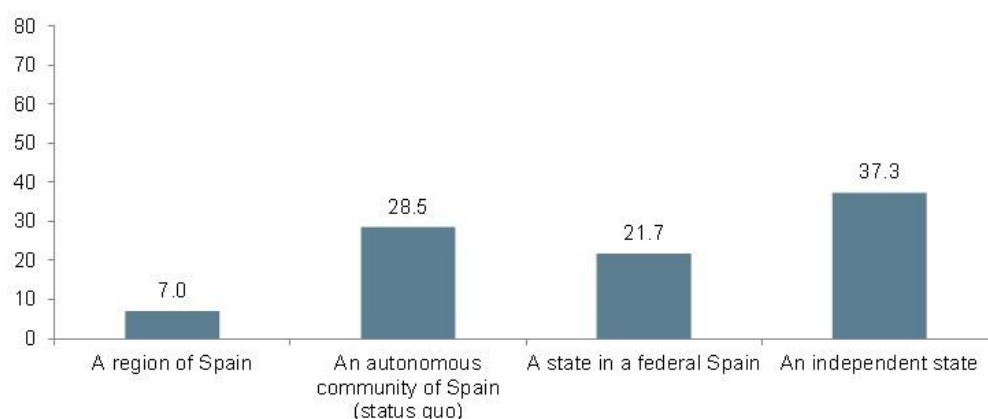
### **2.1.3. Survey of Catalan Public Opinion: What does Catalonia Want?**

In the late 2000's, Catalan's territorial preferences drastically changed. In 2006, Catalan independence was the first territorial preference for less than 15 % of the population<sup>37</sup>. At that point in time, approximately 40% of the population supported the existing system of autonomous communities, meaning that a substantial majority were not willing to make profound changes to the Spanish territorial system. The second most preferred option was to change the territorial model to turn Spain into a "federal state". Finally, the least preferred option was to turn Catalonia into a "region of Spain", in which the level of regional self-government would decrease and ultimately a new territorial system would be designed, in which the regions would have only some administrative powers.

This perception and general feeling was considerably stable until 2009. The change coincided with the series of non-binding referendums on secession that took place between 2009 and 2011, the Constitutional Tribunal release of the sentence on the Statute of Autonomy of Catalonia, the deterioration of the economic situation from 2008 onwards<sup>38</sup> and the arrival into central government of the PP (Popular Party) at the end of 2011. During this period, the status quo and the federal options began a downward trend that only stopped at the end of 2014. In the first barometers of the *Centre d'Estudis d'Opinió* (CEO - Centre for Opinion Studies of the *Generalitat* of Catalonia) that explicitly asked about the referendum, in 2011, support for the option of independence stood somewhat above 40%. This percentage increased to above 50% from mid-2012.

In 2012, for the first time since the question was included in surveys, independence became the most preferred option. Nowadays, in 2017, 37,3% of the population believe that political independence is the best solution for Spain to the detriment for the current status quo with 28,5% and of the federal option with 21,7% (see figure 1 below). On the contrary, the choice of voting against the referendum fell from almost 30% to just above 20%, and a similar trajectory is visible in the would abstain-wouldn't vote option, which dropped from 23% to 15%.

**Figure 1:** "Do you think that Catalonia should be"

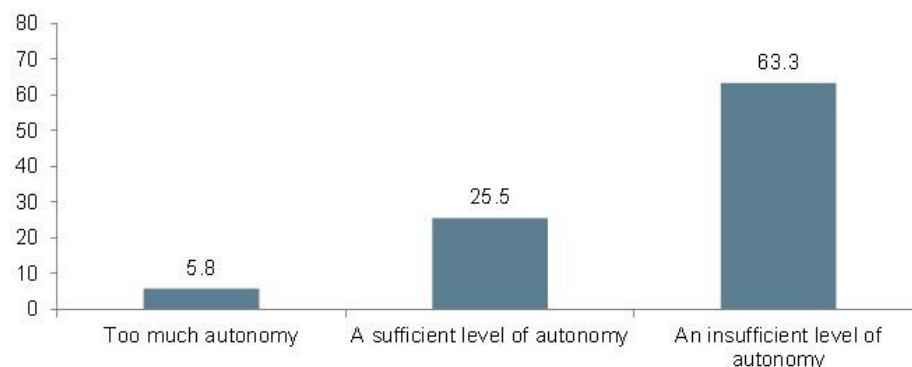


Source: Barometer 850, *Centre d'Estudis d'Opinió* (CEO), 2017

Gradually, the secessionist claim continued to attract supporters and, at the end of 2014 and 2016, it reached 45,2%<sup>39</sup> and 45,3%<sup>40</sup>, respectively, and in the last report at the beginning of 2017, it reached 44,3%<sup>41</sup>. In spite of nuanced variations, in early 2017, 63,3% of the population believed that Catalonia had an insufficient level of authority) – against 66,6% in 2014 and 65,6% in 2016, respectively (see figure 2 below). On top of these numbers, it is interesting to notice that on November 9 2014, 2.3 millions of people vote for

independence, which represents 80% of the voters who participated to that popular consultation.

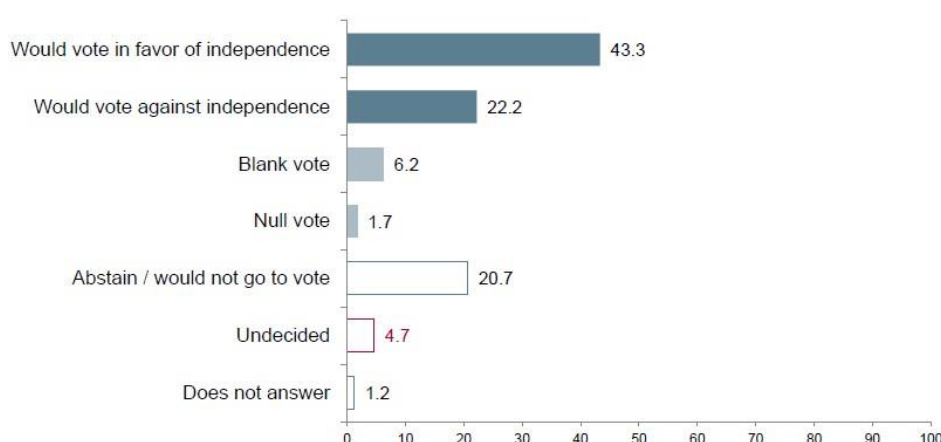
**Figure 2:** “Do you think that Catalonia has achieved”



Source: Barometer 850, *Centre d'Estudis d'Opinió* (CEO), 2017

All of this data reveals that significant changes have occurred in recent years in the attitudes and opinions of many citizens of Catalonia on the territorial organization of Spain and on the institutional status of Catalonia itself. Such attitudes and opinions have evolved in a contrary way to developments in Spain over territorial organization. And among the most significant changes that have occurred in Catalonia are the increased preference for an independent State as a form of territorial organization, and the rise in the intention to vote in favor of independence in the event of a referendum vote, irrespective of whether the Spanish government wants it or not as we can see from figure nº 3 below.

**Figure 3:** “If tomorrow a referendum to decide the independence of Catalonia was to be held and organized by the Generalitat de Catalonia and without the agreement of the Spanish Government, what would you do?”



Source: Barometer 850, *Centre d'Estudis d'Opinió* (CEO), 2017

As for the question of the influence of age on support for independence, Jordi Jordi Muñoz and Raul Tormos<sup>42</sup> have analyzed the question by using the database of the CEO barometers as their raw material and they concluded that age has no influence on support for independence and that Catalan national identity and economic motivations held the explanation. Very seemingly, in his seminal work, Sebastià Prat<sup>43</sup> concluded that between 2005 and 2012, Catalan national identification played a predominant role as a factor to explain the increase in support for independence. For Prat, as in the previous case, the youngest age group of 18-34 revealed a somewhat higher level of support than older group with 58% for people between 18-34 in favor against 51% for people over the age of 64 (a difference which is not statistically significant).

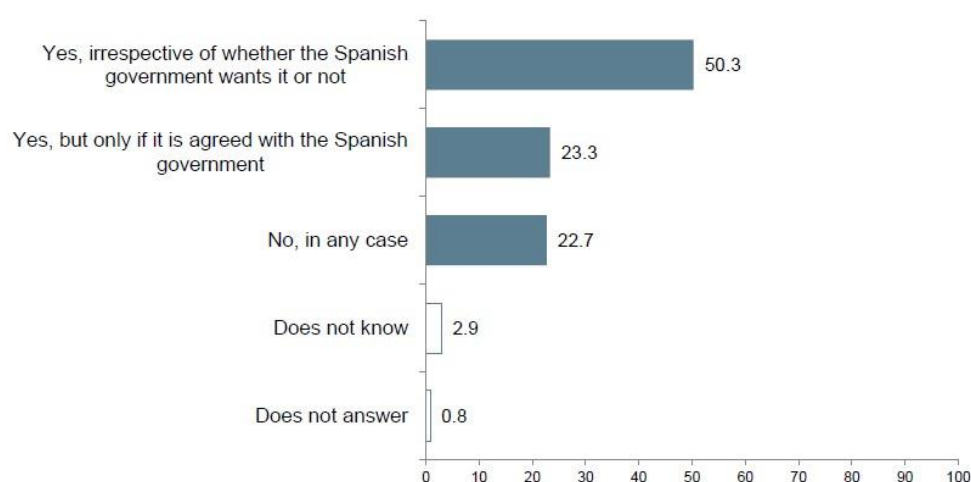
From this study, it is interesting to note how the difference between the younger group and the older group, those over the age of 64, is reduced in terms of their support for independence. Very seemingly, according to these studies, we could conclude that the declared intention to vote in favor of independence is dominant in every age group, both educated under democracy and these educated under Franco and the transition to democracy. The intention among youngest group to vote in favor is 3% higher than among the total population.

Differences are much more pronounced when we cross-tabulate territorial preferences by the language usually spoken at home<sup>44</sup>. Among those who speak Catalan at home, **72% choose independence** as their first territorial preferences<sup>45</sup>. The second most preferred option is the federal state with 14%. The contrast with those who speak Spanish at home is substantial. Among Spanish-speakers, the first territorial preference is the status-quo with 54%, followed by a federal state with 27%. Another variable of interest is the relationship between support for independence and the parents' geographical origins<sup>46</sup>.

Among Catalans with both parents born in Catalonia, support for secession is very high: **it is the first preference for more than 70%**. When one parent is born outside Catalonia, secession is still the first preference, but the percentage goes down to 49%. In this case, support for the federal state and the *status quo* slightly increases. However, when both parents are born outside Catalonia, the situation is reversed. In this case, the federal state is the preferred option for 36%, followed by the status quo with 31%. Finally, when the respondent is born outside Catalonia, the first preferred option is the status quo with 43% and the federal state with 26%. While, according to these data, it is clear that cultural identity seems an important factor to explain support for secession, it is also true that the discourse in favor of secession has largely been driven by a broader set of arguments, as we shall see later in point 5 of this chapter.

However, in spite of nuanced territorial preferences across age, language and geographical origin factors, there is a large consensus among Catalan people as for the decision to celebrate a new referendum on the 1<sup>st</sup> October 2017 with 50,5% of the respondents saying (YES) to the referendum irrespective of whether the Spanish government wants it or not; 23,3% saying (YES) but if only it is agreed with the Spanish and 22,7% saying (NO) (see figure 4 below).

**Figure 4:** “Are you in favor of celebrating a referendum about the independence of Catalonia?”



Source: Barometer 850, *Centre d'Estudis d'Opinió* (CEO), 2017

Moreover, according to a new poll by CEO released on the 21 of July 2017<sup>47</sup>, some 62,4% would vote (YES) in the independence referendum set for October 1. With a projected turnout of 67.5% for the vote, the poll also says that 37,6% of those taking part would vote against independence. The poll also shows that in the hypothetical case of a Catalan parliamentary election, the pro-independence coalition Together For Yes (*Junts pel Sí* - JxS) would win again, with 60 to 63 seats (it currently has 62 seats after the 2015 election), followed by opposition party *Ciutadans* (C's) with 20 to 22 seats (25 seats in last election). The third strongest party would be the Catalan Socialist Party (PSC), which would gain 17 to 20 seats (currently 16), Catalonia Yes We Can (CSQP) would also be one of the winners with 15 to 17 seats (currently 11) and the Catalan People's Party (PPC) would get 11 to 13 seats (currently 11). However, the anti-capitalist CUP party would lose support, dropping from 10 to between six and eight seats. From these latest figures, it is easy to conclude that the support for political independence is still rising, which goes hand in hand with the support for pro-independentist political parties.







### 2.1.4. Catalan Public Opinion and Voting Behavior: Who voted What?

In the same line of argument of what has been suggested before, if we look at how citizens grouped their territorial preferences by individuals recorded votes in previous Catalan elections in 2006 compared to the elections of 2015, we realize that there has been a clear shift from a preferential vote for the maintenance of the status quo in 2006 to political independence in 2015. According to a barometer from CEO<sup>48</sup>, in 2006, the preference for an independent state among ERC voters – the only party that obtained seats in the 2006 elections that had campaigned in favor of independence – was the first option for 44% of its voters, the same percentage as those supportive of the federal solution.

Among voters of CiU, secession represented a quasi-marginal alternative, being the most preferred option only for 18% of them. Their first territorial preferences was the status quo with 40% of the votes, followed by the federal state with 35%. Very seemingly, across the majority of party options, in 2006 the status quo received widespread support. Almost 61% of PP voters, 46% of PSC and 74% of C's voters had this option as their first preferred territorial model. Even more than half of those who did not vote in the 2006 elections were in favor of the status quo. The exception was the leftist party, ICV. Approximately 50% of its voters were in favor of the federal state, whereas the status quo was chosen by 34% of its supporters.

However, if we apply the same analysis to the Catalan elections of 2015 (see table 2 below), the outcome radically differs. On the one hand, the territorial option of political independence stands out with 41,1% of the votes – against the maintenance of the Status Quo with 27,4% and the federal option with 22,2%. Moreover, 93,4% of those who voted for the *Junts pel Sí* (JxS) as well as 76,6% of those who voted for CUP – a pro-independence political party with a critical stance towards Europe – were responsible for the upsurge of the popular vote for political independence.

**Table 2: “Do you believe that Catalonia should be...”**

		Catalonia-Spain relationship by vote recall to the Catalan Parliament					
							
A region of Spain	<b>3,7</b>	0,5	9,5	2,3	3,4	18,1	1,0
An Autonomous Community of Spain	<b>27,4</b>	2,2	<b>65,3</b>	<b>45,9</b>	24,8	<b>72,3</b>	2,9
A State within a federal Spain	<b>22,2</b>	11,0	20,5	<b>47,3</b>	<b>54,5</b>	9,8	15,7
An independent State	<b>41,1</b>	<b>83,4</b>	1,2	1,4	10,7	2,0	<b>76,6</b>
Does not know	<b>4,2</b>	2,5	2,2	3,1	5,1	0,0	2,8
Does not answer	<b>1,4</b>	0,4	1,2	0,0	1,8	0,0	1,0

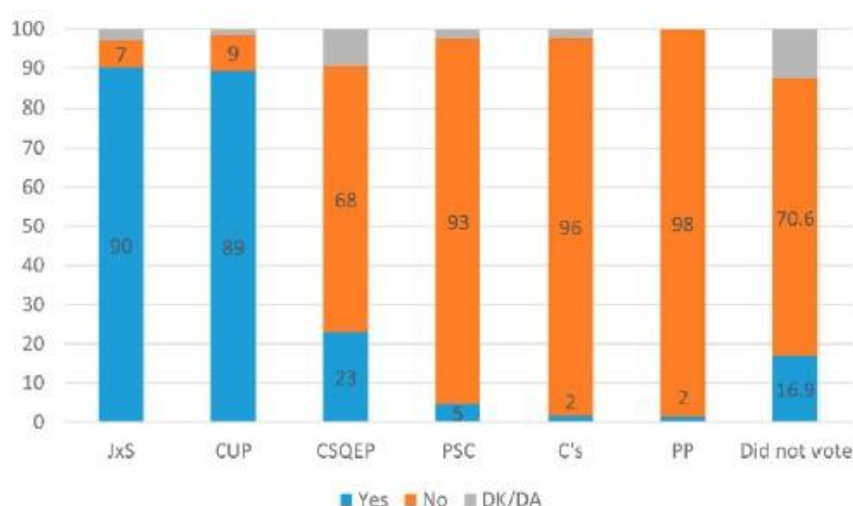
Source: Barometer 804, *Centre d'Estudis d'Opinió* (CEO), 2015



On the other hand, those who voted for the maintenance of the status quo were distributed among PP with 72,3% of voters; C's with 65,3% and PSC with 45,9%. As for the federal option, PSC and CSQP (*Catalunya Sí que Es Pot* - Catalonia Yes we can) – a newly anti-austerity coalition that has not positioned itself clearly on the referendum and independence debate – have received the votes of those who favored a federalist option with 47,3% and 54,5% of the votes, respectively.

Very seemingly, those supporting political independence have concentrated their votes on pro-independence political parties, namely on the coalition of JxS and CUP (figure 5 below). In 2017<sup>49</sup>, these numbers have remained unchanged which confirms the persistence of an overwhelming popular discontent regarding the solution imposed by the Spanish government to the Catalan conundrum.

**Figure 5:** Independence support by reported vote.



Source: Barometer 804, *Centre d'Estudis d'Opinió* (CEO), 2015

### 2.1.5. Is Nationalism the Cause of Increased Demand for Independence in Catalonia?

According to the empirical studies mentioned before<sup>50</sup>, Catalan national identity has a significant influence on support for independence. However, this notion of nationalism needs to be further clarified in order to avoid misleading conclusions. In fact, as we look into figures, we realize that identity is not the full story to account for independence support. In this respect, the barometer of January 2013<sup>51</sup> by the *Centre d'Estudis d' Opinió* (CEO) provides public opinion evidence that sheds light on the issue (see table 4 below). Table 4 presents the main reasons given by respondents who said they would vote either in favor (YES) or against (NO) in a referendum on the independence of Catalonia. The table includes



the six most common responses in each case. This number has been chosen because it allows the inclusion of all responses clearly related to national identity in both cases. The remain responses to this question and their frequency can be found in the barometer of the CEO available on the website.

If we consider the answers in the table that are explicitly and openly identitary, national identity was stated as motivation by half of the respondents who said they would vote against independence but identitary reasons are given by less than a quarter of those who say they would vote in favor. As we look into numbers, a great majority of those who would vote YES, that is, 29,40%, would do it to achieve a greater capacity and fulfill a desire of economic self-management. Very seemingly, only 12,50% and 10,70% would hold a referendum on political independence for identitary feeling and identitary conceptualization of Catalonia as a nation, respectively. To put it differently, the reason to vote for independence in a referendum is founded in the democratic idea of the “right to decide” which embodies the civic/democratic/liberal conception of a national project, rather than the materialization of the essentialist version of the right to self-determination of nations.

**Table 4:** Main reasons for justifying voting in a referendum on independence

In favor		Against	
Capacity and desire for economic self-management	29,40%	Preservation of Spain's unity	31,20 %
Catalonia would improve	18,80%	Identitary feeling	18,60%
Feeling of incomprehension	14,70%	It wouldn't be positive for Catalonia	14,60%
Gain decision-making capacity	13,50%	Independence unviable	12,50%
Identitary feeling	12,50%	Supporter of the globalization process	6,10%
Identitary conceptualization of Catalonia as a nation	10,70%	It's not perceived as a priority process	6,10%

Source: Barometer 723, *Centre d'Estudis d'Opinió* (CEO), 2013

This polysemic motto<sup>52</sup>, *right to decide*, is founded on purely democratic theories that provide a democratic approach to secession based on the right to individual self-determination or autonomy. The “right to decide” is a claim in defence of a model of “direct

democracy” in contrast with that of “representative democracy” currently operating in most western countries. The emergence of this concept is not spontaneous but part of a well-orchestrated campaign. The “right to decide” became popular in 2003, during the campaign for the so-called “Ibarretxe Plan” which sought a *de facto* independence of the Basque Country from Spain. Very seemingly, in Catalonia it became popular in 2006 with the establishment of the *Plataforma pel Dret a Decidir* (PDD) with the financial support of the Catalan regional government *Generalitat*. The adoption and promotion of the neologism “right to decide” by the pro-independence camp meant a shift in its strategy reflecting an increasing concern for international recognition. On the other hand, it also intended to empower citizens and provide legitimacy to Catalan decision on a referendum on independence<sup>53</sup>.

From this point of view, those entitled to morally secede are those groups that have expressed their desire through a referendum or other democratic means. In other words, the focus is put on the group entitled to secede as well as on the procedures that are extremely relevant for the group formation. In other words, the seceding group is formed through democratic actions, no matter its cultural or national identity characteristics. In that sense, we could argue that the right to decide implies the right of a certain community to hold a plebiscite or a democratic process to decide its political future.

In fact, until very recently, Catalonia used to claim the right to self-government and home rule based on the right to national self-determination but since the release of the Constitutional Tribunal ruling of 2010, the Catalan sovereigntist and secessionist movement has concentrated its claims on the so-called “right to decide”. This Catalan path from national self-determination towards “the right to decide” is illustrated by the 2013 Resolution of the Catalan parliament called “Declaration of sovereignty and of the right to decide of the people of Catalonia (as we have mentioned before). In this declaration, no reference is made to the principle of nationality, national self-determination or the Catalan nation or nationality<sup>54</sup> (it only refers to the “people of Catalonia”, that is, a civic notion of the term nation). In this respect, the “right to decide” seeks to hold a referendum on independence based on the principle of democracy, and not as the expression of the collective right of a reified national group.

Even if there is a disagreement among the Catalan political actors about whether this right also implies a moral right<sup>55</sup> to secede (unilaterally), opinions polls show that a vast majority of Catalans are clearly in favor of political independence with 62,4% of the Catalan people favoring political independence (as it has already been mentioned in section 2.1.3). This explains why the growing tendency to move from a national theory of secession towards a

democratic choice theory clearly illustrates the reasons why Catalan people have largely turned to a pro-independence stance in recent years. In other words, this shift in territorial options for Catalonia (as we have seen before) has nothing to do with nationalism understood in a strict ethnic sense.

In this respect, it would be worth mentioning the definition of nationalism presented by Montserrat Guibernau: “Nationalism is both a political ideology and a sentiment of belonging to a community whose members identify with a set of symbols, beliefs and ways of life, and have the will to decide upon their common political destiny”<sup>56</sup>. Thus, nationalism, on some occasions, is associated with backward ethnic political discourses while, in others, it stands as a new progressive social movement in favor of the political emancipation of peoples.

Beyond this civic nationalist cause, other driving factors have also contributed to a shift in territorial politics in Catalonia such as the effect of the economic crisis; high levels of mobilization and popular support (as we have mentioned before) and changing territorial political discourses mainly due to party competition reasons<sup>57</sup>.

### ***2.1.6 Intermediary Conclusion***

In this chapter, we have claimed that the upsurge of territorial demands towards political independence has been put on the political agenda by the organized Catalan civil society immediately after the release of the Constitutional Tribunal ruling in 2010. This bottom-up movements intended to boost the negotiation process with the Spanish Government, asking the Catalan Government to convene a referendum on political independence. Very seemingly, there has been a clear shift in popular territorial preferences, moving from preferences asking for the maintenance of the current “status quo” to demands of “political independence”, irrespectively of people’s age.

Based upon facts and figures presented in this section, we have demonstrated that the Catalan popular demand for the possibility of holding a referendum on political independence has been largely justified by the democratic “right to decide”, which has evolved from the more traditional and long-standing legal framework to the “national right to self-determination”. In other words, we could posit that if, on the one hand, demands of political independence have been legitimized by a democratic principle invested in the Catalan people, on the other hand, this democratic right has been (repeatedly) denied by an (unnegotiable) decision imposed by the Spanish government.

## 2.2. Mapping the Constitutional Philosophy of the “Right to Decide”: The Emergence of a Transconstitutional Jurisprudence

### 2.2.1. *Demystifying parochialism*

The preceding section has made clear what the current situation in Catalonia is. One should resist the temptation of considering the question of the Catalan right to decide as a purely Catalan problem. Obviously, it also involves Spain, which is the State to which the Autonomous community of Catalonia belongs. It also involves the European Union, first because Catalonia is able to rely on EU norms to justify its claim to a right to decide on its institutional future, and secondly because Catalonia naturally intends to become a member of the EU in case it becomes independent.<sup>58</sup> In a parallel way, the Catalan question involves international law, first because it offers several possibilities to support its claims, and secondly because if it becomes a new state, Catalonia will apply to several international organisations, as well as endorse part of what were previously Spanish international obligations.<sup>59</sup>

At a more abstract level, the Catalan right to decide involves questions of principle that can be raised at various geographic, economic, demographic, linguistic, political, etc. levels. It fundamentally and dramatically involves the right to define the institutional structure in which one wants to live and evolve. As Kristina Roepstorff points out:

“Self-generation most generally refers to the freedom of peoples to determine their own political status and form of government through free expression of their will. Self-determination therefore refers to the ability of a group to participate in the determination of the specific political arrangements and institutions, conditions for their participation, as well as the policies to be implemented.”<sup>60</sup>

More than a debate about constitutional design and institutional engineering, it is a genuinely philosophical issue, whose presuppositions and implications, from the viewpoint of political, legal, and moral theory, must be clarified if one is to understand what is at stake. This form of *détour*, which allows adopting a more distant, detached, and impartial viewpoint, is indeed necessary if one is to define regarding this debate a specific position or opinion that is not merely the offspring of hearsay, prejudice, or unreflected feeling, and goes beyond what Jeremy Bentham despises as “ipsedixitism”.<sup>61</sup>

### ***2.2.2. The Horizon of Constitutional Contractualism***

Beneath the current debate regarding the right to decide more or less consciously lies a very specific political representation: the state of nature. In the state of nature, individuals are totally independent from any submission to any kind of external power. Then they realise that they need to cooperate in order to preserve their interests, which can for example be understood as their Hobbesian security<sup>62</sup>, or their Lockean property.<sup>63</sup> Provided all the others do the same, they decide to alienate part of their original freedom in order to establish a common governance structure, in return for other goods. Each member of the community remains free to part with it if she considers that the resulting structure does not fulfil the tasks for which it was established. One of the crucial elements in this theory is the connection that is established between self-government, consent to obey an authority, self-preservation, and the disposition of a territory. In the terms of contemporary public law, this leads directly to the concept of the State, traditionally defined as the association of three elements: a population, a territory, and a sovereignty.<sup>64</sup>

Even if none of those who debate today about Catalonia's future have lived in the state of nature, this seems to be the discussion's imaginary horizon which is at the basis of the reflection on the right to decide. Famous and influential constitutional documents establish themselves on the right to decide about one's institutional environment. In the most remarkable way, the United States Constitution begins with words that truly express, in the first person, collective self-determination:

“We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”

The constitutional text thus appears as a demiurgic means of self-assertion as a historical actor.<sup>65</sup> Similarly, the preamble of the Spanish Constitution expresses dynamics of self-determination inspired by a strong political project:

“The Spanish Nation, desiring to establish justice, liberty, and security, and to promote the wellbeing of all its members, in the exercise of its sovereignty, proclaims its will to:

Guarantee democratic coexistence within the Constitution and the laws, in accordance with a fair economic and social order.

Consolidate a State of Law which ensures the rule of law as the expression of the popular will.

Protect all Spaniards and peoples of Spain in the exercise of human rights, of their culture and traditions, languages and institutions.

Promote the progress of culture and of the economy to ensure a dignified quality of life for all.

Establish an advanced democratic society, and

Cooperate in the strengthening of peaceful relations and effective cooperation among all the peoples of the earth.”

Contemporary constitutionalism echoes the political aspects of social contract theories. The question of self-determination, understood as the possibility to choose the institutional structure of one's (or a collectivity's) life, is thus intrinsically connected with the ideal of political autonomy,<sup>66</sup> both for individuals and for groups.

### **2.2.3. The Ethics of the Right to Decide**

As the Catalan Status of Autonomy acknowledges, the Spanish Constitution remains the supreme law of the land. Article 1 of the *Estatut* precisely reads: “Cataluña, como nacionalidad, ejerce su autogobierno constituida en Comunidad Autónoma de acuerdo con la Constitución y con el presente Estatuto, que es su norma institucional básica.” Contrary to other constitutions, which more or less sincerely or hypocritically did,<sup>67</sup> the Spanish supreme norm does not explicitly provide any right to secession to the Autonomous Communities. This possibility was rejected when the Constitution was drafted.<sup>68</sup> Conversely, Article 2 insists on the fact that “The Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards; it recognizes and guarantees the right to self-government of the nationalities and regions of which it is composed and the solidarity among them all.” This provision was heavily relied upon by the Spanish Constitutional Tribunal to bar any claims that the Catalan people could be understood as a sovereign body.

The justifications for granting or refusing this right at the level of legal norms are necessarily based on metalegal, i.e. political, moral, ethical, or philosophical,<sup>69</sup> argumentations. This is why purely legal considerations are no obstacle to a principled discussion. From this perspective, one may suggest relying on the justifications that have been proposed for secessionist claims. Even though the right to secession and the right to decide are by no means conceptually equivalent, they are closely connected. Indeed, the right to decide is

conceptually and practically antecedent to the right to secede, as the right to decide is precisely the right to ask the question whether to secede or not. If secession is justified, this necessarily means that the right to decide whether to secede or not is itself justified *a fortiori*. This is why one may suggest to pay a close attention to the reflections that have been offered regarding the right to secede and to transpose them to the debate about the right to decide. In this respect, several justificatory doctrines exist for the right to self-determination through independence and, if the collectivity previously belonged to a larger State, secession. Each has its advantages and disadvantages. This testifies again to the need for this more abstract philosophical debate. According to Margaret Moore, three major types of normative theories can justify a right to secession.<sup>70</sup>

#### ***2.2.3.1. The “Just-cause theories” justifying the exercise of the Right to Decide***

The first ones are “Just-cause theories”. According to this justification, the right to secession is understood as a remedy to a situation of injustice whose cause is, at least partially, the belonging of the oppressed collectivity to another, oppressive, one. Occupation, annexion, seizure of land, exploitation, violations of human rights, ethnic or cultural cleansing, genocide, discriminations, etc. are among the most evident manifestations of the injustices that contribute to the justification of a right to decide to break away from the current institutional situation. The right to decide, and eventually the right to secede are thus understood as collective forms of the right to resist oppression. This prerogative is central to contemporary constitutionalism, and appears for example in Article 2 of the French Declaration of Man and the Citizen in the following terms: “The aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression.” As a consequence, once a political collectivity is not able to live up to this standard, which justified in the social contract theory the choice of every individual to join, a legitimate claim arises according to which it can be dismantled.

The idea of an unjust annexion may be difficult to use in the Spanish context, due to the fact that Catalonia became part of the State three centuries ago. No massive violations of human rights seem to be caused by the Spanish State that would, for example, justify referring to the Geneva Refugees Convention of 1951. For example, autonomist parties can legally exist and participate in the political process and express their positions. The Constitutional Tribunal guarantees that, because it is not a militant democracy, even the very existence of the current Spanish political regime can be called into question.<sup>71</sup> Nevertheless, even though no massive exploitation can be identified, it appears that several analyses of the financial

relations between Madrid and Barcelona tend to prove that there exists a kind of structural and long-lasting imbalance between the two. What is more, the right of the Catalan people to self-determination within Spain, i.e. what is known as “internal self-determination” is only imperfectly guaranteed.

According to Will Kymlicka, who is the most renowned specialist of multiculturalism and multicultural institutional arrangements, should this right to internal self-determination be faithfully conferred and enjoyed, there would be no right to secede.<sup>72</sup> In Spain, a specific Autonomous Community was established, which enjoys specific powers according to the Constitution and its Autonomy Statute. Nevertheless, the Catalan claim to increase their autonomy was not heard. In 2006, a new *Estatut* was approved by a vast majority of representatives, both Catalan and Spanish, and by a large majority of the people. Nevertheless, the Constitutional Tribunal found that several of its provisions were unconstitutional, while others needed to be read down in order to guarantee their compatibility with the supreme norm. This was all the more surprising as some of the provisions whose compatibility with the Constitution was denied in 2010 exist in the Statutes of autonomy of other Communities, for example in Andalusia, and have not been struck down in these other contexts. Until that moment, it appears that no dialogue has been possible with Madrid regarding increasingly pressing demands from the *Generalitat*.<sup>73</sup>

In April 2014, the Spanish Parliament denied the possibility to organise a referendum that would have been constitutionally valid. The last attempts of the Catalan government and Parliament in order to initiate a participatory procedure regarding the right to decide were rejected by the Constitutional Tribunal as incompatible with the supreme norm.<sup>74</sup> The very fact that, for the last years, Madrid resorted to all the possible legal and constitutional means to bar any discussion of the Catalan claims led to a kind of political and institutional deadlock. In spite of all their efforts to instore a political dialogue, the Catalan demands and offers were rejected or ignored.

Madrid went so far as to sue political authorities for organising a popular consultation. To present a telling example: Artur Mas, the former president of the Catalan government was sentenced to two years of disqualification and a fine of 36,500 euros for the crime of disobedience. Currently, several members of the Catalan parliament, among whom the very president of that institution, Carme Forcadell, have been charged with the approval in Parliament on October 6th, 2016 of a resolution regarding the celebration of the referendum on the political future of Catalonia, with organising votes in the parliament, and with publishing inquiry reports, although this contradicts basic constitutional principles regarding the immunities that parliamentarians enjoy in free and democratic societies. As a



consequence, it appears that a kind of systematic policy of obstruction to the *Generalitat* has appeared. It tends to silence them, and to deprive them of a crucial part of their right to self-determination as a collectivity. They are readily denied any possibility of debating their future with the legitimate authorities, in spite of the fact this right has repeatedly been proclaimed by the Constitutional Tribunal.

One may as a consequence wonder whether the Spanish State holds to its founding promise of 1978. This can be debated because, although the Constitution does not contain any explicit right to “external” self-determination, i.e. to secession, it is committed to several values that may, according to the “just cause” perspective, very well entail such a right: human rights, democracy, respect for cultures and peoples, the rule of law, etc., especially if internal self-determination is only imperfect or more or less fictitious. The right to discuss about these topics, and the right to make a decision about them, i.e. the right decide are the natural political means to face the issue.

#### ***2.2.3.2. The “Choice theory” justifying the exercise of the Right to Decide***

The second kind of theories bases the right to decide on choice, i.e. on the fundamental liberal idea of individual autonomy. According to this line of thought, the individuals who are the members of a political community have a legitimate right to define the territorial limits of the collectivity in which they exercise their right to self-government. Contrary to the “Just cause” justifications for the right to decide, “individual autonomy” theories do not require any specific injustice to justify claims to the right to decide and, ultimately, secede. A clear link is established between the individual autonomy which allows an individual to join a group in the state of nature and the right to withdraw from it, simply making use again of the fundamental freedom on which the birth of the political unity was made possible in the first place. As is evident, this justification for the right to decide is perfectly abstract and applies everywhere, whatever the size, the location, the age, etc. of the political society it concerns. This is why it applies to Catalonia as well as to Spain or to any municipality in Catalonia.

#### ***2.2.3.3. The “Collective Autonomy theory” justifying the exercise of the Right to Decide***

Lastly, theories of collective autonomy abandon the individual perspective and prefer a communitarian approach of political subjects. They consider that groups enjoy a specific moral status, and sometimes deduce that self-determination can be understood as a human

right of groups.<sup>75</sup> The collective link between individuals is made evident for example in a shared language, a shared culture, a shared religion, a shared way of life, etc. Values and collective feelings and aspirations cannot be reduced to individual choice or individual well-being. They are valuable in themselves. In international law, this reasoning is connected to the “principle of the nationalities”.<sup>76</sup> This kind of justification is perfectly applicable to Catalonia, whose specific cultural characteristics are widely acknowledged, especially, from a legal viewpoint, in the Autonomous Community’s *Estatut*.

Nevertheless, the “collective autonomy” thesis needs to confront several possible objections. A first difficulty is related to the reification of collective identities that it may entail. This thesis downplays the fluidity of cultures and the possibility for them to evolve. It also neglects the fact that exchanges, contacts, etc., necessarily imply that no culture is self-contained and totally fixed. As a consequence, the normative emphasis on one form of identity could result in the moral justification of a form of collective confinement. Moreover, the individuals who compose the group have “multiple selves”, for example depending, among many other overlapping and more or less fluid considerations, on: sex, gender, age, occupation, political opinions, religious practices, etc. The collective identity argument may neglect one’s own “intersectionality” and, once again, confine somebody in only one of her identities, in spite of the fact that being ascribed a specific identity among all the ones she has can be objectionable in regard of the very basic idea of autonomy. Finally, several incompatible conceptions of how a collective identity is formed exist. Insisting on culture, history, ethnicity, religion, and language, a deterministic conception of a nation can be proposed, so that one can hardly change her own belonging. On the contrary, another perspective invites to conceive of a nation as a voluntary phenomenon, a kind of civic project, so that one could choose the nation to which she belongs. In this respect, a strong connection is established between the “collective autonomy” and the “individual autonomy” justifications of the right to decide. But what if two collective identities are struggling against each other? For example, several theories of federalism contend that when they live under such institutional arrangements, individuals and groups simultaneously belong to two collectivities, the local one and the national one.<sup>77</sup> How is one to determine between the competing claims which one is the more legitimate, i.e. which community is worth subjecting or which one worth dismantling? This moral dilemma is directly involved in the Spanish-Catalan debate. Only further thoughts can offer clues, if not to answer it, at least to express the question, its stakes and difficulties, and make it ripe for clear and impartial discussion and decision. This entails that the debate needs to be opened instead of foreclosed, and every stakeholder allowed to express her position regarding it.

#### ***2.2.4. The Democratic Justification for the Right to Decide***

Because it is related to very fundamental principles of human governance and expresses a core value of constitutionalism, the autonomy or the democratic argument appears to be a premise that cuts across all the theses justifying secession.<sup>78</sup> For Hans Kelsen, democracy is a political regime that maximises the freedom of individuals by tendentially making the norm-producers coextensive with the norm-addressees.<sup>79</sup> This argument is simple: if the majority of the Catalans wants to have the right to decide about their future, then they must have it; if the majority of the Catalans want independence, then they must have it.

But the reasoning may not be that evident, for at least three kinds of strongly connected reasons.

First, the most pressing issue is that of the stakeholders, that is, those with an interest in decision-making, and who must therefore, according to the logic of autonomy, pronounce on the right to decide or the right to secession. This democratic principle obliges the existing State in a certain way. Indeed, the refusal to defer to the popular will would itself be a violation of several fundamental rights that are intrinsically rooted in the project of constitutionalism as it has been joined by Spain in 1978, and therefore a cause legitimising secession. But in this case, it is possible to claim that everyone has to vote, including the members of the non-autonomous state that claims autonomy. Otherwise, the majority decision of the autonomist minority would violate the others' autonomy. By the same token, it would ruin the presupposition on which it grounds its own legitimacy.

Framing this issue Daniel Weinstock for example remarks that:

“At one extreme lies what some have called the all affected principle. That principle, as its name indicates, suggests that all those who are affected by a democratic decision should have some say in the decision-making process.

This principle is clearly over-inclusive in the case of a secession referendum. After all, all citizens of the federation in question will be affected in substantial ways by the decision of a federated entity to secede. But it seems inappropriate to give them all a right to vote. After all, the desire to secede is most often born of the sense on the part of a substantial number of those living in the federated entity that all is not as it should be in their relations with their federal partners. To give those federal partners an effective veto would be simply to import the logic of the problems that have triggered the desire for secession into the decision-making process itself.

At the other end of the spectrum lies the nationalist principle, according to which all those people who trace their origins back to the “founding people” of which the territory of the federated entity is seen as the national homeland should be allowed to make such an existential decision as whether to secede or not.

This principle would on broadly liberal-democratic grounds be unacceptable, by ruling in people who oughtn't to have a say, and by ruling out people who ought to have one. [...] The defender of a nationalist principle would consider that someone who traces his origins back to the founding national group should have a say in whether secession should occur or not, even if he has not resided on the territory for years, indeed even if his parents or grandparents had not done so. It would however rule out people who reside on the territory, even though they have only arrived recently, and/or are not members of the founding national group.”<sup>80</sup>

The question, therefore, is that of the interests which must be regarded weightier. *Prima facie* and at the stage of fundamental principles, no clear answer seems possible. Many arguments can be developed for one solution or the other. But they precisely need to be debated and thought out properly. Only a careful and fair deliberation, like the ones that led to the definition of who could participate in the independence referenda in Quebec, in Scotland, or in New Caledonia can provide one.<sup>81</sup> Indeed, if this is not the case, there is a strong risk that “external preferences” may come into play and imperil the constitutional fairness of the procedure. According to Ronald Dworkin,

“the preferences of an individual for the consequences of a particular policy may be seen to reflect [...] either a *personal* preference for his own enjoyment of some goods or opportunities, or an *external* preference for the assignment of goods and opportunities to others.”<sup>82</sup>

Personal preferences should be given a primacy in moral reasoning and, consequently, in political decision. External preferences are basically preferences one has regarding things that are none of her business. For example, one may very well hate that other persons listen to a specific kind of music, which she considers disgusting, noisy, immoral, and so forth. She had better other people stop listening to this kind of music, even though, to borrow from John Stuart Mill's famous principle, this behaviour causes her no harm.<sup>83</sup> As a consequence, according to Dworkin, such preferences should not be taken into account in moral reasoning because they deal with what other persons should do from one's viewpoint, notwithstanding the fact that she is not affected by their conducts. Only personal

preferences should play a decisive role in personal and, especially, collective decision-making. For example this kind of ethical reasoning was crucial to the decriminalisation of homosexuality, when it was made evident that external preferences regarding sexual behaviour mostly expressed prejudice, and, as no personal interest was affected, could not justify interfering with homosexuals' conducts.<sup>84</sup> In the Spanish-Catalan debate, the question is how much of a personal preference there is on the Spanish side? Does Madrid, by refusing the very possibility of the discussion, express a genuine personal preference (e.g. the pride of being a multicultural State) or does it express an external preference that is unjustifiably infringing on the interests of other moral and political agents? Once again, the circle of the actors which need to have their say in the process is not totally determined, and this puzzle can only be solved by a collective debate leading to a rational decision.

Second, a "slippery slope" of some sort could emerge as a result of the choice-based autonomy argument. It would lead to the general dissolution of political units. If the majority of Catalans chooses independence, there will be in Catalonia a minority of hostile people or disgruntled non-Catalans. Should they also be entitled, in the name of the principles which justified the independence of Catalonia, the right to claim their own secession? If the independence movement is doctrinally coherent, this must be admitted, unless cogent arguments can be made to justify the opposite answer. In this respect, Catalans seem to be quite coherent. In the "Vall d'Aran", which is included in the territory of Catalonia, lives an Occitan minority. A whole chapter of the Catalan *Estatut* is dedicated to this territory. It makes clear that, considering the specific national personality of Aran, the rights of the aranes people are acknowledged and respected. This people enjoys self-government and proper institutions. As the Act 1/2015 on Aran's specific legal regime makes perfectly clear: *"El Parlamento de Cataluña reconoce el derecho del pueblo aranés a decidir su futuro."* Moreover, the existence of this enclave of autonomy within an enclave of autonomy was considered perfectly constitutional by the Constitutional Tribunal.<sup>85</sup>

Thirdly, another important difficulty arises with the question of the criteria one may use to define the limits of the group that is legitimate to invoke a right to decide: all the persons who live on a given territory? only men? only adults? etc. What form of second-order justification can be used to justify the fact that only one of the elements that define what truly are pluralistic identities, i.e. namely the "Catalanity criterion", is taken into account? In the context of the debate between Spain and Catalonia, how to justify giving the primacy to the Catalan identity? If any argument succeeds in justifying its prevalence, could not this justification be available as well to legitimise the Spanish identity as a whole, and thus contribute to justifying the denial of the right of Catalonia to decide? If cultural identity is the most important criterion, and provided it can be precisely defined, should Valencia y

Baleares, which share many common points with Catalan culture and will of course be affected in case Catalonia leaves Spain, also participate in a consultation on Catalonia's right to decide? Why should they be excluded? How should they be taken into account? Once again the issue of where to draw the line when defining the breadth of the interests that need to be taken into account arises.<sup>86</sup>

The fact that, differently from many other groups or collectivities one may identify, Catalonia undeniably has a specific history, develops an original culture, uses a specific language, has struggled for several years to push for an institutional evolution by peaceful and democratic means, etc. tends to make its claims *prima facie* weightier than many others. They have built a strong collective project. It is not impossible for countervailing claims to arise and to prove equally or even more legitimate. But in any case, a detailed argumentation needs to be developed through debate, discussion, and deliberation that take each one seriously, according to the fundamental principle of the "equal consideration of interest."<sup>87</sup>

On that delicate question, it may also be worth underlining that the practice of self-determination, which can be transposed to the issue of the right to decide, never really confronted the issue. Most, if not all, passed cases of the exercise of the right to self-determination have been implemented within the existing borders of an administrative or political unit of the currently existing sovereign power (State, Empire, Colonial possession), whether the population of such territory was homogeneously composed as regard identity, language, religion or other common characteristics. This practice is labelled in international law the "*uti possidetis* principle"<sup>88</sup>. As a consequence of this constant practice, most States that emerged through a self-determination process encompass several human groups with distinct identities; this is true in the Americas<sup>89</sup>, in Asia (think about India), in Africa (with the most dramatic example of Rwanda where one ethnic group within that country committed genocide against the other one in 1994) and in Europe. Therefore, the exercise of the right to decide was, in practice, never subordinated to the exact identification of the relevant polity, on the basis of historical, sociological or identity's considerations. Self-determination is *de facto* exerted within the existing borders of a defined administrative or political unit<sup>90</sup>. Therefore, exercising the right to decide within the current borders of the Autonomous Community of Catalonia would be perfectly consistent with international practice.

### **2.2.5. The Conditions of Decision-making**

At several points in the preceding discussion, things were said to be unsettled, and to be in need of further discussion, so as to lead to a situation where one knows where her partners stand and what their arguments are. But due to all these uncertainties, one may be hesitant

as to the possibility of devising a precise procedure to decide on these issues. Although it is undoubtedly difficult, it appears that a widespread agreement has progressively coalesced. It contributes to offer a stabilised blueprint whose main advantages rely on its being inspired by the values of constitutionalism that are common to many contemporary political communities, and especially to Spain as well as to Catalonia.

Fundamentally, the issue of the right to decide can very legitimately be regarded as being beyond the reach of the law. Indeed, it is the right to have one's say on the very possibility of creating a new state. As a consequence, it can hardly be regulated by law, for it is precisely the process by which a new state, i.e. a new entity producing law, can come to exist. This is why one could contend that, because of its revolutionary dimension,<sup>91</sup> the debate involves the so-called of "*pouvoir originaire*"<sup>92</sup>. All what is at stake here could be regarded as pure facts, *de facto*, or pure politics, as opposed to norms, *de jure*, or law.<sup>93</sup> This is why the discussion can very well be framed exclusively in political, ethical, or philosophical terms.

Nevertheless, several legal norms and documents explicitly addressed the issue of self-determination, independence, secession, etc., and offered clues for crafting the modalities of the implementation of a "right to decide".

For example, on 14 December 1960, the General Assembly of the United Nations adopted Resolution 1514 (XV), entitled Declaration on the granting of independence to colonial countries and peoples. Premised on "fundamental human rights, the dignity and worth of the human person, the equal rights of men and women and of nations large and small to promote social progress," Article 2 states that "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." Article 4 insists on a peaceful and free exercise of this right. Later, on 24 October 1970, the same institution adopted Resolution 2625 (XXV), entitled Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. According to that text, which again refers to "peace [...] freedom, equality, justice and respect for fundamental human rights," "Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence. [...] all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and

cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.”

In 1975, the Final Act of the Conference on Security and Co-operation in Europe confirmed that:

“The participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States.

By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.

The participating States reaffirm the universal significance of respect for and effective exercise of equal rights and self-determination of peoples for the development of friendly relations among themselves as among all States; they also recall the importance of the elimination of any form of violation of this principle.”

In its *Advisory opinion on the Western Sahara (Nature of Legal Ties and their Relation to Decolonization and Self-Determination)* of 16 October 1975, the International Court of Justice stated at § 55 that “the application of the right of self-determination requires a free and genuine-expression-of-the will of the peoples concerned.” This is precisely why devising a procedure for a fair deliberation that leads to a clear decision is necessary. In the case concerning *East Timor (Portugal v. Australia)*, of 30 June 1995, the International Court of Justice considered, at § 29, that “the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character.” Answering the question: “Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?”, the ICJ made it clear at § 79 that “the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation.” *In casu*, the ICJ noted that the Kosovo case was related to a context of humanitarian international intervention, and that negotiations regarding the final political status of this territory had



failed. This is why the local authorities, breaking away from the strict legal framework they were supposed to abide by, but undoubtedly acting as representatives of the people (§ 108), decided to secede and to establish Kosovo as an independent and sovereign State (§ 105). The ICJ concluded that in this case, there was no violation of general international law (§ 122).

In 2016, in case C-104/16 P regarding the *Polisario front*, the European Court of Justice had no hesitation to quote the aforementioned international norms and declarations, as well as the case law of the ICJ, in order to conclude that, evidently enough, “that principle [of self-determination] forms part of the rules of international law applicable to relations between the European Union and the Kingdom of Morocco.”

What is crucial from the viewpoint of living law, the legal actors that dealt with the right to decide have made reference, if not always to precise legal norms, at least to fundamental principles that are intrinsically connected to a constitutional organisation of political controversy. Framing this type of debate proves sensitive to basic political and moral values that, because of the spread of constitutionalism, are frequently enshrined in domestic law or in important supranational or international norms. It appears moreover that these organs have progressively paid attention to one another, and quoted one another in their respective decisions. This is why a form of transconstitutional jurisprudence regarding the right to decide emerged. Although it does not result in a determined body of binding law, let alone a code for secessionist processes, it offers a blueprint for as “constitutional” as possible (i.e. as respectful of substantive values and procedural principles that are widely shared in democratic and pluralist societies) a process of deliberation and decision-making regarding such a heated topic. This burgeoning mix of texts and case law provides a basic framework to address that issue in a way that is compatible with major commitments of the Spanish State, such as human dignity (art. 10 C), equal respect (art. 14 C), pluralism (art. 1 C), democracy (art. 1 C), political participation (art. 23 and 92 C), free speech (art. 20 C), or free assembly (art. 21 C).

To date, the most thorough attempt to delineate the fundamental constitutional considerations that should act as a guide to the “right to decide” decision-making process was expressed by the Canadian Supreme court.<sup>94</sup> After the second referendum in Quebec in 1995, the federal government asked the Supreme Court the following questions:

“1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?

2. Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?

3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?"

The answer was based on abstract constitutional principles that can be detached from the domestic context in which they were expressed in order to delineate the main guiding values that allow a fair debate about the right to decide. The Court's answer was premised on the fact that the constitution was not limited to written documents, but also consisted of unwritten elements. These elements expressed fundamental principles that were connected to one another, underlay the concrete rules, and helped define the broader legal context in which the issue of the right to decide was to be addressed. According to the Court, at § 32,

"there are four fundamental and organizing principles of the Constitution which are relevant to addressing the question before us (although this enumeration is by no means exhaustive): federalism; democracy; constitutionalism and the rule of law; and respect for minorities."

As the Court made clear, at §§ 49 and 51,

"These principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based. [...] it would be impossible to conceive of our constitutional structure without them. The principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood."

Because of their generality and abstraction, they are widely shared around the world, and have appeared for example in the political project of the Spanish State since 1978. None of these principles can prevail over the others. Each at the same time contributes to giving effect to another, and to limit another. An organic connection exists between those principles, which are crucial to the very project of constitutionalism. They overlap to a great measure, and operate in a systematic way, so that a form of "reflective equilibrium"<sup>95</sup>

between them is reached by political discussion. The principle of federalism recognizes the diversity of the component parts of the State, and favours the autonomy of local governments to develop their societies within their respective spheres of jurisdiction according to their own preferences. The principle of democracy ensures that a duly elected majority governs, and simultaneously that collective and individual autonomies as well as their participations are protected. Constitutionalism and the rule of law tend to limit arbitrary political power, ensuring the protection of fundamental collective and individual rights. This is why the protection of minorities and their specific linguistic, religious and cultural rights is also integral to the constitutionalist project.

Based on these principles, the Canadian Supreme court considered that there was no constitutional right to secession that Quebec could unilaterally impose to the other provinces and to the federal government. At the same time, there was no right to ignore what Quebec might express. A clear majority given to a clear question regarding secession would “place an obligation on the other [institutions] to acknowledge and respect that expression of democratic will by entering into negotiations and conducting them in accordance with the underlying constitutional principles already discussed” (§ 89). Once the debate is framed according to the most fundamental values of contemporary constitutionalism, no clear-cut answer can be given to the issue of the right to decide, but the need to negotiate in light of the very principles of constitutionalism. If any of the stakeholders ignored these principles, its own position would be delegitimised (§§ 93, 95, 103, and 152).

In front of autonomist claims, several states seem to have embraced such a methodology. Implementing their commitments to constitutionalism and its values, they have organised the consultation of the concerned populations in a transparent, peaceful, and pluralist way. No one can disregard a double constraint. First, each of the major constitutional principles involves concepts whose interpretation and development can admit various meanings or conceptions. Secondly, taken together, these principles or concepts of political morality are not perfectly compatible, but tend at the same time to limit and to reinforce one another. This is why a real political effort is needed, starting from these basic requirements, to devise a public sphere for difficult debates and decisions. Some States have readily attempted to do so.

Just to mention a few examples<sup>96</sup>, such was the case of Canada regarding the independence of Quebec, which was rejected both in 1980 and in 1995. Such was also the case of France regarding the possibility of leaving the colonial possessions by referendum in 1958, which was accepted only by Guinea, or regarding the creation of a unified territorial collectivity in

Corsica, which was rejected in 2003. Finally, such was the case of the United Kingdom regarding Scotland in 2014. In 2018, in France, a referendum will take place in New Caledonia in order for its population to choose whether or not they want full sovereignty. In all these cases, even though the stakeholders had obviously antagonistic positions and interests, they nevertheless managed to organise a consultation that corresponded to an exercise of the “right to decide”. Each camp could clarify, discuss, and sharpen its goals and its arguments, and really engage fundamental issues of collective coexistence in an open way, instead of leaving things concealed. Each of these examples testifies to a faithful collaborative implementation of the shared constitutional principles that have been made explicit by the Canadian Supreme Court. Thanks to mutual efforts, a cooperative public sphere could be engineered and host a vivid and enlightened debate. This contributed to wide political deliberation, where citizenship was given full meaning, thus illustrating what Bruce Ackerman is prone to present as “constitutional moments” of extraordinary politics.<sup>97</sup> Under the latter, the people are not only allowing their representative to adjust their interests, but are truly given the opportunity to debate frankly and openly questions of fundamental principle so as to define the way they want to exercise their political autonomy. On the contrary, the Spanish-Catalan question is totally alien to such a deliberative democratic dynamic.<sup>98</sup> José Tudela Aranda for example remarks:

*“Lo que resulta difícil de comprender, y, desde luego, merece crítica, es que desde el Gobierno del Estado, y desde los partidos opuestos a la independencia, no se haya sabido disputer el partido desde la democracia. No se haya sabido contrarrestar argumentos y presentar otros que, también desde el principio democrático, avalan sus tesis. De esta debilidad ideológica de los no independentistas, nada se puede reprochar a quienes lo son.”<sup>99</sup>*

Is such a promise of constitutionalism totally out of reach in Spain? Even though Madrid has shown some evident reluctance, and even the most recent case law of the Constitutional Tribunal is rather hostile, it seems not. According to Mercé Corretja Torrens, “The Spanish Constitution of 1978 contains sufficient principles that have allowed other democratic and liberal states to construct and legally justify the right to decide.”<sup>100</sup> For sure, in its ruling regarding the Resolution of the Catalan Parliament approving the Declaration of sovereignty and the right to decide of the people of Catalonia,<sup>101</sup> the Spanish Constitutional Tribunal refused the idea of a Catalan sovereign. Nevertheless, regarding the right to decide, the Constitutional Tribunal manifestly drew inspiration from the Canadian Supreme Court, which it explicitly quoted. It made clear that this political initiative was related to the constitutional principles of “democratic legitimacy,” “pluralism,” and “legality”. These are shared principles

between Spain and Catalonia. They were presented by the latter as framing all the process of the right to decide, which was described as based on democratic legitimacy, transparency, social cohesion, euro-friendliness, parliamentary representation, participation, dialogue, and legality. The Constitutional Tribunal noticed that most of these principles were proclaimed by the Spanish Constitution. It also connected them with what the fundamental commitment that the Spanish people had expressed since 1978. This is why it finally decided that there was no violation of the Constitution when the Catalan Declaration invoked a “right to decide”. On the contrary, “it expresses a political aspiration susceptible of being defended in the framework of the Constitution.”

It appears that even if it very clearly refused the idea that the Catalan could be regarded as a “sovereign political and legal subject”, the Constitution Tribunal did not rule out the possibility for a right to decide. On the contrary, it appears perfectly legitimate and compatible with the Constitution so long as constitutional principles very similar to those which emerge from the transconstitutional discussion are respected. By insisting on a democratic process, on political inclusion, on dialogism, on the rule of law, on due respect for the popular will, the Constitutional Tribunal joined this transconstitutional reasoning and was finally led to the conclusion that in case such a claim was expressed under those circumstances, then the Spanish institutions needed to it take into account and face it. Political disagreement, which is perfectly legitimate, needs to be framed in light of the basic constitutional values that allow for a transparent debate, in good faith. This would be perfectly in line with a fundamental concept that has been used several times by the Constitutional Tribunal and expresses the basic attitude of all the stakeholders in this kind of debate: the principles of “constitutional fidelity” and “constitutional loyalty”,<sup>102</sup> understood as a commitment to do one’s best to preserve and give life to a core value of political morality.

By refusing to discuss, by suing political representatives, included the former president of the Catalan government and the current president of the Catalan parliament, the Spanish State constantly refused to discuss and obstructed political debate, denied the Catalans the right to organise a referendum in spite of their clear demand, restricted the legal and political interest of the new *Estatut*, refused to transfer new competences, etc. This tends either to silence the Catalan claims or to refuse hearing them. Catalonia always reacted peacefully, for example by demonstrations or consultative processes of popular participation, local elections, etc., all of which embody the use of fundamental constitutional rights. Because of these efforts to make their position known, and especially in light of the transconstitutional expectation that is growing globally, and that is by no means alien to Spanish constitutionalism, it appears that refusing the debate in the name of a constitutional

system that needs not be so rigid,<sup>103</sup> appears in the end to be contradictory and self-defeating.

### **2.2.6. Intermediary Conclusion**

As a conclusion – or more exactly, not to conclude and on the contrary open the space for rational deliberation, – this section proves that there is no truth of the matter. Nothing is fixed, nothing is for sure, except the need to discuss and debate according to what has grown as a transconstitutional body of shared values that only unveil the preconditions of the most cherished values of contemporary constitutionalism. This does not make things easier, but at least it allows every stakeholder to know where she stands and what her responsibility is. Directly confronting the legitimacy of the right to decide is necessary because as René Lévesque once wrote: *“à côté des forces aveugles et de tous les impondérables, il faut croire que ce sont encore essentiellement les hommes qui font l’histoire.”*<sup>104</sup>

### III. CAN THE “RIGHT TO DECIDE” BE LEGALLY DENIED?

We have shown in Part II of this report that the Right to Decide lays on substantial and solid sociological, political, moral and philosophical foundations. Nevertheless, the exercise of this right by Catalonia in 2017 is being contested (and eventually denied) to the Catalans by the Authorities of the Spanish State. The Spanish national Authorities arguments are legal ones. According to these arguments, the current Spanish constitutional order does not allow for a self-determination referendum to be held in Catalonia.

Whether this legalistic approach can be validly used to contest the exercise of the established right to Decide of the Catalan people is what will be discussed in the present Part. This part will show that Spanish constitutional legal order may not be interpreted outside of its European and international contexts. In that respect, neither international positive law nor international practice forbids the exercise of the right to self-determination by Catalonia (chapter 3.1). Quite on the contrary, extensive and recent practice show the emergence of new States in Europe, even without the approbation of the parent State (section 3.1.3). Identically, European Law – mostly EU law but also the ECHR – not only does not forbid the exercise of the right to self-determination by European peoples willing to join the “ever closer Union among the peoples of Europe”<sup>105</sup>, but allow to ground the exercise of such a right into European Human Rights Law, and maybe even to derive it from EU citizenship Rights, as chapter 3.2. will demonstrate.

This part starts shall conclude with a comparative analysis of the practice of interpretation of contested constitutional norms. As Chapter 3.3. shows, no liberal constitutional order reserves the right of constitutional interpretation to the Constitutional Tribunal. Spanish constitutional order makes no exception to this rule, and the current constitutional meaning of the constitutional text has to be co-constructed among several institutional actors, since Constitutions are by function enshrining “essentially contested norms” (see section 3.3.2). Thus the process of Constitutional interpretation needs to take into account European values such as “the respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities”, as stated in article 2 TEU. And all these values need to be articulated, none – neither the rule of Law principle, nor the democratic principle – being in a position to impose the conclusions drawn from its exclusive application against diverging conclusions stemming from the implementation of another value, as we shall see in part IV below.

### **3.1. Catalonia's Right to Decide its Political Future under International Law**

This section discusses whether it is permissible under international law for Catalans to exercise their right to decide<sup>106</sup> their political destiny by holding a referendum on independence.

Catalonia plans to hold an independence referendum on 1 October 2017. This would be a significant initial step towards independence. The process towards independence can be divided into three phases: (1) up to and including an independence referendum and a declaration of independence; (2) the time between a declaration of independence and recognition of statehood; and (3) the requirements of statehood.

International law is well-developed on the first phase of the process towards independence, namely a sub-state entity's right to decide its political destiny up to and including a declaration of independence. International law is also well-developed on the third phase, namely what is required for a state to be considered independent and legitimate. The second phase, namely the legal framework between a declaration of independence and recognition of statehood, is less developed under international law.

This chapter only addresses the first phase and thus is an analysis of international law and state practice relating to a sub-state entity's right to decide its political destiny up to and including a declaration of independence. Sub-state entities have a right to decide their political destiny by assessing their people's will. The assessment can take many forms, including but not limited to referenda, petitions, or governmental declarations. International law does not prohibit a sub-state entity from organizing and holding an assessment of its people's political will in order to decide its political destiny.

This section concludes that there is no international legal prohibition barring a sub-state entity from assessing the will of its people regarding independence, whether it be through referenda or other appropriate means. Both case law and state practice support this conclusion.

#### ***3.1.1. International Case Law: The International Court of Justice Kosovo Advisory Opinion and its Relevance***

On 22 July 2010, the International Court of Justice issued an Advisory Opinion on the legality of Kosovo's unilateral declaration of independence and determined that the declaration was not prohibited under international law.



To determine whether it is legal under international law for Catalonia to hold a referendum on independence, this sub-section will review the International Court of Justice's 2010 *Advisory Opinion about the Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (*Kosovo Advisory Opinion*). This case analyzes the international law relating to the right to unilaterally declare independence.

The *Kosovo Advisory Opinion* held that "general international law contains no applicable prohibition of declarations of independence."<sup>107</sup> The Court evaluated Kosovo's unilateral declaration of independence from Serbia and held that it did not violate international law.

First, the Court found that state practice between the eighteenth and twentieth centuries does not reveal a prohibition on unilateral declarations of independence.

Second, the Court determined that the only time sub-state entities' declarations of independence may not comply with international law is when relevant UN Security Council resolutions or other *lex specialis* forbid them. For example, UN Security Council resolutions expressly denied the legality of declarations of independence by Southern Rhodesia, Cyprus, and the Republic of Srpska.

Third, the Court decided that the principle of territorial integrity "is confined to the sphere of relations between States" and thus does not affect a sub-state entity's ability to declare independence.<sup>108</sup>

### **3.1.1.1. Facts of the Kosovo Advisory Opinion**

Prior to 1991, Kosovo was an autonomous entity within the Republic of Serbia, which at the time was part of Yugoslavia. As a result of a series of referenda between 1991 and 1992, Yugoslavia dissolved into several new states, including the Federal Republic of Yugoslavia (Serbia and Montenegro). Kosovo remained a part of this new state after the dissolution. In 1998, the Serbian armed forces committed crimes against humanity against the Kosovar people. In response, the international community organized a humanitarian intervention. As a result, Kosovo was put under UN administration in 1999.

In 2008, the Kosovo provisional government unilaterally declared independence. Serbia objected that this violated international law. At Serbia's request, the UN General Assembly referred the question to the International Court of Justice.<sup>109</sup> The International Court of Justice rendered its advisory opinion two years later in 2010, holding that the declaration did not violate international law. To date, 111 of 193 states recognize Kosovo's statehood, including 23 of the 28 member states of the EU.<sup>110</sup>

### ***3.1.1.2. Procedural Posture of the Case Before the International Court of Justice***

The *Kosovo Advisory Opinion* was issued in response to the UN General Assembly's request for an advisory opinion, submitted pursuant to Serbia's concerns that Kosovo's actions violated international law. Article 65(1) of the Statute of the International Court of Justice permits the Court to give advisory opinions "at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request." In advisory opinions, the International Court of Justice answers a legal question that has been submitted to it by a UN body or a UN member state, rather than adjudicating claims asserted by a state party against another. Article 96(a) of the UN Charter allows the UN General Assembly and the UN Security Council to request an advisory opinion from the International Court of Justice on any legal question. While ICJ advisory opinions are not binding, they are highly persuasive international legal authority that clarifies previously contested points of international law.

### ***3.1.1.3. Question Presented***

The Court answered the following question submitted by the General Assembly: "whether [Kosovo's] declaration of independence was 'in accordance with' international law."<sup>111</sup> The Court focused the question in its analysis to whether "applicable international law prohibited the declaration of independence."<sup>112</sup> The Court did not answer whether Kosovo had the right to self-determination or the right to break away from Serbia.<sup>113</sup>

### ***3.1.1.4. Holding in Kosovo Advisory Opinion***

By a vote of 10 justices in favor to 4 against, the International Court of Justice concluded "that the declaration of independence of Kosovo adopted on 17 February 2008 did not violate international law."<sup>114</sup> To reach this conclusion, the International Court of Justice considered written statements from over three dozen states, including Serbia and Kosovo. Several justices appended declarations, separate opinions, and dissenting opinions to the majority advisory opinion.<sup>115</sup>

### **3.1.1.5. The Court's Analysis**

#### **Historical State Practice Does Not Reflect a Prohibition on a Sub-State Entity Declaring Independence**

The Court concluded that general international law had never previously prohibited declarations of independence. To do this, the Court reviewed two periods of state practice: (1) the eighteenth through the early twentieth century and (2) the second half of the twentieth century.

Between the eighteenth and the first half of the twentieth century, numerous sub-state entities declared independence. These were “often strenuously opposed by the State from which independence was being declared.”<sup>116</sup> Not all declarations resulted in the creation of a new state, but “[i]n no case” did the “practice of States as a whole suggest that the act of promulgating the declaration was regarded as contrary to international law.”<sup>117</sup> In fact, “State practice during this period points clearly to the conclusion that international law contained no prohibition of declarations of independence.”<sup>118</sup>

During the second half of the twentieth century, independence was achieved both inside and outside of the decolonization context.<sup>119</sup> Those within the decolonization context had a right to independence.<sup>120</sup> Concerning declarations of independence outside of the decolonization context, the Court found that state practice “does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases.”<sup>121</sup>

#### **A State's Right to Territorial Integrity Does Not Bar a Sub-State Entity from Exercising Its Right to Decide**

As “the scope of the principle of territorial integrity is confined to the sphere of relations between States,”<sup>122</sup> the Court determined that the international legal principle of territorial integrity did not bar a sub-state entity's right to decide its political destiny.

The Court based this decision on a review of the UN Charter, the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States, and the Final Act of the Helsinki Conference on Security and Co-operation in Europe.<sup>123</sup> Article 2, paragraph 4 of the UN Charter provides that:

“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.”

The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States, which the Court found to constitute customary international law, enumerates obligations that states must adhere to in order to avoid violating the territorial integrity of other states. It provides in relevant part:

“that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State.”

Finally, the Final Act of the Helsinki Conference on Security and Co-operation in Europe of 1 August 1975 maintains that “[t]he participating States will respect the territorial integrity of each of the participating States.”

All three documents only impose responsibilities on States, and not on other, non-state or sub-state actors. As a result, the Court determined that the principle of territorial integrity only governs relationships between sovereign States. Therefore, the principle of territorial integrity does not govern the actions of sub-state entities, including their choice to unilaterally declare independence.

### **UN Security Council Resolutions Do Not Create a General Prohibition on Declarations of Independence**

The International Court of Justice found that only in cases where the UN Security Council adopted a resolution expressly denying the legitimacy of a declaration of independence could it be considered illegal under international law. Security Council resolutions condemning particular declarations of independence, such as resolutions on Southern Rhodesia, Cyprus, and the Republika Srpska, could not be interpreted as general prohibitions of declarations of independence. Security Council resolutions addressing the conflict in Kosovo did not apply to Kosovo's declaration of independence for two reasons. First, the resolutions made determinations on concrete situations at the time of specific declarations of independence. Second, the Court had found the Southern Rhodesian, Cypriot, and Serbian declarations illegal because “they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character,” not because they were unilateral. In fact, the “exceptional character” of the Security Council resolutions on Southern Rhodesia, Cyprus, and the Republika Srpska confirmed to the Court that “no general prohibition against unilateral declarations of independence may be inferred from the practice of the Security Council.”

***Lex Specialis Could Prohibit Declarations of Independence, but the Lex Specialis Applicable to Kosovo Did Not Prevent It From Unilaterally Declaring Independence***

The Court also reviewed *lex specialis* of an international character, which in the case of Kosovo included UN Security Council Resolution 1244 and the UNMIK Constitutional Framework. The Court found that neither prohibited Kosovo's declaration of independence.

***3.1.1.6. Referenda Could Be a Preferred Means for Exercising the Right to Decide***

While the International Court of Justice considered it sufficient for the Kosovo parliament to express the will of the people through a parliamentary declaration, in a dissenting opinion, Justice Bennouna noted that a referendum may be a preferable means for exercising the right to decide. Justice Bennouna noted with disapproval that candidates for election to the Assembly of Kosovo's Provisional Institutions had not raised the question of adopting a unilateral declaration of independence "in any form" during their campaigns. Justice Bennouna chided, "[i]f the members of the Assembly . . . had wished to express the 'will of [their] people' in a declaration made on 17 February 2008, they should at least have told their electors so."<sup>124</sup>

***3.1.1.7. Application to Catalonia***

The *Kosovo Advisory Opinion* is important for Catalonia because it holds that international law does not prohibit unilateral declarations of independence. It stands to reason, then, that methods of assessing the will of the people before declaring independence also are not prohibited by international law.

In fact, Catalonia's referendum could possess greater international legitimacy than Kosovo's unilateral declaration of independence because it would more directly reflect the will of the Catalan people. Not only did Catalonia's regional government run on an explicitly pro-independence platform, they also are seeking a direct expression of the will of the Catalan people via the 1 October 2017 referendum.

***3.1.2. State Practice Recognizing the Right to Decide***

State practice provides support for Catalonia's referendum. A surprising number of sub-state entities have exercised the right to decide their political will by holding independence-related referenda. Between 1905 and 1991, 52 sub-state entities held independence-related referenda. In addition, since 1991, 53 independence-related referenda have been held, for a

total of 105 independence-related referenda since 1905. There are four additional referenda scheduled to happen by the end of 2019. State practice demonstrates that many of these sub-state entities and national states negotiate the terms, conditions, and effects of independence referenda both before and after those referenda are held.

The *Kosovo Advisory Opinion* noted numerous instances of sub-state entities declaring independence and concluded that state practice did not reveal any international legal rule prohibiting declarations of independence.

Adopting the *Kosovo* case's approach, this sub-section surveys numerous recent examples of sub-state entities exercising their right to decide their political destiny. This survey examines the state practice of sub-state entities exercising their right to decide their political destiny. It reveals that sub-state entities decide their political destiny in various ways, including referenda and parliamentary or governmental declarations.

State practice also demonstrates that: (1) a number of Western European states have consented to referenda by their sub-state entities; (2) even when national states do not consent to sub-state entities assessing their political will, there are cases of sub-state entities becoming independent; (3) a number of current European member states were recently sub-state entities; (4) European member states frequently recognize new states; (5) national states regularly recognize the expressions of people's political will by their sub-state entities; (6) the community of sub-state entities that have expressed their political will for independence is highly geographically diverse; and (7) national states and sub-state entities often enter into negotiations about assessments of political will and the outcomes of those assessments.

### ***3.1.2.1. General Observations Relating to the State Practice of Sub-State Entities Exercising Their Right to Decide Their Political Destiny***

#### **Numerous Sub-state Entities Exercise Their Right to Decide Their Political Destiny**

State practice indicates that numerous sub-state entities have exercised their right to decide their political destiny, and that there are various methods to do so, including referenda and parliamentary or governmental declarations. Since 1905, sub-state entities exercised their right to decide by holding 105 independence-related referenda.<sup>125</sup> Since 1991, sub-state entities held independence-related referenda 53 times. Of the 53 referenda since 1991, 26 referenda were without consent of the national state, and 27 referenda were with the consent of the national state. There are four referenda scheduled to occur before 2019, including in Catalonia, and two are with consent of the national state, and two are not. In

addition, the UK has consented to Northern Ireland holding a referendum on some future date, if it so chooses. A number of other states have exercised their right to decide via other means. Since 1991, 27 states have achieved independence.<sup>126</sup>

### **Western European States Have Consented to Referenda**

Many Western European democratic states have consented to sub-state entities assessing their people's political will. The UK consented to Bermuda's 1995 independence referendum and Scotland's 2014 independence referendum and has pre-consented to an eventual Northern Ireland independence referendum. France has consented to a 2003 autonomy referendum in Corsica and a 2018 independence referendum in New Caledonia. The Netherlands has consented to multiple political status referenda in Bonaire, Curaçao, Saba, Sint Eustatius, and Sint Maarten.

### **Even When National States Do Not Consent to Sub-State Entities Assessing Their Political Will, There are Cases of Sub-State Entities Becoming Independent**

A substantial number of political will assessments occur without the consent of the national state. A number of the nonconsensual assessments led to recognition of independence by the international community as an independent state. All of the states that were formerly members of the Soviet Union held independence referenda without the consent of the Soviet Union, and the Soviet Union initially objected to their declarations of independence. They are all now recognized states.

All of the states that were formerly members of Yugoslavia held independence referenda without the consent of Yugoslavia, and Yugoslavia objected to their declarations of independence. They are all now recognized states. As another example, Serbia opposed Kosovo's unilateral declaration of independence, and yet Kosovo is now recognized by 111 UN member states, including 23 European Union member states.

### **Current European Union Members Were Recently Sub-State Entities, and They Often Recognize New States**

Since 1991, seven previous sub-state entities that expressed their will to become independent are now members of the European Union. They are: Croatia, the Czech Republic, Estonia, Latvia, Lithuania, the Slovak Republic, and Slovenia.

### **European Member States Frequently Recognize New States**

The European Union is heavily involved in recognizing sub-state entities who have expressed their political will to become independent. In fact, all European Union member states have recognized 26 of the 27 states that have become independent since 1991. They are: Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Croatia, the Czech Republic, East Timor, Estonia, Eritrea, Georgia, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Macedonia, Moldova, Montenegro, Russia, Serbia, the Slovak Republic, Slovenia, South Sudan, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan.

### **National States Regularly Recognize the Expressions of People's Political Will**

Many sub-state entities who assess their people's political will for independence are eventually recognized by their national state. For example, Serbia recognized Montenegro, Sudan was the first state to recognize South Sudan, Ethiopia recognized Eritrea, and Indonesia recognized East Timor.

### **Geographically Diverse Sub-State Entities Have Assessed Their People's Political Will**

Sub-state entities from around the world assess their people's will through independence referenda and other appropriate means. The practice is widespread and occurs in states in Africa, Asia, the Caribbean, Europe, and North America.

### **National States and Sub-State Entities Often Enter into Negotiations About Assessments of Political Will and the Outcomes of Those Assessments**

State practice also demonstrates that sub-state entities and national states regularly negotiate the contours of the assessment of the people's political will. This trend is discussed at the end of the state practice review.

### ***3.1.3. Review of State Practice Regarding Sub-State Entities Exercising Their Right to Decide since 1991***

**Armenia in 1991:** Without the consent of the Soviet Union, Armenia held an independence referendum on 21 September 1991. 99.5% of voters supported independence. This vote confirmed an earlier declaration of independence on 21 September 1990. The UN admitted



Armenia to membership on 2 March 1992. All of the member states of the European Union recognized Armenia, including Spain.

**Azerbaijan in 1991:** Without the consent of the Soviet Union, Azerbaijan held an independence referendum on 29 December 1991. 99.8% voted in favor of independence. This vote confirmed Azerbaijan's earlier declaration of independence on 30 August 1991. The UN admitted Azerbaijan to membership on 2 March 1992. All of the member states of the European Union recognized Azerbaijan, including Spain.

**Belarus in 1991:** Without the consent of the Soviet Union, Belarus declared independence on 27 July 1991. It became independent on 26 December 1991. All of the member states of the European Union recognized Belarus, including Spain.

**Croatia in 1991:** Without the consent of Yugoslavia, Croatia held an independence referendum on 19 May 1991. 93% of voters decided in favor of independence. Croatia declared independence on 15 June 1991. The declaration went into effect on 8 October 1991. The UN admitted Croatia to membership on 5 May 1992. All of the member states of the European Union recognized Croatia, including Spain.

**Estonia in 1991:** Without the consent of the Soviet Union, Estonia held an independence referendum on 3 March 1991. 78.4% of voters chose to become independent. The Estonian Supreme Council declared independence on the night of 20 August 1991. Estonia was admitted to UN membership on 17 September 1991. All of the member states of the European Union recognized Estonia, including Spain.

**Georgia in 1991:** Without the consent of the Soviet Union, Georgia held an independence referendum on 31 March 1991. It was approved by 99.5% of the votes. Georgia was admitted to UN membership on 31 July 1992. All of the member states of the European Union recognized Georgia, including Spain.

**Kazakhstan in 1991:** Without the consent of the Soviet Union, Kazakhstan declared its independence and became independent on 16 December 1991. It was admitted to UN membership on 2 March 1992. All of the member states of the European Union recognized Kazakhstan, including Spain.

**Kosovo in 1991:** Without the consent of Yugoslavia, Kosovo held its first independence referendum on 30 September 1991. This referendum confirmed the Provincial Assembly's declaration of independence on 22 September 1991. Kosovo remained a part of Yugoslavia.

**Kyrgyzstan in 1991:** Without the consent of the Soviet Union, Kyrgyzstan joined the Commonwealth of Independent States on 21 December 1991. It became independent on 25

December 1991 and was admitted to UN membership on 2 March 1992. All of the member states of the European Union recognized Kyrgyzstan, including Spain.

**Latvia in 1991:** Without the consent of the Soviet Union, Latvia held an independence referendum on 3 March 1991. 74.9% of voters chose independence. Latvia declared independence on 21 August 1991 and was admitted to UN membership on 17 September 1991. All of the member states of the European Union recognized Latvia, including Spain.

**Lithuania in 1991:** Without the consent of the Soviet Union, Lithuania held an independence referendum on 9 February 1991. 93.2% of voters voted for independence. This vote confirmed Lithuania's earlier declaration of independence on 11 March 1990. Lithuania was admitted to UN membership on 17 September 1991. All of the member states of the European Union recognized Lithuania, including Spain.

**Macedonia in 1991:** Without the consent of Yugoslavia, Macedonia held an independence referendum on 8 September 1991. 96.4% of votes were in favor of independence. Macedonia declared independence on 20 November 1991. It was admitted to UN membership on 8 April 1993. All of the member states of the European Union recognized Macedonia, including Spain.

**Nagorno-Karabakh in 1991:** Without the consent of the Republic of Azerbaijan, Nagorno-Karabakh held a referendum on 10 December 1991. 99.98% of voters voted for independence. This referendum was held to ratify Nagorno-Karabakh's earlier declaration of independence on 2 September 1991. Azerbaijan did not recognize the results of the referendum.

**Tajikistan in 1991:** Without the consent of the Soviet Union, Tajikistan declared independence on 9 September 1991. It became independent in 26 December 1991. Tajikistan was admitted to UN membership on 2 March 1992. All of the member states of the European Union recognized Ukraine, including Spain.

**Ukraine in 1991:** Without the consent of the Soviet Union, Ukraine held a referendum on 1 December 1991. 90.3% of voters chose independence. This vote ratified Ukraine's earlier declaration of independence of 24 August 1991. All of the member states of the European Union recognized Ukraine, including Spain.

**Transnistria in 1991:** Without the consent of either the Soviet Union or Moldova, Transnistria held an independence referendum on 1 December 1991. 97.7% voted for separation from Moldova. This vote confirmed an earlier declaration of independence issued on 2 September 1990. Transnistria remains a part of Moldova.

**Moldova in 1991:** Without the consent of the Soviet Union, Moldova declared its independence on 27 August 1991. Moldova became a member of the United Nations on 2 March 1992. All of the European Union members recognized Moldova, including Spain.

**Turkmenistan in 1991:** Without the consent of the Soviet Union, Turkmenistan held an independence referendum on 26 October 1991. 94.06% voted for independence. Turkmenistan became independent on 26 December 1991. Turkmenistan became a member of the United Nations on 2 March 1992. All of the member states of the European Union recognized Turkmenistan, including Spain.

**Uzbekistan in 1991:** Without the consent of the Soviet Union, Uzbekistan held an independence referendum on 29 December 1991. 98.3% voted in favor of independence. This vote confirmed an earlier declaration of independence issued on 26 December 1991. Uzbekistan became a member of the United Nations on 2 March 1992. All of the European Union members recognized Uzbekistan, including Spain.

**Bosnia and Herzegovina in 1992:** Without the consent of Yugoslavia, Bosnia and Herzegovina held an independence referendum between 29 February 1992 and 1 March 1992. 99.7% of voters voted for independence. Bosnia and Herzegovina declared independence on 1 March 1992. It became a member of the United Nations on 22 May 1992. All of the member states of the European Union recognized Bosnia and Herzegovina, including Spain.

**Montenegro in 1992:** Without the consent of Yugoslavia, Montenegro held its first independence referendum on 1 March 1992. 95.96% voted against independence. As a result, Montenegro remained a part of the Federal Republic of Yugoslavia. All of the member states of the European Union recognized Montenegro, including Spain.

**Eritrea in 1993:** With the consent of Ethiopia, Eritrea held an independence referendum in April of 1993. 99.83% voted in favor of becoming independent. On 24 May 1993 Eritrea formally declared its independence from Ethiopia. On 28 May 1993 Eritrea became a member of the United Nations. All of the European Union members recognized Eritrea, including Spain.

**Czech Republic in 1993:** With the consent of Czechoslovakia, the Czech Republic negotiated its independence with the Slovak Republic following the Slovak Republic's declaration of independence in July 1992. The Czech Republic became independent on 1 January 1993, with its constituent states becoming the independent states of the Czech Republic and the Slovak Republic. The Czech Republic became a member of the United Nations on 19 January

1993. All of the members of the European Union recognized the Czech Republic, including Spain.

**Slovak Republic in 1993:** With the consent of Czechoslovakia, the Slovak Republic declared independence on 17 July 1992. The Slovak Republic became independent on 1 January 1993, with its constituent states becoming the independent states of the Czech Republic and the Slovak Republic. The Slovak Republic became a member of the United Nations on 19 January 1993. All of the members of the European Union recognized the Slovak Republic, including Spain.

**United States Virgin Islands in 1993:** With the consent of the United States, the Virgin Islands held a status referendum on 11 October 1993. Voters were offered the options of integration into the United States, becoming a United States territory, or independence. 82% of voters voted in favor of territorial status but low voter turnout (31.4%) led to voiding the results. The U.S. Virgin Islands remain a U.S. territory.

**Puerto Rico in 1993:** With consent of the United States, Puerto Rico held a status referendum on November 14, 1993. 48.6% voted in favor of Puerto Rico becoming a commonwealth, 46.3% voted in favor of statehood, and 4.4% voted in favor of independence. Puerto Rico's political status remained unchanged because it did not receive the necessary majority.

**Curaçao in 1993:** With the consent of the Netherlands, Curaçao held its first status referendum on 19 November 1993. 73.56% voted for restructuring the Netherlands Antilles, while 17.93% voted for becoming a self-governing country within the Kingdom of the Netherlands. Only 0.49% voted for independence. Curaçao remained a part of the Netherlands Antilles.

**Sint Maarten in 1994:** With the consent of the Netherlands, Sint Maarten held a status referendum on 14 October 1994. 59.6% voted for restructuring but remaining part of the Netherlands Antilles, while 6.2% voted for independence. Sint Maarten remained part of the Netherlands Antilles.

**Saba in 1994:** With the consent of the Netherlands, Saba held a status referendum on 14 October 1994. 86.3% voted for retaining the status quo within the Netherlands Antilles while 0.5% voted for independence. Saba remains a part of the Netherlands Antilles.

**Sint Eustatius in 1994:** With the consent of the Netherlands, Sint Eustatius held a status referendum on 14 October 1994. 90.7% voted for retaining the status quo within the Netherlands Antilles, while 0.2% voted for independence. Sint Eustatius remains a part of the Netherlands Antilles.

**Bonaire in 1994:** With the consent of the Netherlands, Bonaire held a status referendum on 21 October 1994. Voters were asked to choose between the status quo, autonomy within the Netherlands, integration with the Netherlands, or independence. 89.65% voted for the status quo, while 8.86% voted for autonomy within the Netherlands, 1.27% voted for integration with the Netherlands, and 0.22% voted for independence. Bonaire's status remained unchanged.

**Bermuda in 1995:** With the consent of the United Kingdom, on 16 August 1995 Bermuda held an independence referendum. 74.12% of the people of Bermuda voted not to secede from the United Kingdom.

**Quebec in 1995:** Without the consent of Canada, Quebec held an independence referendum on 30 October 1995. 50.58% voted not to secede from Canada. Quebec remains part of Canada.

**Anjouan in 1997:** Without the consent of the Comoros, Anjouan held an independence referendum on 26 October 1997. 99.68% voted in favor of independence. The referendum vote came after a unilateral declaration of independence by Anjouan in August 1997. The results of the referendum were not recognized and the island continues to be under the control of the Comoros.

**Nevis in 1998:** With the consent of the Federation of Saint Kitts and Nevis via its Constitution, Nevis held an independence referendum on 10 August 1998, to determine whether it would secede from the Federation of Saint Kitts and Nevis. Although 61.83% voted in favor of independence, the referendum failed to achieve the necessary two-thirds majority necessary to secede.

**Puerto Rico in 1998:** With the consent of the United States, on 13 December 1998 Puerto Rico held a referendum on its political status relative to the United States. Voters were asked to decide whether Puerto Rico should have limited self-government, free association, statehood, sovereignty, or none of the above. 50.5% voted for "none of the above," 46.6% voted for Puerto Rico to become a state, 2.6% voted for independence from the United States, 0.3% voted for free association, none voted for Puerto Rico to become a territorial commonwealth. Accordingly, the political status of Puerto Rico has remained unchanged since the referendum.

**East Timor in 1999:** With the consent and at the request of the Government of Indonesia, a referendum was held on 30 August 1999 to determine whether East Timor would seek a special autonomous status within the unitary state of Indonesia. 78.50% of the people of East Timor voted against pursuing special status within Indonesia. East Timor declared

independence and became a member of the United Nations on 20 May 2002. All of the European Union member states recognized East Timor, including Spain.

**Sint Maarten in 2000:** With the consent of the Netherlands, Sint Maarten organized a referendum on 22 June 2000 to determine its political status. 69.98% voted in favor of becoming a constituent country of the Kingdom of the Netherlands. A year later, Sint Maarten officially became a constituent country of the Kingdom of the Netherlands.

**Corsica in 2003:** With the consent of France, on 6 July 2003 Corsica held a referendum on devolved institutions with greater autonomy from the central French government. 51% of the electorate voted “No” while 49% voted “Yes” in response. Corsica remains part of France.

**Bonaire in 2004:** With the consent of the Netherlands, Bonaire held a status referendum on 10 September 2004 to determine its relationship with the Netherlands. 59.45% voted for direct ties with the Netherlands, 24.11% voted for autonomy within the Kingdom of the Netherlands, 15.93% voted to maintain the status quo, 0.51% voted for independence. Bonaire is now a special municipality of the Netherlands.

**Saba in 2004:** With the consent of the Netherlands, Saba held a status referendum on 5 November 2004 to determine its relationship with the Netherlands. 86.04% voted for direct constitutional ties with the Netherlands, 13.17% voted to remain part of the Netherlands Antilles, 0.79% voted for independence. Saba is currently a special municipality of the Netherlands.

**Kurdistan in 2005:** Without the consent of Iraq, on 30 January 2005, a referendum was held in Kurdistan on independence from Iraq. 98.98% voted for independence, 1.02% voted against independence. Iraq did not recognize the results of the Kurdish referendum, and it remains part of Iraq.

**Curaçao in 2005:** With the consent of the Netherlands, Curaçao held a status referendum on 8 April 2005 to determine its relationship with the Netherlands. 67.82% voted to become an autonomous country within the Kingdom of the Netherlands, 25.73% voted to integrate into the Netherlands, 4.81% voted for independence, and 3.74% voted to remain part of the Netherlands Antilles. Curaçao is now a special municipality of the Netherlands.

**Sint Eustatius in 2005:** With the consent of the Netherlands, Sint Eustatius held another status vote to determine whether to remain in the Netherlands Antilles on 8 April 2005. While 76.58% voted in favor of remaining part of Netherlands Antilles, the other Netherlands Antilles members did not vote for this, and thus Sint Eustatius also forged direct constitutional ties with the Netherlands.

**Montenegro in 2006:** With the consent of Serbia and Montenegro via the Union Treaty, Montenegro held an independence referendum on 21 May 2006. 55.5% voted in favor of independence. Montenegro declared independence on 21 May 2006. It became a member of the United Nations on 28 June 2006. All of the member states of the European Union recognized Montenegro, including Spain.

**Tokelau in 2006:** With the consent of New Zealand via the Treaty of Free Association, Tokelau held two referendums in order to decide its political destiny. During the first referendum, on 11-15 February 2007, 60% of voters chose independence. This fell short of the two-thirds majority required for independence under the treaty, and so Tokelau remained part of New Zealand.

**Tokelau in 2007:** With the consent of New Zealand, Tokelau held a second referendum on 20-24 October 2007. In this referendum, 64% voted for independence. This again fell short of the two-thirds majority required for independence under the treaty, and so Tokelau remained part of New Zealand.

**Kosovo in 2008:** Without Serbia's consent, Kosovo declared independence on 17 February 2008. 111 UN member states, including 23 European Union member states, recognize Kosovo.

**South Sudan in 2011:** With the consent of Sudan via a peace agreement signed in 2005, South Sudan held an independence referendum in January 2011. 98.83% voted in favor of secession. On 9 July 2011, South Sudan officially declared its independence from Sudan. On 14 July 2011, South Sudan became a member of the United Nations. All of the member states of the European Union recognized South Sudan, including Spain.

**Puerto Rico in 2012:** With the consent of the United States, Puerto Rico held a referendum on 6 November 2012. 54% voted against continuing Puerto Rico's current territorial status, 61.16% voted in favor of becoming a state of the United States, 33.34% in favor of free association, and 5.49% in favor of independence. However, the U.S. Congress took no action and Puerto Rico neither became a state in the United States nor an independent state.

**Scotland in 2014:** With the consent of the United Kingdom via the Edinburgh Agreement, Scotland held an independence referendum on 18 September 2014. 55.3% of the electorate voted against independence, while 44.7% for independence. Scotland remains part of the United Kingdom.

**Sint Eustatius in 2014:** With the consent of the Netherlands via a Parliamentary vote, Sint Eustatius held a referendum on 17 December 2014. The people of Sint Eustatius voted in favor of autonomy, but not independence, with 65.53% of voters choosing autonomy but



only 0.44% choosing full independence. As voter turnout was below the 60% required by law for the results to be binding, Sint Eustatius' status remains unchanged.

**Puerto Rico in 2017:** With the consent of the United States, Puerto Rico held a referendum on 11 June 2017. 97.18% of voters voted in favor of becoming a state in the United States. However, the U.S. Congress took no action and Puerto Rico's status remains unchanged.

**Kurdistan in 2017:** Without the consent of Iraq, Iraqi Kurdistan will hold a referendum in order to decide the political destiny of Kurdistan on 25 September 2017.

**Faroe Islands in 2018:** With the consent of the government of Denmark, the Faroe Islands will hold an independence referendum on 25 April 2018.

**New Caledonia in 2018:** With the consent of France (via the Nouméa Accord), New Caledonia will hold an independence referendum sometime in November 2018.

**Bougainville in 2019:** With the consent of the government of Papua New Guinea (via the Bougainville Agreement), Bougainville will hold an independence referendum in 2019.

**Northern Ireland (no scheduled referendum):** With the prior consent of the United Kingdom via the Good Friday Accords, Northern Ireland is permitted to hold an independence referendum. To date, it has not done so.

### ***3.1.4. Intermediary Conclusion***

This chapter concludes that there is no international legal prohibition barring a sub-state entity from deciding its political destiny by assessing the will of its people. Both case law and state practice support this conclusion. State practice demonstrates that numerous geographically diverse sub-state entities have expressed the will of their people regarding independence. The practice occurs both with and without the consent of the national state. Many sub-state entities have achieved independence after assessing the political will of their people. EU member states have recognized many former sub-state entities that assessed their people's political will and decided to pursue independence. In almost all instances, the sub-state entity and national state negotiate the contours of the assessment of political will; we'll come back on that aspect in sub-section 4.2.3 below.



### 3.2. Catalans' Right to Decide on Their Political Future under European Law

The right to self-determination was initially successfully claimed and exerted by the resident of the North American Colonies who declared independence on 4<sup>th</sup> of July 1776. During the XVIII century, most colonies in the Americas exerted a right to self-determination and became independent States, for the benefit of dissident colonizers, and not the autochthonous people. The principle of self-determination would later be progressively transposed to international Law by the end of the First World War<sup>127</sup> and play an important role in the creation of new States in Eastern Europe. As President Wilson put it in his speech to Congress on 11 February 1918, "all well-defined national aspirations shall be accorded the utmost satisfaction that can be accorded them without introducing new or perpetuating old elements of discord and antagonism that would be likely in time to breaks the peace of Europe and consequently of the world."

After the Second World War, the UN Charter lays down as one of its most fundamental aim, "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples"<sup>128</sup>, therefore recognizing in positive international Law the equal rights and self-determination of all peoples<sup>129</sup>. This will later be transposed as a right to all peoples, grounded in Human's right Law<sup>130</sup>.

European Law in contrast, did not put any explicit emphasis on the right of peoples to self-determination. Neither the Council of Europe, nor EU specifically recognize the right to self-determination. OSCE in the mid-seventies (Helsinki principles of 1975) and early 1990 (Paris Charter of 21 November 1990 for a New Europe) does refer to the right of people to self-determination. However, neither the Helsinki principles nor the Paris Charter are considered as legally enforceable documents, and therefore do not constitute positive European Law. This absence of any explicit provision of European Law has led to many conjectures and divergent opinions among scholars<sup>131</sup> and authorities on the possibilities to ground in European Law the right to self-determination.

As we shall show in this section, European Law in no way forbids the exercise of the right to self-determination by European peoples. Quite on the contrary, European Law recognizes, and EU Treaties even encourage the right of self-determination of peoples, through their provisions and the long-lasting practice of member States and EU institutions. The present section shall first show that EU Law does not prevent the exercise of the democratic right to self-determination (1), and then show that EU law, both through Treaty provisions and long-lasting practice of EU institutions and member States supports the right for European people to self-determination (2).

### ***3.2.1. EU Law Does Not Prevent the Exercise of a Democratic Right to Self-determination***

EU, as all its member States, is “founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights” (art. 2 TEU). It means that any restriction of individual rights, and even more so for fundamental human rights, may not be exercised arbitrarily, but only on the ground of a clear legal basis. Therefore, any limitation to the right to self-determination which would be grounded in European (or national) Law should rely on the correct implementation of a legal rule to be found in the EU founding Treaties (TEU, TFEU or ECHR<sup>132</sup>). In the absence of any specific provision, no right may be claimed – for example by the Spanish national authorities, or the EU Commission – to limit the right to self-determination of European peoples within the EU.

#### ***3.2.1.1. The Absence of Specific Treaty Provision on the Right to Self-determination prevents action by EU institutions***

As already noticed, there is no specific provision in EU Law on the exercise of the right to self-determination by a European people within the EU (see below 2.3 as regard the practice of EU institutions and member States as regard the exercise of the right to self-determination). The EU being based on a principle of conferral (art 5 § 1 TEU), EU institutions may only act if a Treaty disposition or a general principle of EU Law does confer them the power to do so (art. 5 § 2 TEU). Article 4 TEU, which deals with the place of member States within EU stipulates that “in accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.”

Thus, EU institutions may not act to prevent a European Nation without a State to exert its legitimate right to self-determination since no EU-law provision would give them a legal basis on which to ground such intervention. This limitation also applies to the European Council and the Council of Ministers, in which the governments of member States are represented. These EU institutions may not be used by the Spanish government outside the existing EU competencies to try to prevent the legitimate exercise of the right to decide by the Catalan people<sup>133</sup>.

In that respect, note that contrary to an often heard argument according to which Spain would have a right to veto a Catalan State application for membership to the EU, the decision power of EU institutions (including the Council) will be constrained by “the conditions of eligibility agreed by the European Council”. There is therefore no discretionary

power within the institutions. It would only be at the phase of ratification of the agreement between Catalonia and member States of the EU, as delineated in paragraph 2 of article 49, that Spain could, like all other member States act “in accordance with their respective constitutional requirements”, meaning not subject to EU constraints. It is an interesting issue to debate whether this constitutional requirements are only procedural, or they may include elements of substance, which may bind Spain and limit its decision power.

Nevertheless, for the time being and paradoxically, Catalonia which is currently a “region” within the EU and may only participate as such to the EU (see 3.2.2. below for the shortcomings of such limited participation as regard Catalans’ EU citizenship rights). Catalonia would be in a position to fully participate to the EU only by first becoming a European State – which would be the result of a self-determination process which EU institutions may not interfere with – in order to apply for EU membership. Only then would the EU institutions, and member States, be competent, according to article 49 TEU and following an application for membership by the Catalan national authorities, to deal with the State of the Catalan nation.

#### ***3.2.1.2. No Disposition of the EU Treaty Allows the Spanish Government to Prevent the Exercise of Democratic Self-determination***

Some authors and decision-makers argued, notably on the basis of art. 4 § 2 TEU, that the EU Treaties and the EU institutions are bound to protect the existence and intangibility of current EU member States. They rely mainly on article 4 § 2 TEU, which States that “the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.” The reference to both member States “national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government” and “essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security” has led some authors to the conclusion that EU law protects existing “national identities” and “territorial integrity” of current member States.

This reading of art. 4 § 2 TEU is fundamentally wrong. As clearly stated by art. 5 TEU, the competencies of EU are bound by the principle of conferral, which means that “the Union shall act only within the limits of the competences conferred upon it by the Member States

in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.” (art. 5 § 2 TEU). Therefore, the EU founding treaties do not recognize additional competencies to member States. Art. 4 TEU does not confer any additional competence or legal protection to member States. The EU founding Treaties only confer competences to the EU and its institution. Art. 4 TEU explicitly specify that the issues of national identity and of territorial integrity of the State are fully outside of EU range of competence and remain “the sole responsibility of each Member State.” (art. 4 § 2 TEU *in fine*).

It thus remains a matter outside the scope of EU law as such. It doesn't however mean that EU member States are free to exert their own competencies as regard their national identity or territorial authority as they wish; they remain bound by their membership to the EU, and notably by the duty to respect “European values” as they are explicitly enunciated in article 2 TEU. As an example to be kept in mind, Austria was in 2000 subject to EU sanctions for non-respect of European values, as the leader of the Austrian conservative Party (Mr Wolfgang Schüssel) formed a national government – following national elections that were held in November 1999 and that were clearly meeting the democratic standards for European States – by a coalition agreement with a political Party (FPÖ of Mr Jorg Haider) whose discourse and positions regarding passed European history (Nazi legacy) were contrary to European values. At the time, nobody claimed that the right and political motivations to form a national government was falling within EU competences, or that Austria had violated any specific Treaty provision. No one either pretended that the November 1999 Parliamentary elections in Austria had violated democratic standards or any legal provision. It did not however prevent all the other EU member States to adopt sanctions against the Austrian government for the breach of European value, by a non-illegal behavior within its own sphere of competence<sup>134</sup>.

Thus, EU membership does not provide any additional “protection” to member States national identity or territorial integrity. And as we have shown above<sup>135</sup>, the protection of territorial integrity of the State only applies in relationship between States, and not to deter the right to decide on their future for a nation included in an existing State. Further, EU membership entails for EU member States the respect of European values as stated in article 2 TEU, even in the exercise of their own competences. EU law therefore provides a legal framework within which this situation has to be dealt with by national authorities.

### ***3.2.2. EU Law Implicitly Recognizes in its Founding Treaties the Right of European Peoples to Self-determination***

As stated in the introduction of this section, contrary to contemporary international law which made the equal right of all peoples to self-determination one of its founding principle, European Law, in contrast, did not put any explicit emphasis on the right of peoples to self-determination. It nevertheless doesn't mean that European Law doesn't have provisions which are relevant for the exercise of the right to decide on democratic national self-determination.

As we shall examine below, EU law makes some references to "peoples" and clearly recognize a right to self- or co-determination to those European people that have their own European State (see 3.2.2.1.). Further, EU law is not classical international law, which mainly deals with relationship between States and international organization, but constitutes "a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member States but also their nationals. Independently of the legislation of member States, community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage."<sup>136</sup> As stated by the Court, it is not only States and institutions which derive rights from the Treaties, but also other legal subject, such as individuals, but also local or regional governments, non-profit organizations or businesses.

Keeping that fundamental characteristic of EU law in mind, it is worth noting that the EU founding Treaties do make references to "peoples" in the EU context, which may confer rights to peoples as EU legal subjects and serve to support a claim for a right to self-determination for European peoples without a State (3.2.2.1.2.) Further, the right to self-determination is grounded in an individual human right exercised collectively (a political, social, cultural and economic right); the exercise of such right must respected by EU member States and protected by EU institutions (3.2.2.2.). Finally, the EU citizenship democratic rights conferred to all EU citizens by the Treaties may constitute a European legal base for the democratic exercise of the right to self-determination (3.2.2.3).

### ***3.2.2.1. The Right to Decide as a European People under EU Law***

#### ***3.2.2.1.1. The Right to Decide as the Nation of a European State***

The treaties do recognize the right to self-determination to the European peoples who are constituted as European States. Articles 50 TEU (withdrawal from the EU), 49 TEU (adhesion to the EU) and 48 TEU (Treaty modification) clearly allow for these people to freely decide on their own political destiny, “in accordance with their respective constitutional requirements”<sup>137</sup>.

However, the constitutional requirements referred to in each of these provisions are constrained both by respect of international Law (see below 3.2.3. for the *erga omnes* value of the principle of self-determination of peoples as recognized by the ECJ) and the duty to respect European values as enshrined in article 2 TEU. Also, except for article 50 which genuinely allows for self-determination for a withdrawal of the Union – it is a unilateral decision, despite the fact that it does not have immediate full legal consequences, but only produces effect two years after the formal announcement to the European Council (art. 50 § 3 TEU) – right of the peoples of member States according to their constitutional requirements are actually subordinated to the equivalent positive choice of other European peoples. Thus, European States that decide to join the EU exert their right to self-determination under international law, with the effect of replacing it by , a right to co-determination. However, even this fundamental choice to exert self-determination by applying for EU membership will be an act of co-determination, since every EU member State has to agree to the choice of the applicant State for its membership to become effective.

The paradox as regard the Catalan situation is thus that Catalonians would undoubtedly like to participate to the EU process as a people which accepts co-determination; however, in order to be allowed to do so, they first have to claim a right to self-determination, in order to become a European State which may then renounce its full Statehood to join the EU in a co-determination process, according to article 49 TEU.

The paradoxical situation then concerns all European actors, because as we’ve seen above, the incompetence of EU institutions to deal with the process of exercising the right to decide does not mean that the EU institution will not recognize the result of the exercise of such right. Quite on the contrary, art. 49 clearly states that “any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified

of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account.” Thus, as soon as Catalonia can proclaim with success itself as a European State, it will be in a position to apply for EU membership and there is then a legal basis for EU institutions and member States’ involvement.

Within the framework of the EU, States (through their authorities) act on behalf of “their peoples” as is mentioned five times in the two Treaties<sup>138</sup>. It is as regards such references interesting to note two elements. First, all the five occurrences refer to the peoples [plural] of each member State, and not the people [singular], which may either mean that it is recognized that a member State is not necessarily constituted by one single “national people” – that would most likely be the case in Belgium, Spain or the UK – or that even though each State only has one people, when member States act together within the framework of the Treaties, their action concerns not only their own national people, but each and all national peoples. Unfortunately, these repeated references appearing only in the preamble of the Treaties, their formulation and consequences have not been commented in the legal literature. The question – albeit interesting in our case – must thus remain open.

### ***3.2.2.1.2. The Right to Decide as a European people without a State***

The Treaties do not only contain references to peoples of member States represented by the Head of the respective States (whose names appear at the beginning of the preamble); there are also other references to “peoples”, such as “peoples of Europe”<sup>139</sup>, the “European peoples”<sup>140</sup>, the “peoples of the EU”<sup>141</sup>, or, in EU relations to the wider world, in the broadest meaning of the term whereas EU undertakes to promote “mutual respect among peoples”<sup>142</sup>. However, the most interesting reference for our investigation to a specific category of peoples in EU law is to be found in the preamble of the TFEU, where one can read that the States united within the EU are “calling upon the other peoples of Europe who share their ideal to join in their efforts.” This wording dates from the 1957 Rome Treaty establishing the EEC and has not been changed since. As for other occurrences of the word “peoples” in the Treaty, the legal doctrine did not comment on this paragraph of the preamble. One may easily imagine that at that time, it may have referred either to peoples in the Western European States that were not yet in the Communities – UK, Scandinavian countries, ..., peoples from Southern Europe that were still under military rulers (Portugal

and Spain) - or peoples from Eastern Europe. Today, most of these peoples have joined, the EU, and the paragraph remains.

Whose peoples is it nowadays aiming at? The Icelanders, the Norwegians and the Swiss? Or could it be European peoples that do not have their own State, thus are unable to join the EU process – since art. 49 TEU clearly limits the capacity to postulate for membership to “European States” – which are being encouraged to create their own national State, in order to be able to join the peoples of EU in their efforts to unite? It would most likely be far-fetched to defend such interpretation, despite the fact that EU practice as regard peoples deprived of their own State outside the EU has been, if not encouragement to secede, at least quick reward for their secession through membership (think about Croatia, Estonia, Latvia, Lithuania, Slovenia). Following such practice, it would not be surprising that Scots could be supported in their bid to join the EU, were they to become a European State as referred to in art. 49 TEU after Brexit is completed. Which then raises an interesting question: if a nation without a State outside of EU could be called to join the efforts of unification – and Scots would certainly qualify as such an European people after Brexit – as Lithuanian did under USSR or Slovenia under Yugoslavia – would the fact that the Catalans (or others) are a European people within a member State (which always refer to their peoples in plural) disqualify them as being one of the “other European peoples”<sup>143</sup>?

Such an interpretation would create reverse discrimination for European peoples without a State within the EU, as compared to European peoples without a State outside the EU (see below 3.2.4. for the clear support, EU member States have through their practice given to the realization of the right to decide of European people without a State outside the EU). Even though the ECJ has admitted in some cases that reverse discrimination between EU citizens may be a consequence of the EU law – when a national receives a less favorable treatment in his/her own Country than a EU citizen from another nationality in that same Country – the issue as always concerned in the case-law of the ECJ, so far, the exercise of individual rights.

Nevertheless, even inside EU member States, there may be other European peoples, which cannot join the efforts of European unification as such (as a people of its own), except by becoming a European State, that is seceding from the existing European State in which this “other European people” is encompassed. That is probably the meaning the former European Commission’s President Jacques Delors had in mind when he famously declared that the EU had to become a “Federation of Nation-States”<sup>144</sup>, implying that the genuine and full participation to the EU project for citizens of European peoples without a State entails



the right for these peoples to constitute themselves as European Nation-States in order to fully participate to the EU as member States, under the terms of art. 49 TEU<sup>145</sup>.

As we see, EU is not indifferent to the rights of European peoples, even though no clear provision of positive law – and even less procedural considerations for the materialization of such peoples' right – is present in EU Law. Further, and as in international Law, a precise definition of peoples who could claim the right to self-determination will not be found in European Law, making it difficult to effectively implement such right. However, Catalans authorities rely in their exercise of the right to self-determination on a civic conception of national self-determination, which is not limited to members of a pre-existing ethnic or cultural group<sup>146</sup>, but is grounded in the democratic rights of citizens to freely decide their own political and socio-economic future. In such perspective, the Constitution as a European people is consubstantial to the exercise of the right to decide.

### ***3.2.2.2. The Right to Decide as a Collectively Exercised Individual Human Right***

EU law, until very recently, did not incorporate provisions for the protection of Human rights. In a form of "division of labor", the protection of Human rights was left to the Council of Europe<sup>147</sup>. Within the framework of this organization was adopted in November 1950 in Rome, the *European Convention for the Protection of Human Rights and Fundamental Freedom*, which not only guarantees a series of Human Rights, but also institutes a European Court of Human Rights, based in Strasbourg.

In the late 1960s and early 70s, the European Court of Justice (of the EU, based in Luxembourg), recognized that EU legal order included Human Rights, as general principles enshrined in European Community Law<sup>148</sup>, or as "constitutional traditions common to the Member States"<sup>149</sup>. It is however only in 1992, with the Maastricht Treaty, that a requirement for Member States of the EU to respect fundamental Human Rights, the Rule of Law, etc. (more or less the values nowadays listed in current art 2 TEU) was explicitly included in EU law (Treaty of Maastricht, art. F). And only in 2000 was adopted the *Charter of Fundamental Rights of the European Union*, which is since the entry into force of the Lisbon Treaty (1<sup>st</sup> December 2009) "recognized by the European Union [...] and shall have the same legal value as the Treaties"<sup>150</sup>.

The right to decide about the political future of a European nation, as already stated in the introduction of this section, is not expressly granted as a human right in European law. Contrary to the 1966 UN Covenants on Economic, Social and Cultural Rights on the one hand, and Civil and Political Rights on the other, which have a Common article one

guaranteeing the right of all peoples to self-determination (see 3.2.3 below), European Human Rights law remain silent on this issue.

However, political rights of Europeans are recognized and protected. Among other, the exercise of the Freedom of expression (art. 10 ECHR) and Freedom of assembly and association (art. 11 ECHR) gave rise to an interesting case-law. Both these freedoms may be limited by State authorities; however, as regard the freedom of assembly and association, “no restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.”<sup>151</sup>

In a 2001 Decision revising the legality of the interdiction of a political party in Bulgaria, that was openly calling in its program for the secession of part of Bulgaria to join Macedonia, the European Court of Human Rights stated that « the fact that a group of persons calls for autonomy or even requests secession of part of the country’s territory – thus demanding fundamental constitutional and territorial changes – cannot automatically justify a prohibition”<sup>152</sup>. This ECtHR ruling means that such call for secession is not as such contrary to national security and may not be invoked, in a democratic society, to prevent the expression of such will, nor the assembly of peoples to exercise such right. Thus art. 10 (freedom of expression), and 11 (freedom of association) of the ECHR protect the right to decide, based on collectively exercised individual freedoms, as enshrined in the ECHR.

### ***3.2.2.3. The Right to Decide as a Right of EU Citizens Members of a European People without a State***

European citizenship is acquired (derived) through the nationality of a Member State, but is distinct from it<sup>153</sup>. It implies specific new political rights, such as the right to participate to the electoral processes at local level in the member States in which you reside notwithstanding your nationality, the right to participate to the EP elections in the Country where you live, the right to initiate and sign European Citizens’ Initiatives, and more general right to participate to the democratic life within the EU (Title II of the Treaty on the European Union).

Based on this European citizenship as a political right, a strong trend in EU studies’ literature defends the idea that EU constitutes a *demoicracy*, meaning that several *demoi* (peoples in greek) co-exist within a single EU polity<sup>154</sup>. All these theories are built on the idea that these European peoples are the people of each nation-State; there is however no theoretical

argument to consider that among the *demos* of an EU *democracy*, Basques, Catalans, Flemings or Scots, as European peoples, are to be excluded.

Actually, art. 1 of the Treaty on the European Union, as it reads after Lisbon's modification, recognizes the right to "peoples of Europe" to participate to the process "creating an ever closer Union between the peoples of Europe" (art. 1 al. 2 TEU). In this First article of the Treaty on the EU, a very fundamental one as a systematic analysis of the Treaty evidences, "peoples of Europe" are clearly considered in a distinct way from European States, who are referred to in the 1<sup>st</sup> paragraph of this article 1, as the High contracting Parties. Paragraph 2 of article 1 TEU, deals with the "peoples of Europe" and European citizens, whereas paragraph 3 deals with the legal foundation of the EU. This article 1 is thus clearly referring to fundamental rights of legal subjects within the EU, and peoples and citizens are treated separately from member States and EU as such, and have specific rights. As already quoted above, in its Van Gend & Loos ruling of 1963, the ECJ declared that "the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage." Even more interesting for our present analysis, the Court pursued by stating: "These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community."<sup>155</sup> This is presently the case.

In article 1 § 2 TEU are recognized the rights for the citizens, to have decisions "taken as openly as possible and as closely as possible" and for European peoples, to be part of the "process creating an ever closer Union between the peoples of Europe". So the right of European peoples within the EU are systematically linked to citizen's right. In that respect, one has to acknowledge that the participation to the European *democracy* are not satisfactorily materialized for EU citizens of Catalan nationality, since these EU citizens would only be directly represented in the EP (art. 10 § 2 TEU), but not, as expressly required by the TEU, indirectly through their national government within the Council and European Council (art. 10 § 2 al 2 TEU).

The existing political conflict between the Catalan government and the Madrid government allows to substantiate the claim that Catalan EU citizens are not represented in the Council of the EU by Madrid government as being their "national government". Such situation does violate their right, as EU citizens, to fully "to participate in the democratic life of the Union"

(art. 12 § 3 TEU), as well as their right to equal treatment by EU institutions as EU citizens (art. 9 TEU). This means that the current institutional arrangement of the EU, in which these EU citizens member of European peoples without a State do not enjoy full participation to the democratic life of the Union (art. 12 § 3 TEU), is in violation of the value of democracy, on which the EU is founded (art. 2 TEU), and by which it is bound.

This legal analysis however demonstrates that the democratic right does not belong to any European people as such – as the logic of self-determination of peoples as commonly understood in international Law implies. Under the European legal framework, each people will be self-determined and self-constituted; it thus cannot be defined from the outside (which is quite coherent with the concept of self-determination), neither on ethnic, linguistic, historic or other “objective” factor. However, being grounded as a citizens’ right to participate in the democratic life of the Union, which would be violated by the denial of the expression of self-determination within the EU of the European people to which s/he belongs – especially as regard representation in the Council of Minister of the EU (according to art. 10 § 2 TEU, this is an individual political right derived from EU citizenship). There will thus be a remedial dimension to the recognition of the right to national self-determination within the EU for all European peoples, based on European values and citizens’ rights (non-discrimination, democracy), for these other European peoples that do not already have their own national-State. Leaving it to each European people to constitute itself as a European State before formally acknowledging such claim (whose legitimacy is, as we have shown already guaranteed by the Treaties), or considering a specific procedure to deal with the situation of European peoples within EU which do not yet have their own European State may be an issue to be envisaged in a future Treaty revision.

### ***3.2.3. EU Recognizes the Right to Self-determination of Peoples as a Fundamental Rule of International Law***

If the Founding Treaties of the EU do not expressly recognize a right to self-determination of the Catalan people, it has to be underlined that in a decision of 21 December 2016, the European Court of Justice has recognized that “the customary principle of self-determination referred to in particular in Article 1 of the Charter of the United Nations is, as the International Court of Justice stated in paragraphs 54 to 56 of its Advisory Opinion on Western Sahara, a principle of international law applicable to all non-self-governing territories and to all peoples who have not yet achieved independence. It is, moreover, a legally enforceable right *erga omnes* and one of the essential principles of international law.”<sup>156</sup>

As a constant case-law of the ECJ shows, general international law is part of EU law and, as such, is binding on EU institutions<sup>157</sup> and Member States, especially if they constitute fundamental human rights<sup>158</sup>.

The reference of the ECJ December 2016 decision to the right of self-determination as a fundamental principle of international law and an *erga omnes* right was set within the framework of decolonization on the matter underlying that specific case (Western Sahara); however, the ECJ refers to the right to self-determination as enshrined in article 1 of the UN Charter, which does not at all limit this right to peoples under colonial domination, but recognizes it to all peoples. The International Court of Justice 2010 in its *Advisory Opinion about the Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (*Kosovo Advisory Opinion*) also clearly examined the scope of the right to self-determination under international Law, and underlined that:

“during the eighteenth, nineteenth and early twentieth centuries, there were numerous instances of declarations of independence, often strenuously opposed by the State from which independence was being declared. Sometimes a declaration resulted in the creation of a new State, at others it did not. In no case, however, does the practice of States as a whole suggest that the act of promulgating the declaration was regarded as contrary to international law. On the contrary, State practice during this period points clearly to the conclusion that international law contained no prohibition of declarations of independence. During the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation (cf. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, I.C.J. Reports 1971, pp. 31-32, paras. 52-53; *East Timor (Portugal v. Australia)*, *Judgment*, I.C.J. Reports 1995, p. 102, para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion*, I.C.J. Reports 2004 (I), pp. 171-172, para. 88). A great many new States have come into existence as a result of the exercise of this right. There were, however, also instances of declarations of independence outside this context. The practice of States in these latter cases does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases.”<sup>159</sup>

Even though the International Court of Justice did not expressly pronounce itself on the scope and legal consequences of the right to self-determination<sup>160</sup>, it underlines that the development of this right within the political background of decolonization did not negatively affect the more general right to self-determination as recognized by general international Law. The European Court of Justice did not ignore the ICJ 2010 advisory opinion and the ongoing debate on its relevance for a number of European situations such as Catalonia (and to mention a few, Euzkadi, Flanders or Scotland may also be concerned by such right). Further, European practice – especially the work of the so-called “Badinter Commission”, set-up by a EEC Council decision of 27 August 1991<sup>161</sup> - has been keen to envisage the extension of the right to self-determination beyond the scope of colonial situations, and to the European territory, even though at that time outside of the EU<sup>162</sup>. It must in this context be underlined that two of the “secessionist Republics” of the Socialist Federal Republic of Yugoslavia have since then been admitted as EU member States (Slovenia in 2004 and Croatia in 2013), showing that not only is the EU not considering such exercise of the right to decide by European peoples without a State as illegal, but clearly recognizes the outcome of the process and welcome these European peoples and their newly created State’s will to join the “ the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen”<sup>163</sup>.

#### ***3.2.4. The Constant Practice of EU Institutions and Member States Shows Support for the Exercise of the Right to Self-determination***

In international Law, as in EU law, States and international organizations may be bound by legal norms which emerge out of their practice (customary law). One shall thus ask two questions in that respect: First, whether the threshold for creating an EU or an international Law customary norm has been reached by the past practice of EU member States. And if the answer to this first question is potentially positive, then one should check whether the situation of European nations without a State within the EU is similar enough to these precedents for which a customary rule has emerged.

Identifying the emergence of a customary norm, international law requires two elements: a practice and an *opinio iuris*. The practice seems to be existent and consistent as we shall see below. Relevant *opinio iuris* linked to this practice is both the one of the EU institutions, who according to article 49 TEU decide on the acceptance of the candidacy for membership, and the one of EU member States, since each State ratify the new member State accession treaty according to its “respective constitutional requirements”. As regard EU member States

practice, it is not only the government that may express the State's *opinion iuris*, but all the State organs and components, according to the national constitutional requirements. Examination of the arguments put forward during the national debates on accepting new member States did not reveal any significant position against national self-determination as exerted by these European peoples or nations.

The result of such investigation may thus amount to identify a common constitutional tradition of Member States. The ECJ has been known to complete EU Law by incorporating legal rights as the “result from the constitutional traditions common to the Member States”<sup>164</sup>, especially in the field of Human Rights. So if the constitutional practice from member States as regard recognition of the results of national self-determination processes within the EU context is sufficient to constitute a constitutional practice common to the member States, the ECJ may consider that this common practice gives birth to an EU right, as a general principle of EU Law.

Also EU member States have shown their recognition of the principle of self-determination as a compulsory legal principle by ratifying the 1966 UN Covenants on Human Rights, both of which recognize in their common article 1 the right to the self-determination of people without reservation on this clause, which in the framework of these Covenants is clearly not limited to peoples under colonial domination.

From all these elements, it appears that EU member States recognize a right to national self-determination to other entities and population groups than the sole recognition of self-determination to member States as is expressed by the EU Treaty.

#### ***3.2.4.1. The Constant Practice of Supporting Accession to the EU for New European States Having Emerged through the Exercise of Self-determination***

Even if no formal right to democratic self-determination could be identified in EU law, the practice of recognizing results of referenda of self-determination has been continuous and consistent, both for peoples outside the EU, that have been allowed to join shortly after their democratic self-determination process allowed them to become State under international law, or for peoples living within the EU. The adhesion to the EU in 2004 of Estonia, Latvia, Lithuania, and Slovenia<sup>165</sup> – none of which was a European State before 1990, but all emerged as such following referendums of self-determination organized in the years previous to their adhesion of the EU<sup>166</sup> – are all examples of self-determination practices of European peoples or nations, unanimously accepted by EU member States. Even though the independence referenda were held in the early 1990s, the relevant practice from EU



institutions and Member States dates from the early 2000 as regard the four mentioned States, and was expressly repeated in 2013, when Croatia was allowed to join the EU<sup>167</sup>, showing a clear continuity in the EU practice.

Also part of the practice of EU member States and certainly helpful in the identification of an *opinio iuris* among member States on self-determination practices, one may look at the 16 December 1991 Declaration adopted by EU member States on “guidelines on the recognition of new States in Eastern Europe and in the Soviet union”. This declaration shows that EU member States do have the opinion that some criteria must be met to be recognized as a new European State (since then, Slovenia, Croatia and the three Baltic States have become members of the EU), and do not oppose democratic self-determination as such.

There is therefore a long lasting and consistent practice of EU member States on the recognition of self-determination processes, notably outside any decolonization context and within Europe, that binds EU and its member States, which shall thus be called to act consistently with their past practice. One may argue that the situation of a national self-determination process on the territory of an EU member State is different from those on which the examined practice is based. We shall show below that self-determination referenda within the EU (or EEC) have already taken place, and neither their legality, nor their result have been challenged as illegal.

#### ***3.2.4.2. The Right to Decide Recognized through the practice of Self-Determination Referendums Held on the Territory of Member States***

A consistent practice of European States also shows the acceptance of self-determination referendum for infra-State territorial units within the EU territory (Saarland, 1955 and Greenland, 1982, Scotland 2014), and the acceptance of the outcome of such self-determination referenda performed by infra-State entities.

First, the 1955, 1982 and 2014 referenda held on the territory of EU member State did not give rise to any legal dispute as regard their conformity to EU Law. The 1955 Saarland referendum, which was clearly linked to the European integration process<sup>168</sup>, even though without a legal base within the EEC Treaty, recognized the right to Saarlander to determine their own political status, within the EU. The fact that Saarlanders chose to join Germany has no influence on the fact that they effectively did exert a right to national self-determination<sup>169</sup>. In 1982, Greenlanders were also recognized the right to self-determination as regard their belonging to the EEC, and the result of their referendum was recognized by



the EEC member States, through a subsequent modification of the EEC Treaty, recognizing the choice of Greenland to withdraw from the EEC full regime<sup>170</sup>.

Identically, the 2014 self-determination referendum of Scotland did not raise concerns about its legality under EU-law. This referendum was based on a political agreement between the UK and Scottish governments, formally embedded in legal acts of the legislative institutions both at the UK and the Scottish levels. It was thus indisputably legal from the domestic point of view<sup>171</sup>. However, if many discussion arose about the future status of Scotland as regard EU after the referendum, no commentator, nor the European Commission as “guardian of the Treaties”, raised the issue of the legality of the exercise of the right to decide under EU law. There is therefore no possible doubt that such practice of self-determination referenda within EU is not forbidden by EU Law.

Now the question whether a European people without a State may organize such democratic self-determination process without the consent of the State on which territory it lives on is slightly different. As the Chapter about international Law shows, about half of self-determination referenda organized in the past 20 years, (24 out of 53) have been held without the consent of the parent State. Further, the present report shows that Catalan elected authorities, with a clear mandate for realizing Catalans’ right to self-determination, have attempted at numerous occasions to negotiate with Spanish national government on the way to organize a democratic process to determine the political future of Catalans. Madrid persistent refusal to discuss such matter and its attempts to criminalize Catalan elected representatives for pursuing such a legitimate end makes it legitimate for Catalans elected Authorities to proceed, unilaterally under the Aegis of European law, to the democratic consultation on the political future of Catalonia.

### ***3.2.5. Intermediary Conclusion***

In the absence of specific Treaty provision on the right of Self-determination for a European people without a State on the territory of the EU, EU law, which is based on the principle of conferral, does not forbid the exercise of its Right to Decide for a European people within the EU. There are even numerous Treaty provisions that indicate that if such Right was to be exercised, EU and its member States would react positively to a new European State candidacy to join the EU. Further, recent and consistent practice clearly points that way. Finally, both as a collectively exercised human right and as a fundamental norm of international Law, EU recognizes the Right to decide.

### **3.3. The Right to Decide under Spanish Law: The Illegitimacy of a Rigid Interpretation of the Spanish Constitution**

Constitutionalism is frequently understood as a means to proclaim and protect fundamental political values by enshrining them in a specific document. By resisting change and prevailing over conflicting norms, constitutions appear to be “the supreme law of the land”.<sup>172</sup> Nevertheless, constitutions cannot be set in stone. Being faithful to the very project of constitutionalism imposes to underline the intrinsically unsettled nature of constitutional norms, which allows for the continuance of a fair deliberation on the community’s self-understanding as a political actor. The Catalan right to decide offers a case in point to test both the sincerity and the viability of Spanish constitutionalism.

#### ***3.3.1. The role of Constitutions as Fundamental Norms***

##### ***3.3.1.1. The Entrenchment of Constitutional Norms***

Constitutionalism has a long history. Today’s constitutionalism relies on a conceptual template which originates in the American and French Eighteenth-Century Revolutions. According to this paradigm,<sup>173</sup> which finds some of its most remarkable expressions in the writings of Thomas Paine and Emmanuel-Joseph Sieyès, a constitution must display several specific properties. According to Paine, for example,

“A constitution is not a thing in name only, but in fact. It has not an ideal, but a real existence; and wherever it cannot be produced in a visible form, there is none. A constitution is a thing antecedent to a government, and a government is only the creature of a constitution. The constitution of a country is not the act of its government, but of the people constituting its government. It is the body of elements, to which you can refer, and quote article by article; and which contains the principles on which the government shall be established, the manner in which it shall be organised, the powers it shall have, the mode of elections, the duration of Parliaments, or by what other name such bodies may be called; the powers which the executive part of the government shall have; and in fine, everything that relates to the complete organisation of a civil government, and the principles on which it shall act, and by which it shall be bound. A constitution, therefore, is to a government what the laws made afterwards by that government are to a court of judicature.”<sup>174</sup>

From a formal point of view, the constitution closes the legal order. It defines the characteristics that must be present in any other element for it to belong to the said system. The constitution is a supreme legal norm, both in an active way – since it has the capacity to derogate any other norm – and in a passive way – since it has the capacity to resist any other norms’ derogating it. As the Spanish Constitutional Tribunal put it:

*“El ‘imperio de la Constitución como norma suprema’ [...], declarado expresamente por su artículo 9.1, trae causa de que la Constitución misma es fruto de la determinación de la nación soberana por medio de un sujeto unitario, el pueblo español, en el que reside aquella soberanía y del que emanan, por ello, los poderes de un Estado.”<sup>175</sup>*

From a substantive point of view, a constitution is considered as the document in which the most crucial defining features, values, normative commitments, collective aspirations, and principles the society wants to protect must be entrenched. As Article 16 of the French Declaration of the Rights of Man and the citizen canonically put it: “Any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution.”

The Spanish constitution of 1978 offers a telling example of this dynamics. As it was drafted in the context of a political transition from authoritarianism to democracy, it was explicitly embedded in a constitutional project based on new fundamental values. It thus fulfils in a remarkable way the aspirational and expressive functions of constitutions.<sup>176</sup> The perspective of the constitutional preamble is evidence of this ambition to break away from the past, as it reads:

“The Spanish Nation, desiring to establish justice, liberty, and security, and to promote the wellbeing of all its members, in the exercise of its sovereignty, proclaims its will to:

Guarantee democratic coexistence within the Constitution and the laws, in accordance with a fair economic and social order.

Consolidate a State of Law which ensures the rule of law as the expression of the popular will.

Protect all Spaniards and peoples of Spain in the exercise of human rights, of their culture and traditions, languages and institutions.

Promote the progress of culture and of the economy to ensure a dignified quality of life for all.

Establish an advanced democratic society, and  
Cooperate in the strengthening of peaceful relations and effective cooperation  
among all the peoples of the earth.”

The Constitutional Tribunal confirmed that:

*“Por lo que respecta a su contenido, la Constitución se fundamenta en el respeto de los valores de la dignidad humana, la libertad, la igualdad, la justicia, el pluralismo político, la democracia, el Estado de Derecho y los derechos fundamentales. El principio democrático, como principio constitucional, debe interpretarse, en consecuencia, a la luz del conjunto del ordenamiento constitucional y de sus procesos (normas electorales, reglas de procedimiento, derechos fundamentales, protección de las minorías o reforma constitucional, por citar algunas manifestaciones significativas). A los efectos del presente proceso conviene considerar en particular la conexión del principio democrático con dos rasgos preeminentes de nuestro Estado constitucional: el pluralismo político y el pluralismo territorial.”<sup>177</sup>*

Accordingly, it defines a framework for the organisation of public authorities and the pursuit of these goals. Based on the fundamental premise according to which “Spain is hereby established as a social and democratic State, subject to the rule of law, which advocates freedom, justice, equality and political pluralism as highest values of its legal system,” the Constitution establishes a horizontal separation of powers that is characteristic of a rationalised form of parliamentarianism. It also creates an original system of vertical separation of powers, known as “the state of the autonomies”, which grants autonomous communities, i.e. “provinces with common historic, cultural and economic characteristics, insular territories and provinces with a historic regional status”, the legal means to manage their own specific interests and develop their own political projects. Regarding the protection of rights, the Spanish Constitution offers one of the most innovative and generous catalogue of fundamental rights and duties, consisting for example of equality, right to life, freedom of religion, right to privacy, freedom of expression, freedom of press, academic freedom, freedom of assembly, right to a fair trial, etc. Finally, it establishes a roadmap for the authorities it creates. Pursuant to these provisions, the public authorities shall for example promote favourable conditions for social and economic progress and for a more equitable distribution of regional and personal income, ensure labour safety and hygiene, maintain a public Social Security system for all citizens, watch over access to culture, watch over a rational use of all natural resources, guarantee the preservation and

promote the enrichment of the historical, cultural and artistic heritage of the peoples of Spain, etc.

Constitutions thus appear as the value-laden foundations of political units. This is why they deserve specific protections.

### ***3.3.1.2. The Enforcement of Constitutional Supremacy***

As any other legal norm, such as a traffic regulation, a constitution cannot automatically be respected or be effective. Only can a specific instrument of enforcement ensure the observance of legal norms. The supremacy of the constitution typically entails two specific devices, both of which are defining features of contemporary constitutionalism and can be found almost everywhere around the world.

#### ***3.3.1.2.1. Constitutional Rigidity***

The first is constitutional rigidity, i.e. the establishment of a (at least) two-tiered procedure of legislation, one being easier (with respect to whatever criterion) than the other. The easy way of producing norms is that of “ordinary legislation”, which is typically produced by the parliament. The difficult manner to produce norms is that of “constitutional legislation” or constitutional amendment. Today, only 4% of the world’s constitutions lack a provision for a formal amending process.<sup>178</sup> The rationale for making it different from, and harder than, ordinary legislation is to preserve the will of the sovereign constituent power. As a comparative study reveals, several techniques allow for the relative rigidity of constitutions.<sup>179</sup>

##### ***3.3.1.2.1.1. The Procedural Aspects of Constitutional Amendment***

From a procedural viewpoint, it is not exceptional for constitutional amendment first to require or permit the intervention of specific legal actors, which are not involved in the adoption of ordinary legislation. For example, among other devices, in federal structures, the states, provinces, cantons, etc. are frequently asked to consent to constitutional amendments. In the United States, for example, Article V of the Constitution provides that:

“The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, *on the Application of the Legislatures of two thirds of the several States*, shall call a Convention for

proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when *ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof*, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”

Similarly in Mexico (art. 135 C), Australia (art. 126 C), or Switzerland (art. 195 C), the subnational entities are involved in the adoption of a constitutional amendment.

Alternatively, it is sometimes asked that two successive parliaments – as distinguished from two houses of the same parliament – concur in approving a constitutional amendment. One initiates the procedure, whereas the other adopts it after a general election has taken place. Without implying a referendum, this device allows the people to make their position known through the majority they send to the new assembly. It also prevents an assembly from trying to amend the constitution to its own benefit, as its members are not sure to be automatically re-elected in order to adopt the said revision. Lastly, the need for successive election of new assemblies necessarily implies some delay, which should favour a calm reflection on the proposed amendment. Such is for example the device that is established in Estonia (art. 163(2) and 165 C), Norway (art. 112(1) C), Sweden (art. 15(1) C), Belgium (art. 195 C), and Spain concerning total constitutional revisions or revisions affecting specific topics. According to article 168 C:

“(1) When a total revision of the Constitution is proposed, or a partial revision thereof, affecting the Preliminary Title, Chapter II, Section 1 of Title I, or Title II, the principle shall be approved by a two-thirds majority of the members of each Chamber, and the Parliament shall immediately be dissolved.

“(2) The Chambers elected must ratify the decision and proceed to examine the new Constitutional text, which must be approved by a two-thirds majority of the members of both Chambers.

“(3) Once the amendment has been passed by the Parliament, it shall be submitted to ratification by referendum.”

A specific assembly sometimes has to be established to draft or to adopt the constitutional amendment. Under the French Constitution of 1791, three successive legislatures had to

propose a constitutional amendment. It could only be adopted by a fourth one, to which 249 extra-delegates had been added (Title VII). In Argentina, Article 30 C imposes a supermajority of two-thirds of the members of the Congress in order to initiate a constitutional amendment. This change will be carried out by a specific assembly.

Several constitutional systems impose or permit the direct intervention of the people in the process of constitutional change. This seems quite natural when the constitution is presented as the expression of their sovereign will. For example, referenda are necessary in Switzerland (art. 140(1)(a) and 195 C), Japan (art. 96 C), Bolivia (art. 411 C), or Ireland (art. 46(2) and 47 C). In other States, the people's consent is only one of the alternatives for the adoption of a constitutional amendment. Such is the case in France (art. 89 C), Italy (art. 138 C), Benin (art. 155 C), Algeria (art. 174 to 178 C), Iceland (art. 113 C), or Peru (art. 206 C). In Spain Art. 167(3) C makes referendum possible for partial constitutional revisions, whereas article 168(3) C makes it mandatory for total revisions or revisions affecting specific topics, where a purely parliamentary option is also conditionally available.

Secondly, even without necessarily imposing to resort to specific legal actors who have no play in ordinary legislation, several devices are used to make constitutional amendment harder than ordinary legislation. For example, whereas ordinary legislation must generally be adopted by a simple majority, i.e. a majority of the present members of the Parliament who cast a vote, constitutional amendments frequently need to be adopted by a supermajority. It can be defined in terms of (a) 50% + 1 of the number of the elected (and not only present) members of the assemblies or (b) a higher threshold than 50% +1, such as 2/3, 3/5, etc. of the present members or of the actual members of the assemblies. Among many examples, in Germany, a two-thirds majority is needed in both the Bundestag and the Bundesrat (art. 79(2) BL). In the first assembly, this majority is that of its members, whereas in the second one, it is only that of the voters. In the Czech Republic, three-fifths of all the deputies and tree-fifths of the senators in attendance must accept a constitutional amendment (art. 39(4) C). Similar requirements exist in Poland (art. 235(4) C), Hungary (art. S(2) BL), Peru (art. 206 C), Norway (art. 112 C), South Korea (art. 130(1) C), or Japan (art. 96 C).

Other procedural technicalities, such as additional readings, renewed approbations, and specific delays for the discussion, or specific delays between the successive readings can be necessary for constitutional amendment. For example, in Latvia, article 76 of the Constitution imposes both a supermajority and several successive readings: "The Saeima may amend the Constitution at sittings at which at least two-thirds of its members are present. The amendments shall be passed in the course of three readings, by a majority of not less than two-thirds of the members present." Even more precisely in Italy, successive

debates and votes at a supermajority must be separated by a specific delay, in order to enhance reflection. According to article 138, “Laws amending the Constitution and other constitutional laws shall be adopted by each House after two successive debates at intervals of not less than three months, and shall be approved by an absolute majority of the members of each House in the second voting.” Similar provisions exist in Norway (art. 112 C), Colombia (art. 375 C), Lithuania (art. 148 C), Poland (art. 235 C), and Australia (art. 128 C). These additional mandatory steps in the process of constitutional amendment contribute to constitutional rigidity, as they make the alteration of the constitution more cumbersome and time-consuming, thus enhancing political reflection and stability.

As constitutional rigidity is a relative concept, it is possible for the *pouvoir constituant* to imagine alternative procedures for constitutional amendment, such as in France, Italy, Iceland (art. 113 C), Columbia, or Peru, or even graduated amendment procedures. The constitution thus displays a gradual rigidity, depending on how important a given constitutional item is. A major distinction in this respect is that between total and partial constitutional revisions. Because a total replacement of the constitution involves higher legal and political stakes, it must be made more difficult than a more limited amendment. This distinction exists for example in Switzerland, Austria (art. 44 C), Nicaragua (art. 191 to 195 C), Ecuador (art. 441 to 444 C), and Bolivia (art. 411 C). Other constitutions do not necessarily distinguish between total and partial constitutional revisions, but establish different procedures, depending on what aspect of the basic norm is affected. Such is the case in South Africa (art. 74 C), or Canada (art. 38, 41, 43, and 44 of 1982 Constitutional Act). Article 148 of the Constitution of Lithuania and Article 162 of the Constitution of Estonia similarly branch out in several procedures for constitutional amendment.

The Spanish example deserves some attention. The procedure which is applicable to total constitutional revisions must also be followed when the amendment relates to “the Preliminary Title, Chapter II, Section 1 of Title I, or Title II” of the Constitution. These elements define the basic structure of the Spanish polity (Social and democratic State, rule of law, national sovereignty, parliamentary monarchy, national unity and devolution, language, flag, etc.), and proclaim fundamental rights. Asymmetrical procedures of constitutional amendment testify to the will to offer a strong protection for certain constitutional items.



### **3.3.1.2.1.2. The Substantive Aspects of Constitutional Amendment**

To put it bluntly, for several constitution-makers, “to amend” means “to amend”, i.e. “to correct” or “rectify” punctually. It is not “to change totally”, “to subvert” or “to get rid of”.<sup>180</sup> This is why several constitutional actors consider that limits are inherently imposed on any power of constitutional *amendment*. This is based on the idea that the constitution, as a whole, expresses some kind of organic unity or global political vision, which would be imperilled if some specific items among its various provisions were changed. As a consequence, these elements are absolutely rigid.

For example, in Germany, Article 79(3) of the *Grundgesetz* provides that “Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.” In Italy and France, the “republican form of government” cannot be the object of a constitutional amendment (respectively art. 139 and art. 89 al. 5 C). In the Czech Republic, “The substantive requisites of the democratic, law-abiding State may not be amended.” (art. 9(2) C). Article 288 of the Portuguese Constitution provides a very extensive list of absolutely entrenched elements:

“Constitutional revision laws shall respect:

- a) National independence and the unity of the state;
- b) The republican form of government;
- c) The separation between church and state;
- d) Citizens’ rights, freedoms and guarantees;
- e) The rights of workers, workers’ committees and trade unions;
- f) The coexistence of the public, private and cooperative and social sectors in relation to the ownership of the means of production;
- g) The requirement for economic plans, which shall exist within the framework of a mixed economy;
- h) The elected appointment of the officeholders of the bodies that exercise sovereign power, of the bodies of the autonomous regions and of local government bodies by universal, direct, secret and periodic suffrage; and the proportional representation system;
- i) Plural expression and political organisation, including political parties, and the right to democratic opposition;

- j) The separation and interdependence of the bodies that exercise sovereign power;
- l) The subjection of legal rules to a review of their positive constitutionality and of their unconstitutionality by omission;
- m) The independence of the courts;
- n) The autonomy of local authorities;
- o) The political and administrative autonomy of the Azores and Madeira archipelagos.”

The most important features of the polity, which represent the *raison d'être* of the constitution, are immune from any constitutional change. This is not the case in Spain, where there is no material limit to constitutional change.<sup>181</sup> In this respect, the constitutional project that was expressed in 1978 is not absolutely rigid, but is contrarily open to evolution. One may even consider that this flexibility really is intrinsic to that project. In this respect, the Catalan demands for a reconsideration of the institutional arrangements are perfectly compatible with it and legitimate within its own terms.

### **3.3.1.2.2. Constitutional Review**

Besides constitutional rigidity, the second consequence of the constitutional paradigm which emerged at the end of the Eighteenth century is constitutional review, i.e. a procedure by which the conformity of the *pouvoirs constitués'* action, mainly embodied in the legislation, with the *pouvoir constituant's* will, mainly embodied in the constitution, is ensured.<sup>182</sup> Sieyès was one of the most explicit in this respect, when he proposed the establishment of a “*jury constitutionnaire*”. According to him,

“A constitution is a body of mandatory laws, or it is nothing; if it is a body of laws, one wonders who its guardian, its judiciary is. Someone must be able to respond. An omission of this kind would be inconceivable and ridiculous in the civil order; why should you tolerate it in the political order? Laws, whatever they are, imply the possibility of their violation, with a real need to enforce them. I am thus allowed to ask this: who have you named to receive complaints against violations of the Constitution?”<sup>183</sup>

In the *Marbury v. Madison* case,<sup>184</sup> Chief Justice John Marshall of the Supreme Court of the United States established the necessity for a jurisdictional guarantee of constitutions:

“The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it. [...] Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature repugnant to the constitution is void. [...] if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law: the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.”

This reasoning paved the way for later assertions of judicial review for example in Argentina, Norway, Portugal, Greece, Romania, and Israel. Constitutional review is now established in more than 75% of the States across the world.<sup>185</sup> The main rationale that drives this evolution is the following. Whereas the democratically elected politicians may be led by passion, irrationality, or prejudice, the judge enjoys specific technical skills. The deliberative culture of the judge also allows her to address the moral dilemmas every modern society faces regarding for example bioethics, the death penalty, same-sex rights, or euthanasia in a neutral, detached, and unbiased way which is said not to be open to political stakeholders. This makes her the guarantee of the well-functioning of the political process, as well as the protector of the rights of individuals and minorities.

The universalisation of constitutional justice goes hand in hand with a growing diversification. Traditionally, two main “models” of constitutional review are identified.<sup>186</sup> In the American model, constitutional review (1) is *decentralised*, as it is entrusted to every court; (2) is *concrete*, as the judge makes her decision relating to a specific “case or controversy”; (3) is activated *by way of exception*, i.e. starting from a given substantive litigation where the constitutionality of a norm is called into question; and (4) results in a ruling that is only binding *inter partes*, i.e. for the specific case and the specific litigants who were involved. On the contrary, in the European model, constitutional review (1) is *centralised*, as a unique and specialised Constitutional Court is competent to deal with constitutional enforcement; (2) is *abstract*, as the litigation immediately focuses on the constitutionality of a legal norm, independently from any other question; (3) is activated *by*

*way of action*, i.e. directly and independently from any other legal question, and (4) results in a ruling that is binding *erga omnes*, and not only for the litigant who seized the court.

Yet this dichotomy does not account for the polymorphous character of constitutional justice as it is currently practiced.<sup>187</sup> Several organs can have the power of constitutional review: ordinary judges (e.g. Canada, Argentina, India, Japan, etc.), *ad hoc* Constitutional Courts (e.g. Italy, Germany, Czech Republic, Armenia, Mongolia, Morocco, etc.), specific formations of ordinary courts (e.g. Rwanda, Uganda, Estonia, Venezuela, Costa Rica, etc.), ordinary judges and *ad hoc* constitutional judges simultaneously (e.g. Portugal, Ecuador, Colombia, Peru, Russia, etc.). Constitutional jurisdictions enjoy qualitatively diverse and quantitatively numerous functions, which are so many ways to participate in the definition of major political and societal issues. Olivier Jouanjan for example identifies six aspects which constitutional justice is responsible for protecting: (1) horizontal separation of powers (disputes between organs); (2) vertical separation of powers (disputes between the central and the local governments); (3) protection of the constitution against its enemies (indictment of political authorities, control of political parties); (4) sincerity of representation (control of political elections); (5) validity of supreme norms (especially ordinary legislation); (6) protection of fundamental rights.<sup>188</sup>

Constitutional judges cumulate several methods of referral (direct appeals, remedies by way of exception, preliminary questions, *ex ante* review, *ex post* review, etc.), and open their doors to various actors (legislative and executive bodies, parliamentary minorities, local entities, professional organizations, political parties, ombudsman, ordinary litigants, etc.) to the point of admitting the *actio popularis* (e.g. Colombia, Nicaragua, Salvador, Panama, and Bolivia) and self-activation (e.g. Benin, Serbia, and Croatia). Several original legal remedies to protect fundamental rights are open to ordinary individuals (e.g. *Verfassungsbeschwerde* in Germany, *recours de droit public* in Switzerland, *amparo* in Mexico, Spain, or Peru, *tutela* in Colombia, habeas corpus, habeas data and many others e.g. in Argentina, Paraguay, Peru, or Brazil). The constitutional judges' decisions are not limited to merely and mechanically establishing the constitutionality or the unconstitutionality of the norm or conduct that is criticised before them. They may consist of partial derogations, decisions whose normative effect in time (retroactive, starting from the date of the decision on the constitutionality, or even from a later date) is carefully modulated (e.g. Austria, Poland, Portugal, Canada, Spain, France, etc.), decisions imposing harmonizing or neutralizing interpretations of texts, extensions or restrictions on the scope of legal provisions, injunctions, sometimes accompanied by more or less coercive deadlines against political authorities (e.g. South Africa, Canada, Ecuador), etc. As a consequence, constitutional judges cannot be presented

as mere “negative legislators”, as Kelsen pretended. They play a much more active part in the determination of the norms that are applicable *hic et nunc* in a given society.<sup>189</sup>

It is not uncommon for these judges to be confronted with questions concerning the very existence of the political unity in which they operate. The South African Constitutional Court thus contributed to the establishment of the new democratic order by monitoring the observance of a number of fundamental values by the Constitution.<sup>190</sup> In Canada, the failure of the second Quebec referendum on sovereignty led the federal government to ask the Supreme Court to rule on the constitutionality of the secession and on the modalities that should regulate it.<sup>191</sup> A similar process is under way in Spain, with the Constitutional Tribunal reviewing the constitutionality of the Catalan “right to decide”. In the former Eastern countries, the newly established Constitutional Courts had a considerable role in the application of transitional policies designed to break with the communist past. This increasing importance and activity of constitutional judges worldwide leads to a deep transformation of the political fabric, which is known as the “judicialisation” of politics.<sup>192</sup>

Such are the roots, trajectory, achievements and concrete consequences of modern constitutionalism, which resulted in the universalisation of “rigid” constitutions and constitutional jurisdictions. But even though the paradigm for the organization of political societies in which we live seems to be settled, and to impose a relative fixity on several fundamental political choices, it undoubtedly makes room for several forms of “unsettledness”.

### ***3.3.2. Constitutions as “Essentially Contested Norms”***

The two most important tools that have been instrumental to the success of constitutionalism need not be interpreted as necessarily petrifying political debate.

#### ***3.3.2.1. Debating Constitutional Rigidity***

Although useful to protect fundamental commitments, constitutional rigidity must not be achieved at all costs. As Justice Jackson of the Supreme Court of the United States once wrote, constitutions are not “suicide pacts”.<sup>193</sup> Their seeking to establish an enduring framework for a flourishing society implies both stability and adaptability.<sup>194</sup> A rigid process ensures that no haphazard alteration to the constitution is to be adopted, but only one in which passion and emotion have calmed down, and each actor is able to have a clear perception of the situation, and form a fully documented and refined judgment about it. It ensures that the will of the people, as it is expressed by the constitution, prevails on the will

of the representatives, as it exists *hic et nunc*.<sup>195</sup> It also bars transient majorities from oppressing minorities. Based on this premise, constitutional amendment aims at several ends: (1) to allow adaptation to new circumstances, (2) to permit the adaptation of the basic norms to the changing values of the people, (3) to allow for the fact that human nature is perfectible, and that in the future, the human understanding of the mechanisms of governance may improve and make constitutional changes appropriate in order to solve unexpected difficulties in the institutional machinery.<sup>196</sup>

The Spanish Constitutional Tribunal clearly endorses such a dominant justificatory narrative:

*“En cuanto a su fuente de legitimación, la Constitución Española formalizó la voluntad del poder constituyente. El pueblo soberano, concebido como la unidad ideal de imputación del poder constituyente, ratificó en referéndum el texto acordado previamente por sus representantes políticos. La primacía incondicional de la Constitución también protege el principio democrático, ‘pues la garantía de la integridad de la Constitución ha de ser vista, a su vez, como preservación del respeto debido a la voluntad popular, en su veste de poder constituyente, fuente de toda legitimidad jurídico-política’ [STC 42/2014, FJ 4 c)]. Por ello, es misión de este Tribunal velar por que se mantenga la primacía incondicional de la Constitución, que no es más que otra forma de sumisión a la voluntad popular, expresada esta vez como poder constituyente [STC 108/1986, de 29 de julio, FJ 18].”*<sup>197</sup>

Nevertheless, powerful arguments can be made, starting from the very same fundamental values of constitutionalism, that lead to a more moderate view of constitutional rigidity.

First, the idea of minority protection is highly debatable. . In the Spanish case, the Catalan minority is clearly deprived of any serious possibility to influence substantively the process of constitutional amendment. The only minorities that are protected by rigid amendment procedures consist of large fractions of the members of political assemblies or large fractions of the people, which are granted veto powers. Small minorities, which supposedly are the most in need of protection, cannot automatically be considered to be protected by the amendment procedure. Moreover, one cannot take for granted that the members of parliaments exactly represent the social minorities which may mostly be threatened. Finally, the very concept of numerical minority is not totally appropriate. For example, women represent a numerical majority, but undoubtedly a minority in terms of actual influence on the political process in many countries, whereas wealthy people are a numerical minority, whose qualitative influence on the political process is highly superior to what strictly

quantitative considerations suggest. In this respect Anthony J. McGann radically proved wrong the idea that supermajority rules protect minorities by taking into account temporal change.<sup>198</sup> Supermajority rules favour *statu quo* and place the *onus* of proof on those who want things to change. This introduces a bias in the decision-making procedure. It may tend to preserve the situation of former hegemons, even though currently they are not a majority anymore, but just enjoy the veto power which is granted to concentrated and unified minorities. As long as a minority does not know what its situation in the future will be, imposing a supermajority rule rather than a simple majority rule tends to lower its ability to initiate political changes. On the contrary, a simple majority rule implies that today's losing group enjoys as strong as possible a probability of ensuring a coalition in the future in order to change things. As it increases political hope, this rule tends to favour political participation and inclusiveness. This is not to say that other values than democracy must not be taken into account and balanced against that of letting the people do what they want and how they want, in the logic of flexible constitution, but it is necessary to make these choices explicit and to discuss about them.

Secondly, too rigid procedures may prove dysfunctional if they result in obstruction to a strong political will. Instead of protecting the basis of the political society, they may on the contrary lead to its very destruction. French constitutional history is somehow emblematic of constitutional changes which, until recently, were never made according to the constitution, but in spite of it, and by abolishing it altogether. Such was for example the case in 1792, 1795, 1799, 1814, 1815, 1830, 1848, 1851, and 1870-1875. Especially in 1851, President Louis-Napoléon Bonaparte attempted to amend the constitution of the Second Republic. The text of the 1848 provided that the President could not immediately be re-elected (art. 45 C). He wanted to change this, but though the amendment was adopted by a majority of the members of the National Assembly, it did not reach the three-quarters which were imposed by article 111 C. In order to remain in power, the President decided to resort to a *coup d'Etat*, which was massively approved by the people. Although no similar threat exists on the Spanish constitution, one should not neglect the risk of making an institutional system so deaf to political demands that it might lead to its very disruption.

Thirdly, the democratic defence of rigid constitutions is not totally convincing. The politicians who are in charge of the ordinary legislative process are the people's representatives. They express the current people's political will. Why should they be bound by what former generations of politicians or former generations of the people have done? What title can past representatives or today's representatives have to bind future generations? Is this process not purely oppressive? Such was the reason why one of the founding fathers and third president of the United States, Thomas Jefferson (1743-1826), strongly promoted a

constitution that was tendentially flexible, so as to ensure that the fundamental norm is always approved at every epoch by the majority of its subjects, in light of the progresses of human understanding and knowledge. According to him, broadly speaking, the social contract by which a majority of the population delegates its power to some representatives is lost in a generation, i.e. in about 20 years, because of deaths and births. Because every generation has the same right as any other to self-government, every 19 or 20 years, a constitutional convention should be convened to renew its consent to the government.<sup>199</sup> This is exactly what Article 28 of the French Declaration of the Rights of Man and the Citizens of Year I provided that “A people has always the right to review, to reform, and to alter its constitution. One generation cannot subject to its law the future generations.”

Such an analysis was developed by the philosopher Richard Bellamy, who advocates “political constitutionalism” instead of “legal constitutionalism”.<sup>200</sup> In his views, constitutional rigidity limits the ability of a society to deliberate. A possible rejoinder could be Dieter Grimm’s or Cass Sunstein’s contention that avoiding permanent discussion about the foundations of the political system is necessary because the elements that belong to a constitution are not the object but the very condition of politics.<sup>201</sup> Bellamy cannot accept such a thesis. According to him, the argument that at least the formal framework of deliberation and the rights to participate must be rigid does not hold, since this framework and these rights themselves obviously are one of the subjects of political debate. The latter must be as open as possible and ensure the construction of a public culture of collective definition of the just social order. For example, in the present context, no one would deny that issues such as who is allowed to vote in a popular consultation regarding the future of Catalonia, what counts as a clear question, what counts as a clear answer to that question, what the effects of the vote are, which thresholds of participation are required to reach a valid result, after which kind of campaign, etc. are directly political questions, that have a direct impact not only on the process, but also on the possible result of the process. This is why they cannot just be regarded as a-political preconditions of political debate. They are directly one of the most crucial elements of political debate itself. Consequently, constitutionalisation or constitutional rigidification has everything of a fallacy intended to ensure the removal from the political debate of such essential issues as fundamental rights or the limitation of power. The exclusion from political debate of these elements, even though their content is the subject of the most essential disagreements of any collectivity, risks being arbitrary and favouring a specific form of pre-established domination.<sup>202</sup>

It follows that, although one seems at first sight to be on safe ground by contenting that the fundamental values of contemporary constitutionalism necessarily entail constitutional rigidity, this is by no means the case. On the contrary, there undoubtedly is room, precisely



to be faithful to the political ambitions of constitutionalism, for uncertainty and, as a consequence, for debate. This is precisely the kind of claim that is made by the Catalan government when it proposes to discuss about the Spanish constitution and the way it organised the governance of a diverse population some forty years ago. In this respect, it is perfectly legitimate. What is more, this debate about constitutional values is not to be regarded as the exclusive province of constitutional judges.

### ***3.3.2.2. Debating Judicial Supremacy in Constitutional Enforcement***

#### ***3.3.2.2.1. The Vagaries of Constitutional Interpretation***

As Marshall, Sieyès, and Kelsen have made clear, constitutions understood as norms are not self-enforcing devices. This is why a constitutional jurisdiction is needed. What this institution has to enforce is not always totally clear. Whereas a common view holds that the law is certain, so that its provisions possess an evident meaning, this is not true. Interpreting a text, i.e. defining the meaning it has, is nothing else than making a choice between various possibilities. According to the American legal “realists,” the role of the law-giving authority, i.e. the legislator, needs to be downplayed when compared to the true role of the law-applying institutions, i.e. the judges. Some authors radically contended that

“After all, it is only words that the legislature utters; it is for the courts to say what those words mean [...]. It has been sometimes said that the Law is composed of two parts, – legislative law and judge-made law, but, in truth, all the Law is judge-made law.”<sup>203</sup>

As far as constitutional norms are concerned, as one Chief Justice once said, the consequence is the following: “We are under a Constitution, but the Constitution is what the judges say it is.”<sup>204</sup> This is why this is no surprise that the debates regarding the various sorts of constitutional interpretation, and the various sorts of constitutional reasoning, is very important in the constitutional literature. Different individual judges, different courts, different states, etc., have so many different approaches to constitutional meaning. For example, one may insist on interpreting a constitutional text only by referring to the meaning its terms had when it was enacted. Others may rely on the intentions of the persons who drafted the text. Others may propose to update the text and to understand it in

light of the current state of the society. Others may insist on giving an *effet utile* to the text, so that they take into account its practical function more than its exact wording, etc.

It is evident that depending on one's interpretive methodology, the resulting interpretation, and the resulting decision as to the compatibility of a text or a behaviour with the constitutional norms will not be the same. But there is no metamethodology to solve the resulting antinomy, i.e. to impose one specific methodology instead of another. This is why it is not exceptional for constitutional judges to change their mind. For example, in the United States, whereas the criminalisation of homosexual intercourse was considered perfectly constitutional in 1986,<sup>205</sup> it was not any more a few years later, when the (unwritten) constitutional right to privacy was extended to such behaviour.<sup>206</sup> Constitutional interpretation cannot be regarded as a scientific activity, but as a practical one that necessarily depends on one's preferences, attitudes, prejudice, aptitudes, sensitiveness to specific issues, etc. It results that any constitutional interpretation is intrinsically tentative and open to debate.

Moreover, judges do not have any monopoly in constitutional interpretation. They must take into account the interpretations of the same constitutional text that is given by other legal bodies. "The constitutional judge thus appears as part of a system comprising other authorities with which she has a balance of power or cooperative relations. [...] All the authorities entrusted with the implementation of the constitutional text interpret it and recreate it together."<sup>207</sup> For example, in the United States, it is perfectly possible for the Congress to pass a bill that it considers perfectly compatible with the Constitution. Once this text is presented to the President, he may very well consider on the contrary that it is unconstitutional, and veto it. The Congress may consider that the President's constitutional interpretation is mistaken, and overcome the veto with a supermajority. When the act is later applied to concrete situations, it is perfectly possible for the courts to consider once again that the act is not constitutional. What is more, as constitutional interpretation is a matter of choice and not an automatic intellectual operation, it is perfectly possible for all the members of the Supreme Court not to have the same opinion as to the constitutionality of the act. In this case, some will express concurring or dissenting opinions.

As a consequence, the picture of the constitution as given once and for all in a more or less rigid text needs to be abandoned. A constitution depends on the interactions between all the possible interpreters of the text, each one taking into account the decisions of the others, and their possible reactions to its own, which are also dependent on the others' perceptions of the institutional landscape. Not only is this a descriptive and objective

statement, but one may additionally consider, from a normative viewpoint, that it is perfectly in line with the political ambition of contemporary constitutionalism.

### **3.3.2.2.2. Co-constructing Constitutional Meaning**

It is not infrequent for constitutions or for the legislation that organises constitutional review, to define the authority of the constitutional jurisdictions. They frequently stipulate that their rulings are final, binding on every other legal actor, and that no appeal can be lodged against them. A clear example is offered by Article 95.1 of the Constitution of Andorra that states that “The Constitutional Tribunal is the supreme interpreter of the Constitution [...] and its decisions bind public authorities and individuals alike.” § 31(1) of the German Federal Act on the Federal Constitutional Court similarly reads: “The decisions of the Federal Constitutional Court shall be binding upon the constitutional organs of the Federation and of the Laender, as well as on all courts and those with public authority.” Similar provisions exist in many countries such as Portugal (art. 2 LOFPTC), France (art. 62 al. 3 C), Croatia (art. 31 LCC), Ecuador (art. 436 and 440 C), Colombia (art. 243 C), Peru (1<sup>st</sup> final provision LOTC; art. 82 CPC). In Spain, pursuant to Article 164.1 of the Constitution,

“The judgments of the Constitutional Tribunal [...] have the force of *res judicata* from the day following their publication, and no appeal may be brought against them. Those declaring the unconstitutionality of an act or of a statute with the force of an act and all those which are not limited to the acknowledgment of an individual right, shall be fully binding on all persons.”

Most of the time, the rulings of constitutional jurisdictions are respected and applied. When a provision is cancelled, it is not enacted again; when a new norm needs to be adopted to remedy an unconstitutional vacuum, it is adopted, etc., so that the constitution manages to impose its supremacy to the actions of the *pouvoirs constitués*. This is why many scholars tend to perceive the relation between constitutional judges and political institutions as a “dialogue”.<sup>208</sup> Constitutional rulings are received by other actors – political institutions, international or supranational judges, ordinary judges, etc. –, which answer them by new decisions that take into account those of the judges. Through these interactions, a shared understanding of the constitution is reached.<sup>209</sup> The metaphor of dialogue undoubtedly presents an important explanatory power. Nevertheless, it is far from offering a general description, let alone a general explanation, of other kinds of interaction that are by no means exceptional.

From a realistic viewpoint, many constitutional jurisdictions have faced strong resistance or, to say the least, strategies of “constitutional avoidance”. Regarding for example the control of elections, massive demonstrations took place in Benin against several rulings by the Constitutional Court. In Israel, orthodox groups frequently criticize the Supreme Court’s growing activism. In 1999, between 250 000 and 400 000 persons participated in an important demonstration. Rabbi Ovadia Yosef, leader of the Shas party, violently proclaimed that:

“The justices of the Supreme Court are wicked, stubborn, and rebellious [...] they are empty-headed and reckless [...] they violate Shabbat [...] and they are the cause of all the world’s torments [...] the justices are slaves who now rule us [...] they are not worthy of even the lowest court [...] Any seven-year-old boy is better versed in the Torah than they are.”<sup>210</sup>

Even in Germany, where the Constitutional Court is a much respected institution, its banning crucifix in schools<sup>211</sup> led to strong criticism. Several cases of constitutional disobedience by political authorities can be mentioned, for example in Belarus, Moldova or in Austria, where Jörg Haider refused to abide by rulings imposing the bilingualism of signposts. Without openly refusing to enforce a constitutional ruling, political institutions frequently delay their action or incompletely apply it.<sup>212</sup> In the United States, the constitutional principles regarding abortion that have been laid down in *Roe v. Wade*<sup>213</sup> have largely been ignored or deprived of any practical effect, for example by limiting the public funding of abortion centres. Before, in the 1820s and 1830s, President Jackson supported the policy of the State of Georgia against Cherokee tribes. A State statute prohibiting non-Indians to live on Indian Territory was struck down by the Supreme Court.<sup>214</sup> But Jackson refused to abide, and disdainfully declared: “John Marshall has made his decision; now let him enforce it.”<sup>215</sup> In the Federation of Russia, Tatarstan totally ignored the Constitutional Court’s interdiction to organise a referendum, and proceeded autonomously towards its own independence.<sup>216</sup>

In these cases, constitutional disobedience can appear as a defect in the proper functioning of the system, so that they contradict the ambitions of constitutionalism by overtly calling into question the authority of constitutional jurisdictions. Yet, some of these cases and other ones may be analysed through another lens. They can be understood not as unfaithfulness to the project of constitutionalism, but on the contrary as an attitude that is truly committed to the deepest ambitions of this movement. As, pursuant to the theory of constitutional dialogues, all the legal actors participate in the process of constitutional enforcement, it is perfectly possible and legitimate for them to consider that, just like the judicial actors, they

are empowered, as far as their field of intervention is concerned, to give their own interpretation of the constitution without being bound by judicial rulings.

Such was James Madison's position. He first developed the theory of "departmentalism", according to which each of the three constitutional branches is allowed to interpret the constitution in so far as its own action is concerned. There is no hierarchy between them, but a situation of equality and coordination. After his election as President of the United States, Thomas Jefferson explained to Abigail Adams, the wife of the former President:

"You seem to think it devolved on the judges to decide on the validity of the sedition law. but nothing in the constitution has given them a right to decide for the executive, more than to the Executive to decide for them. Both magistracies are equally independent in the sphere of action assigned to them. The judges, believing the law constitutional, had a right to pass a sentence of fine and imprisonment; because that power was placed in their hands by the constitution. But the Executive, believing the law to be unconstitutional, was bound to remit the execution of it; because that power has been confided to him by the constitution. That instrument meant that it's co-ordinate branches should be checks on each other. But the opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the legislature & executive also in their spheres, would make the judiciary a despotic branch."<sup>217</sup>

This is why Jefferson used his power to pardon in order to prevent the application of the Anti-Sedition Act 1798, which appeared to him to contradict the First Amendment, although it had been judged constitutional by the Supreme Court. Adopting a similar stand, Abraham Lincoln was able to abolish slavery in spite of the Supreme Court's opinion that it was constitutional.

A second teaching of Madison is related to the relations between a national government and federal, subnational, or local governments. A formidable constitutional controversy emerged in the United States regarding who, between the Union and the States, was entitled to interpret the Constitution.<sup>218</sup> According to John Marshall, the people of the United States as a whole adopted the Constitution. A national body, the Supreme Court, was ultimately responsible for determining its interpretation. According to the alternative position, whose most outstanding proponent was Vice-President John C. Calhoun, the Constitution was adopted not by a single people but by the States. Since it was a pact,<sup>219</sup> it was up to each of

the parties to determine its meaning, so that a State might oppose, even by deciding its “nullification,” a federal policy which it considered unconstitutional.

Departamentalism and nullification offer a doctrine that is coherent with constitutionalism, as it makes each institution responsible for the continuing enforcement of the fundamental norms. It explains that, although the contemporary fascination with courts tends to make one lose sight of this phenomenon, constitutional interpretation and constitutional review by political institutions are by no means of minor importance.<sup>220</sup> When specific provisions establish the supremacy of the national constitutional jurisdiction, one has to notice that, in line with the teachings of legal realism, these provisions themselves need to be interpreted by legal actors. For example, in Spain, Article 5.1 of the Organic statute of the judicial power n° 6/1985 quite straightforwardly established that: “The Constitution is the supreme norm of the legal system, and binds all judges and tribunals, which will interpret and apply the laws and regulations according to the constitutional norms and principles, complying with the interpretation of the same that results from the resolutions issued by the Constitutional Tribunal in all kinds of processes.” But this text was not sufficient to avoid conflicts between the Constitutional Tribunal and the Supreme Court, the latter refusing to abide by the former’s rulings in spite of Article 5.1 supremacy clause.<sup>221</sup> This proves that every institution retains an autonomous faculty of constitutional interpretation.

Even more clearly, several countries explicitly admit such a polycentric constitutional enforcement. For example, in Argentina, as early as 1893, the Supreme Court decided in *Cullen v. Llerena* that: “*Es una regla elemental de nuestro derecho público que cada uno de los tres altos poderes que forman el Gobierno de la Nación, aplica e interpreta la Constitución por sí mismo, cuando ejercita las facultades que ella les confiere respectivamente.*” Article 130 of the Constitution of Ecuador of 1998 empowered the Congress to “*Reformar la Constitución e interpretarla de manera generalmente obligatorio*”, while Article 284 provided that: “*En caso de duda sobre el alcance de las normas contenidas en esta Constitución, el Congreso Nacional podrá interpretarlas de un modo generalmente obligatorio.*” Currently, in Bolivia, Article 4.III LTCP makes it clear that constitutional interpretation is a shared responsibility: “*El Tribunal Constitucional Plurinacional en su labor de guardián de la Constitución Política del Estado es el intérprete supremo de la Ley Fundamental sin perjuicio de la facultad interpretativa que tiene la Asamblea Legislativa Plurinacional como órgano depositario de la soberanía popular.*” A similar position was adopted by the Peruvian Constitutional Tribunal.<sup>222</sup> In Portugal, the Constitutional Tribunal has no monopoly for the enforcement of the Constitution. Ordinary courts are also competent in this respect, as well as the President of the Republic (art. 120; art. 134.d; 138, and 195.2 C), and the Parliament (art. 162, a C). Recently, “weak forms of constitutional review”<sup>223</sup> that refuse to give the final

word to courts, and the renewed concern of parliaments for constitutional rights<sup>224</sup> made clear that judicial supremacy is not the only – nor maybe the best – way to comply with the requirements of the constitutionalist project.

By rejecting the dogma of the supremacy of one specific organ, namely constitutional judges, these elements reveal a renewed understanding of constitutionalism that gives more space to the dynamics of constitutional dialogue.

In Spain as well as in many other countries, the Constitutional Tribunal is the most visible institution whose function is the guarantee of the Constitution. This is why, according to Article 21 of the LOTC:

*“El Presidente y los demás Magistrados del Tribunal Constitucional prestarán, al asumir su cargo ante el Rey, el siguiente juramento o promesa:*

*‘Juro (o prometo) guardar y hacer guardar fielmente y en todo tiempo la Constitución española, lealtad a la Corona y cumplir mis deberes como Magistrado Constitucional’.*

But the members of the Constitutional Tribunal are not the only legal actors who swear to respect, protect and enforce the Constitution. Per Article 61.1 of the Spanish Constitution,

*“The King, on being proclaimed before the Cortes Generales, will swear to faithfully carry out his duties, to obey the Constitution and the laws and ensure that they are obeyed, and to respect the rights of citizens and the Self-governing Communities.”*

Such is also the case for the members of the *Congreso de los diputados*. Pursuant to Article 4.1 of the Standing orders of the lower house of the parliament (see also art. 20.1.3°), *“El Presidente electo prestará y solicitará de los demás Diputados el juramento o promesa de acatar la Constitución.”* Article 11 of the standing orders of the *Senado* also provides that:

*“1. Tras la elección definitiva o tras la confirmación de la Mesa, los Senadores deberán prestar juramento o promesa de acatamiento a la Constitución.*

*2. El Presidente de la Mesa de edad o el de la interina, según corresponda, o un Vicepresidente, tomará la declaración de acatamiento al que resulte elegido o confirmado como Presidente en la constitución definitiva de la Cámara, y éste, a su vez, a todos los Senadores, empezando por los Vicepresidentes y Secretarios y continuando por orden alfabético por los restantes.*

*3. A tales efectos, se leerá la fórmula siguiente: '¿Juráis o prometéis acatar la Constitución?' Los Senadores se acercarán sucesivamente ante la Presidencia para hacer la declaración, contestando 'sí, juro' o 'sí, prometo'."*

Catalan parliamentarians also swear to enforce the Constitution, according to Article 23.1.a of the standing orders of the Catalan parliament:

*"El diputado proclamado electo accede al pleno ejercicio de la condición de parlamentario una vez cumplidos los [...] requisitos siguientes: a) Presentar al Registro General del Parlamento la credencial expedida por el órgano correspondiente de la Administración electoral y prometer o jurar respetar la Constitución española y el Estatuto de autonomía de Cataluña."*

As a consequence, it is impossible to consider that it only belongs to the Constitutional Tribunal to enforce the fundamental norm. Several other institutional actors share this mission. They are on a par with the former, and must be able to make their own interpretation known, so that it can compete, in a fruitful dialogue, with other understandings of the constitutional framework and values. Each has a legitimate constitutional right – if not an obligation – to enforce the Constitution. By rejecting any idea of supremacy that would benefit one institution, favouring multiple approaches and exchanges about constitutional meaning is the best way to develop a widely shared constitutional culture, not only among legal institutions, but also among the citizenry, so as to achieve what Peter Häberle famously called an “open society of constitutional interpreters”.<sup>225</sup>

### **3.3.3. Intermediary Conclusion**

As this section showed, it is necessary from an empirical viewpoint, and fruitful from a normative one, to give up the quest for a supreme constitutional interpreter. What is crucial in a constitutional state that is faithful to the ambitions of constitutionalism is the ongoing dialogue about, and engagement with, constitutional values and principles. Only this makes the constitution a living document, infused by the competing interpretations of values and principles that, by their very nature, admit various readings and conceptions.<sup>226</sup> The quest for the final word is useless, illusory and possibly lethal from the political viewpoint of a sane deliberative community. The debate is much more open than what one might think at first sight by examining too rapidly the basic features of contemporary constitutionalism, especially as it is illustrated by the Spanish constitutional system. Far from being disruptive



of the constitutional project that was adopted in 1978, the Catalan claim to a right to decide on its political future precisely testifies to a genuine commitment to the ongoing constitutional dialogue that is legitimate in an open society. This is why simply dismissing this claim as “unconstitutional” cannot be an attitude that lives up to the high standard of political morality that is imposed by the ideal of constitutionalism.

In the end, it appears that contemporary constitutionalism as a means to organise political coexistence and to promote collective projects based on the limitation of political power and the protection of fundamental rights cannot fruitfully be understood as a device for rigidification, possibly leading to political stalemate. As the American scholar Louis Michael Seidman suggested,<sup>227</sup> constitutions should be understood as structures of unsettlement, even granting every group and every individual a “right to unsettlement” that guarantees an ongoing fair and healthy deliberation on the global community’s self-understanding as a historical actor.

## **IV. IS THE ORGANIZATION OF A REFERENDUM ON 1<sup>ST</sup> OCTOBER 2017 BY THE CATALAN AUTHORITIES LEGITIMATE?**

As the present report shows, the Right to Decide of Catalonia is firmly grounded in international and European Law, and the arguments of unconstitutionality put forward by Spanish authorities may be balanced by the commitments of Spain to respect International and EU Law, as well as the deepest values of constitutionalism which it embraced in 1978. However and despite the fact that a referendum, as shown above<sup>228</sup>, is most likely the best option to obtain democratic legitimacy for the chosen political future of Catalonia, it is not the only option possible. We shall in this last chapter analyze the articulation and respective weight of the different legitimacies at stake in the current process (4.1), before exploring possible options for materializing Catalonia's Right to decide (4.2)., We shall finally briefly examine which behavior by different concerned actors appears, in regard of all the elements examined in the present report, legitimate or not (4.3).

### **4.1. Potentially Conflicting Legitimacies**

As the present report show, there are conflicting claims of legitimacy. One is a conflict between democratic and legalistic legitimacies (4.1.1). The other could be a conflict between two democratic legitimacies at different levels: the desire for Catalans to become a European State that could be democratically favored by a majority of voters in Catalonia on October 1<sup>st</sup> 2017, and the desire for Spaniards to remain in a territorially unchanged Country, which could be democratically favored by a majority of voters in Spain (4.1.2).

The present section will show that none of these legitimacy claims may disqualify the others, but that some claims seem to carry greater legitimacy than others.

#### ***4.1.1. Democratic vs Legalistic Legitimacy***

In the current situation, the Catalan government has a clear majority in the Catalan Parliament, which is issued from a 2015 election in which the winning political parties had been elected on a clear political platform calling for the realization of Catalonia's Right to Decide (and even independence) (see chapter I above). The Catalan government can thus claim to have a democratic legitimacy to pursue its efforts towards the materialization of the Right to Decide, and that calling for a self-determination referendum is a further democratic

step in the materialization of the Right to Decide; and as we've just seen (4.1), this is the only path presently available.

On the other hand, the Constitutional Tribunal by its strict interpretation of some of the constitutional provisions, the General Prosecutor of Spain and the current Spanish government, claim that the exercise by Catalans of their Right to Decide is unconstitutional and illegal.

As the first chapter of this report show, the democratic mandate of the current Catalan government is clear and unambiguous. This does however not exempt Catalan authorities from respecting the Constitution and the Law. However, as has also been shown (section 3.3. above), the interpretation of the Constitution is not an uncontested exercise and many examples from comparative constitutionalist approach show that constitutional interpretation is not the exclusive competence of the Constitutional Court.

Further, Spain, as a member State of the Council of Europe and the EU is bound to respect the European Convention of Human Right and EU Law, which represent in Europe a supra constitutional framework in which all national constitutional decisions shall frame themselves. In that respect, it is well possible that some of the decisions of Spanish Courts, as regard the exercise of the right to decide by present or former Catalans authorities, could be successfully challenged in front of European Courts (either the ECtHR or the ECJ).

Also, as shown again from comparative constitutionalism, departamentalism and nullification (see above pp. 144-146) have in the past been used with success in the context of contested constitutional interpretations.

In that context, it may be worth recalling that modern democracies are neither solely based on the rule of Law, nor on the popular vote. Modern democracies represent a complex balance between the two elements, including the respect for Human Rights<sup>229</sup>. One way or another, they need to be reconciled; and if, concerning the challenge to national sovereignty raised by the claim of part of a country's population requesting the exercise of their right to decide, the national framework does not alone allows such an exercise, it then has to be dealt with in a broader context.

Often quoted in support of the idea for the sovereign State to deal according to its sole legal order with such issue is the opinion of a three eminent jurist Commission that had been appointed by the League of Nations to determine whether the inhabitants of the Aaland Island had the right to decide on their "reunification" with Sweden by referendum, or whether they should remain as a part of the newly created Finnish State. In their opinion adopted in Paris in September 1920, these three eminent lawyers ruled that "Positive

International Law does not recognize the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish, any more than it recognizes the right of other States to claim such a separation. Generally speaking, the grant or refusal of the right to a portion of its population of determining its own political fate by plebiscite or by some other method, is, exclusively, an attribute of the sovereignty of every State which is definitively constituted.”<sup>230</sup> This reference however usually omits quoting the preceding sentences which read: “Although the principle of self-determination of peoples plays an important part in modern political thought, especially since the Great War, it must be pointed out that there is no mention of it in the Covenant of the League of Nations. The recognition of this principle in a certain number of international treaties cannot be considered as sufficient to put it upon the same footing as a positive rule of the Law of Nations. On the contrary, in the absence of express provisions in international treaties, the right of disposing of national territory is essentially an attribute of the sovereignty of every State.”<sup>231</sup>

Such affirmation, correct as regard the development of international law in 1920, means, *a contrario* and for the present day, that if the right to self-determination of peoples is a positive rule of international law, dealing with such issue does not rest within the exclusive competence of any national State. In that respect, we have shown above that the right to self-determination of people is a positive rule of international law, even at the heart of international Law according to article 1 of the UN Charter, and to which Spain has subscribed by ratifying the two 1966 Covenants on Human Rights. Even more compelling from an international law perspective, according to the ECJ quoting the case-law of the ICJ, is an *erga omnes* rule of international law (see section 3.2.3.) Therefore, the legitimacy of the legalistic position defended by Spanish national authorities may not be evaluated in the Spanish constitutional framework taken as a totally closed, complete and intangible legal system, but has to take into account fundamental principles of International and European Law, in order to be legitimate. Therefore, the claim of Spanish judges and current national government that such democratic self-determination issue for Catalonia should be dealt with exclusively within Spanish national legal order is at odd with Spain's commitments under positive international and EU Law. In the contemporary context, the legitimacy of a legal interpretation of the Spanish constitution out of international and European context is therefore not very strong.

#### ***4.1.2. Catalan vs Spanish Democratic Legitimacy<sup>232</sup>***

Catalan authorities have a democratic mandate and parliamentary majority, following the 2015 elections, to implement the Right to Decide of the Catalan people. It has nevertheless been argued that this democratic legitimacy is irrelevant, because the proper political level at which democratic rights should be exercised is the whole Spanish country. Therefore, Catalan democratic legitimacy could not be imposed against a Spanish democratic government, which rely on a “larger” democratic base.

Such argument is irrelevant, if not fallacious. As was discussed above (see 2.2.4 and 2.2.5), the moral and legal argument for opposing these two democratic legitimacies is weak, if not unacceptable. Further, the democratic mandate to the current government of Spain on the issue of Catalonia's Right to Decide has been at the heart of difficult coalition making to provide the government with a stable majority, showing that the issue at Spanish level is also open to an unsettled democratic debate. Further, Catalan authorities do not rely on their sole electoral mandate to democratically legitimate the choice about the political future of Catalonia, but they call for a referendum, which will provide a strong democratic legitimacy.

However, contrary for example to the referendum on Scottish independence (refused by 55.3% of voters)<sup>233</sup> or the creation of a new Swiss canton that were both carried out in accordance with existing constitutional provisions<sup>234</sup>, an 'out-of-frame' vote cannot be apprehended on the basis of a legal or constitutional analysis only. The situation is different from any other because its organization raises the question of the legitimacy of the vote itself. The question asked is political and the answer given is also political. It must in that sense be understood as an explicit demand to which the existing political system has not been able to respond. Therefore, the rules change or rather, the absence of rule prevails.

In the context of a vote of self-determination, as is the case, the national framework will inevitably be inappropriate because the existing democratic processes to address the issue did not allow for a solution or a process to emerge within the existing national framework. A change of scale thus appears necessary by justifying either locally or internationally the organization of a referendum. In this sense, the Catalan law on the self-determination referendum is based precisely on this double level. It recalls in its explanatory memorandum the recognition in the Spanish Constitution of the primacy of international law and as positive law, the International Covenants on Civil and Political Rights, and Economic, Social and Cultural Rights, published in Spain's Official Gazette (April 1977) which states the right to self-determination to the people. Thus, a self-determination referendum can be organized by the sovereign people of Catalonia, on behalf of its Parliament. In such context, it is worth underlying that in a referendum, the deciding authority (the people) is the same as those

who will have to abide by the decision (the people); therefore, this referendum as all referendums correspond to acts of democratic self-determination, as there is no intermediate authority between the people and the people<sup>235</sup>. However, the binding effect of the referendum on the larger polity, that is on the pre-existing national State, is more complex.

The fundamental issue is that no democratic majority, even one expressed through a referendum, is more legitimate than another democratic majority, expressed at a different level. In its 1998 Decision in the *Reference re Secession of Quebec*, the Canadian Supreme Court dealt with that precise issue; and it stated: "Democratic rights under the Constitution cannot be divorced from constitutional obligations. Nor, however, can the reverse proposition be accepted. The continued existence and operation of the Canadian constitutional order could not be indifferent to a clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The other provinces and the federal government would have no basis to deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others."<sup>236</sup> From that principle position, it drew "a reciprocal duty on the other participants to engage in discussions to address any legitimate initiative to change the constitutional order."<sup>237</sup> Then the Canadian supreme Court conclude its opinion with the following consideration: "No one suggests that it would be an easy set of negotiations"<sup>238</sup> for the reason that "the negotiation process would require the reconciliation of various rights and obligations by negotiation between two legitimate majorities, namely, the majority of the population of Quebec, and that of Canada as a whole."<sup>239</sup>

The same reasoning and arguments hold true for the Spanish situation. Even if Catalonia can ground its claim for self-determination in a strong democratic majority in Catalonia, it cannot impose this democratic majority as democratically legitimate within a larger polity. But symmetrically, a democratic legitimacy at Spanish level may not be opposed to a clear majority of Catalans expressing their wish for self-determination. And certainly not to deny Catalans their right to democratically decide about their political future. That would constitute a fundamental denial of democratic rights, contrary to European values as expressed in article 2 TEU, and therefore be illegitimate.

## **4.2. The Three Possible Paths for Materializing Catalans Right to Decide**

As shown in chapter 2.1. of the present report, the emergence of the Claim for the Right to Decide was progressive; it only became politically relevant in Catalan society after several refusals by Spanish State Authorities (the Constitutional Tribunal and the current Government) to grant or discuss requested improvements of the Statute of Autonomy of Catalonia within the Spanish Constitutional system. Thus the decision to organize unilaterally, and against the clearly stated position of the Spanish government, a self-determination referendum – which has been publicly announced on the 4<sup>th</sup> of July 2017 but is not yet the object of a formal decision<sup>240</sup> – was only proposed after repeated refusal of the Spanish authorities to negotiate with the elected Catalan Authorities about the exercise of the Right to Decide by Catalonia<sup>241</sup>.

### ***4.2.1. Negotiations with the Spanish State on the Condition of Exercise of the Right to Decide***

Negotiations with the Spanish State, before or after the 1<sup>st</sup> of October 2017, is still a possible path. However, it is presently not available for Catalans authorities, due to the refusal of the Spanish government to enter into any kind of negotiations. Considering the clear political mandate on which current Catalan Authorities have been elected, they cannot wait forever for a decision by Madrid to enter negotiations. However, as was shown by the present report examining international practice of self-determination (see above section 3.2), negotiation with national authorities takes place in a majority of cases, before or after a self-determination referendum. Therefore, a negotiated solution with the Spanish State remains an attractive option, before or after the Self-determination referendum. However, Spanish government should agree to enter into negotiations on the issue for this path to be open. For the time being, the behavior of the Spanish government makes this path non-effective. We nevertheless consider, as the observation of recent international practice makes it evident, that it should remain a possible option, before the referendum is formally called by the Catalan Authorities, or even after the referendum has been held.

### ***4.2.2. Unilateral Organization of a Self-determination Referendum***

As international practice shows, about half of the self-determination processes of the past 30 years have been initiated without the consent of the parent State (see 3.1.3 above). Out of the 24 cases in which the Right to Decide was exerted by a sub-State entity without the

consent of the parent State, 18 successfully led to the creation of new States<sup>242</sup>, recognized as such by the international Community, including, in all cases, the Spanish State.

This is therefore a possible path; however, success or failure does not solely depends on the choice of the people who decide, but is after independence has been proclaimed, subject to recognition of the new State by existing States of the international Community. Some self-proclaimed independent States fail to obtain sufficient recognition, and therefore do not succeed, despite the independence declaration, in becoming recognized independent States. Other cases are still undecided – as is for example Kosovo, which has been recognized on this day by 111 UN member States (among which, 23 EU member States). This is a significant number of recognitions, but not yet sufficient to have an undisputed status as a State under international Law.

Thus exercising democratically the Right to Decide is a necessary condition for achieving Statehood, but not a sufficient one. The issue of recognition after a unilateral declaration of independence is therefore crucial, and by no means within the sole hands of the people who exercised its Right to Decide. A self-determination referendum, whatever its result, will not as such bring an enforceable solution and one central question will remain, upon which the ultimate legitimacy of the ballot will depend: its political recognition. From Brexit to the creation of a new Swiss canton, or in the case of Scotland's refusal to leave the United Kingdom, all these polls have been politically legitimized on a national and international level. Formal validation of the referendum results has always been completed by political validation. To the extent that a community cannot live in a vacuum, there is no meaning of a vote recognized exclusively by the community itself. There is no future for an isolated state in the heart of Europe, whose creation has not been recognized outside its new borders. The case of Kosovo or, even more extreme, the case of Northern Cyprus, reveal that such situations are possible but highly unsatisfactory.

Thus, even if the Right to Decide may be exercised unilaterally, its political and legal effects will be dependent on the acceptance of a people's choice by existing States. Among States forming the international Community, the attitude of the State from which the new aspiring State wants to secede plays most of the time a significant, if not essential role, in the success or failure of recognition. In that perspective, the conditions under which the Right to Decide is exercised, as well as the clarity of the question asked and the result achieved all play an important role in the chances of successful exercise of the right to decide.

In that respect, the draft law on the self-determination referendum appropriately respects international standards. The definition of the electoral body is based on an existing electoral college (and not constituted as a potentially suspect *ad hoc* college) (art. 6 of the Law on the



self-determination referendum, to be voted by the Catalan Parliament on 6 September 2017; all article quoted in this and the next two paragraphs refer to this draft law). The territorial scope of the vote (the entire territory of Catalonia) is appropriately defined (art. 5 § 2). The question which shall figure on the ballot papers is unambiguous and reads as such: “Do you want Catalonia to be an independent state in the form of a republic?” (art. 4 § 2 and 7). The conditions for validating the expressed votes (art. 8) compel with internationally recognized practice.

The principles set forth for the organization of the campaign as regard the exercise of political rights (art. 11), neutrality of public administration (art. 10) and the role of the media (art. 12) are also in line with internationally recognized standards. The organization of the vote (titles V and VI of the draft law) is under the responsibility of a genuinely independent electoral commission (arts 13 and 17) with clearly defined duties and powers (art. 18). Procedures for dealing with queries or complaints as regard the referendum process are clearly exposed by articles 26 to 28 of the draft law. Territorial organization of the voting process and of polling stations is well thought of (arts 29 to 32). The whole process appears transparent and it will be submitted to scrutiny by political parties and other local stakeholders (arts 14), as well as international observers which are invited to come and monitor the process (art. 15).

Finally, the outcome of the referendum process is clearly stated and easily understandable for voters. The result shall be binding (art. 4 § 3). In the case a majority of votes in favor of independence, “the Parliament of Catalonia shall within two days of the proclamation of the results by the Electoral Commission [...] issue the formal declaration of independence of Catalonia (art. 4 § 4). In the case of a majority of negative votes to the question put to the voters, an “immediate calling of elections for the Autonomous Community of Catalonia” shall result.

Therefore, all the formal conditions for a clear and valid expression of Catalonia's Right to Decide are being set forth in the draft law on the self-determination referendum that has been examined by the experts.

#### ***4.2.3. Negotiating with Spain under the “Earned Sovereignty Framework” within the EU***

This third path is less obvious than the two others. It has actually never been explored within the EU, but has been the object of a developing practice in international relations and may therefore be worth, if not interesting, for Catalonia, Spain and EU to explore. Even when a

self-determination referendum was organized without the consent of the parent State it is worth noting that earned sovereignty<sup>243</sup> has developed as a common framework under which post-referendum negotiations could take place. Similar to many other states, once a referendum is held in Catalonia one pathway forward could be negotiating with the Spanish government using the emerging conflict resolution framework of earned sovereignty.

#### ***4.2.3.1. Negotiation Trend in International Practice***

In nearly all of the state practice examples above, there was a degree of negotiation between the national state and the sub-state entity. These negotiations often took place both before and after a referendum. During these negotiations, parties often addressed whether and how the sub-state entity could pursue independence. Pre-referendum negotiations sometimes involved the national state and sub-state entity agreeing on the terms of the referendum. Further, many of these negotiations were mediated by regional or international bodies.

There are a number of additional instances of national states and sub-state entities negotiating the contours of greater autonomy, devolved governmental power, or complete independence. Some examples are: Serbia/Montenegro (Union Treaty), Papua New Guinea/Bougainville (Bougainville Peace Agreement), Netherlands/Netherlands Antillean Government/Island Entities (agreements from the Round Table Conference), Sudan/South Sudan (Comprehensive Agreement); United Kingdom/Scotland (Edinburgh Agreement); and United Kingdom/Ireland (Good Friday Accords).

In fact, the Supreme Court of Canada, when evaluating Quebec's 1995 independence referendum, highlighted a duty of the national state to negotiate with the sub-state entity if the majority of its people clearly express a desire to secede. The Court found that under the Canadian Constitution "[t]he clear will of the people of Quebec to secede would place an obligation on the other provinces and the federal government to enter into negotiations in accordance with underlying constitutional principles."<sup>244</sup> This is consistent with the transconstitutional jurisprudence on the right to decide discussed above, which embodies liberal democratic principles. Per these principles, when the will of the people is expressed clearly, the democratically elected government has a responsibility to acknowledge the will of its people and negotiate accordingly.

#### ***4.2.3.2. Negotiating with the National State under the Earned Sovereignty Framework***

From its development in state practice, earned sovereignty entails the progressive devolution of power from a national to sub-state entity, and this occurs under international supervision (such as the EU). As an emerging conflict resolution framework, earned sovereignty is designed to facilitate negotiations between the national and sub-state entity for a power-sharing arrangement that will allow them to politically co-exist. Such an arrangement will require negotiations around the terms and conditions of the sub-state entity's future.

There are three core elements of earned sovereignty: (1) shared sovereignty between the national state and sub-state entity; (2) institution building to prepare for increased self-government; and (3) mutual determination on the sub-state entity's final status. Catalonia meets the first two elements because it already shares sovereignty with both Spain and the EU, and it has institutional capacity to function independent of Spain.

State practice illustrates that negotiations are often a key component of a sub-state entity's path towards independence. To permit flexibility in the negotiations, states like Catalonia can consider applying any of the following three optional paths under earned sovereignty: (1) phased sovereignty; (2) conditional sovereignty; and (3) and constrained sovereignty. These three negotiation approaches would permit the negotiating parties to develop an approach to devolution that best meets the needs of the parties. Notably, applying the earned sovereignty framework to any negotiations between Catalonia and the government of Spain would not preclude Catalonia from expressing its political desire for independence through a referendum vote.

Phased sovereignty involves measured devolution of sovereign functions and authority from the national state to the sub-state entity during the period of shared sovereignty. For instance, in Kosovo the sub-state entity shared sovereignty with the UN, which was serving as the national sovereign pursuant to a UN Security Council resolution. Under that arrangement, Kosovo shared sovereignty for an interim period prior to the determination of final status. If Catalonia pursued phased sovereignty, then it will continue to share sovereignty with Spain for an interim period that is followed by a determination of Catalonia's final status, which could be secession from Spain, with membership in the EU.

Conditional sovereignty involves transferring sovereign authority to the sub-state entity or conditioning final status on the fulfillment of certain benchmarks. In Northern Ireland, the continued devolution of authority was conditioned on the decommissioning of paramilitary forces and the surrender of weapons. If Catalonia pursued conditional sovereignty, then its

independence from Spain may be contingent on Catalonia meeting particular benchmarks that have been agreed upon by the negotiating parties.

Finally, constrained sovereignty involves imposing continued limitations on the new state's sovereign authority and functions. These limitations can include a prolonged administrative presence and limits on the right of the state to undertake territorial association with other states. In East Timor, the UN had a prolonged administrative presence to providing continued assistance in areas like law and order. If Catalonia pursued constrained sovereignty, then it would experience limitations on its exercise of sovereignty as a new state that were mutually agreed to during negotiations with the Spanish government.

Which of these is the "best" approach for Catalonia will ultimately depend on compromises reached between Catalonia and the Spanish government, and what the two parties determine best meets their needs.

Moreover, under a negotiation framework of earned sovereignty, one of the European regional organizations would be best suited to mediate discussions between Catalonia and the government of Spain. The EU may be a particularly good mediator, as Catalonia is already subject to EU regulations, a member of the EU common market, and a participant in the Schengen Zone in its current status as an autonomous region of Spain. The EU may therefore have a vested interest in effectively resolving Spain and Catalonia's conflict, if Catalans choose independence. After all, a failure to integrate a new Catalan state into the EU could jeopardize its participation in the common market and the Schengen Zone, possibly distorting EU economic and migration policies. It would also entail consequences for EU citizens living in Catalonia on the basis of the free movement of persons as guaranteed by the EU Treaty. Otherwise, as a European forum for multilateral dialogue and conflict resolution, the Organization for Security and Cooperation in Europe (OSCE) may also be well-suited to mediate any conflicts between the government of Spain and Catalonia related to Catalonia's right to decide its political destiny. The Council of Europe, which among other things works to further the rule of law and human rights in Europe, might also be well-placed to mediate any discussions between Catalonia and the Spanish government regarding Catalonia's political future.

#### ***4.2.3.3. Negotiating Catalonia's Constrained Sovereignty within the EU***

As we have shown above (see chapter 3.2.), Catalonia in its current statute (an autonomous Community within Spain) has very little rights under European Law, be it EU Law or Council of Europe Treaties. However, Catalans as European citizens have rights guaranteed by

European Law, both as Human Rights under the European Convention of Human Rights and political Rights as EU citizens, to fully participate to “the ever closer union among the peoples of Europe”<sup>245</sup>.

Further, if the Catalan people succeed in having its own European State, the later then have the right, guaranteed by article 49 TEU, to apply for EU membership, as have for example done Croatia, the Czech Republic, Estonia, Latvia, Lithuania, Slovakia and Slovenia. If not encouraging Catalonia to become the State of the Catalans so that Catalans may be able to fully participate to EU, the current EU legal structure comes close from doing so. In that perspective, it also has to be underlined that Catalan authorities have always claimed their desire to have Catalonia as a full member of the EU, even expressing a preference for finding a way for the residents of Catalonia to enjoy uninterrupted benefit of EU citizenship, currently as Spanish nationals, in the future as Catalan nationals.

Despite all these elements, Catalonia's authorities may not access this third path, since it is only EU member States or institutions that may trigger European mechanisms. And the EU founding treaties never envisaged the hypothesis of a new European State emerging on the territory of an already existing European State. Therefore, there is no specific EU rule for dealing with such an occurrence, and the principle of conferral (art. 5 TEU; see above 3.2.1.1 for its meaning in our context) even prevents EU institutions to intervene in the present affair.

However, under the emerging international framework of “earned sovereignty” , a possible path envisaged for earned sovereignty negotiations is “constrained sovereignty”, which “involves imposing continued limitations on the new state's sovereign authority and functions.”<sup>246</sup> As underlined by the European Court of Justice in 1963 already, EU (at that time EEC) constitutes “a new legal order of international law for the benefit of which the States have limited their sovereign rights”<sup>247</sup>. Thus becoming a member of EU equals accepting constrained sovereignty; and it actually happens to be what the Catalan authorities want for their future European State.

In that perspective, no one should forget the valuable contribution of Catalonia to the European project in the late 80s' and early 90's. Back at that time, notions such “regionalism”<sup>248</sup> and the “federalization of Europe” have grown rapidly, thanks to the contribution of regional authorities such as Catalonia, the Basque Country, Flanders, Scotland and the German Landers.

Given the rise of regional assertiveness; it is not surprising that the speculation of a powerful image of the “Europe of the Regions”<sup>249</sup> has grown rapidly where it was possible to imagine a federal Europe in which the “regions” would serve as some kind of a “third level”<sup>250</sup> of the

European Government<sup>251</sup>. According to this widespread image, the nation-states were deemed to fade away in favor of regions and super-regions that would successfully survive and thrive within the EU without the support of the nation-states.

For many authors, in the age of globalization and of complex interdependence, the nation-state was withering and, in Europe, the EU on the one hand, and the regions on the other, were conceived to be its heirs. The state, caught in the middle, would be stripped of its power from above and from below, as if we were in a zero-sum game. The scheme has been called the “sandwich thesis”, and seemed very attractive to ethno-regionalist political parties. This favorable context has led to the growing involvement of sub-national authorities in EU policy making and has rendered, in some way, the state centric conception of the Union obsolete while the notion of the “Europe of the Regions” was forging a “European federation” compounded of smaller, more natural units, namely nation-regions, gathered around a strong supranational core.

Within this particular context, it is not surprising why regional political parties across Western Europe – including Catalonia with pro-European parties such as CiU and ERC - were among the most ardent defenders of the “Europe of the Regions”, hoping for a national-bypassing<sup>252</sup> strategy with the extra-political space granted by the Maastricht Treaty at the Council of Ministers (modification of article 146 of the EC Treaty by the Maastricht Treaty). Parallel to this institutional change, the development since 1988 of an EU regional policy (through the structural funds) also enhanced the relevance and importance of regional actors within the EU polity, leading to the emergence of the multilevel governance approach of the European policy making<sup>253</sup>. Furthermore, the creation of the Committee of the Regions<sup>254</sup> (CoR) in 1994 with the Maastricht Treaty, as well as the inclusion of the subsidiarity principle to the European polity project (art. 2 of the TEC after the Maastricht modification) led actors and authors to believe that the EU had provided one of the *stimuli* for a bottom-up regionalism in which Europe seemed to dissolve sovereignty enabling regions to prosper in a context where cultural<sup>255</sup> or/and political recognition could be reached.

In this respect, Jordi Pujol from CiU – President of the Catalan Generalitat between 1980 and 2003 – has decisively contributed to the consolidation of regionalism in Europe as well as to the popular slogan of “Europe of the Regions”<sup>256</sup> (or “with the Regions”). Indeed, Pujol has established a Catalan regional presence in Brussels with the *Patronat Català* Pro Europa at a time when the practice of regional para-diplomacy<sup>257</sup> was a highly contentious issue. Additionally, from 1992 to 1996, he became the President of the Assembly of the Regions (ARE), the institution that has inspired the creation of the Committee of the Regions (CoR).

Finally, in 1998, he became one of the founding fathers of the “Four Motors of Europe”, which provided a favorable context for the development of particular contributions of regional identities and initiatives.

Unfortunately, as soon as regional parties realized that Europe could not deliver sovereignty, the European institutional opportunity structure was about to shrink as much as to dictate the end of the naïve hype of the “Europe of the Regions”. Whilst regional actors had been granted new access points to European decision-making processes, these were either not available to them - because the access was reserved to parties in regional governments - or the scope of influence that could be exercised was very limited due to a sovereign logic prevailing at the Council of Ministers. Very seemingly, the CoR became a political disappointment due to its political weakness, lack of resources and excessive diversity in terms of authority within it.

More recently, and in spite of a general Catalan setback on Europeanism<sup>258</sup> by the late 90’s, the CiU has not lost its faith in Europe as the discussion of the secession of Catalonia at the regional elections of November 2012 favored a future Catalan state within the European framework. In a similar line of argument, on 23 January 2013<sup>259</sup>, the *Declaration on the sovereignty and the right to decide of the people of Catalonia* contained a declaration of Europeanism, which means that, as in the past, Catalan nationalism and pro-Europeanism come hand in hand, as the two faces of the same coin.

Thus, although the EU does not have an explicit policy on the right of Nations without a State within the EU, it should be noted that the absence of an institutional answer to the legitimate claim of these peoples of Europe could also endanger the future of the EU project itself, since unresolved processes of self-determination could be highly disruptive for the survival of the fragile European project, as the Brexit issue is already suggesting. Additionally, it could have a domino effect, as more nationalist political movements across Europe would be tempted to replicate the “secessionist option” to overcome the absence of an answer on the part of national governments to enduring demands of territorial accommodation.

There would therefore be an interesting, and in our view much needed avenue to explore for a negotiation procedure, within the framework of the EU, between Catalonia, Spain (and other EU member States) and EU institutions, for recognizing a proper place to Catalonia within the “ever closer union among the peoples of Europe”. Thus in the context of an earned sovereignty process for Catalonia if the Head of the Spanish government, with the support of Catalan authorities, was to address the European Council (meeting of the Heads of Government or State of EU member State) with a request to work on a negotiation for

Catalonia to find a just place in Europe, it seems to us that it could be an initiative that the European Council could support<sup>260</sup>. It could even lead to a Treaty revision which would define a procedure for “internal enlargement of the EU”<sup>261</sup>.

**In conclusion**, only the path of the exercise of a unilateral Right to Decide is open at the sole initiative of the Catalan authorities. Other paths exist, but their use is dependent on the initiative or cooperation of other actors, which do not appear available for the time being. This is why, Catalan authorities, considering the clear mandate on which they were elected in 2015, have at present no other choice than to pursue the unilateral exercise of the Right to Decide; a clear moral argument, based on the failed exercise of the right to internal self-determination<sup>262</sup> support this conclusion. Moving ahead on this path does however not preclude using other paths at a later stage, depending on the will of the other actors. In that perspective, recourse to the earned sovereignty framework may not be a panacea to conflict resolution, nor a mandatory approach, but it does provide a flexible framework under which states can and have negotiated greater independence.

### 4.3. Behaving as regard the Exercise of the Right to Self-determination

It is naturally not for international expert to assess the legitimacy of actor's future behavior in the context of a self-determination process. The present report however sheds light on the legal, political and moral constraints that weight on the different actors.

And as abundantly made clear in the pages above, there is no clear cut legal, political or moral solution to the issues raised by the exercise by Catalonia of its Right to Decide its political future. However, and comparative studies on which the present report relies clearly demonstrate so, the outcome of such a process will be decided, in practice, on the perceived legitimacy of claims and behaviors of the concerned actors.

Therefore, even if Catalan authorities have a clear democratic mandate for implementing self-determination of Catalonia (which is nowadays the case), they should as far as possible try to act within the framework of the law. As regard the very peculiar case of a self-determination referendum, international practice and ongoing scholarly debate show that the applicable law to such situation, and its exact content remain unsettled; that should not prevent Catalonia's authorities to always try to ground their actions and claim on existing legal basis. Also, international practice shows that the exercise of the right to decide is a complex process, and not a right whose enforcement may be decided by a Court<sup>263</sup>, it is ultimately a right that will be effectively implemented through a political process. Therefore, notwithstanding the legal or democratic legitimacy of their claim, Catalan authorities should



always remain open to enter into a negotiation process to effectively realize their right to decide, eventually within the framework of an “earned sovereignty” process.

Spanish authorities’ will to preserve the current political and constitutional framework of Spain is legitimate. Nevertheless, Spanish authorities are also confronting legitimacy issues, and their denial of the right to decide to Catalans may not, in the long run, remain only based on legalistic-constitutionalist arguments. They will have to work on a political solution to the issue. Further, even if their goal is as legitimate as Catalans right to decide, it does not absolve them from respecting the law and fundamental European values. Worrying information has reached the expert group about potentially illegal activities of Spanish national authorities<sup>264</sup> and naturally, the legitimacy of their claim to continuing unchanged territorial unity of Spain will also be measured against European standards. Let us also notice that political threats to disrupt the proper functioning of Catalonia as one of the component of the Spanish State (in July 2017 has emerged a discourse from the Spanish government about cutting budgetary transfers to Catalonia if Catalonia’s authorities tried to go ahead with their unilateral implementation of the Right to Decide) are not without danger for the legitimacy of the Spanish State position. In 1992, the Badinter Commission dismissed the claim of the Yugoslav (Serbian) Authorities for preserving territorial unity of the Federal Socialist Republic of Yugoslavia on the ground that the Yugoslav political system was dysfunctional, and that Yugoslavia had entered into a dissolution process<sup>265</sup>. The legitimacy of the claim for Spanish national Unity is based on the proper and satisfactory functioning of the Spanish State and political system.

As regard European authorities, we have underlined that EU being based on the principle of conferral, and considering that no EU treaty provision dealing with an issue such as the one at stake with Catalonia’s right to decide can clearly be identified, EU institutions may not intervene directly. Nevertheless, recent EU practice shows a consistent support for newly emerged European States (see 3.2.4.1 above). On its side, the ECJ may be seized for preliminary rulings by any legal person (individual, company, authorities) as regard national authorities’ decisions that may impact the implementation or require an interpretation of EU law. Naturally, the ECJ may always declare itself incompetent on such a request, but this does not prevent from trying to use this channel to bring challenges linked to the side effects of the right to decide within the realm of EU law. It is a mid-term process, as legal decisions by the ECJ, especially when they concern sensitive issues, may take a couple of years to be adopted; despite this timeframe, it is certainly worth pursuing this path for involving the ECJ. Also, as a political body composed of elected representative, the European Parliament may adopt Resolutions on any topic it finds relevant.

Further, European institutions are not limited to EU institutions. Within the Council of Europe, the Parliamentary assembly and the Congress of Local and Regional Authorities of Europe adopt, every year, reports on the current democratic situation in Europe. The development around the Right to Decide of Catalans should certainly be included in the coming reports from these two European institutions. Also, if Human Right violations may be at stake, the High Commissioner for Human Right of the Council of Europe may be approached. It is an independent institution within the Council of Europe. Also the Commission for democracy through Law (better known as the Venice Commission) may be called for legal opinion on the issues raised by the matter; however, this later Commission is an intergovernmental body (composed of independent experts), and its involvement is to a large extent dependent on the consent of the Spanish State.

Finally, OSCE shall, at this stage, not come into consideration. It gets involved mostly when there are major security threats in Europe (and around). It has in that perspective to be underlined that the whole process of self-determination of Catalonia has so far been exempt of any violence or security threat, and the expert dare express the wish that it will continue so, whichever way the process shall evolve.

#### **4.4. Intermediary Conclusion**

Democratic legitimacy at Catalan and Spanish levels may both be equally valid, even though the principle of external preference limits the capacity of Spain to permanently oppose the democratic choice of Catalonia. When conflicting political legitimacies compete, there is a duty for democratic authorities to negotiate. Further, in a genuine liberal democracy, rule of law may not trump democratic legitimacy, nor the other way around; therefore, in a modern democratic State, rule of law and democratic legitimacy need to be reconciled and cannot in the long term remain opposed. In the context of a vote of self-determination, as is the case, the national framework will inevitably be inappropriate because the existing democratic processes to address the issue did not allow for a solution or a process to emerge within itself. A change of scale then appears necessary, by justifying either locally or internationally (or both) the organization of a referendum.

Thus, if Spanish national Authorities deny the right to Catalonia to negotiate its Right to Decide within the Spanish political framework, then the only path left for Catalonia's Authorities is the call for a self-determination referendum. Notwithstanding, international practice shows that self-determination processes always rely at some point on a negotiation procedure, and the experts recommend the exploration of an earned sovereignty negotiating process within the framework of the EU.

## CONCLUSIONS

1. The evolution of the negotiating process between the Catalan and Spanish governments since the re-establishment of democracy in 1977 through time has allowed us to identify key moments of a deteriorating political relationship where the Spanish government has gradually renounced to accommodate Catalan territorial demands. Very seemingly, the evolution of this relationship sheds a new light on the tortuous path towards the legally binding referendum on political independence to be held on the 1<sup>st</sup> October 2017.
2. The upsurge of territorial demands towards political independence has been put on the political agenda by the organized Catalan civil society immediately after the release of the Constitutional Tribunal ruling in 2010. Additionally, there has been a clear shift in popular territorial preferences, moving from preferences asking for the maintenance of the current “status quo” to demands of “political independence”, irrespectively of people’s age.
3. Catalan popular demand for the possibility to hold a referendum on political independence has been largely justified by the democratic “right to decide”, which has evolved from the more traditional and long-standing legal framework to the “national right to self-determination”. In other words, demands for political independence have been legitimized by a democratic principle invested in the Catalan people, reinforced by the repeated denial to accommodate Catalonia’s demands on the part of the Spanish government.
4. From an international law perspective, it appears clearly that there is no international legal prohibition barring a sub-state entity from deciding its political destiny by assessing the will of its people. Both case law and state practice support this conclusion. State practice demonstrates that numerous geographically diverse sub-state entities have expressed the will of their people regarding independence. The practice occurs both with and without the consent of the national state. Many sub-state entities have achieved independence after assessing the political will of their people. EU member states have recognized many former sub-state entities that assessed their people’s political will and decided to pursue independence.
5. As regard European Law, in the absence of specific Treaty provision on the right of Self-determination for a European people without a State on the territory of the EU, EU law, does not forbid the exercise of its Right to Decide for a European people within the EU. There are even numerous Treaty provisions that indicate that if such Right was to be exercised, EU and its member States would react positively to a new European State candidacy to join the EU.

Recent and consistent practice clearly points that way. Further, both as a collectively exercised human right and as a fundamental norm of international Law, EU recognizes the Right to decide.

6. As regard the constitutionality of the claim for the Right to Decide, it is necessary from an empirical viewpoint, and fruitful from a normative one, to give up the quest for a supreme constitutional interpreter. What is crucial in a constitutional state that is faithful to the ambitions of constitutionalism is the ongoing dialogue about, and engagement with, constitutional values and principles. Only this makes the constitution a living document, infused by the competing interpretations of values and principles that, by their very nature, admit various readings and conceptions. The quest for the final word is useless, illusory and possibly lethal from the political viewpoint of a sane deliberative community.

7. In that respect, the debate is much more open than what one might think at first sight by examining too rapidly the basic features of contemporary constitutionalism, especially as it is illustrated by the Spanish constitutional system. Far from being disruptive of the constitutional project that was adopted in 1978, the Catalan claim to a right to decide on its political future precisely testifies to a genuine commitment to the ongoing constitutional dialogue that is legitimate in an open society. This is why simply dismissing this claim as “unconstitutional” cannot be an attitude that lives up to the high standard of political morality that is imposed by the ideal of constitutionalism.

8. Democratic legitimacy at Catalan and Spanish levels may both be legitimate, even though the principle of external preference limits the capacity of Spain to permanently oppose the democratic choice of Catalonia. However, when conflicting political legitimacies compete, there is a duty for democratic authorities to negotiate. This is confirmed by the observation of international practice that in almost all instances, the sub-state entity and national state negotiate the contours of the assessment of political will.

9. Further, in a genuine liberal democracy, rule of law may not trump democratic legitimacy, nor the other way around; therefore, in a modern democratic State, rule of law and democratic legitimacy need to be reconciled and cannot in the long term remain opposed. In the context of a vote of self-determination, as is the case, the national framework will inevitably be inappropriate because the existing democratic processes to address the issue did not allow for a solution or a process to emerge. A change of scale thus appears necessary by justifying either locally or internationally the organization of a referendum. If Spanish national Authorities deny the right to Catalonia to negotiate its Right to Decide within the Spanish political framework, then the only path left for Catalonia's Authorities is the call for a self-determination referendum.

10. Thus, whatever the conflicting claims of legitimacy put forward by the political actors, international practice and transconstitutional jurisprudence show that successful self-determination processes always rely at some point on a negotiation procedure. In that perspective, the experts recommend the exploration of an earned sovereignty negotiating process within the framework of the EU. This would imply involvement by EU institutions; we consider it possible in the perspective of a negotiation within the EU, fully associating Spain in seeking for Catalonia a constrained sovereignty solution, as an EU full member.

## NOTES

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<sup>1</sup> As often in such heated debate, many rumors, accusations and unchecked facts are being circulated by media or the actors themselves. The experts have only relied in their work on sources that could be verified, according to academic standards.

<sup>2</sup> Article 1 § 1, common to the 1966 UN Covenant Economic, Social and Cultural Rights and the UN Covenant on Civil and Political Rights.

<sup>3</sup> As is shown by a consistent European practice and has been recognized by the International Court of Justice in its 2010 *Kosovo Advisory Opinion* (see below, section 3.1.1.).

<sup>4</sup> Article 1 § 3, common to the 1966 UN Covenant Economic, Social and Cultural Rights and the UN Covenant on Civil and Political Rights.

<sup>5</sup> On 14 December 1960, the UN General Assembly adopted Resolution 1514 on the Granting of Independence to Colonial People, leading the UN to focus on the right to self-determination for people under colonial rule.

<sup>6</sup> International Court of Justice, “Western Sahara, Advisory Opinion”, *I.C.J. Reports 1975*, p. 12.

<sup>7</sup> See below section 2.2.4. for developments of the three different foundations of national projects.

<sup>8</sup> Preamble of the Treaty on the Functioning of the European Union, § 8 (*JOUE*, n° C 202/49 of 7 June 2016).

<sup>9</sup> See for example Edward, David (2013), “EU law and the separation of member states.” *Fordham Int'l LJ* 36, pp. 1151-1168.

<sup>10</sup> According to art. 48 TEU, it is for the government of any member State, the European Parliament or the Commission to propose a Treaty revision.

<sup>11</sup> This typology has been suggested by the contribution of Bossacoma, Pau and López Bofill, Hèctor (2016), “Legal Strategies and barriers to secession”, in *Catalonia: a new independent state in Europe? A debate on secession within the European Union*, edited by Xavier Cuadras-Morató. London, Routledge pp.107-148; and by the contribution of Fisher, Roger, Ury, William and Patton, Bruce (1999), *Getting to Yes – Negotiating Agreement Without Giving In*. 2nd ed. London, Random House Business Books.

<sup>12</sup> Guibernau, Montserrat (2004), “Catalonia within the new democratic Spain”, in Guibernau, Montserrat (ed), *Catalan Nationalism: Francoism, transition and democracy*, London, Routledge, pp. 81-82.

<sup>13</sup> Cuadras-Morató, Xavier (2016), “Catalonia, a new State in Europe? “, in *Catalonia: a new independent state in Europe? A debate on secession within the European Union*, edited by Xavier Cuadras-Morató. London, Routledge, p.11.

<sup>14</sup> Guinjoan, Marc and Rodon, Toni (2016), “Catalonia at the crossroads: analysis of the increasing support for secession”, in *Catalonia: a new independent state in Europe? A debate on secession within the European Union*, edited by Xavier Cuadras-Morató. London, Routledge, p. 30.

<sup>15</sup> Cuadras-Morató, Xavier (2016), “Catalonia, a new state in Europe? “, in *Catalonia: a new independent state in Europe? A debate on secession within the European Union*, edited by Xavier Cuadras-Morató. London, Routledge p. 12.

<sup>16</sup> Resolution 742/IX of the Parliament of Catalonia, on the general political orientation of the Government of Catalonia (at: <https://www.parlament.cat/document/intrade/6026>).

<sup>17</sup> See Resolution 5/X of the Parliament of Catalonia, adopting the Declaration of sovereignty and right to decide of the people of Catalonia (at: <https://www.parlament.cat/document/intrade/7176>).

<sup>18</sup> See *Declaration on the sovereignty and the right to decide of the people of Catalonia* (at: <https://assemblea.cat/sites/default/files/documents/sovereignty.pdf>).

<sup>19</sup> Elias, Anwen (2015), "Catalan independence and the challenge of credibility" in *Contesting Spain? The dynamics of nationalist movements in Catalonia and the Basque Country*, edited by Richard Gillespie and Caroline Gray. London, Routledge, p.79.

<sup>20</sup> For further details, see Bossacoma, Pau and López Bofill, Hèctor (2016) "Legal Strategies and barriers to secession", in *Catalonia: a new independent state in Europe? A debate on secession within the European Union*, pp.107-148.

<sup>21</sup> CDC and DC political parties were previous partners in CiU federation. The federation was dissolved in June 2015 due to differences between the positions the UDC leadership and CDC leader Artur Mas took over the sovereignty process.

<sup>22</sup> Martí, David and Cetrà, Daniel (2016), "The 2015 Catalan election: a *de facto* referendum on independence?", *Regional & Federal Studies*, 26:1, p. 112.

<sup>23</sup> Muñoz, Jordi and Guinjoan, Marc (2013), "Accounting for internal variation in nationalist mobilization: unofficial referendums for independence in Catalonia (2009–11)", in *Nations and Nationalism*, 19 (1), pp. 44–67.

<sup>24</sup> Guinjoan, Marc and Rodon, Toni (2016), "Catalonia at the crossroads: analysis of the increasing support for secession", in *Catalonia: a new independent state in Europe? A debate on secession within the European Union*", edited by Xavier Cuadras-Morató. London, Routledge, p. 40.

<sup>25</sup> See Aragonès, Enriqueta and Ponsati, Clara (2016), "Negotiations and political strategies in the contest for Catalan independence", in "Catalonia at the crossroads: analysis of the increasing support for secession", in *Catalonia: a new independent state in Europe? A debate on secession within the European Union*", edited by Xavier Cuadras-Morató. London, Routledge, p. 67

<sup>26</sup> Guinjoan, Marc and Rodon, Toni (2016), *loc. cit.*, p. 39.

<sup>27</sup> Cramer, Kathryn (2015), "Political power and civil counterpower", in *Contesting Spain? The dynamics of nationalist movements in Catalonia and the Basque Country*, edited by Richard Gillespie and Caroline Gray. London, Routledge, p. 103.

<sup>28</sup> *Ibid.*

<sup>29</sup> Gillespie, Richard (2015), "The Political evolution of Basque and Catalan Nationalism", in *Contesting Spain? The dynamics of nationalist movements in Catalonia and the Basque Country*, edited by Richard Gillespie and Caroline Gray. London, Routledge, p.5.

<sup>30</sup> The CiU was formed in 1978 as a center-right federation of *Unió Democràtica de Catalunya* (UCD) and *Convergència Democràtica de Catalunya* (CDC). This party combined the defense of Catholic values with a clear Catalanist vocation expressed via support for Catalan self-government within a federal Spain. The political formation, headed by Jordi Pujol, ruled the Catalan government uninterruptedly from the first Catalan elections in 1980 until 2003. The political formation had largely favored a gradual system of increasing self-government, although since 2012 CDC geared itself towards sovereignty and pro-independence postulates, while UDC remained in an undecided camp, balancing between the status quo and a confederation.

<sup>31</sup> Cuadras-Morató, Xavier (2016), "Catalonia, a new independent state in Europe? ", in *Catalonia: a new independent State in Europe? A debate on secession within the European Union*", edited by Xavier Cuadras-Morató. London, Routledge, p.14.

<sup>32</sup> The notion of civil society stands for the non-organizational institutions or actors that manifest their interests and will of citizens. This includes trade unions, associations and other political actors that do not have a formal connection with institutions and political parties.

<sup>33</sup> Martí, David and Cetrà, Daniel (2016), "The 2015 Catalan election: a *de facto* referendum on independence?", *Regional & Federal Studies*, 26:1, pp. 107-119.

<sup>34</sup> For further information, consult *Òmnium Cultural* webpage at <https://www.omnium.cat>.



<sup>35</sup> Crameri, Kathryn (2015), "Political power and civil counterpower", in *Contesting Spain: The Dynamics of nationalist movements in Catalonia and the Basque Country*, edited by Richard Gillespie and Caroline Gray, Routledge, London, pp.99-113.

<sup>36</sup> *Ibid.*, p.107.

<sup>37</sup> Guinjoan, Marc and Rodon, Toni Rodon (2016), *loc. cit.* p. 36.

<sup>38</sup> Cuadras-Morató, Xavier (2016), *op. cit.*; and Bel, Germà (2015), *Disdain, Distrust and Dissolution: The surge of Support for Independence in Catalonia*". Chicago, Sussex Academy Press.

<sup>39</sup> Barometer 746 from the *Centre d'Estudis I Opinió* (CEO), 2014.

<sup>40</sup> Barometer 838 from the *Centre d'Estudis I Opinió* (CEO), 2016.

<sup>41</sup> Barometer 850 from the *Centre d'Estudis I Opinió* (CEO), 2017.

<sup>42</sup> Munoz, Jordi & Tormos, Raul (2012), *Identitat o càlculs instrumentals? Anàlisi dels facts explicatius del suport a la independència* (Barcelona: Papers de Treball del Centre d'Estudis d'Opinió).

<sup>43</sup> Prat i Guilanyà, Sebastià (2012), *El suport a la independència de Catalunya. Anàlisi de canvis i tendències em el període 2005-2012* (Barcelona: Papers de Treball del Centre d'Estudis d'Opinió).

<sup>44</sup> Guinjoan, Marc and Rodon, Toni (2016), *loc. cit.*, p.52.

<sup>45</sup> See Barometer 758, from the *Centre d'Estudis I Opinió* (CEO), 2014.

<sup>46</sup> *Ibid.*

<sup>47</sup> See Barometer 857 from the *Centre d'Estudis I Opinió* (CEO), 2017 (2<sup>nd</sup> wave).

<sup>48</sup> Barometer 346 from the *Centre d'Estudis I Opinió* (CEO), 2006.

<sup>49</sup> Barometer 850 from the *Centre d'Estudis I Opinió* (CEO), 2017 (1<sup>st</sup> wave).

<sup>50</sup> See Muñoz, Jordi & Tormos, Raul (2012), *Identitat o càlculs instrumentals? Anàlisi dels facts explicatius del suport a la independència* (Barcelona: Papers de Treball del Centre d'Estudis d'Opinió). Also Prat i Guilanyà, Sebastià. 2012. *El suport a la independència de Catalunya. Anàlisi de canvis i tendències em el període 2005-2012* (Barcelona: Papers de Treball del Centre d'Estudis d'Opinió).

<sup>51</sup> Barometer 723 from the *Centre d'Estudis I Opinió* (CEO), 2013.

<sup>52</sup> Sanjaume-Calvet, Marc (2016), "The morality of secession: secessionist and antiseccessionist arguments in the Catalan case", in *Catalonia: a new independent state in Europe? A debate on secession within the European Union*", edited by Xavier Cuadras-Morató. London, Routledge, p.91.

<sup>53</sup> For further details see the report from Jaume López, 2011, "From the right to Self-determination to the Right to Decide: a possible paradigm shift in the struggle for the right of stateless nations", UNESCOCAT. This report can be consulted here: <http://www.unescocat.org/fitxer/3373/QR4%20okxweb.pdf>

<sup>54</sup> Bossacoma, Pau and López Bofill, Hèctor (2016) "Legal Strategies and barriers to secession", in *Catalonia: a new independent state in Europe? A debate on secession within the European Union*", edited by Xavier Cuadras-Morató. London, Routledge, p.111.

<sup>55</sup> For further details see Tornos, Joaquín (2014), "El problema catalán: una solución razonable", in *El cronista del Estado social y Democrático de Derecho*, 42: pp. 44-53.

<sup>56</sup> Guibernau, Montserrat (2014), "Prospects for an Independent Catalonia", *International Journal of Politics, Culture and Society*, nº27, p. 6.

<sup>57</sup> For further details, see Anwen, Elias (2015), "Catalan independence and the challenge of credibility" in *Contesting Spain? The dynamics of nationalist movements in Catalonia and the Basque Country*, edited by Richard Gillespie and Caroline Gray. London, Routledge, pp.79-98; see also Serrano, Ivan (2013), "Just a matter of Identity? Support for independence in Catalonia", *Regional & Federal Studies*, 23(4): 387-405 and Serrano,



Ivan (2014), "The evolution of the political discourse in Catalonia 2003-2014: From Self-government to Self-determination", on research gate website:

[https://www.researchgate.net/profile/Ivan\\_Serrano2/publications](https://www.researchgate.net/profile/Ivan_Serrano2/publications) ; also Lineira, Robert and Cetrà, Daniel (2015,) "The Independence Case in Comparative Perspective", *Political Quarterly*, vol 86, no. 2, pp. 257-264.

<sup>58</sup> See Chapter 3.2. and Section 4.2.3. below.

<sup>59</sup> See Chapter 3.1. below.

<sup>60</sup> Roepstorff, Kristina (2013), *The Politics of Self-Determination. Beyond the Decolonisation Process*, London, New York, Routledge, p. 57.

<sup>61</sup> Bentham Jeremy (1834), *Deontology or the Science of Morality in which the Harmony and Co-Incidence of Duty and Self-Interest, Virtue and Felicity, Prudence and Benevolence*, 2 Vol., Bowring J. (ed.), London, Longman, 1834, 470 p., 316 p., Vol. 1, pp. 322-323.

<sup>62</sup> Hobbes Thomas (1651), *Leviathan, or, The Matter, Forme, & Power of a Common-wealth Ecclesiasticall and Civill*, Edited and with an introduction by Ian Shapiro, New Haven (Conn.), London, Yale University Press, 2010, 583 p.

<sup>63</sup> Locke John (1690), *Two Treatises of Government and A letter concerning toleration*, ed. and with an introduction by Ian Shapiro, New Haven, Conn., London, Yale University Press, 2003, 358 p.

<sup>64</sup> See Art. 1 of the Montevideo Convention on the Rights and Duties of States (1933).

<sup>65</sup> See Chapter 3.3. below.

<sup>66</sup> Raz Joseph (1986), *The Morality of Freedom*, Oxford, Clarendon Press, 435 p.

<sup>67</sup> E.g. UdSSR Constitution of 1977: « Article 72.

Each Union Republic shall retain the right freely to secede from the USSR. »

Ethiopian Constitution: « Article 39: Rights of Nations, Nationalities, and Peoples

1. Every Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession.

2. Every Nation, Nationality and People in Ethiopia has the right to speak, to write and to develop its own language; to express, to develop and to promote its culture; and to preserve its history.

3. Every Nation, Nationality and People in Ethiopia has the right to a full measure of self-government which includes the right to establish institutions of government in the territory that it inhabits and to equitable representation in state and Federal governments.

4. The right to self-determination, including secession, of every Nation, Nationality and People shall come into effect:

a. When a demand for secession has been approved by a two-thirds majority of the members of the Legislative Council of the Nation, Nationality or People concerned;

b. When the Federal Government has organized a referendum which must take place within three years from the time it received the concerned council's decision for secession;

c. When the demand for secession is supported by a majority vote in the referendum;

d. When the Federal Government will have transferred its powers to the Council of the Nation, Nationality or People who has voted to secede; and

e. When the division of assets is effected in a manner prescribed by law.

5. A "Nation, Nationality or People" for the purpose of this Constitution, is a group of people who have or share a large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common

or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory. »

Saint Kitts and Nevis Constitution: « Article 115.

If, by virtue of a law enacted by the Nevis Island Legislature under section 113(1), the island of Nevis ceases to be federated with the island of Saint Christopher, the provisions of schedule 3 shall forthwith have effect.

Liechtenstein's Constitution: « Article 4

1. Changes in the boundaries of the territory of the State may only be made by a law. Boundary changes between communes and the union of existing ones also require a majority decision of the citizens residing there who are entitled to vote.

2. Individual communes have the right to secede from the State. A decision to initiate the secession procedure shall be taken by a majority of the citizens residing there who are entitled to vote. Secession shall be regulated by a law or, as the case may be, a treaty. In the latter event, a second ballot shall be held in the commune after the negotiations have been completed. »

<sup>68</sup> Amendment proposed by F. Letamendía creating a right to self-determination for the peoples of the State. *Diario de sesiones de las Cortes Generales. Congreso de diputados*, nº91, 16 de junio de 1978, pp. 3427-3435.

<sup>69</sup> See e.g. Buchanan, Allen (1991), *Secession. The Morality of Political Divorce from Sort Sumter to Lithuania and Quebec*, Boulder, Westview Press, 1991, xviii+174 p.; Also Buchanan, Allen (2007), *Justice, Legitimacy, and Self-Determination. Moral Foundations for International Law*, Oxford, Oxford University Press, 522 p.

<sup>70</sup> Moore, Margaret (2000), "The Ethics of Secession and a Normative Theory of Nationalism", *Canadian Journal of Law & Jurisprudence*, Vol. 13, 2000, pp. 225-250; See also Moore Margaret (ed.) (1998), *National Self-Determination and Secession*, Oxford, Oxford UP.

<sup>71</sup> See SSTC 48/2003; 5/2004; 235/2007; 12/2008; 42/2014.

<sup>72</sup> Kymlicka, Will (2000), "Federalism and Secession: At Home and Abroad", 13 *Can J L & Jurisp*, pp. 207-224, esp. 216

<sup>73</sup> See Chapter 1.2. above.

<sup>74</sup> See esp. SSTC 31/2015; 32/2015; 138/2015; 259/2015.

<sup>75</sup> Roepstorff, Kristina (2013), *The Politics of Self-Determination. Beyond the Decolonisation Process*, London, New York, Routledge, pp. 75-87.

<sup>76</sup> See e.g. Bossacoma i Busquets, Pau (2015), *Justícia i legalitat de la secessió. Una teoria de l'autodeterminació nacional des de Catalunya*, Institut d'Estudis autonòmics.

<sup>77</sup> See e.g., in the Canadian context, Leclair, Jean (2012), "Le Fédéralisme Comme Refus des Monismes Nationalistes", in Dimitrios, Karmis and François Rocher (dir.), *La dynamique confiance-méfiance dans les démocraties multinationales. Le Canada sous l'angle comparatif*, Québec, Presses de l'Université Laval, pp. 209-243.

<sup>78</sup> See e.g. Wellman, Christopher Heath (2005), *A Theory of Secession. The Case for Political Self-Determination*, Cambridge, Cambridge University Press ; Tudela Aranda, José (2016), « El derecho a decidir y el principio democrático », *Teoría y realidad constitucional*, nº 37, pp. 477-497, esp. p. 479.

<sup>79</sup> Kelsen, Hans (1929), *Vom Wesen und Wert der Demokratie*, Tübingen, J.C.B. Mohr (Paul Siebeck), 119 p.

<sup>80</sup> Weinstock, Daniel "In a Secession referendum the franchise would depend on what you do, not what you are", accessible at <http://eudo-citizenship.eu/commentaries/citizenship-forum/citizenship-forum-cat/1157-independence-referendums-who-should-vote-and-who-should-be-offered-citizenship?showall=&start=13>.

<sup>81</sup> For a general discussion see e.g. the symposium "Independence Referendums: Who should vote and whou should be offered citizenship?", available at the internet address referred to in endnote 77.

<sup>82</sup> Dworkin, Ronald (1977), *Taking Rights Seriously*, Cambridge, Harvard University Press, 295 p., p. 234.

<sup>83</sup> Mill, John Stuart (1859), *On Liberty*, Harmondsworth, Penguin, 1976, 186 p.

<sup>84</sup> Bentham, Jeremy, *Of Sexual Irregularities, and Other Writings on Sexual Morality*, ed. Philip Schofield, Catherine Pease-Watkin, Michael Quinn, Oxford, Clarendon Press, Oxford University Press, 2014, 180 p. See also the famous debate between Lord Devlin and Herbert L.A. Hart: Patrick Devlin, *The Enforcement of Morals*, London, Oxford, New York, Oxford University Press, 1965, 139 p. ; Hart, Herbert L.A. (1963), *Law, Liberty, and Morality*, Stanford, Calif., Stanford University Press, 88 p.

<sup>85</sup> STC 31/2010.

<sup>86</sup> Regarding this difficulty in moral theory, see e.g. Singer, Peter (2011), *Practical Ethics*, 3rd ed., New York, Cambridge University Press, 337 p.

<sup>87</sup> Singer, Peter (2011), *op. cit.*

<sup>88</sup> Ratner, Steven (1996), "Drawing a Better Line: *Uti possidetis* and the Borders of New States", *American Journal of International Law*, pp. 593 ff.; for reflections on the relevance of this principle for Europe: Corten O., Delcourt B., Klein P. & Levrat N. (1999), *Démembrements d'Etats et delimitations territoriales: L'uti possidetis en question(s)*, Bruxelles, Editions Bruylant, 455p.

<sup>89</sup> In South America, it was agreed that the delimitation between new States would be based on the "1810 *uti possidetis*", while in Central America, the agreement was on the "1821 *uti possidetis*"; see Sanchez Rodriguez, L.I. (1997), "L'*uti possidetis* et les effectivités dans les contentieux territoriaux et frontaliers", *Recueil des Cours de l'Académie de Droit International*, vol. 263, p. 182 ff.

<sup>90</sup> Corten, Olivier (1999), "Droit des peuples à disposer d'eux-mêmes et *uti possidetis* : deux faces d'une même médaille ? », in Corten & al. (1999), quoted above note 85, pp. 403-435.

<sup>91</sup> See e.g. Tudela Aranda, José (2016), « El derecho a decidir y el principio democrático », *Teoría y realidad constitucional*, n° 37, p. 492.

<sup>92</sup> Héraud, Guy (1946), *L'ordre juridique et le pouvoir originaire*, Paris, Sirey, 490 p.

<sup>93</sup> See for example Pérez Royo Javier (2014), « Entre política y derecho: el debate sobre la independencia de Cataluña », in Solozábal Echevarría J. (coord.), *La autodeterminación a debate*, Madrid, pp. 143-155.

<sup>94</sup> *Reference re Secession of Quebec* [1998] 2 SCR 217.

<sup>95</sup> Rawls, John (1971), *A Theory of Justice*, Cambridge, Mass., The Belknap Press of Harvard University Press, 607 p.

<sup>96</sup> See for a systematic survey of such practice since 1991, section 3.1.3 below

<sup>97</sup> Ackerman, Bruce (1991), *We the people. 1. Foundations*, Cambridge (Mass.), Belknap Press of Harvard University Press, 369 p. On this aspect of referenda, see e.g. Tierney, Steven (2012), *Constitutional Referendums. The Theory and Practice of Republican Deliberation*, Oxford, Oxford University Press.

<sup>98</sup> Martí, José Luis (2006), *La república deliberativa. Una teoría de la democracia*, prólogo de Roberto Gargarella y José Juan Moreso, Madrid, Marcial Pons, 359 p.

<sup>99</sup> Tudela Aranda, José (2016), « El derecho a decidir y el principio democrático », *Teoría y realidad constitucional*, n° 37, p. 486.

<sup>100</sup> Corretja Torrens, Mercè (2016), « El fundamento democrático del derecho de los Catalanes de decidir », in Caciao y Conde J., Ferraiuolo G. (coord.), *El encaje constitucional del derecho a decidir. Un enfoque polémico*, Madrid, Catarata, 270 p., pp. 62-81, esp. p. 73.

<sup>101</sup> STC 48/2014.

<sup>102</sup> See esp. STC 247/2007, FJ 4.

<sup>103</sup> See Sub-section 3.3.2.1. below.

<sup>104</sup> Lévesque, René (1968), *Option Québec*, Montréal, Éditions de l'Homme, 175 p., quoted by <https://fondationrene-levesque.org/rene-levesque/ecrits-de-rene-levesque/option-quebec-le-chemin-de-lavenir/>.

<sup>105</sup> Treaty on European Union, art. 1 § 2.

<sup>106</sup> In this Chapter, the term “right to decide” reflects the liberal democratic principle that people have the right to democratic self-expression by popular vote. It does not refer to any purported right to external self-determination.

<sup>107</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, I.C.J. Reports 2010, § 84.

<sup>108</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, I.C.J. Reports 2010, § 80.

<sup>109</sup> General Assembly Resolution 63/3 of 8 October 2008.

<sup>110</sup> The five EU member states who have not recognized Kosovo are Cyprus, Greece, Romania, Slovakia and Spain.

<sup>111</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, I.C.J. Reports 2010, § 56.

<sup>112</sup> *Ibid.*

<sup>113</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, I.C.J. Reports 2010, § 56. The Court did not answer “whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it.” The Court also did not answer whether Kosovo’s declaration of independence complied with Serbian law.

<sup>114</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, I.C.J. Reports 2010, § 123. The Court also issued two holdings related to jurisdiction: (1) it found unanimously that it had jurisdiction over the advisory opinion requested; and (2) decided by nine votes to five to comply with the request for an advisory opinion.

<sup>115</sup> Vice-President Tomka appended a declaration; Judge Koroma appended a dissenting opinion; Judge Simma appended a declaration; Judges Keith and Sepúlveda-Amor appended separate opinions; Judges Bennouna and Skotnikov appended dissenting opinions; Judges Cançado Trindade and Yusuf appended separate opinions.

<sup>116</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, I.C.J. Reports 2010, § 79.

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.*

<sup>120</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, I.C.J. Reports 2010, § 79 (“During the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation (cf. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, I.C.J. Reports 1971, pp. 31-32, paras. 52-53; *East Timor (Portugal v. Australia)*, *Judgment*, I.C.J. Reports 1995, p. 102, para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004 (I), pp. 171-172, para. 88).”).

<sup>121</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, I.C.J. Reports 2010, para. 79.

<sup>122</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, I.C.J. Reports 2010, para. 80.

<sup>123</sup> *Ibid.*

<sup>124</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, I.C.J. Reports 2010, dissent. op. Bennouna, § 47, available at <http://www.icj-cij.org/files/case-related/141/141-20100722-ADV-01-06-EN.pdf>.

<sup>125</sup> Norway in 1905; Iceland in 1918; Western Australia in 1933; Cambodia in 1945; Mongolia in 1945; Faroe Islands in 1946; Saar in 1955; Cameroon in 1958; Central African Republic in 1958; Chad in 1958; Comoros in 1958; Republic of the Congo in 1958; Dahomey in 1958; Djibouti in 1958; French Polynesia in 1958; Gabon in 1958; Guinea in 1958; Ivory Coast in 1958; Madagascar in 1958; Mali in 1958; Mauritania in 1958; New Caledonia in 1958; Niger in 1958; Saint Pierre and Miquelon in 1958; Senegal in 1958; Upper Volta in 1958; Samoa in 1961; Algeria in 1962; Malta in 1964; Rhodesia in 1964; Djibouti in 1967; Puerto Rico in 1967; West Papua in 1969; Northern Mariana Islands in 1969; Bahrain in 1970; Niue in 1974; Comoros in 1974; Trust Territory of the Pacific Islands in 1975; Guam in 1976; Aruba in 1977; Djibouti in 1977; Nevis in 1977; Quebec in 1980; Ciskei in 1980; Guam in 1982; Federated States of Micronesia in 1983; Marshall Islands in 1983; Palau in 1983; Palau in 1984; Cocos (Keeling) Islands in 1984; Falkland Islands in 1986; New Caledonia in 1987; Slovenia in 1990; Armenia in 1991; Azerbaijan in 1991; Croatia in 1991; Estonia in 1991; Georgia in 1991; Kosovo in 1991; Latvia in 1991; Lithuania in 1991; Macedonia in 1991; Nagorno-Karabakh in 1991; Azerbaijan in 1991; Ukraine in 1991; Transnistria in 1991; Moldova in 1991; Turkmenistan in 1991; Uzbekistan in 1991; Bosnia and Herzegovina in 1992; Montenegro in 1992; South Ossetia in 1992; Tatarstan in 1992; Eritrea in 1993; United States Virgin Islands in 1993; Puerto Rico in 1993; Curaçao in 1993; Moldova in 1994; Bonaire in 1994; Sint Maarten in 1994; Saba in 1994; Sint Eustatius in 1994; Bermuda in 1995; Quebec in 1995; Seborga in 1995; Anjouan in 1997; Nevis in 1998; Puerto Rico in 1998; East Timor in 1999; Sint Maarten in 2000; Bonaire in 2004; Saba in 2004; Kurdistan in 2005; Curaçao in 2005; Sint Eustatius in 2005; Montenegro in 2006; Tokelau in 2006; Tokelau in 2007; South Sudan in 2011; Puerto Rico in 2012; Veneto in 2014; Scotland in 2014; Catalonia in 2014; Sint Eustatius in 2014; and Puerto Rico in 2017.

<sup>126</sup> Armenia in 1991; Azerbaijan in 1991; Belarus in 1991; Croatia in 1991; Estonia in 1991; Georgia in 1991; Kazakhstan in 1991; Kyrgyzstan in 1991; Latvia in 1991; Lithuania in 1991; Macedonia in 1991; Moldova in 1991; Russia in 1991; Slovenia in 1991; Tajikistan in 1991; Turkmenistan in 1991; Ukraine in 1991; Uzbekistan in 1991; Serbia and Montenegro (Federal Republic of Yugoslavia) in 1992; Bosnia and Herzegovina in 1992; Czech Republic in 1993; Slovak Republic in 1993; Eritrea in 1993; East Timor in 2002; Montenegro in 2006; Kosovo in 2008; and South Sudan in 2011.

<sup>127</sup> The November 1917 « Balfour Declaration » on the right for Jews to have a “national home” in Palestine, and the US President Wilson speeches of January and February 1918 recognizing the right to self-determination to “

<sup>128</sup> UN Charter, Art. 1 § 2.

<sup>129</sup> In 1920, a Commission of three eminent jurist had been appointed by the League of Nations to determine whether the inhabitants of the Aaland Island had the right to decide on their “reunification” with Sweden by referendum, or whether they should remain as a part of the newly created Finnish State. In their opinion adopted in Paris in September 1920, these three eminent lawyers ruled that “Positive International Law does not recognize the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish, any more than it recognizes the right of other States to claim such a separation. Generally speaking, the grant or refusal of the right to a portion of its population of determining its own political fate by plebiscite or by some other method, is, exclusively, an attribute of the sovereignty of every State which is definitively constituted.”<sup>129</sup> This reference however usually omits quoting the preceding sentences which read: “Although the principle of self-determination of peoples plays an important part in modern political thought, especially since the Great War, it must be pointed out that there is no mention of it

in the Covenant of the League of Nations. The recognition of this principle in a certain number of international treaties cannot be considered as sufficient to put it upon the same footing as a positive rule of the Law of Nations. On the contrary, in the absence of express provisions in international treaties, the right of disposing of national territory is essentially an attribute of the sovereignty of every State.”( “Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands question”, adopted in Paris on September 5<sup>th</sup> 1920 and published in the *League of Nations official Journal*, October 1920, pp. 3 ff.) Such affirmation means, *a contrario*, that if the right to self-determination of peoples is a positive rule of international law, dealing with such issue does not rest within the exclusive competence of any national State.

<sup>130</sup> Article 1 § 1, common to the 1966 UN Covenant Economic, Social and Cultural Rights and the UN Covenant on Civil and Political Rights.

<sup>131</sup> See among others, Crawford, James & Boyle, Alan, (2013), “Annex A opinion: Referendum on the independence of Scotland—International law aspects”, *Scotland Analysis: Devolution and the implications of Scottish independence*. UK Government; Edward, David (2013), “EU law and the separation of member states.” *Fordham Int'l LJ* 36, pp. 1151-1168.; Tierney, Stephen (2013), “Legal issues surrounding the referendum on independence for Scotland”, *European Constitutional Law Review*, 9(03), 359-390; Weiler, Joseph (2012), « Catalan Independence and the European Union », *EJIL Talk*, vol. 20, p. 1.

<sup>132</sup> In its *Opinion 2/13* of 18 December 2014, The ECJ famously considered contrary to the structure of EU Law, despite the clear provision of article 6 § 2 TEU, the adherence of EU to the ECHR: However, as early as 1975, The ECJ recognized that the provisions of the ECHR were to be implemented as general principles of EU Law (case 36/75, *Roland Rutili v. Ministère de l'Intérieur*). According to this case-law, the ECHR is currently part of EU law through art. 6 § 3 TEU which makes a direct reference to this case-law.

<sup>133</sup> See for a more detailed argument on the same line : Kochenov, Dimitry and van den Brink, Martijn (2016), *Secessions from EU Member States: The Imperative of Union's Neutrality*, University of Groningen Faculty of Law Research Paper 2016-09; Edinburgh School of Law Research Paper No. 2016/06; Europa Working Paper No 2016/04. Available at SSRN: <https://ssrn.com/abstract=2746846> .

<sup>134</sup> See for a detailed presentation and analysis of this episode, Levrat, Nicolas (2004), « Valeurs démocratiques contre procédures démocratiques ? », in Jacques Le Rider et Nicolas Levrat (sous la dir.), *La crise autrichienne de la culture politique européenne*, Bruxelles, Presses interuniversitaires européennes, pp. 151-201.

<sup>135</sup> See above Sub-section 3.1.1.5. of the present report, quoting the International Court of Justice..

<sup>136</sup> ECJ, 5 February 1963, in the case *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, case 26/62.

<sup>137</sup> Article 48 § 4, 49 al. 2 and 50 § 1 TEU.

<sup>138</sup> Such reference to “their peoples” are to be found in paragraphs 6, 9 and 12 of the TEU, and paragraphs 3 and 9 of the Preamble of the Treaty on the Functioning of the European Union.

<sup>139</sup> § 13 of the Preamble of the TEU and § 1 of the Preamble of the TFEU, but also art. 1 § 2 of the TEU.

<sup>140</sup> Art. 167 § 2 TFEU, the article conferring competence to EU in the field of « culture ».

<sup>141</sup> Art. 3 § 1 TEU.

<sup>142</sup> Art. 3 § 5 TEU.

<sup>143</sup> Such situation would be qualified as reverse discrimination, which is the appellation for situations in which the legal subject that enjoy the best status, end up being treated in less favorably than other legal subject with a lesser statute. Within EU law, the topic as mostly been studied as regard discrimination between nationals and EU citizens, whereas the later may, through their rights derived from the EU law after they have exerted their right to establish themselves in a third country, benefit from a better treatment than national (see for example, Tryfonidou, Alina (2009), *Reverse discrimination in EC law*, Leiden, Kluwer Law International, 271 p. If



formally plausible under positive law, such situations are always difficult to legitimize in a democracy-based legal order.

<sup>144</sup> Ricard-Nihoul, Gaétane & Delors, Jacques (2012), *Pour une fédération européenne d'Etats-Nations: la vision de Jacques Delors revisitée*, Bruxelles, Larcier, 203 p.

<sup>145</sup> For a reflection on these issues, see Levrat, Nicolas (1997), "Fédéralisme, nationalisme, Europe: une difficile équation", in Aligisakis, M., Roissard de Bellet M. et Saint-Ouen F. (sous la dir.), *Nationalismes en Europe centrale et orientale : conflits ou nouvelles cohabitations ?* Genève, Georg Editeur, pp. 13-43.

<sup>146</sup> As is evidenced by article 6 of the draft law on the self-determination referendum. Also see Sub-section 2.2.3.2. above.

<sup>147</sup> A European organization based on a Statute adopted in London on the 5th of May 1948. Based in Strasbourg, it actually has 47 member States.

<sup>148</sup> ECJ, 12 November 1969, *Erich Stauder v. City of Ulm*, case 29/69.

<sup>149</sup> ECJ, 17 December 1970, *Internationale Handelsgesellschaft v. Einfuhr Vorattstelle für Getreide und Futtermittel*, case 11/70. The formula is nowadays written in art. 6 TEU.

<sup>150</sup> Article 6 § 1 TEU.

<sup>151</sup> Art. 11 § 2 ECHR.

<sup>152</sup> ECtHR, 2 October 2001, *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria* (application numbers 29225/95 & 29221/95).

<sup>153</sup> ECJ, 2 March 2010, *Janko Rottmann v. Freisaat Bayern*, case C-135/08.

<sup>154</sup> See for a good presentation of this thesis and the underlying debates, Cheneval, Francis, & Schimmelfennig, Frank (2013), "The case for democracy in the European Union", *Journal of Common Market Studies*, 51(2), pp. 334-350.

<sup>155</sup> ECJ, 5 February 1963, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, case 26/62.

<sup>156</sup> ECJ, 21 December 2016, *Council of the European Union v. Front Polisario*, case C-104/16 P, § 88.

<sup>157</sup> ECJ, 16 June 1998, *A. Racke GmbH & Co. v. Hauptzollamt Mainz*, Case C-162/96, § 45: « It should be noted in that respect that, as is demonstrated by the Court's judgment in Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019, paragraph 9, the European Community must respect international law in the exercise of its powers. It is therefore required to comply with the rules of customary international law [...]

<sup>158</sup> ECJ, 3 September 2008, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union*, joined cases C-402/05 P and C-415/05 P, especially § 283: "according to settled case-law, fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the ECHR has special significance (see, inter alia, Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraph 29 and case-law cited)." Also see De Burca, Grainne (2010), "The European Court of Justice and the International Legal Order After *Kadi*", *Harvard International Law Journal*, Vol. 51, pp. 1-49.

<sup>159</sup> International Court of Justice 2010 *Advisory Opinion about the Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (*Kosovo Advisory Opinion*), *I.C.J. Reports 2010*, § 79. Also see above for an analysis of this Advisory Opinion, section 3.1.1.

<sup>160</sup> See *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, *Advisory Opinion*, *I.C.J. Reports 2010*, §§ 82 and 83 ; in the later, the Court states : « The Court considers that it is not necessary to resolve these questions in the present case. The General Assembly has requested the Court's opinion only on whether or not the declaration of independence is in accordance with international

law. Debates regarding the extent of the right of self-determination and the existence of any right of “remedial secession”, however, concern the right to separate from a State. As the Court has already noted (see paragraphs 49 to 56 above), and as almost all participants agreed, that issue is beyond the scope of the question posed by the General Assembly. To answer that question, the Court need only determine whether the declaration of independence violated either general international law or the *lex specialis* created by Security Council resolution 1244 (1999).”

<sup>161</sup> The formal name was “Arbitration Commission of the Conference on Yugoslavia”, a five member Commission under the Presidency of French Constitutional Council President, Robert Badinter, was set up by the Council of Ministers of the EEC on 27 August 1991.

<sup>162</sup> See Pellet, Alain (1992). “The opinions of the Badinter Arbitration Committee a second breath for the self-determination of peoples”, *European Journal of International Law*, pp. 178-185.

<sup>163</sup> Article 1, al. 2 TEU.

<sup>164</sup> See for example, ECJ, 12 November 1969, *Stauder v. Ulm-Sozialamt*, case 29/69; ECJ Decision of 28 October 1975, *Rutili v. Ministre de l’Intérieur*, case 36/75, or ECJ joint Decisions of 19 November 1990, *Francovich et al. v. Republic of Italy*, case C-6/90 & C-9/90.

<sup>165</sup> The case of the Czech Republic and Slovakia, which also became member States of the EU in 2004 is technically different since these two new European States came to life through a constitutional arrangement within Czechoslovakia which may not be formally considered as a referendum process. See

<sup>166</sup> Referendums on independence were organized: On the 23 December 1990 in Slovenia, on 9 February 1991 in Lithuania, and on 3 March 1991, both in Estonia and in Latvia. See section 3.1.3. for more information on these referendums

<sup>167</sup> Croatia had organized an independence referendum on 19 May 1991; it joined the EU on the 1<sup>st</sup> of July 2013.

<sup>168</sup> Patterson, E. J. (1958), “The Saar Referendum”, *European Yearbook*, Springer, pp. 226-242.

<sup>169</sup> See UN General Assembly Resolution 2625 (XXV) of 24 October 1970 clearly states “The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.”.

<sup>170</sup> “Brussels Treaty on Greenland” of 13 February 1984, *JOCE* n° L 29 of 1<sup>st</sup> February 1985.

<sup>171</sup> See Tierney, Stephen (2013), “Legal issues surrounding the referendum on independence for Scotland”, *European Constitutional Law Review*, 9(03), 359-390.

<sup>172</sup> Article VI of the US Constitution.

<sup>173</sup> On other paradigms, see for example McIlwain, Charles Howard (1947), *Constitutionalism. Ancient and Modern*, Ithaca, New York, Cornell University Press; Dobner, Petra and Loughlin, Martin (ed.) (2010), *The Twilight of Constitutionalism?*, Oxford, Oxford University Press; Maurizio Fioravanti, Maurozio (1999), *Costituzione*, Bologna, Il Mulino.

<sup>174</sup> Paine, Thomas (1791), *The Rights of Man*, available at <http://www.ushistory.org/paine/rights/>.

<sup>175</sup> STC 259/2015, FJ 4.

<sup>176</sup> Sunstein, Cass (1996), “On the Expressive Function of Law”, *University of Pennsylvania Law Review* 144(5), p. 2021; Tushnet, Mark (1999), “The Possibilities of Comparative Constitutional Law”, *Yale Law Journal* 108(6), p. 1225.

<sup>177</sup> STC 259/2015, JF 5.

<sup>178</sup> Lutz, Donald S. (2006), *Principles of Constitutional Design*, New York, Cambridge University Press, p. 152.



<sup>179</sup> Lorenz, Astrid (2005), "How to Measure Constitutional Rigidity: Four Concepts and Two Alternatives", 17 *Journal of Theoretical Politics*, pp. 339-361.

<sup>180</sup> Ripepe, Eugenio and Romboli, Roberto (1995), *Cambiare costituzione o modificare la costituzione*, Torino, G. Giappichelli.

<sup>181</sup> See esp. STC 48/2003; STC 42/2014, FJ 4.

<sup>182</sup> For a general presentation of the various devices of constitutional review, see Pegoraro, Lucio (2015), *Giustizia costituzionale comparata. Dai modelli ai sistemi*, Torino, G. Giappichelli, 305 p.

<sup>183</sup> Discourse of 18 Thermidor year III (1862), 25 *Réimpression de l'ancien Moniteur*, Paris, H. Plon, p. 442.

<sup>184</sup> 5 U.S. 137 (1803).

<sup>185</sup> Ramos Romeu, Francisco (2006), « The Establishment of Constitutional Courts: A Study of 128 Democratic Constitutions », *Review of Law & Economics*, Vol. 2(1), 2006, pp. 103-135, p. 103 ; Schor, Miguel (2008), « Mapping Comparative Judicial Review », *Washington University Global Legal Studies Law Review*, Vol. 7, pp. 257-287, esp. p. 273 n. 99.

<sup>186</sup> Favoreu, Louis (1990), « Constitutional Review in Europe », in Henkin L., Rosenthal A.J. (ed.), *Constitutionalism and Rights. The Influence of the United States Constitution Abroad*, New York, Columbia University Press, 462 p., pp. 38-62.

<sup>187</sup> Tusseau, Guillaume (2011), *Para acabar con los « modelos » de jurisdicción constitucional: Un ensayo de crítica*, 2<sup>a</sup> ed., pres. E. Ferrer Mac-Gregor, México, Porrúa, col. « Biblioteca de Derecho Procesal Constitucional », Vol. 50, 171 p.

<sup>188</sup> Jouanjan, Olivier (2005), « Aperçu d'une histoire des fonctions de la justice constitutionnelle en Allemagne (1815-1933) », in Grewe C., Jouanjan O., Maulin E., Wachsmann P. (dir.), *La notion de « justice constitutionnelle »*, Paris, Dalloz, coll. « Thèmes et commentaires », 188 p., pp. 13-48, pp. 15-16.

<sup>189</sup> Tusseau, Guillaume (2016), « Les juges constitutionnels comme autorités normatives : éléments d'une taxonomie des sentences constitutionnelles », in G. Grandjean, J. Wildemeersch (dir.), *Les juges : décideurs politiques ? Essais sur le pouvoir politique des juges dans l'exercice de leur fonction*, préf. P. Martens, Bruxelles, Bruylant, 371 p., pp. 169-196.

<sup>190</sup> *Certification of the Constitution of the Republic of South Africa*, CCT 23/96 ; *Certification of the Amended text of the Final Constitution*, CCT 37/96.

<sup>191</sup> *Reference Re Secession of Quebec* [1998] 2 SCR 217.

<sup>192</sup> Vallinder, Torbjorn (1995), « When the Courts Go marching In », in Tate C.N., Vallinder T. (ed.), *The Global Expansion of Judicial Power*, New York, London, New York University Press, 556 p., p. 13.

<sup>193</sup> *Terminiello v. Chicago* 337 U.S. 1, 37 (1949), Jackson J., dissenting.

<sup>194</sup> On this topic, see Elkins, Zachary, Ginsburg, Tom and Melton, James (2009), *The Endurance of National Constitutions*, Cambridge, New York, Cambridge University Press.

<sup>195</sup> Ackerman, Bruce (1991), *We the People. 1, Foundations*, Cambridge, Mass., The Belknap Press of Harvard University Press.

<sup>196</sup> Lutz, Donald S. (2006), *Principles of Constitutional Design*, New York, Cambridge University Press, pp.150-151, 153-154.

<sup>197</sup> STC 259/2015 FJ 5.

<sup>198</sup> McGann, Anthony J. (2004), « The Tyranny of the Supermajority: How Majority Rule Protects Minorities », *Journal of Theoretical Politics*, Vol. 16, pp. 53-77.

<sup>199</sup> See e.g. Letter to James Madison, September 6, 1789.

<sup>200</sup> Bellamy, Richard (2007), *Political Constitutionalism. A Republican Defence of the Constitutionality of Democracy*, Cambridge, Cambridge UP, 270 p.

<sup>201</sup> See respectively Grimm, Dieter (1991), *Die Zukunft der Verfassung*, Frankfurt am Main, Suhrkamp, « Taschenbuch Wissenschaft », Bd. 968, 447 p., p. 427; Sunstein, Cass (1991), « Constitutionalism and Secession », *University of Chicago Law Review*, Vol. 58, pp. 633-670.

<sup>202</sup> Bellamy, Richard (2007), *op. cit.*, pp. 145-175.

<sup>203</sup> Gray, John Chipman (1938), *The Nature and Sources of the Law*, 2<sup>nd</sup> ed., New York, MacMillan, 1938, 348 p., pp. 124-125.

<sup>204</sup> Hughes, Charles Evans (1908), « Speech Before the Elmira Chamber of Commerce, May 3, 1907 », in *Addresses and Papers of Charles Evans Hughes Governor of New York (1906-1908)*, Intro. Schurman J.G., New York, London, G.P. Putnam's Sons, The Knickerbocker Press, 1908, 289 p., p. 139.

<sup>205</sup> *Bowers v. Hardwick*, 478 US 186 (1986).

<sup>206</sup> *Lawrence v. Texas*, 539 US 558 (2003)

<sup>207</sup> Troper, Michel (1994), *Pour une théorie juridique de l'Etat*, Paris, PUF, coll. « Léviathan », 358 p., p. 313.

<sup>208</sup> Meuwese, Anne and Snel, Marnix (2013), « 'Constitutional Dialogue': An Overview », *Utrecht Law Review*, Vol. 9(2), pp. 123-140.

<sup>209</sup> De Visser, Maartje (2014), *Constitutional Review in Europe. A Comparative Analysis*, Oxford, Portland, Hart, 484 p., pp. 334-346.

<sup>210</sup> Quoted by Hirschl, Ran (2004), *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism*, Cambridge (Mass.), London, Harvard University Press, 286 p., p. 71.

<sup>211</sup> BVerfGE 93, 1 (1995).

<sup>212</sup> Choper, J.H. (1980), *Judicial Review and the National Political Process. A Functional Reconsideration of the Role of the Supreme Court*, Chicago, The University of Chicago Press, 494 p., pp. 146-150; Canon, B.C. and Johnson, C.A. (1999), *Judicial Policies. Implementation and Impact*, 2<sup>nd</sup> ed., Washington D.C., Congressional Quarterly Press, 256 p., pp. 19-20, 62-91.

<sup>213</sup> 410 U.S. 113 (1973).

<sup>214</sup> *Worcester v. Georgia* 31 US 515 (1832).

<sup>215</sup> Quoted by Tushnet, Mark (2000), *Taking the Constitution Away From the Courts*, Princeton (NJ), Princeton University Press, 242 p., p. 14.

<sup>216</sup> Trochev, Alexei (2002), « Implementing Russian Constitutional Court Decisions », *East European Constitutional Review*, Vol. 11(1-2), pp. 95-103.

<sup>217</sup> Jefferson to Mrs. John Adams, Sept. 11, 1804, in Jefferson 1907, pp. 50-51.

<sup>218</sup> Feldman, Jean-Philippe (2004), *La bataille américaine du fédéralisme. John C. Calhoun et l'annulation (1828-1833)*, Paris, PUF, coll. « Léviathan », 294 p.

<sup>219</sup> In STC 76/1988, FJ 3 ; STC 247/2007, FJ 4 ; STC 42/2014, FJ 3 ; STC 259/2015, FJ 4, the Spanish Constitutional Tribunal refused to regard the Constitution as a pact.

<sup>220</sup> Tusseau, Guillaume (2013), « Un oublié du constitutionnalisme contemporain : le contrôle politique de constitutionnalité », in *Espaces du service public. Mélanges en l'honneur de Jean du Bois de Gaudusson*, Pessac, Presses universitaires de Bordeaux, 2 Vol., 1420 p., Vol. 1, pp. 711-750.

<sup>221</sup> Fernández Segado, Francisco (2002), « La guerra de los Tribunales en España », *Contribuciones*, Vol. 19(3), pp. 71-130; Cruz Villalón Pedro (2006), « Conflict Between Tribunal constitucional and Tribunal Supremo. A

National Experience », in Pernice I., Kokott J., Saunders C. (ed.), *The Future of the European Judicial System in a Comparative Perspective*, Baden-Baden, Nomos, 324 p., pp. 111-116.

<sup>222</sup> TC 0030-2005-PI/TC.

<sup>223</sup> Gardbaum, Stephen (2013), *The New Commonwealth Model of Constitutionalism. Theory and Practice*, Cambridge, New York, Cambridge UP, 262 p. ; Tushnet Mark (2008), *Weak Courts, Strong Rights. Judicial Review and Social Welfare Rights in Comparative Constitutional Law*, Princeton, Oxford, Princeton UP, 272 p.

<sup>224</sup> Hunt, Murray, Hooper, Haylay J. and Yowell, Paul (ed.) (2015), *Parliaments and Human Rights. Redressing the Democratic Deficit*, Oxford, Portland (Or.), Hart, 520 p.

<sup>225</sup> Häberle, Peter (1975), « Die offene Gesellschaft der Verfassungsinterpreten », *JuristenZeitung*, Bd. 30, pp. 297-305.

<sup>226</sup> See Section 3.3.2. above.

<sup>227</sup> Seidman, Louis Michael (2001), *Our Unsettled Constitution. A New Defense of Constitutionalism and Judicial Review*, New Haven, London, Yale University Press, 260 p.

<sup>228</sup> See the reference to Judge Benouna dissenting Opinion in the Kosovo Advisory Ruling (above p. 81) as well as Section 2.2.4 above.

<sup>229</sup> The statute of the Council of Europe affirms in its preamble that « individual freedom, political liberty and the rule of law, [are the] principles which form the basis of all genuine democracy.” See on these concepts, Mény, Yves, (2003), "De la démocratie en Europe: old concepts and new challenges" *Journal of Common Market Studies* 41.1, pp. 1-13.

<sup>230</sup> “Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands question”, adopted in Paris on September 5<sup>th</sup> 1920 and published in the *League of Nations official Journal*, October 1920, p. 3 ff.

<sup>231</sup> *Ibid.*, p. 5

<sup>232</sup> This section has benefited from an input from Frederic Esposito, Senior lecturer at the Global Studies Institute of the University of Geneva.

<sup>233</sup> The Scottish Independence Referendum Bill, setting out the arrangements for this referendum, was passed by the Scottish Parliament in November 2013, following an agreement between the Scottish and the United Kingdom governments. It was enacted as the Scottish Independence referendum Act 2013.

<sup>234</sup> On September 24 1978, all Swiss cantons and 82.3% of the population agreed to change the federal constitution by recognizing the creation of the new canton of Jura.

<sup>235</sup> Trechsel, Alexander H. (2010), “Reflexive Accountability and Direct Democracy”, 33/5 *West European Politics*, pp.1050-1064.

<sup>236</sup> *Reference Re Secession of Quebec* [1998] 2 SCR 217, § 151.

<sup>237</sup> *Ibid.*, § 150.

<sup>238</sup> *Ibid.*

<sup>239</sup> *Ibid.*, § 152.

<sup>240</sup> At the time of completing this report, the draft Law for the Organization of a Self-determination Referendum has been presented on Monday 31 July 2017 to the Catalan Parliament.

<sup>241</sup> Since October 2012, we could identify numerous calls for the Right to Organize a popular consultation made to Spanish Authorities; they all received negative answers.

<sup>242</sup> These are Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Croatia, Estonia, Georgia, Kazakhstan, Kyrgystan, Latvia, Lithuania, Macedonia, Moldova, Montenegro, Tajikistan, Turkmenistan, Ukraine and Uzbekistan.

<sup>243</sup> Williams, Paul R. and Jannotti Pecci, Francesca (2012), "Earned Sovereignty: Bridging the Gap Between Sovereignty and Self-Determination", 40 *Stanford Journal of International Law*, p. 347; Williams, Paul R., Avoryie, Abigail J. and Armstrong, Carlie J. (2015), "Earned Sovereignty Revisited: Creating a Strategic Framework for Managing Self-Determination Based Conflicts", 21 *ILSA Journal of International & Comparative Law* 2.

<sup>244</sup> Supreme Court of Canada: *Reference Re Secession of Quebec* (August 20, 1998).

<sup>245</sup> Art. 1 § 2 TEU.

<sup>246</sup> Sub-section 3.2.4. of the present report.

<sup>247</sup> ECJ, 5 February 1963, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, case 26/62; quoted above p. 108.

<sup>248</sup> Keating, Michael (1998), "Introduction", in *The New Regionalism in Western Europe. Territorial Restructuring and Political Change*. Cheltenham: Edward Elgar, pp. 1-20.

<sup>249</sup> Loughlin, John (1996a). "Europe of the Regions and the Federalization of Europe", *Publius*, 26(4), pp. 141-162.; Jeffery, Charlie (2002), "The Europe of the Regions" from Maastricht to Nice", *Queen's Papers on Europeanisation*, n°7/2002, pp. 1-9.

<sup>250</sup> Jeffery, Charlie (1997), *The Regional Dimension of the European Union. Towards a Third Level in Europe*, London, Frank Cass; Bullman, Udo (1996), "The Politics of the Third level", *Regional and Federal Studies*. 6(2), pp. 3-19.

<sup>251</sup> Keating, Michael (1997), "The invention of regions: political restructuring and territorial government in Western Europe", *Environment and Planning*, Vol. 15, pp. 383-398; Keating, Michael (1995), "Europeanism and Regionalism", in *The European Union and the Regions*, edited by Barry Jones and Michael Keating. Oxford, Clarendon Press, pp. 1-22.

<sup>252</sup> Keating, Michael and Hooghe, Liesbet (2006), "Bypassing the nation-state? Regions and the EU policy process", in *European Union: power and policy-making*, edited by Jeremy Richardson, Oxford, Routledge, pp. 269-286; Tatham, Michael (2010) "With or without you"? Revisiting territorial state-bypassing in EU interest representation", *Journal of European Public Policy*, 17(1), pp. 76-99.

<sup>253</sup> Hooghe, Liesbet and Marks, Gary Marks (2001), "Channels to Europe", in *Multi-level Governance and European Integration*, Oxford, Roman and Littlefield Publishers, pp. 81-93; Magone, José M. (2003) "Introduction: The Role of the Regions in the European Union Multilevel Governance", in *Regional Institutions and Governance in the European Union*, edited by José M. Magone, Westport, Praeger Publishers, pp. XVII-XXV.

<sup>254</sup> Loughlin, John (1996b). "Representing regions in Europe: the Committee of the Regions", in *Regional and Federal Studies*, 6(2), pp. 10-34.

<sup>255</sup> Keating, Michael (2001), "Nations without states: the Accommodation of Nationalism in the New State Order", in *Minority Nationalism and the Changing International Order*, edited by Michael Keating and John McGarry. New York, Oxford University Press, pp. 19-43.

<sup>256</sup> Hooghe, Liesbet and Marks, Gary (1996), "Europe with the Regions": Channels of regional representation in the European Union", *Publius: Journal of Federalism*, 26 (1), pp. 73-91.

<sup>257</sup> Keating, Michael (1999), "Regions and International Affairs. Motives, Opportunities and Strategies", *Regional and Federal Studies*, 9 (1), pp. 1-16.

<sup>258</sup> Elias, Anwen (2008) "From Euro-enthusiasm to Euro-scepticism? A re-evaluation of minority Nationalist party attitudes towards European integration", *Regional and Federal Studies*, 18:5. pp. 557-581; Hepburn, Eve (2008), "The rise and fall of a Europe of the Regions", *Regional and Federal Studies*, 18 (5), pp. 537-555;

Keating, Michael (2008), "A Quarter of Century of the Europe of the Regions", *Regional and Federal Studies*, 8 (5), pp. 629-635.

<sup>259</sup> Guirao, Fernando, (2016), "An independent Catalonia as a member state of the European Union? Terra Ignota", in *Catalonia: a new independent State in Europe? A debate on secession within the European Union*, edited by Xavier Cuadras-Morató. London, Routledge, pp. 189-215.

<sup>260</sup> As other EU institutions, the European Council is bound by Treaty provisions. However, due to its composition – which happens to be the same as an "intergovernmental conference" (cf. art. 48 TEU) – the European Council sometimes examines issues beyond the strict scope of EU competences. Thus, during the sovereign debt crisis that started in 2009, the European Council sometimes did propose solution that went beyond what the Treaty provisions allowed it to do.

<sup>261</sup> See for the use and meaning of this concept, Chamon, Meirjin and Van der Loo, Guillaume (2014), "The Temporal Paradox of Regions in the EU Seeking Independence: Contraction and Fragmentation versus Widening and Deepening?", 20 *European Law Journal* 5, pp. 614 ff.; also Guirao, Fernando (2016), "An independent Catalonia as a member state of the European Union?" in Morato, Xavier Cuadras (ed), *Catalonia: A New Independent State in Europe?: A Debate on Secession Within the European Union*, Routledge, pp. 189-215.

<sup>262</sup> See sub-section 2.2.3.1. above for substantial arguments supporting this conclusion.

<sup>263</sup> See both the 1998 Canadian Supreme Court decision on Quebec secession and the 2010 ICJ Advisory Opinion on Kosovo unilateral Declaration of Independence.

<sup>264</sup> Among others, see the April 2017 Report by the Catalan Ombudsman entitled *Human Rights Regression : Elected Officials' Freedom of Expression and the Separation of Power in the Kingdom of Spain*.

<sup>265</sup> Badinter Commission, opinion n° 3 of 11 January 1992. Also see Alain Pellet (quoted above, note 162).

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