

The Spanish Constitutional Court Confronts Catalonia's 'Right to Decide' (Comment on the Judgment 42/2014)

Víctor Ferreres Comella*

INTRODUCTION

On March 25, 2014, the Spanish Constitutional Court rendered an important decision (Judgment 42/2014) on a resolution that had been passed by the Catalan parliament on 23 January 2013.¹ The parliamentary resolution basically proclaimed that the Catalan people is sovereign and has therefore the 'right to decide' its future.

The Court's opinion needs to be understood in the context of the current political developments in Catalonia. It is important to note, by way of introduction, that Spain is a quasi-federal polity. The Constitution of 1978, enacted after the end of Franco's dictatorship (1936-1975), established the framework for a process of devolution of power that has made it possible for all the territory of Spain to be divided into 17 self-governing units called *Comunidades Autónomas*. Each Community has its own regional parliament and government, which exercise significant political power. Catalonia, together with the Basque country, is the region that has traditionally had the strongest nationalist sentiment, and has historically struggled most intensely in favour of autonomy. In 1979, Catalonia achieved self-government through the passage of a Statute of Autonomy.²

In recent years, however, a secessionist movement has been able to mobilize a large section of the citizenry in Catalonia. Its goal is for this territory to break its ties with Spain, and thus become a new independent state. A powerful association (the *Assemblea Nacional Catalana*) has organized several demonstrations in the

*Professor of Constitutional Law, Universitat Pompeu Fabra (Barcelona). Visiting Professor, University of Texas at Austin.

¹ *Resolució 5/X del Parlament de Catalunya, per la que s'aprova la Declaració de sobirania i del dret a decidir del poble de Catalunya*. The resolution was published in the *Butlletí Oficial del Parlament de Catalunya*, No. 13, Jan. 24, 2013.

² For a general introduction to Spain's decentralized political structure, see Víctor Ferreres Comella, *The Constitution of Spain. A Contextual Analysis* (Oxford, Hart Publishing 2013), p. 161-199.

streets. The most spectacular ones have taken place in the context of the festivity of the Catalan *Diada Nacional*, which is celebrated on 11 September every year. In 2012, the association gathered many people in Barcelona under the banner, 'Catalonia, the next European state'. The following year, it organized a human chain in favour of independence, which ran from the north of Catalonia to the south. These events showed that the movement had strong popular support.

The Catalan Parliament soon took note of the impressive number of people that participated in the 2012 demonstration. On 27 September that year, it passed a resolution to express the need for Catalans to be allowed to determine their future through a popular consultation. It also called for the construction of a new state.³ In turn, the President of the Catalan government, Artur Mas, decided to call early elections. He said that he needed a strong mandate from the people to lead the process of 'national transition'. He proposed that, after the elections, Catalans would be asked in a referendum about the future status of Catalonia. His position on secession, as well as that of his party, CiU, was ambiguous, however.

The elections were held on 25 November 2012. Artur Mas did not receive the robust popular mandate that he sought. His party only obtained fifty seats in the Catalan parliament (out of 135). This was 12 seats less than it had garnered in the previous elections. But another party that is more clearly in favour of independence, ERC, improved its position: it obtained 21 seats, 11 more than it held before. A new party, CUP, which is also secessionist, achieved parliamentary representation for the first time, with 3 seats. Another party that is also in favour of holding a referendum, though not committed to independence, ICV-EUiA, obtained 13 seats, 3 more than in the previous elections. The PSC (which is linked to the Spanish Socialist Party) spoke against independence during the campaign, but it was not opposed to the idea of holding a referendum, provided that it was legal and agreed upon by the Spanish authorities. This party got 20 seats, 8 less than in the last elections. Finally, PP (the party that currently supports the Spanish government under Mariano Rajoy), as well as Ciutadans, are against both secession and the referendum. PP achieved 9 seats, one more than it already had, while Ciutadans got 9 seats, 6 more than it had previously obtained.

In sum, although Artur Mas and his party lost popular support, other parties that advocate secession became stronger after the elections. Once CiU and ERC reached an agreement concerning the political program to be implemented in the immediate future, Artur Mas was installed as President of the Catalan government for a second term..

The new parliament exhibited a majority of political forces that were firmly committed to the idea that Catalan citizens should be allowed to express their

³ *Resolució 742/IX del Parlament de Catalunya, sobre l'orientació política general del Govern*. This Resolution was published in the *Butlletí Oficial del Parlament de Catalunya*, No. 390, Oct. 2, 2012.

preferences in a referendum concerning the future status of Catalonia. If we include CiU, ERC, ICV-EUiA and CUP in that group, they together represent about two thirds of the Catalan parliament (87 seats, out of 135).

These political parties claim that Catalans have a 'right to decide' their political future, a right that encompasses the right to determine whether to secede from Spain. There is ambiguity, however, as to the precise content of this right.⁴ The right to 'decide' suggests that it is for Catalans to actually choose by themselves, in a unilateral manner, whether they want Catalonia to remain in Spain. According to this understanding, if Catalans voted for independence, negotiations with the Spanish authorities would ensue, in order to work out the details of the process of secession. But secession as such would be for Catalans to decide. Quite often, however, the political forces that support the referendum argue that they simply want Catalans to express their opinion on this matter. Instead of the right to 'decide', they are actually invoking the right to be 'heard' or 'consulted', which is different. The space for negotiation with the Spanish authorities would be larger, of course, if the referendum were understood to be a mere expression of opinion, and not the exercise of a political power to decide an issue unilaterally. If the referendum were simply an instrument to test the political waters in Catalonia with regard to the status of this region in Spain, secession would not be the only way out of the problem, even if most people voted in favour of it. A new institutional arrangement that changed the form and amount of self-government in Catalonia would also be part of the menu, as a political answer to the dissatisfaction expressed by citizens.

It is important to note that the political parties that prod this process of 'national transition' have constructed a narrative that has had great impact on Catalan public opinion. According to their story, the political agreement that underlies the Spanish Constitution of 1978 has been broken by the Spanish authorities. The Constitution is politically dead in Catalonia, they often say, because the spirit of the document has not been honored by the Spanish state.

Within this narrative, lots of emphasis is placed on the Constitutional Court's decision of 28 June 2010 (STC 31/2010), which invalidated several parts of the new Statute of Autonomy of Catalonia that was enacted in 2006, to replace the previous Statute of 1979. The draft of this new Statute of Autonomy had first been approved by the Catalan parliament in 2005. The draft was then sent to the Spanish legislative assembly, the *Cortes Generales*, where the Socialist Party (PSOE) held a majority of seats. (José Luis Rodríguez Zapatero was the Prime Minister at that

⁴ For a thoughtful analysis of the ambiguity of the 'right to decide', see Joaquín Tornos Mas, 'El problema catalán: una solución razonable', 42 *El Cronista del Estado Social y Democrático de Derecho* (2014) p. 47-48. See also, the collection of articles by various scholars, published in the special issue, 'Foro Especial: Autodeterminación', 46-47 *Cuadernos de Alzate* (2013) p. 27-244.

time). The assembly introduced some relevant changes to the proposal. To a large extent, the changes sought to reduce the tensions between the Statute of Autonomy and the Spanish Constitution. The main party in the opposition, Partido Popular (PP), voted against the new Statute. Actually, by April 2006 it had collected four million signatures from citizens throughout Spain to petition the government to hold a nation-wide referendum in order to decide whether Spain should continue to be a single nation, based on equal rights. Its clear aim was to block the passage of the Catalan Statute. Prime Minister Rodríguez Zapatero refused to hold such a referendum. The final text of the Statute of Autonomy was then submitted to the Catalan people, in a referendum that was held on 18 June 2006. Although voter turnout was low (around 49%), the vast majority of citizens who went to the polls voted yes (74%). The Statute was thus finally enacted into law.

The PP, however, challenged the Statute on constitutional grounds, by means of an appeal to the Spanish Constitutional Court. Paradoxically, however, this party later voted in favour of a Statute of Autonomy for another region (Andalucía), which included many provisions similar to those it was asking the Court to quash in the name of the Constitution. This inconsistency was strongly criticized, especially in Catalonia. The PP has never given convincing public reasons to justify this double standard.

The Court took a long time to hand down its decision, unfortunately. When it finally did, in June 2010, there was great controversy, not only among politicians, but also among scholars.⁵ Many critics have contended that the Court was too activist. As a matter of fact, however, the Court was rather self-restrained. It is true that it invalidated some provisions of the Statute, while it reinterpreted others to save their constitutionality. But most of the articles that the PP had questioned were actually upheld by the Court. In many instances, moreover, the reasons the Court articulated to justify its decision to invalidate or reinterpret the legal provisions were rather technical. The Court did not frustrate in any serious way the possibility of introducing most of the desired reforms through technically correct legal means.⁶

⁵ For a collection of early comments on the decision by various scholars in Catalonia, see *Revista catalana de dret públic. Especial Sentència 31/2010 del Tribunal Constitucional* (Barcelona: Escola d'Administració Pública de Catalunya 2010).

⁶ The Court observed, for example, that 'organic statutes', instead of 'statutes of autonomy', are the pertinent instruments to change the organization of the judiciary, or to create a new system to finance the regional governments. Organic statutes are actually *easier* to enact than statutes of autonomy: they simply require the approval of an absolute majority of Congress (the lower house of the Spanish parliament), whereas statutes of autonomy require, in addition to that approval, the participation of the regional parliament and (in many instances) the ratification by citizens in a regional referendum.

One of the most controversial parts of the Court's decision, however, concerned a reference to the Catalan 'nation' in the Preamble of the Statute of Autonomy. In the original draft that the Catalan parliament had approved, Catalonia was declared to be a nation. The final text that came out of the Spanish legislative assembly was not so explicit. The Preamble of the Statute stated that the Catalan parliament had indeed proclaimed Catalonia to be a nation, and that this declaration was to be taken as an acknowledgement of Catalonia as a 'nationality' – a term that figures in Article 2 of the Spanish Constitution, which grants self-government to the 'nationalities and regions' that exist in Spain. The Constitutional Court insisted that, from a legal point of view, Catalonia is not a nation – only Spain is. The Preamble was therefore to be read in light of the Constitution, so that any suggestion that Catalonia is a nation had to be excluded. The Court explained that its analysis was exclusively legal: it did not mean to deny the legitimacy of viewing Catalonia as a nation from historical, linguistic, cultural, sociological or other perspectives. Still, the Court was probably too strict when it insisted on the legal impossibility of defining Catalonia as a nation. The expression 'Spain, a nation of nations' has been proposed in some circles as an interpretation of the cultural pluralism that characterizes Spain. The Court, moreover, did not choose the most felicitous phrase when it asserted that 'the Constitution only knows of the existence of the Spanish nation'.⁷ This does not sound like good news for the other nations on the planet! A Constitution that explicitly opens itself to international and supranational law (as the Spanish Constitution does, particularly in Articles 10 and 93) would be expected to 'know' of the existence of nations other than Spain.

When the Court's decision was announced, a huge demonstration was organized in Barcelona to protest against it. The Catalan government (then presided over by José Montilla), as well as the majority of Catalan political forces, headed the demonstration. People shouted: 'We are a nation. We decide'. Quite apart from the technical criticisms that the Court's decision triggered, the reaction was primarily based on the idea that no court should have been empowered to invalidate what the Catalan people had ratified in a referendum. The Statute of Autonomy was considered to be a new constitutional pact 'between Catalonia and Spain', which the Court ought to have respected.

This understanding rested on the assumption that the Constitution is so open-ended when it comes to the territorial distribution of power that there is no specific content that the Court could derive from it, in order to test the constitutional validity of the new Statute. This, however, is not a plausible assumption. It is true that the Constitution leaves ample room for different institutional arrangements to be implemented, as far as regional self-government is concerned. But it does establish some limits, which the Court has specified through its case

⁷ See *Fundamento Jurídico* 12, STC 31/2010.

law. That case law may change, as new circumstances and understandings emerge with the passage of time. But a Statute of Autonomy cannot simply force the Court to dismantle its jurisprudence, to the extent that the latter is rooted in the Constitution, a norm that has a higher authority than a Statute of Autonomy. Only a constitutional amendment can force the Court to cancel the legal doctrines it has constructed around a constitutional provision.

In any event, the 2010 decision was widely criticized in Catalonia. Many observers have argued that it became the turning point that caused the rise of the strong independentist movement we have witnessed in recent times. The current rhetoric on the 'right to decide' is to be linked to the democratic objection that many people advanced against the Court's decision.

It is against this background that the Catalan parliament passed the January 23, 2013 Declaration of sovereignty.

THE PARLIAMENTARY RESOLUTION OF JANUARY 23, 2013

The Declaration of sovereignty, which was proposed by CiU, ERC and ICV-EUiA, obtained the support of 63% of the members of the Catalan parliament (85 votes). PP, PSC and Ciutadans voted against (41 votes).

The Preamble of the Declaration refers to the aspiration to self-government that the Catalan people have expressed throughout history. It recalls the representative institutions that Catalonia enjoyed since the Middle Ages, which were eliminated after the defeat of Barcelona in 1714, in the context of the War of Spanish Succession that was fought between European powers. It then makes reference to the ways in which self-government was restored during the XXth century, first under the Second Republic (1931-1936), and then, after Franco's dictatorship (1936-1975), with the Constitution of 1978.

The Preamble then goes on to explain that the Catalan people have shown their wish to deepen their self-government, through new legal frameworks, as was the case when they supported the Statute of Autonomy of 2006. But the Spanish state has 'blocked' this evolution, the Declaration asserts. The Spanish Constitutional Court, in particular, undercut this process when it rendered its judgment on the Catalan Statute of Autonomy. The foundations were then established for a regression as to the amount of self-government granted to Catalonia. In this scenario, the Catalan citizens, through demonstrations in the streets and by way of their votes in the elections of November 2012, have expressed their desire to be consulted about the future status of Catalonia.

As a result of these political events, the Preamble concludes, the Catalan parliament has decided to approve a 'Declaration of sovereignty and of the right to decide of the Catalan people'.

Against the background of this Preamble, the Declaration begins with the statement that Parliament 'has decided to start the process to make it possible for Catalan citizens to exercise their right to decide their collective political future'. The Declaration then enumerates nine 'principles' that will govern this process. Each principle is given a specific name. The first is called 'sovereignty': it establishes that the Catalan people is a sovereign legal and political subject. The second principle is that of 'democratic legitimacy': the people will exercise their right to decide in conditions that will ensure deliberation and pluralism. The third is 'transparency': all the necessary information will be given to citizens. The fourth is 'dialogue': dialogue and negotiations will be entertained with the Spanish state, the European institutions, and the international community. The fifth is 'social cohesion': the social and territorial cohesion of the country (Catalonia) will be preserved. Catalonia will be kept united as a single people. The sixth is 'Europeanism': the foundational principles of the European Union will be promoted, in particular those that refer to fundamental rights, democracy, the welfare state, solidarity among the European peoples, and economic, social and cultural progress. The seventh is 'legality': all the existing legal frameworks will be used to make it possible for citizens to exercise their right to decide. The eighth concerns 'the principal role of parliament': the Catalan parliament must have a key role in this process. Finally, the ninth principle is 'participation': the Catalan parliament and the Catalan government must secure the active participation of local bodies, and the involvement of as many political, economic, social and cultural groups as possible.

After announcing these nine principles, the Declaration ends by encouraging 'all citizens to be active protagonists in the democratic process in order to exercise the right of the Catalan people to decide'.

Soon after the Declaration was passed, the Catalan government appointed a commission of experts (the *Consell Assessor per a la Transició Nacional*) whose explicit mandate is to render advice on the creation of 'structures of state' for Catalonia, as well as on the procedures to be used to call a popular referendum in Catalonia on the issue of independence.⁸ The President of this commission, Carles Viver Pi-Sunyer, had previously served as judge of the Spanish Constitutional Court (from 1992 to 2001), and Vice-President of the Court (from 1998 to 2001). He was later to have a leading role in the team of legal experts that helped draft the Catalan Statute of Autonomy of 2006, which was afterwards partially struck down by the Court. The commission he now presides over has already published 18 reports on the procedures and the consequences of secession.

Some of the ideas advanced in such reports are quite surprising, to say the least. The commission has argued, for example, that secession is a political process aimed

⁸ See *Decret 113/2013*, Feb. 12, 2013.

at 'strengthening the links between the two territories' (Catalonia and Spain).⁹ In a very postmodern fashion, political divorce is offered as a strategy to deepen the reciprocal feelings of affection between Catalans and Spaniards. There is no sense of drama here.¹⁰ The commission, however, has also contended that, if Spain does not allow a referendum on Catalonia's independence, it breaches the democratic principle that animates European Union law. The Catalan authorities should therefore look for allies in Europe in order to start proceedings against Spain, under Article 7 of the Treaty of the European Union, which empowers the Union to certify that there is a risk of violation of democratic values in a particular country, and to suspend the rights (including voting rights) of the member state concerned. Although the experts acknowledge in their report that it would be hard to obtain the required majorities against Spain, it maintains that the initiative would give European visibility to the existing conflict.¹¹ It is remarkable that these experts do not realize that there is a deep tension between triggering Article 7 procedures against Spain, on the one hand, and viewing secession as an opportunity for building a stronger relationship between Catalonia and Spain, on the other.

The reaction of the Spanish government was to bring the parliamentary Declaration of sovereignty before the Constitutional Court. A challenge was filed on 8 March 2013, which forced the Court to suspend the operation of the parliamentary resolution.¹² In the following months, as the Court was examining the issues raised by the challenge, two important political events took place.

First, on 12 December 2013, President Artur Mas and the leaders of the political parties that are in favour of the referendum announced that they had reached an agreement to the effect that the referendum would be held on 9 November 2014. There would be two questions posed to the citizens. First, 'Do you want Catalonia to become a State?' Second, 'If the answer is yes, do you want that state to be independent?' The Spanish government was not informed about this move by the Catalan political forces. Prime Minister Mariano Rajoy has said several times that he learned about it through the public media.

⁹ *Informe número 2: 'Les relacions de cooperació entre Catalunya i l'estat espanyol'*, p. 5.

¹⁰ The paradoxical notion that breaking with Spain is a good way to build stronger links with Spain was already advocated in the 1920s by some Catalan groups. The idea was forcefully criticized by Agustí Calvet, *Gaziel*, one of the most perceptive writers at that time. See *Gaziel, Tot s'ha perdut* (Barcelona, RBA La Magrana 2013), p. 27-31.

¹¹ *Informe número 1: 'La consulta sobre el futur polític de Catalunya'*, p. 67-68.

¹² The procedure the Spanish government used is regulated in Art. 161.2 of the Constitution, as well as in Arts. 76 and 77 of the *Ley Orgánica del Tribunal Constitucional*. When the government resorts to this procedure, in order to attack norms or acts adopted by the Autonomous Communities, the Constitutional Court must suspend the effects of the challenged norm or act. The Court can afterwards decide to lift the suspension. In a decision rendered on 11 July 2013, the Court chose to maintain the suspension until it ruled on the merits (see ATC 156/2013).

Second, the Catalan parliament, on 16 January 2014, approved a proposal to request the Spanish legislative assembly to transfer to the Catalan government the authority to organize a referendum on the future status of Catalonia.¹³ The Spanish Constitutional Court rendered its decision on the Catalan parliamentary Declaration of sovereignty just two weeks before Congress (the lower house of the Spanish legislative assembly) started to discuss this proposal. So the debates in Congress, which took place on 8 April 2014, benefited from the Court's pronouncement. The different political actors read the Court's opinion differently, however, reaching divergent conclusions as to the constitutional legality of the Catalan proposal under consideration. Congress finally voted against it by a vast majority of its members: 299 voted against, while only 47 voted in favour, with one abstention.

THE CONSTITUTIONAL COURT IS EAGER TO SPEAK

The first thing to note about the Constitutional Court's decision of 25 March 2014 on the Catalan Declaration of sovereignty is that it reveals the Court's willingness to say something about the political developments in Catalonia. The Court could have taken a longer time to decide – as it did when it was asked to rule on the validity of the Statute of Autonomy of 2006. Here, in contrast, it decided to make its voice heard at a relevant political time: just a couple of weeks before Congress had to discuss the proposal to transfer power to the Catalan government to hold a referendum.

Actually, the Court could have easily avoided saying anything at all about the parliamentary resolution. The reason is simple: according to its case law, parliamentary acts can only be challenged before the Constitutional Court if they generate legal effects.¹⁴ It is hard to specify what exactly are the legal effects that the Declaration of sovereignty produces. It rather looks like a purely political act, to be understood as part of the political game, which does not give rise to any legal effects on the institutions or on citizens. The Court, however, concluded that the resolution could be reviewed against the Constitution.

Another important feature to highlight is that the Court's decision was unanimous: no judge published any dissenting or concurring opinion. It must have been

¹³ Under Art. 150.2 of the Spanish Constitution, it is possible for the Spanish parliament, by means of an organic statute, to delegate or transfer certain state competences to the Autonomous Communities. Such a statute can fix the forms of control that the state is to retain. There is a limit, however, to the use of this mechanism: the competence involved 'must be of a nature that makes it susceptible to being transferred or delegated'. There is interpretive controversy as to the scope of this abstract constraint.

¹⁴ See ATC 135/2004, April 20, 2004.

hard for the members of the Court to reach a unanimous outcome, given their internal tensions. Probably, the judges wanted to avoid the situation that emerged when the Court published its 2010 opinion on the Catalan Statute of Autonomy. Dissenting opinions were filed in that case, and the Court's authority suffered as a result.¹⁵

A SOLOMONIC JUDGMENT?

It is plausible to read the Constitutional Court's decision as the upshot of a strategy on the part of the judges to find a middle ground position between the extremes. In order to reach unanimity, some intermediate solution had to be worked out. Basically, the Court invalidated one part of the challenged Declaration, while it upheld the other (provided, however, that the latter was read in a constitutionally proper manner).

The principle of sovereignty

The Court, first, invalidated the 'principle of sovereignty' that figured in the Declaration. It was easy for the Court to point out that the Constitution clearly announces in Article 1 that national sovereignty is ascribed to the Spanish people. The 'constituent power', from which all structures of the state derive, is exercised by the Spanish people. Article 2, in addition, proclaims that the Constitution rests on the indissoluble unity of Spain. If so, the Catalan people, legally speaking, cannot be sovereign, for its sovereignty would involve the denial of the sovereignty of the Spanish people. The two sovereignties cannot legally coexist.

One consequence that the Court drew from this conclusion was that a region in Spain 'cannot unilaterally call a referendum of self-determination to decide on its integration in Spain'.¹⁶ In this context, the Court cited in its support the opinion rendered by the Supreme Court of Canada in 1998, on the issue of Quebec's independence.¹⁷ As has been noted by various scholars, however, the Spanish Court failed to distinguish two different issues: whether a region is entitled to

¹⁵It should be noted, however, that the Court's 2010 decision was almost unanimous, in the sense that the provisions that were found defective under the Spanish Constitution were found defective both by the judges in the majority and by the dissenting judges. What happened, basically, was that the dissenters would have invalidated more provisions than those that the majority decided to strike down. So there was practical unanimity as to the invalidity of the articles that were actually declared unconstitutional.

¹⁶See *Fundamento Jurídico 3*. All the citations in the text to the 2014 decision refer to this section of the opinion.

¹⁷See opinion of Supreme Court of Canada, Aug. 20, 1998, 'Reference re Secession of Quebec' [1998] 2.S.C.R 217.

secede unilaterally, and whether the region can hold a referendum on secession unilaterally. The Supreme Court of Canada did not question the legality of the two unilateral referenda that Quebec had organized in 1980 and 1995. Instead, it ruled on whether Quebec had a right to secede unilaterally, and the answer was no. The Spanish Court, in contrast, derived two consequences from the idea that the Spanish people is sovereign: Catalonia cannot secede unilaterally, *and it cannot hold a referendum on independence unilaterally*. The Spanish Court's reference to the Canadian judicial opinion is therefore confusing in this context.¹⁸

It is also interesting to observe that the Court is strongly 'legalistic' when it discusses the issue of sovereignty. It explicitly says that in the same way that the Catalan people, as a legal entity, exists in the legal world as a result of its recognition in the Constitution, *the Spanish people also exists by virtue of the Constitution*. This, of course, can give rise to familiar paradoxes in constitutional theory: if the Spanish people is the author of the Constitution, how is it possible to maintain that the Spanish people exists by virtue of the Constitution? This legalism, however, can have the advantage of flexibility. As we will see, the Court has always insisted that the Constitution can be amended in any direction. There are no constitutional principles that are immune against modification through the applicable procedures of revision. Even the principles that establish the unity of Spain and the sovereignty of the Spanish people can be altered in the future through the pertinent amendment. Indeed, if the Spanish people, legally speaking, only exists as a creature of the Constitution, there is no limit to the kinds of transformations that the Spanish people can undergo in the future, including its partial fragmentation. Secession is therefore not excluded as a legal possibility.

It also bears emphasizing that the Court asked itself whether the principle of sovereignty that figured in the Catalan Declaration could be reinterpreted in order to save its constitutional validity. It concluded, however, that this remedy was not possible, since the Declaration was very clear when it affirmed that the Catalan people *is* (already) sovereign. Parliament was not expressing its wish that the Catalan people would be sovereign sometime in the future, after the necessary constitutional reforms had been adopted. It instead stated that it was already sovereign. The Court, in sum, concluded that it had no other option but to strike down the principle of sovereignty.

¹⁸ For a criticism of the Spanish Constitutional Court's reasoning on this point, see Enric Fos-sas Espadaler, 'Interpretar la política: Comentario a la STC 42/2014, de 25 de marzo, sobre la Declaración de soberanía y el derecho a decidir del pueblo de Cataluña', 101 *Revista Española de Derecho Constitucional* (2014) p. 287-289.

The right to decide

The Court, however, upheld another relevant part of the Declaration, the one that concerns the ‘right to decide’. The Court maintained that this right has to be understood in light of the general legal context of the Declaration. The Declaration enumerates certain principles, one of which is the ‘principle of legality’. If the right to decide is to be exercised according to the existing legal framework, there is then no constitutional objection to it. The Court cited its earlier case law, which had espoused the idea that Spain is not a militant democracy: all political programs can be defended in the public sphere. Their implementation simply needs to observe the existing laws and rules of legal change. The Constitution, in particular, can be revised in many different directions, and there is no substantive limit to the changes that may be brought about through constitutional means.¹⁹ So if the ‘right to decide’ means the future status of Catalonia is to be exercised according to the existing constitutional framework, including the rules on constitutional amendment, there is nothing legally wrong with it. It is merely a political ‘aspiration’, the Court wrote, that can only be realized through the applicable constitutional procedures.

This Solomonic strategy that the Court followed is probably wise from an institutional and political point of view. From a more purely legal perspective, however, the decision presents some problems.

The main problem is that the Court detaches the right to decide (which it upholds) from the principle of sovereignty (which it invalidates). This argumentative move is not convincing. The Declaration should be read in a holistic fashion. Its title explicitly embraces two ideas – sovereignty and the right to decide – which are the two sides of the same coin. The basic proposition is that the Catalan people, which is a sovereign subject, has the right to decide its future. The Declaration explicitly affirms that the right to decide is to be exercised according to a list of nine principles, the first of which is labeled ‘sovereignty’. If the Court invalidates this first principle, it is hard to see how the derivative right to decide that the Declaration talks about can survive. The Court does not mention any clause in the Spanish Constitution that might give independent support to this right. The Court is aware of the problem, of course, but it does not offer much by way of justification of its conclusion. It simply asserts that the right to decide is not ‘directly’ tied to the principle of sovereignty.

¹⁹ See STC 48/2003, on the constitutionality of the Law on Political Parties. For an analysis of this decision and the doctrine it develops, on the absence of substantive limits to constitutional amendments, see Victor Ferreres Comella, ‘The New Regulation of Political Parties in Spain, and the Decision to Outlaw Batasuna’, in Andrés Sajó (ed.), *Militant Democracy* (Utrecht, Eleven International Publishing 2004), p. 133-156.

Actually, if the Court was ready to reconstruct the Declaration so radically in order to adjust it to the Constitution, it could easily have gone in the other direction too: it might as well have held that we cannot read the principle of sovereignty of the Declaration to really mean that the Catalan people is already sovereign, since it would make no sense for a sovereign Catalan people to be asked in a referendum whether it wants to become sovereign through a process of secession from Spain. If the parliamentary resolution seeks to organize a referendum on independence, this is because the Catalan people is not yet acknowledged as a sovereign subject, from a legal point of view.²⁰

A deeper question that is worth asking is whether the conditions exist for the Court to award, as it does, a presumption of constitutional validity to the resolutions of the Catalan parliament that concern the political process of 'national transition'. Let me briefly explain.

As a general rule, the laws enacted by parliament (as well as norms and acts issued by other institutional bodies) are reviewed by courts under the presumption that they are constitutional. One of the consequences of this presumption is that when the legal text being reviewed can be understood in different ways, the court chooses that interpretation under which the text is constitutionally valid. The court must interpret the text 'in conformity with the Constitution'. There are two key reasons for this interpretive rule.

The first reason is connected to the negative consequences that often arise when a legal provision is annulled. Quite often, the gap that emerges in the legal system, if a law is struck down, is quite dysfunctional. The lack of regulation may leave certain legitimate interests or rights under-protected. It is thus reasonable for courts to try their best to find an interpretation of the law that will save it from the constitutional fire.

The second reason that may justify the rule that asks courts to read legal provisions in conformity with the Constitution is that there are good grounds to believe that the institution that has enacted the legal provision under attack wishes to respect the Constitution. The political community as a whole should have trust in that institution – there is no reason to suspect that it is disloyal to the constitutional order. In this context, it makes sense for courts to assume that, if the text can be read in various ways, the reading that makes the text comply with the Constitution is the one that should be ascribed to the law-maker. In the same way that, when we interact with people who we believe are not crazy, we resolve any potential ambiguities in their utterances in favour of a meaning that makes those utterances reasonable, courts are expected to read legal provisions in such a manner that what they establish is in conformity with the Constitution. In the same

²⁰ This argument has been advanced, among others, by Fossas Espadaler, *supra* n. 18, at p. 285-287, and Pau Bossacoma, 'Justícia i legalitat de l'autodeterminació nacional i secessió' (unpublished manuscript, on file with the author).

way that we assume that our interlocutor is sane, courts should assume that the political institutions wish to respect the Constitution. Of course, a sane person may sometimes say crazy things, and a political institution may sometimes pass clearly unconstitutional rules. But this does not force us to abandon the general presumption. Unless the lapses are frequent or concern very important matters, we keep the presumption alive.

How does this general theory fare, when we apply it to our case? The Constitutional Court insists on the need to read the Declaration of the Catalan parliament in a manner that makes it consistent with the Constitution. But why should such an interpretive rule be followed here? Would a legal gap open up, which would produce negative consequences, if the reference to the 'right to decide' were formally struck down? Not really. The Court itself chooses to eliminate the reference to the 'sovereignty' of the Catalan people, and it is not worried, of course, about the harmful effects of such a gap.

Should we instead rely on the general presumption that the political institutions are committed to the Constitution? The problem is that there is sufficient evidence on the table by now to suggest that, by and large, the political forces that are pushing the process of 'national transition' in Catalonia consider the Constitution to be a dead document as far as they are concerned. The 'right to decide' is being advanced in the Catalan public sphere as a moral right that is connected to democratic ideals. The law, it is often contended, must yield to the higher authority of democracy. If the Constitution is a barrier to the right to decide, the Constitution is said to be illegitimate. In a democracy, it is argued, the people is sovereign. And because the Catalan people is sovereign, it should freely decide its future. In this context, it is hard to sustain the presumption that the political moves within the Catalan parliament are meant to respect the Spanish Constitution.

It is true that the Declaration includes 'legality' as one of the principles that must govern the exercise of the right to decide. But this principle is extremely vague in its formulation: it establishes that all the legal frameworks will be used to make it possible for Catalans to exercise their right to decide. The Spanish Constitution is not explicitly mentioned as part of the relevant legal framework. Many influential political actors, including President Artur Mas, have argued that a popular consultation can be organized, either under Spanish law or, if that possibility is excluded, under Catalan law. This suggests the existence of a clash of normative systems: courses of action that are illegal under the Spanish Constitution may nevertheless be entertained under a separate legal order constructed in Catalonia.²¹

²¹ Thus, the Parliamentary Resolution 742/IX, passed on 27 Sept. 2012, establishes that the mechanism that will allow Catalan citizens to express their opinion on the future status of Catalonia 'must be built on the basis of the Catalan Parliament's *own legality and legitimacy*' (emphasis added).

So, all things considered, it sounds a little counter-intuitive to read the parliamentary Declaration of sovereignty as one that is committed to respecting the Spanish Constitution. The presumption of validity has very weak foundations, when it is extended to the decisions that the Catalan parliament and the Catalan government have taken in this field in recent years.

It is possible to take the Court's decision, however, as a heroic effort at preserving the existing constitutional order, in spite of the political crisis that the Catalan developments have caused. That is, even if there is ample evidence to suggest that the will on the part of the Catalan authorities to respect the Constitution is very weak, the Court still treats them as loyal actors within the constitutional system. When the Court says that the 'right to decide' has to be understood as the right to pursue political aspirations about the status of Catalonia within the framework of the existing Constitution, under which only the Spanish people is sovereign, and that this is the kind of right that we must interpret the Catalan parliament to be talking about, it is sending a message of hope. It seems to be saying that, in spite of all, we should assume that the Spanish Constitution is still alive within the Catalan political process.

Actually, the Court's opinion includes two passages that call on the political players to enter into a dialogue in order to find a solution to the current constitutional crisis. The Court writes that the problems that arise when a particular territory wishes to change its legal status cannot be solved by the Constitutional Court. The latter can only check that the applicable legal procedures to organize this dialogue are properly complied with. The Court, in addition, invokes the principles of institutional cooperation and loyalty to the Constitution, and holds that if a region submits a proposal to change the Constitution, the Spanish parliament 'should take it into account'. The Court leaves unspecified the conditions and the consequences of this duty to take into account such a proposal of constitutional reform. But there is a cry here for the political branches to assume the burden of negotiating a political solution to a deep constitutional crisis.²² Paradoxically, the Court has been eager to examine the constitutionality of the Catalan parliamentary resolution, even if it could easily have avoided the case, as we saw. But, at the same time, one of the key messages it has sent is that its role is marginal when it comes to ensuring the maintenance of the political authority of the Constitution in the middle of a territorial crisis of the sort Spain is now confronting.

²²The Court's approach is similar in spirit to that of Robert Burt's theory of judicial review, which asks courts to help the actors in conflict to find a workable solution through a process of dialogue between majorities and minorities. Courts are to play a role in this process of accommodation of the values and interests in tension, but they are not to impose in advance the answer which they independently determine to be right. See Robert A. Burt, *The Constitution in Conflict* (Cambridge, MA, Harvard University Press 1992).

AN IMPLICIT QUALIFICATION TO THE COURT'S EARLIER LEGAL DOCTRINE ON REFERENDA?

One of the interpretive controversies that the Constitutional Court's decision has raised is whether the Court has changed its doctrine as to the conditions under which referenda are legally valid. An earlier ruling by the Court dealt with a referendum that Juan José Ibarretxe, the President of the Basque government, wanted to hold to decide the future status of the Basque Country. The regional parliament enacted a law in 2008 that fixed the date of the referendum and the questions to be posed to the citizens. The Spanish government brought a constitutional action against it. In its decision (STC 103/2008), the Court declared the law unconstitutional and established a general doctrine on the validity of referenda.

It held, first of all, that only the Spanish government can authorize referenda. Article 149.1.32 of the Constitution is very clear when it provides that the state (the central government) has 'the exclusive power to authorize popular consultations by way of referendum'. It is not possible, therefore, for a regional legislative assembly to convoke a referendum without the central government's green light. Even if the popular consultation is not formally called a 'referendum', and even if no binding decision is made through it, it is still a referendum, if the electorate is asked to participate in a procedure to express its opinion on an important political matter.

The second key point that the Court made was that certain matters cannot be submitted to referenda, even if the Spanish government's authorization is obtained. The excluded matters are those that affect the foundations of the constitutional order and would thus require the amendment of the Constitution. Even if the referendum is consultative in nature, and no binding decision is therefore adopted through it, it cannot be used as a mechanism to consider political issues that would require a constitutional reform.

In order to understand why this is so, it is important to bear in mind that the Constitution stipulates in Articles 167 and 168 the procedures that need to be followed in order to modify the Constitution. Two procedures are established: one applies as a general rule, while the other applies in some special cases. As a general rule, the procedure to be followed is regulated in Article 167. Basically, a supermajority of three fifths of both chambers of parliament (the Congress and the Senate) is required for the passage of the amendment. A popular referendum to ratify the amendment is only necessary if one tenth of the members of the Congress or one tenth of the members of the Senate ask for it. A special, more burdensome procedure specified in Article 168, however, is to be employed in order to modify certain parts of the Constitution that are considered of higher importance (the Preliminary Title, certain fundamental rights of Title I, and Title

II – which concerns the Crown). The procedure requires a supermajority of two thirds of both chambers of parliament, the immediate dissolution of parliament, and a new two-thirds legislative supermajority. In addition, a final referendum must necessarily be held, to ratify the amendment, even if no political forces ask for it.

So, in order to modify the Constitution, a referendum may have to be called, either because the pertinent percentage of members of parliament requests a referendum, in the context of the general procedure of Article 167, or because the matter at stake is covered by the special procedure of Article 168, in which case a referendum is then compulsory.

According to the Court, it is not possible to alter the applicable procedure of constitutional amendment through the introduction of an additional referendum *at an early stage*. If the Constitution specifies that the first step consists of a supermajority vote in parliament, and only later are citizens to be called to participate in a referendum to ratify or reject the proposed amendment, then that is the way to proceed. It is not legitimate to introduce a previous step, a consultative referendum.

The Court does not specify the rationale for this holding, but it would be easy to construct one, based on the negotiated character of the Spanish Constitution of 1978. This text was indeed the result of an enormous effort at accommodation and compromise on the part of the various political parties that were represented in the parliament that discussed and wrote the Constitution. The commitment was made that any future modification of the Constitution would be adopted in the same spirit of *consenso* that characterized the birth of the Constitution.²³ That is why the rules on amendment specify that there must first be a supermajority in parliament that agrees to introduce a particular change. Only then is a referendum possible (or required). If a referendum were added at the initial stage, before there was any supermajority agreement in parliament, it would be hard to preserve the spirit of *consenso*. If, for example, a referendum were called on the maintenance of the monarchy, and a majority of the people voted against the monarchy, there would not be any real space left for the different political parties to bargain in parliament on this matter, as the Constitution requires in Articles 167 and 168. Once the people had spoken at the initial stage, the future of the monarchy would have been decided.

It is arguable, however, that this general doctrine that the Court laid down in its 103/2008 decision may need to be qualified in the very extreme scenario of secession. As has already been noted, the Court has insisted that all the constitutional clauses are open to future revision, including the clause that establishes the

²³ On the birth and character of the Spanish Constitution, see Ferreres Comella, *supra* n. 2, at p. 1-24.

unity of Spain (Article 2). This means that it is technically feasible for the Constitution to be modified in order to make it possible for a territory to secede. Such a transcendental change in the identity and architecture of the polity, presumably, would be adopted if there was sufficient evidence that there was a strong preference on the part of a territory to become independent from Spain. It seems reasonable, therefore, to first ascertain through a referendum that there is indeed a majority of the people in a given region that would opt for secession. It would be dysfunctional, for example, to amend the Constitution to allow Catalonia to become independent, without first asking Catalans whether they really want to secede. So it appears justified to introduce an exception to the Court's general doctrine on the need to follow the specific steps – and only those steps – of constitutional amendment that figure in Articles 167 and 168.

The Court, in its 2014 decision on the Catalan Declaration of sovereignty, does not explicitly address this specific issue. Whether the exception I have just mentioned is embraced by the Court is highly controversial. The Court has not expressly qualified its earlier 2008 holding. The Spanish government reads the decision as confirming the general doctrine developed in the earlier ruling, and therefore argues that the Spanish government has no power to authorize a referendum on secession in Catalonia. The Constitution would have to be amended first. The political parties that are in favour of holding the referendum, in contrast, try to read the new decision as qualifying the previous jurisprudence on the matter. The Court's nominal upholding of the 'right to decide' may suggest that a referendum on secession could be authorized by the Spanish government, as a first step. If the majority of Catalans expressed their preference for secession in the referendum, then the proceedings of constitutional amendments would have to be triggered.

There is room for reasonable disagreement on this issue. Different prestigious legal experts have argued powerfully for and against the view that it would be legal for the Spanish government to give its green light to a referendum in Catalonia on the independence of the region.²⁴

What seems utterly implausible, however, is to read into the Court's 2014 decision a more radical proposition, namely: that the Catalan authorities, *without the central government's authorization*, may organize a referendum. Article 149.1.32 of the Constitution is so clear when it grants the state the exclusive power to authorize popular consultations through referenda that it would be unreasonable to

²⁴Francisco Rubio Llorente (an influential professor of constitutional law, former judge and Vice-President of the Constitutional Court, and former President of the Council of State), for example, has argued that the Spanish government is empowered to call a referendum on secession, in order to get the opinion of Catalan citizens on the matter, without first amending the Spanish Constitution. See his newspaper article, 'Un referendun para Cataluña', *EL PAIS*, Oct. 8, 2012.

conclude that the Court has opened the door to a referendum on secession that is unilaterally called by the Catalan regional institutions. Even if no binding decision is adopted through it, the referendum can only be authorized by the central government.²⁵

The Catalan Parliament, however, has recently passed a statute that tries to circumvent the barrier erected by Article 149.1.32 of the Constitution.²⁶ The new statute empowers the Catalan institutions to organize a 'popular consultation', without the central government's permission. The problem is that there is no relevant difference between a referendum and such a popular consultation. In both instances no legally binding decision is made by the people. The circle of people who participate may be different: only citizens who are at least 18 years old may take part in a referendum, whereas those who are 16 are also allowed to participate in popular consultations under the new Catalan statute. This difference, however, does not help sustain the constitutionality of the new law. If the central government's authorization is necessary to hold a referendum where those who are 18 are entitled to participate, that green light is also necessary, *a fortiori*, in order to hold a consultation where not only those who are 18, but also those who are 16, are allowed to vote.²⁷

The new law has been examined for its constitutionality by the *Consell de Garanties Estatutàries*, a Catalan institution that has the power to issue advisory reports on constitutional matters. The *Consell* is deeply divided: five members have held that the new statute is valid, while four other members have concluded that it is not.²⁸

²⁵ See, however, the report of April 1, 2014, by experts of the Generalitat de Catalunya, '*Informe sobre la Sentència del Tribunal Constitucional de 25 de març de 2014*'. The report makes the untenable claim that the Court, in its 2014 decision on the Declaration of sovereignty, has only banned one type of referendum: the referendum of 'self-determination', in the course of which a binding decision is made to secede from Spain. 'Any other type of referendum or consultation whose aim is to get to know the will of citizens', under the assumption that the rules of constitutional amendment will have to be observed in the future, in order to implement the secessionist outcome of the referendum or consultation, is legal (p. 15). But this is patently false: the Court has not dismantled Art. 149.1.32 of the Constitution, of course, which gives the central government exclusive competence when it comes to permitting referendums. So a regional referendum that is not authorized by the central government is clearly illegal, even if it purely consultative.

²⁶ *Llei 10/2014, de 26 de setembre, de consultes populars no referendàries i d'altres formes de participació ciutadana*. The law was published in the *Diari Oficial de la Generalitat de Catalunya*, No. 6715, on Sept. 27, 2014.

²⁷ For a careful analysis of this issue, see Josep Maria Castellà Andreu, 'Consultas populares no referendarias en Cataluña. ¿Es posible constitucionalmente un *tertium genus* entre referéndum e instituciones de participación ciudadana?', *Monografías de la Revista Aragonesa de Administración Pública*, XIV (2013) p. 121-155.

²⁸ See *Dictamen 19/2014*, rendered on Aug. 19, 2014.

In spite of all the constitutional doubts that the new statute raises, President Artur Mas has used it to call a popular consultation on Catalonia's independence, to be held on 9 November 2014.²⁹

As all commentators expected, the Spanish government has challenged the new Catalan statute and the presidential decree before the Constitutional Court. At the request of the Spanish government, the Court has suspended the operation of the statute and the decree that derives from it until it rules on the merits.³⁰

It is unlikely that the Catalan institutions will organize a consultation in violation of the decision of the Constitutional Court. This is not because the political actors that are leading this process in Catalonia are sincerely committed to the Constitution. Rather, they will act out of prudence – they are afraid of the domestic and international consequences of engaging in political actions that are clearly invalid under the Spanish Constitution.

It is unclear, however, what will happen next. Local and general elections (and maybe early regional elections in Catalonia) are on the horizon in 2015. New opportunities will be available to test the strength of the movement in favour of independence. There is no doubt, in any event, about the political and constitutional gravity of the developments in Spain on this front. The decision of the Constitutional Court on the Catalan Declaration of sovereignty is just a piece in a very complex puzzle.



²⁹ See *Decret 129/2014*, Sept. 27, 2014.

³⁰ See *Providencia del Tribunal Constitucional*, Sept. 29, 2014.