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THE POLITICAL FUTURE OF CATALONIA: THE ROLE OF PARLIAMENT[*]

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Abstract

This article analyses the activity of the Catalan Parliament which has to do with Catalonia's political future. The analysis begins with the parliamentary resolution of 2013 that declared the sovereignty and right to decide of the people of Catalonia and goes as far as the latest resolutions on the independence process adopted during the current legislature by the majority that came out of the elections held on 27 September 2015. All these decision have opened up a legal debate on basic constitutional principles, in particular those of democracy and legality. The debate revolves around the following points: how to defend and promote a political project that does not fit in with the established constitutional order? Can the Constitutional Court intervene in non-legal acts of a strictly parliamentary nature? What are the effects of disobeying the duty to comply with the Constitutional Court's decisions? The article studies all these questions from a legal perspective but without neglecting socio-political considerations that are essential for putting them in the proper context.

Keywords: Parliament of Catalonia; right to decide; referendum; democracy; legality; Spanish Constitutional Court; Catalan sovereignty process.

Resum

Aquest article analitza l'activitat del Parlament relacionada amb el futur polític de Catalunya. L'anàlisi parteix de la resolució parlamentària de 2013 que declarava la sobirania i el dret a decidir del poble de Catalunya i arriba fins a les darreres resolucions sobre el procés d'independència adoptades durant la legislatura actual per la majoria parlamentària sortida de les eleccions del dia 27 de setembre de 2015. Totes aquestes decisions parlamentàries han obert un important debat jurídic sobre principis constitucionals bàsics, en particular, el de democràcia i el de legalitat, debat que gira al voltant dels punts següents: com defensar i promoure un projecte polític que no s'ajusta a l'ordre constitucional establert? Pot el Tribunal Constitucional fiscalitzar actes no normatius de naturalesa estrictament parlamentària? Quins són els efectes de desobeir el deure de complir les resolucions del Tribunal Constitucional? L'article estudia totes aquestes qüestions des de la perspectiva jurídica, sense ometre, però, consideracions d'índole sociopolítica indispensables per contextualitzar-les adequadament.

Paraules clau: Parlament; dret a decidir; referèndum; democràcia; legalitat; Tribunal Constitucional; procès sobiranista.

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1 Introduction

The Parliament of Catalonia is the political institution that has played the leading role in driving a political project with the declared aim of turning Catalonia into an independent state.

During the current legislature the will to achieve this goal has been expressed clearly and unequivocally and created a situation of conflict, in particular on a legal level with the Constitutional Court. This conflict has had important consequences for the Catalan Parliament, which has seen how the decisions it has adopted on this question have repeatedly been declared unconstitutional, null and void.

In this article we will analyse Parliament's actions from an institutional and legal perspective, which is complex for two main reasons. Firstly, because of the political consequences implied by a process intended to achieve a result that is incompatible with the established constitutional order. Secondly, because of the difficulty involved in reconciling the democratic will, in this case represented and expressed by Parliament, with the demands of the principle of legality, and more specifically, constitutional legality. Together with the principle of democracy, this is part of a pairing that is difficult to separate within the framework of a state that defines itself precisely as a "democratic State of Law" (Article 1 of the Spanish Constitution - SC)

However, the implications of the political process currently under way in Catalonia do not end here. In order to understand them fully it is also necessary to consider the nature of the parliamentary acts through which Parliament's will has been expressed, because from a legal point of view that is important. Another important aspect that needs to be considered is the path Parliament has followed, inasmuch as this has not always followed a clear, straight, coherent line. A proper assessment of the political and legal content of the most recent parliamentary decisions is only possible with an overall view of how the process has developed over time, and that needs to go back to Resolution 5/X, which approved the Declaration of Sovereignty and Right to Decide of the People of Catalonia. Nor should it be forgotten that Parliament has asserted the right to self-determination in declarations that go back much further.

Nevertheless, it should be noted that this study cannot be framed in purely legal terms. The difficulties of such an approach, given the characteristics of the process itself, have already been pointed out. To properly understand the way in which it has developed it is also vital to analyse the political context in which the parliamentary decisions have been adopted and the reasons why Parliament has chosen a specific option and discarded others. Obviously that does not exclude the possibility of making a legal assessment of those options and the problems they pose. The assessment here will essentially be from the perspective of parliamentary proceedings, as another article, which will be published in the same issue of this journal is devoted specifically to the role played by the Constitutional Court in this matter.

The considerations outlined above mean this study is a complex and, to some extent, unusual one, because they require integrating elements that have a marked political content with legal analysis criteria. As shall be seen, this cannot always avoid the clash between the expression of Parliament's political will and the usual guidelines for interpreting and applying the law.

2 Parliament and the right to self-determination: the background

The current debate on Catalan independence has been explicitly formulated in this legislature, with the result of the parliamentary elections held on 27 September 2015 providing the legitimate basis for this. This debate has a direct precedent in the first statement of intent expressed during the 10th legislature, by means of which Parliament explicitly recognised, for political and legal purposes, the sovereign character of the people of Catalonia and demanded the power to decide on its future.[1] Obviously, this declaration of sovereignty was intended to serve as the necessary starting point for exercising the right of self-determination in its broadest sense.

1 Resolution 5/X, of 23 January 2013, which approved the Declaration of Sovereignty and the Right to Decide of the People of Catalonia. Published in the BOPC, No. 13, of 24 January 2013.

However, self-determination as a right attributable to the Catalan people was present in declarations adopted by Parliament in much earlier legislatures and periods, which highlights the fact that the debate on self-determination is nothing new and has been present throughout the autonomous period.

Resolution 98/III, of 12 December 1989, on the Right to Self-determination of the Catalan People[2] solemnly declared that Catalonia was part of a "differentiated national reality" in the State as a whole. From this it flows that, for Parliament, respect for the current institutional framework does not imply the Catalan people renounce the right of self-determination, as laid down in the principles of international bodies and can be deduced from the preamble of the 1979 Statute of Autonomy.

This self-recognition led Parliament to affirm in the same resolution that, at the right time and by means of actions envisaged in the constitutional system itself, it would be able to increase the level of self-government and adapt national rights to the circumstances of each historical period.

Resolution 679/V, of 1 October 1998, on the General Political Orientation of the Executive Council,[3] contains another specific reference to self-determination when it "ratifies once again" the right of the Catalan people to freely determine their future. At the time this declaration was accompanied by various demands directed at the State with regard to reinforcing the principle of bilateralism, granting new powers under SC Article 150(2), funding and the presence of the Catalan Government (Generalitat) in the bodies of the European Union.

The 8th legislature of the Catalan Parliament approved Resolution 631, of 3 March 2010,[4] in which it ratified the earlier resolutions 98/III and 679/V, along with the will to use all legal instruments in force and all necessary policies to ensure the Catalan people can exercise their *right to decide*. This was the first parliamentary resolution to use this expression, in the context of the consultations held at the end of 2009 and 2010 in more than 250 municipalities so citizens could express their political will to take part in shaping the future of Catalonia.

The "right-to-decide" concept was subsequently used in Resolution 742/IX, of 27 December 2012,[5] on the Government's general political orientation, in a section that gives an initial clue for determining the sense and scope of the term. Parliament notes in this resolution that for the previous 30 years a very large part of the Catalan nationalist movement had been fully committed to transforming and accommodating Catalonia in the Spanish State without renouncing their legitimate national aspirations, desire for self-government and survival as a nation. But the resolution also notes that the attempts to accommodate Catalonia in the Spanish State, with the latter's repeated negative responses, has now reached "dead end". Consequently, Parliament believes that "Catalonia has to start a new stage based on the right to decide".

In this resolution, the right to decide seems to be seen as a right or power the citizens of Catalonia have to decide Catalonia's political future, on the understanding that this future may depend on other legal and political parameters than those that define the system of autonomous regions envisaged by the Constitution and Statute currently in force. It should be remembered that this resolution was passed after the Constitutional Court Judgement STC 31/2010, of 28 June, on the Statute of Autonomy which, as may be reasonably deduced, had an appreciable effect on the Catalan Parliament's crisis of confidence as regards the autonomous region formula of self-government.

This moment probably marks an important change in the political strategy, as it meant abandoning the statutory path and opting for a new scenario geared towards the goal of achieving Catalonia's independence and creating its own state. Although the resolution makes no explicit reference to independence, it is obvious that it opens up this possibility when it affirms "the need for Catalonia to make its own way" so that "the Catalan people can decide their collective future freely and democratically", appeals for "dialogue with the international community, the European Union and the Spanish Government" and, finally, calls on the

2 Published in the BOPC, No. 120, 18 December 1989.

3 Published in the BOPC, No. 327, 13 October 1998.

4 This resolution was approved in committee (Institutional Affairs Committee) and published in the BOPC. No. 657, 22 March 2010.

5 Published in the BOPC, No. 390, 2 October 2012.

Catalan Government to consult the people of Catalonia on their collective future. This is confirmed in the resolution itself when, in another section, it proclaims and ratifies the imprescriptible and inalienable right to self-determination, judges it necessary to launch a process to become a new state in Europe and considers it essential to equip Catalonia with an instrument whereby its citizens can be consulted on these questions, an instrument that must be built on the Catalan Parliament's "own legality and legitimacy".

With regard to these initial parliamentary declarations on the right of self-determination and the right to decide, it is important to stress that, from a strictly legal perspective, the basic political approach they express is not in any clear or evident contradiction with the Constitution. The right of self-determination can be understood in internal terms, that is, as an aspiration to change a people's legal and political status without that necessarily taking the form of a state independence process, or external terms, in other words, the latter. Moreover, even in the latter scenario, the start of an independence process is not unconstitutional in itself, because the Constitution does not exclude its possible reform if its promoters do not exclude the possibility of following this path either. Nor is the will to hold a consultation based on Catalan legality decisive in the opposite sense, as the Catalan institutions still believe it is possible to hold one by means of an Act on non-referendum consultations, exercising the Catalan Government's powers under Article 122 of the Statute of Autonomy of Catalonia (SAC).

3 Resolution 5/X and the beginning of constitutional conflict

The concept of *right to decide* has an essentially political character that Resolution 742/IX associates directly with the capacity or decision of a body of citizens (in this case, those of Catalonia) to freely and democratically decide their collective future.[6]

As a juridical concept it has no defined value, nor can it be considered to correspond exactly to the right of self-determination, though that may be the result. The relationship that Resolution 742/XI establishes between this right and holding a consultation seems to give it more of an instrumental rather than a decision-making meaning. The right to decide is thus a right to be able to express a will or opinion on the political future of the Catalan people. This instrumental character was confirmed in the later Resolution 5/X, of 23 January 2013, which approved the Declaration of Sovereignty and the Right to Decide of the People of Catalonia.

This parliamentary resolution was a declaration of intent to start the process whereby the citizens of Catalonia could exercise the right to decide on their political future in accordance with the principles outlined in the resolution itself. So it is clear that, despite a degree of calculated ambiguity and the absence of any specific reference to convening a consultation, the resolution presupposes that. This is confirmed in the preamble, where it is directly linked to Resolution 742/IX as a reminder that the latter linked the "right to decide" to the need for the citizens of Catalonia to express themselves on their collective future "by means of a consultation".

Among the principles that have to guide the process of giving effect to the right to decide, Resolution 5/X highlights sovereignty above all, affirming that the people of Catalonia, for reasons of democratic legitimacy, have the "nature of a sovereign political and legal subject". The other principles are not as politically charged and refer to the need for the process to develop in accordance with the rules of democracy, transparency, dialogue with the State, European institutions and the international community as a whole, respect for the founding values of the European Union, recognition of the role of Parliament as the main institution in this process and the participation of the political forces and social actors.

6 On the concept of *right to decide* and its political and legal implications, see Barceló, Mercè [et al.]. *El derecho a decidir. Teoría y práctica de un nuevo derecho*. Barcelona: Atelier, 2015; Ridao, Joan. "Sobre la 'Declaració de sobirania i del dret a decidir del poble de Catalunya' i el seu exercici per la via d'una consulta popular. Estat de la qüestió». *Revista de Catalunya,* Issue 285 (June 2014), p. 49ff.; Vintró, Joan. "La Declaració de sobirania i del dret a decidir del poble de Catalunya: un apunt jurídic". Barcelona: *Revista Catalana de Dret Públic* [blog], 2013 [Consulted: 8 May 2013]; Tudela, José. "El derecho a decidir y el principio democrático". *Teoría y Realidad Constitucional.* Madrid: UNED, Issue 37 (2016), p. 477ff; Jiménez, José J. "Principio democrático y derecho a decidir". *REAF*. Barcelona: Government of Catalonia. Ministry of the Presidency, Issue 19 (April 2014), p. 211ff; Ferreres, Víctor. "Cataluña y el derecho a decidir". *Teoría y Realidad Constitucional.* Madrid: UNED, Issue 37 (2016), p. 461ff.

As might easily be deduced, the most contentious point in the resolution was recognising the Catalan people as, or attributing to them the character of, a sovereign political and legal subject. None of the other principles pose a special problem, especially when the reference to the principle of legality allows one to deduce a will for the process to respect the legal system and the constitutional framework in particular. Nevertheless, it is obvious the declaration of sovereignty could be a problem in the latter sense, depending on how it is interpreted and the value and effects that could derive from the nature of the parliamentary act in which it is formulated.[7]

Parliamentary resolutions such as 5/X are acts by means of which Parliament expresses a declaration of intent, as a result of carrying out its role of supervising and promoting government action. This declaration of intent can be addressed to the Government or citizens of Catalonia[8] and has neither a regulatory character nor the binding nature of a regulation. The doctrine notes these are acts of an intrinsically political nature and they can only be subject to political control through Parliament. In that regard, some authors have gone as far as to assert that these parliamentary acts can be considered alien to the world of law.[9]

However, this did not prevent the Spanish State Government from bringing a challenge to Resolution 5/X before the Constitutional Court, opening up a channel unknown until then by allowing a judicial review of a parliamentary act of this nature. The key issue that needed to be determined, therefore, was whether Resolution 5/X, despite its essentially political character, could also be regarded as an act with legal effects, since this was crucial in paving the way for the Constitutional Court to intervene on the assumption the resolution could give rise to a problem that is constitutional at root.

This question was resolved by the STC 42/2014, of 25 March, which established for the first time a doctrine on the legal effects of parliamentary acts promoting government action, with the understanding that the legal effects are not "binding" on the government or citizens in the sense of a legislative act. The Court applies a particularly lax criterion on this point and considers that, despite its markedly political character, the resolution could have consequences of a legal nature. And it justifies this conclusion on the basis that the declaration could lead to the recognition of powers in relation to a group or an institution that have not been conferred on them by the Constitution, an inference that the assertive tone in which the parliamentary declaration is expressed could warrant.[10]

The Constitutional Court uses this doctrine to declare the first principle of the resolution (declaration of the sovereignty of the Catalan people) unconstitutional, null and void because it regards that as contrary to Article 1(2) of the Spanish Constitution, which proclaims national sovereignty belongs to the Spanish people. The Court concludes that only the latter are sovereign, and "exclusively and indivisibly" so, which means no other subject or State body, or part of this people, can be endowed with an attribution of sovereignty already established by the constituent powers. Here the arguments used in the judgement to infer the resolution has a legal content take on special importance, because they seem to be aimed at preventing any possibility of the

7 See the pleadings submitted by Parliament against the challenge to Resolution 5/X brought before the Constitutional Court. In theses it is argued (especially in sections II and III) that the resolution is a strictly political act with no legal effects that might be subject to legal control.

8 Resolution 5/X is the result of a parliamentary initiative processed in accordance with Article 164 of Parliament's Rules of Procedure, which allows members and parliamentary groups to present draft resolutions for promoting political and government action with one of these ends.

9 Santaolalla, Fernando. *Derecho parlamentario español*. Madrid: Dykinson (2013), p. 422. ISBN 9788490316214.

10 With regard to STC 42/2014, see:

Tajadura, Javier. "La STC 42/2014, de 25 de marzo, respecto de la Resolución del Parlamento de Cataluña 5/X, de 23 de enero de 2013, por la que se aprueba la declaración de soberanía y del derecho a decidir del pueblo de Cataluña: la introducción del 'derecho a decidir' en el ordenamiento jurídico español". In *La última jurisprudencia relativa al Parlamento: seminario celebrado en Vitoria-Gasteiz los días 27 y 28 de enero de 2016.* Vitoria-Gasteiz: Eusko Legebiltzarra = Basque Parliament, 2016, p. 57-90.

Vintró, Joan. "El Tribunal Constitucional y el derecho a decidir de Cataluña: una reflexión sobre la STC de 25 de marzo de 2014" [online]. Barcelona: *Revista Catalana de Dret Públic* [blog], 2014 [Consulted: 8 May 2013].

Ridao, Joan. "La juridificación del derecho a decidir en España: la STC 42/2014 y el derecho a aspirar a un proceso de cambio político del orden constitucional". *Revista de Derecho Político.* Madrid: UNED, Issue 91 (2014), p. 91ff.

declaration of sovereignty giving rise to an implicit capacity to adopt decisions or measures that are the right of a sovereign power, in particular, to call a unilateral referendum of self-determination.

However, this pronouncement does not imply the Constitutional Court rejects the right to decide recognised in Resolution 5/X. In fact, leaving aside the point regarding the declaration of sovereignty, the Court accepts the constitutionality of the rest of the resolution and of the concept of the *right to decide* itself, when it considers a political project that might involve altering the foundations of the established constitutional order (such as one that puts forward the goal of independence) could be *prepared and promoted* legitimately, provided this is done without undermining democratic principles, basic rights or other constitutional mandates. In that sense, the Court understands that the rest of the principles contained in Resolution 5/X are compatible with these conditions, bearing in mind the Constitution does not establish a "militant" model of democracy and, therefore, there is no core that is inaccessible to constitutional reform.

Basing itself on these criteria, the Constitutional Court accepts the constitutional legitimacy of the right to decide as a process intended to promote and defend a goal initially contrary to the tenets of the Constitution, but on the understanding that any actions that may derive from this process, as well as its outcome, ensure its "effective achievement" respects the constitutional "reform procedures". The Court understands that, a priori, (leaving aside the first principle) the resolution does not exclude following established constitutional channels to turn the political wish expressed in it into a legal reality and, therefore, accepts its constitutionality in accordance with the principles of democracy and legality, which thus find their point of equilibrium.

Judgement 42/2014 raised some important interpretive doubts regarding the room for manoeuvre that promoting and defending the political project expressed in Resolution 5/X might have, especially with regard to the central question of being able to exercise the right to decide by means of a popular consultation. This question has been dealt with in other Constitutional Court judgements that we will comment on later. What is important to stress here is that this first episode in the conflict between the Catalan Parliament and the Constitutional Court basically served to clear up two things: firstly, that the Catalan political authorities and Catalan citizens may promote the political project for independence as an expression of democracy and, despite its initial opposition, within the Constitution; and, secondly, that this democratic expression, along with the activities that support it and give it content, have to accept the application of constitutional reform procedures so the project may become a "legal reality". That means placing them outside the Constitution if the intention is to achieve the desired end by excluding those reform procedures.

4 The will to exercise the right to decide in accordance with the constitutional and statutory framework

STC 42/2014 had the effect of recognising the right to decide not only from a political viewpoint but from a legal one too, something that perhaps was not fully appreciated. Although the judgement does not directly consider the nature of this right, a reading of the legal grounds shows it is understood as one more expression of the democratic principle, in the specific sense of trying to drive a process to achieve a political goal, even though this might not be compatible with the existing Constitution. The absence of constitutional intangibility clauses enables this recognition but only on the condition it becomes a reality within the framework of the constitutional reform procedures. The Court itself points out that the Generalitat has the power to move a reform of the Constitution and that, should it do so, the Spanish Parliament would have to consider it.

As indicated in the previous section, one of the aspects which raises the most doubts with regard to recognising the right to decide are the activities that the Catalan public powers might promote to exercise it. The Court makes it clear that one of these is the proposal for constitutional reform, regarding which it seems to infer a certain binding effect in relation to its processing when it says, literally, that "the Spanish Parliament shall (*deberá*) consider it". The reference that the STC 42/2014 makes to the decision of the Supreme Court of Canada, of 20 August 1998, in which it rejected the possibility of a province unilaterally seceding while requiring the federal government and province to negotiate if the result of the referendum was clearly in favour of the latter's independence, might suggest the Court's use of the term *deberá* is intended to exclude the inadmissibility of the proposed reform at the first parliamentary procedural stage of taking it into consideration.

However, it is difficult to support this interpretation for two reasons. Firstly, because STC 42/2014 does not make any pronouncement on holding a consultation regarding the right to decide. Moreover, there are rulings against holding referendums or consultations with similar characteristics. In our case, therefore, the main element that the Supreme Court of Canada based the obligation to negotiate on would be missing. The second reason is the difficulty of inferring a legal processing obligation or duty in an essentially political and parliamentary decision-making setting, namely an act of considering a legislative initiative.

Aside from the possibility of initiating a constitutional reform procedure, the fundamental question of exercising the right to decide is, without doubt, determining whether within the room for manoeuvre afforded by STC 42/2014 there is the possibility of calling the citizens to take part in a referendum to vote on Catalonia's political future. It is worth remembering that this was precisely the ultimate meaning of the right to decide, as defined in resolutions 742/IX and 5/X approved by the Parliament of Catalonia.

STC 42/2014 gives legitimacy and constitutional cover to carrying out activities that promote and defend the political project that the right to decide involves, including the independence of Catalonia, but, as has been pointed out, at no point does it say these activities include promoting the holding of a popular consultation. However, this possibility could be asserted by virtue of the fact that it is not clearly excluded by the judgement and because the validation of Resolution 5/X (apart from the first principle) would imply accepting the possibility of holding the consultation, given this is the essence of the right to decide in the terms expressed by Resolution 5/X and the earlier Resolution 742/IX, which was not challenged.[11]

This *possibilist* interpretation of the consultation is the line taken by Catalonia's political institutions, as their subsequent actions show. For example, in 2013, Parliament approved Resolution 17/X, of 13 March 2013,[12] urging the Catalan Government to "start a dialogue with the Government of the Spanish State to enable a consultation of the people of Catalonia to be held to decide on its future". Even more importantly, Parliament later passed Resolution 479/X, of 16 January 2014,[13] in which it agreed to submit to the Congress of Deputies a draft organic act delegating to the Generalitat the power to authorise, call and hold a referendum on the political future of Catalonia.

These resolutions came after Resolution 5/X and before STC 42/2014 but in any event they clearly illustrate two things. First, the close relationship between the concept of *right to decide* and holding the consultation. And second, the willingness then to channel the right to decide and the consultation through a process *agreed* with the State. Submitting the draft act to the Spanish Parliament is unequivocal in that sense, as a compromise was being sought between the State's power to authorise a referendum (SC Art. 149(1)(32)) and the possibility of delegating the calling and holding of the referendum to the Generalitat under SC Article 150(2). This compromise solution was also evident in the provision that calling the referendum would be conditioned by the "terms agreed with the Government of the State", despite it being delegated to the Generalitat.

5 The *right to decide* does not cover calling the people of Catalonia to take part in a consultation on their collective political future: constitutional case law in relation to referendums and popular consultations

The fact that there is no explicit reference in STC 42/2014 to holding a popular consultation or, more specifically, to definitively excluding this possibility (except in the case of a unilateral referendum on self-determination, which is referred to and explicitly discarded in the judgement) encouraged the Catalan Parliament to feel legitimised in trying this approach by means of a regulation on non-referendum popular

11 The manifesto issued by jurists who support the right of Catalonia's citizens to hold a referendum to decide the future of Catalonia, and presented at the Barcelona Bar Association on 3 May 2017 [Consulted: 8 May 2017], maintains the right to decide not only recognises the right to dissent from the established constitutional order and territorial unit, but also the right to propose alternatives expressed by means of a democratic procedure, usually a referendum, and then negotiate with representatives of the State to give shape to the result obtained.

12 Published in the BOPC, No. 43, 18 March 2013.

13 Published in the BOPC, No. 239, 17 January 2014.

consultations in Act 10/2014, of 26 September, on Non-Referendum Popular Consultations and Other Forms of Citizen Participation.[14]

This legislative initiative was presented as the only possible way to express the right to decide after the Spanish Parliament had rejected the draft organic act submitted by the Catalan Parliament to agree with the State the delegation to the Generalitat of the power to call a referendum in the terms expressed in the previous section. The option of drafting a law on non-referendum popular consultations could be seen to comply with the powers bestowed by Article 122 of the Statute of Autonomy of Catalonia (SAC) based on the theoretical difference referendum-type consultations and other kinds. This distinction was essential because Article 149(1)(32) of the Spanish Constitution (SC) reserves the power to authorise popular consultations by means of a referendum for the State and because, following its judgement STC 31/2010, of 28 June (Ground 69), the Constitutional Court had established the doctrine whereby the State is not only the competent body for authorising referendums but also for establishing their legislative regulation.

The Catalan Government's room for manoeuvre was therefore reduced to regulating non-referendum consultations by interpreting SAC Article 122 in the broadest possible sense. However, that raised a key problem difficult to resolve, namely the need to distinguish between a non-referendum consultation and a referendum, when the former also has the basic features that characterise the latter, especially the coincidence, or rather, similarity with the subject called upon to participate by exercising the right to vote and the application of a procedure and safeguards similar to those of an electoral process.[15]

With some minor variations compared to the regulation of referendums, Title II of Act 10/2014 regulated general consultations (Arts. 3 to 39) and this was challenged by the State, which understood that what was being regulated under this heading was in fact a referendum consultation. In STC 31/2015, of 25 February, its judgement on this appeal, the Constitutional Court accepted the State's thesis in considering the regulation established to be that of a referendum, which is characterised by calling on all the citizens of a specific territory (in this case Catalonia) to exercise the fundamental right of participating in public affairs (SC Art. 23(1)), expressing their opinion on a specific issue, whether binding or not, by means of a vote that enjoys the safeguards of an electoral process.[16] This opinion was not shared by the Council of Statutory Guarantees in its Ruling No. 19/2014, of 19 August, although four dissenting votes argued essentially as the Constitutional Court did later.

STC 31/2015 considers the fact that the Act broadens the electorate does not prevent the subject called upon to participate from being the same as that of a referendum (electoral roll) and that. when it comes to establishing the essential difference with a referendum, the variations contained in the Act with regard to the participatory procedure are not relevant, because this consists of casting a vote, i.e. exercising the right of active suffrage (SC Art. 23.1) At this point STC 31/2015 recalls the doctrine established by the earlier judgement STC 103/2008, of 11 September, which identified the notion of referendum by referring to the electoral body and electoral procedure, i.e. the electoral roll, to the electoral administration and some specific judicial safeguards. And it considers that, despite a possible "legislative distortion" of these elements, the consultation is still a referendum if its "intrinsic" nature means the basic features and effective condition of referendum can be attributed to it. In line with that, the judgement concludes that general consultations regulated by Act 10/2014, of 26 September, constitute "a genuine referendum consultation", which led it to declare the part of the Act that affects these kinds of consultations unconstitutional. This declaration of unconstitutionality was, naturally, extended to Decree 129/2014, of 27 September, issued by the President

14 On this Act, see Alonso, Àngel L. *Análisis constitucional de la ley catalana de consultas populares no referendarias y otras formas de participación ciudadana*. Pamplona: Aranzadi, 2015. ISBN 9788490982594.

15 Regarding the Generalitat's powers in relation to popular consultations, see: Álvarez, María Isabel. "La participación directa de los ciudadanos en la Constitución española y las consultas populares en el ámbito estatutario". *Revista de Derecho Político*. Madrid: UNED, Issue 96 (2016), p. 121ff; Bossacoma, Pau. "Competències de la Generalitat de Catalunya sobre regulació i convocatòria de consultes populars". *REAF*. Barcelona: Government of Catalonia. Ministry of the Presidency, Issue 15 (2012), p. 241ff; Castellà, Josep M. "Consultas populares no referendarias en Cataluña, ¿es admisible constitucionalmente un tertium genus entre referéndum e instituciones de participación ciudadana?". *In Transparencia, participación ciudadana y administración pública en el siglo XXI.* Zaragoza: Gobierno de Aragón, Departamento de Hacienda y Administración Pública, 2013, p. 121ff. (Monographs of the Revista Aragonesa de Administración Pública; XIV)

16 Ground (FJ) 6 of STC 31/2015, of 25 February.

of the Generalitat and by means of which a non-referendum popular consultation was called on Catalonia's political future for 9 November, in accordance with Act 10/2014.[17]

Regardless of what has just been outlined, another aspect of constitutional case law should be noted that affects the limits of the right to decide and goes beyond the discussion on whether the Generalitat has the competence to promote a popular consultation. In relation to a referendum, the Constitutional Court had already pointed out in STC 103/2008, of 11 September, that this cannot be used, even in a consultative form, to learn the opinion of the people on key issues resolved through the constituent process and which, therefore, have to be regarded as outside the decision of the constituted powers If the question or issue affects the constitutional order, the only referendum possible according to the Constitutional Court is the one envisaged by the procedures for reforming the Constitution.

STC 31/2015 recalls this doctrine and extends it to non-referendum consultations as well. It also notes that the constraint on consultations involving issues resolved by the constituent power applies to all public powers, including bodies of the State. Finally, it says that this doctrine must be applied particularly to issues that might affect the fundamental point of a single sovereign subject, so they are openly and directly dealt with through the channel that the Constitution has envisaged for this purpose.

The conclusion that can be drawn from the doctrine established by STC 103/2008 and STC 31/2015, therefore, is that neither the Generalitat nor the State can call a referendum or a popular consultation that might affect the constitutional order, as one designed to ask people on the independence of Catalonia in exercising their right to decide would do. As can easily be deduced, constitutional case law is especially rigid and the prohibition which flows from this even casts doubt on the possibility of the State calling a referendum in the hypothetical situation it reached an agreement with the Generalitat to question the Catalan people on the political future of Catalonia, if the question could affect the constitutional status quo.

It is worth mentioning that this interpretation has been called into question by one doctrinal camp which understands that while it could be applied as a general rule, there are reasons that would justify making an exception in the case of a referendum on self-determination, because there is no sense in starting a particularly complex reform process like the one envisaged by the Constitution if, prior to that, it has not been possible to verify the existence of a majority will among the population affected.[18] Nevertheless, it is also true that holding a referendum beforehand, despite its consultative character, could, in the hypothetical case of a positive result, pose important political and legal problems that would inevitably have repercussions on the constitutional reform process.

In any event it is interesting to note that the case-law doctrine outlined, short of any modification or important qualification in the future, currently prevents the holding of a referendum or any other form of consultation addressed to the citizens of Catalonia with the aim of questioning them on the independence of Catalonia or the creation of a Catalan state. This means, as can be deduced from STC 31/2015,[19] that the margin for action indicated by STC 42/2014 with regard to the right to decide is determined by the existence of a space for dialogue, cooperation and negotiation between the public powers which does not exclude any system or legitimate institution capable of helping to resolve a political conflict, nor any procedure that respects the constitutional framework. But that is on the assumption there will be no room for holding any consultation in this margin for dialogue and possible negotiation. Consequently the doctrine that flows from STC 103/2008, STC 31/2015 and STC 32/2015 represents a major constraint on the hopes that appeared to be have been aroused by STC 42/2014 with regard to Resolution 5/X, in that the application of its principles in practice would not legitimise calling a consultation.

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17 Decree declared unconstitutional, null and void by STC 32/2015, of 25 February.

18 Rubio Llorente, Francisco (9 October 2013). Un referéndum para Cataluña. *El País*; De Carreras, Francesc (20 September 2012). Un referèndum? *La Vanguardia*; Ferreres, Víctor. "The secessionist challenge in Spain: an independent Catalonia?" [online]. *I-CONnect, Blog of the International Journal of Constitutional Law and ConstitutionMaking.org [blog], 2017* [Consulted: 8 May 2017]; Arbós, Xavier (7 February 2017). Un referèndum vinculant impossible. *El Periódico*; Bossacoma, Pau. *Justícia i legalitat de la secessió*: *Una teoria de l'autodeterminació nacional des de Catalunya*. Barcelona: Government of Catalonia. 2015, p. 336-337.

19 Ground 6, *B), a);* Aláez, Benito. "Constitucionalizar la secesión para armonizar la legalidad constitucional y el principio democrático en estados territorialmente descentralizados como España". *REAF.* Barcelona: Government of Catalonia. Ministry of the Presidency, Issue 22 (October 2015), p. 136ff.

6 The call for elections on 27 September 2015 and the unilateral turn of the independence process

The elections called for 27 September 2015 to the Parliament of Catalonia marked an important change of direction in the right-to-decide strategy. They were called in a frank and open manner as a *plebiscite* to measure the social support for independence and thereby legitimise, should they show majority support in Catalan society, opening up a *non-subordinate process*, i.e. one not dependent on any necessary agreement with the Spanish State.

This new approach was based on recognising the fact that the State had not allowed a consultation on the right to decide to go ahead (neither by agreement nor by means of a non-referendum consultation moved by the Generalitat itself). Given this deadlock, the citizens of Catalonia would have to decide directly on their future as a people. Calling the elections as a plebiscite thus represented an attempt to hold the consultation by using the only legally possible means and, therefore, meant accepting this participatory instrument (the elections themselves) could produce results similar to those of a referendum.

It is important to point out the political impact that this political focus had on the actual configuration of the candidates, namely, the formation of the Junts pel Sí [Together for Yes] coalition comprising the main pro-sovereignty forces (CiU and ERC) and independent candidates known for their commitment to independence. Nor will it escape the attention of any reader that the intention behind this coalition was to obtain an absolute majority in Parliament, so it is of special interest to recall the basic lines of the electoral programme as far as the *independence roadmap* is concerned.

This roadmap begins with a historical summary of the political situation in Catalonia, starting from the 1978 Constitution and the 1979 Statute of Autonomy, which can be explained in various stages: the autonomy period up to STC 31/2010, on the 2006 Statute of Autonomy; the fiscal agreement years of 2010-2012, and the right-to-decide years, defined as the attempt to hold a consultation on independence (2012-2015). After noting that these stages are over as a result of the State's inability to offer an adequate response, the electoral programme envisages the start of a political and legal process following the elections called for 27 September 2015, provided that this proposal achieved the majority support that would give it legitimacy.

According to the Junts pel Sí programme,[20] this new stage would consist of the following stages: an initial declaration of the process towards independence based on the democratic mandate obtained in the elections of 27 September 2015; drafting the legal transition and constituent process laws, prior to the declaration of Catalonia's independence, and, finally, calling constituent elections and holding a referendum to ratify the new Catalan constitution. The so-called *State structures* would be created as these stages unfolded and a schedule drawn up for negotiating with the State, the European Union and the international community without excluding, as far as the Spanish State is concerned, the possibility of going back to the initial plan if it was possible to agree on holding a binding referendum.

What is very clear from the points outlined above is the importance of the elections of 27 September 2015 as a political act taking the right to decide down a route that puts negotiations with the State to solve the conflict on the back burner and adopts, as its main strategy, self-recognition of the right of the people of Catalonia and its institutions to initiate and conclude a process towards independence. In the end the results of the 27 September elections did not give the Junts pel Sí coalition a majority of votes or seats in Parliament. However, it was possible to constitute a parliamentary majority in favour of this process with the support of the Candidatura d'Unitat Popular - Crida Constituent (CUP), an agreement that also allowed the creation of a government dominated by the political force with the largest parliamentary representation (Junts pel Sí). The conditions under which this political agreement was forged and the vicissitudes it has experienced in the course of this legislature give rise to many questions that we will not deal with here. Nevertheless, it is necessary to point out that one of the most important consequences of its evolution has been the emphasis placed on the unilateral nature of the process which, among other consequences, has had a major impact on the relations between the Catalan Parliament and the Spanish Constitutional Court.

20 *Programa electoral de Junts pel Sí*, p. 30-40.

7 Resolution 1/XI of the Parliament of Catalonia, of 9 November 2015, on the start of the political process in Catalonia as a consequence of the election results of 27 of September 2015

Resolution 1/XI, of 9 November 2015,[21] as the first parliamentary act of the new legislature (before the swearing-in of the new president and constitution of the new government) has a special importance with regard to the start of the independence process in the terms outlined in the previous section. Whereas Resolution 5/X posed the right to decide in a context of compatibility with the Constitution, Resolution 1/XI marks an important turning point in that regard, as the Constitutional Court itself noted in STC 42/2014 (with the exception we already know about). From a legal perspective, the big difference it presents compared to Resolution 5/X is the fact that it clearly and unequivocally expresses the will to initiate the process of creating an independent Catalan state in the form of a republic and approve the laws required to make the "disconnection" of Catalonia from the Spanish State possible. Even though Resolution 1/XI does not say so directly or explicitly, the process is seen as a *unilateral* one that does not take the constitutional reform processes into account, as it implies when it affirms a "non-subordinate" constituent process is being initiated and adds that neither the Catalan Parliament nor the disconnection itself "will be subject to the decisions of the Spanish State, in particular of the Constitutional Court". This declaration is supplemented by the directive addressed to the Catalan Government to "comply exclusively with the laws and mandates of [the Catalan] Parliament".

From the outset Resolution 1/XI raises an important political and legal problem by setting the democratic principle against the principle of legitimacy. It prioritises the former over the latter in considering the result of the elections held on 27 September 2015 enables the Catalan institutions to start a process leading to independence without necessarily being conditioned by constitutional and statutory legality. The parliamentary groups that supported the resolution's approval[22] understand those elections gave Parliament a "mandate" to initiate a process leading to independence, on the assumption that this democratic mandate implies de facto recognition of the sovereignty required for starting and completing this route. That means attaching less importance to the rules of the constitutional system in general and those that define and condition the institutional position of the Catalan Parliament and Government in particular.

However, it should be remembered that the nature of the electoral process on 27 September 2015 (elections to the Catalan Parliament) has only enabled the formation of a parliamentary majority that is objectively in accordance with the current electoral system. It does not correspond to a majority of the votes cast being obtained by the political forces driving the process designed in Resolution 1/XI. If, from a political point of view, the elections were supposed to prove the existence of a social majority in favour of Catalonia's independence, they did not achieve this *political* objective, nor does it seem right to distort that by using the criterion of seats won. Furthermore, from the perspective of the democratic principle, which is fundamental in the process begun by Resolution 1/XI, it clearly shows a weakness from the outset when the intention is to legitimise a *break* with the current legal framework in force to achieve independence. The election results should have given rise to some serious reflection on whether the votes received paved the way for taking the step that Resolution 1/XI entails or whether it was necessary to broaden the social support for another better strategy for continuating the process.

A second weakness that may serve to challenge the appeal to democratic principle as the legitimising source of the process is that of *segregating* the idea of democracy from that also expressed by the general bodies of the State, legitimised in turn by the electoral processes in which Catalonia's citizens have also taken part. As has been pointed out before, the idea that emanates from the substance of Resolution 1/XI is that the Parliament and people of Catalonia are already sovereign powers, which is a necessary condition for considering as full and independent the democracy that emanates from the Catalan people and is represented by their Parliament. That necessarily implies a *confrontation between two mandates* that are equally democratic: one that legitimises the unilateral route to independence and another that legitimises the status quo. A coherent reading of Resolution 1/XI shows that Parliament believes the citizen mandate it got from

21 Published in the BOPC, No. 7, 9 January 2017.

22 Resolution 1/XI was approved by the votes of Junts pel Sí and the Candidatura d'Unitat Popular - Crida Constituent.

the electoral process of 27 September 2015 enables it to transcend the principle of constitutional legality which derives from the 1978 Constitution. This democratic mandate would be the source of an *alternative* power and legality creating a new political and legal reality that would make it possible to achieve the goal of Catalonia becoming an independent state *by its own will*.

Either way the considerations outlined above make it clear there is a very serious juridical conflict between two basic principles inherent in Western democracies, namely, democracy and legality, two principles that cannot be separated because they are necessarily interrelated. The constitutional clauses that define a state as "democratic State of Law" merely show that, in any democratic system, democracy and legality are indissolubly linked or, to put it more practically and plainly, two sides of the same coin. It could not be any other way because democracy is what creates legality through the actions of parliamentary representatives, and legality is legitimate because the result of exercising democracy. It shouldn't be forgotten that in any democratic society, all legality is subordinate to a constitution and this, naturally, is also based on the democratic principle. Consequently, in a democratic state with the rule of law, there is no higher expression of the democratic principle by all the political powers than that which represents the Constitution and the rules which, in accordance with it, determine the decision-making capacity or *measure* of all the constituted powers.

Setting the democratic principle against the principle of legality could be justified in a political context in which legality has not been established as a consequence of the former. It is possible in such a setting to accept the primacy of the democratic principle to carry out a transition or break with the rules of an authoritarian state in the interests of a new, fully democratic and constitutional regime. But it could be dangerous to confuse such a situation with the shortcomings that affect the democratic quality of a state which, despite that, maintains the essential elements that define it as democratic with the rule of law, above all if that continues to be the image that the international community has of it. To pretend, on the basis of certain shortcomings, that the Spanish State still maintains authoritarian (post-Franco) forms of governance that make it undemocratic, could lead to a serious error of political and particularly legal judgement.

From an ideological perspective it is possible not to share this conclusion and to consider the people of Catalonia as a sovereign political and legal subject with full capacity for self-determination. This conclusion could be sustained by conviction from the outset or as a result of the democratic devaluation of the constitutional system of the Spanish State and the repeated refusal to offer a way out within the constitutional framework in response to a legitimate social demand with a democratic basis. However this interpretation of the political situation in Catalonia and Spain should not ignore or underestimate the more complex scenario outlined above nor the instruments that the State has at its disposal for defending the integrity of the Constitution.

An independence or secession process could prove more difficult to carry out in a democratic system than in another system, even though that might seem contradictory. A consolidated democracy implies the existence of a stable political and legal framework, and the guarantee that any substantial change is carried out within the framework established by the Constitution. This might make an independence process very complex and subject to political compromises and agreements, as the unilateral route casts doubt on a system based on the need to maintain a balance and respect for its basic principles and values.

For that reason, a process of this kind has the added burden that it needs to be planned as scrupulously as possible within the constitutional framework and rely on the necessary perseverance to seek dialogue and negotiation using formulas that enable the democratically expressed will to be reconciled with instruments that do not violate constitutional legality. Perseverance that is especially incumbent on anyone who intends to alter the status quo and forces them to show they have exhausted all the possible courses of action within the constitutional framework, while accepting the other party, the State, also has the right and democratic legitimacy to defend the Constitution.

As the Supreme Court of Canada said in its pronouncement in 1998,[23] a secession process does not merely depend on the will of a majority expressed by the citizens of a territory that might have the characteristics of a national community, because the Constitution does not cover a unilateral secession project. That will, in

23 Consultative decision of 20 August 1998.

theory, has to respect the constitutional legality which, in any event, requires loyal political negotiation that does not exclude the necessary constitutional reform. But, as the Supreme Court of Canada also recognised then, the facts show that many independence processes have resulted in *de facto* recognition, that is, not by means of a constitutional reform but through the international community recognising the new state. This, therefore, is the *final scenario* to consider A scenario where law has little to say and in which the eruption of a new state reality depends on certain *factual* circumstances which make it possible.

Resolution 1/XI opens the way to this scenario and there are essentially two main unknown quantities: whether the fact it is the last resort, the breakaway route, justifies it; and whether the de facto route (despite the legal appearance that the disconnection laws want to give it) will be capable of imposing itself and lead to the real and effective creation of an independent state recognised by the international community. Unravelling these unknowns is a complex task that is not the aim of this study. However, it is possible to offer some thoughts on each of them without pretending to provide conclusive answers.

With regard to the *breakaway* option led by Parliament by means of the will expressed in Resolution 1/XI (maintained in other resolutions we shall refer to later), it has to be recognised that the dialogue and negotiation route that once inspired Resolution 5/X, more than coming to an end, has shown itself to be inaccessible. From a political point of view it is undeniable that the State has pursued a line that is clearly opposed to the possibility of negotiating a referendum or a consultation on the right to decide and has aborted all the initiatives that the Generalitat has taken in that direction. The margin for action is also very limited from a legal viewpoint because the Constitutional Court, despite initially having played up the principle of dialogue and negotiation, and the political game that should be respected in a case like this (STC 42/2014), has clearly excluded the possibility of holding a consultation that is not a referendum on constitutional reform (STC 103/2018, STC 31/2015 and STC 32/2015). This particularly *rigid* doctrine is in contrast with the situation in Canada, for example, where the possibility of holding a referendum called by a province prior to secession is accepted, although its impact on forcing the State to negotiate is conditioned by the terms of the Clarity Act (in French, *Loi de clarification*) of 29 June 2000 and a subsequent constitutional reform.

This political and legal conduct on the part of the State institutions cannot, therefore be regarded as particularly *respectful* towards the democratic principle, in the sense of allowing its expression to verify, at least, whether there is a social majority in favour of independence and, on the basis of that, develop a procedure for offering a political and legal response.[24]

With regard to the practical feasibility of the disconnection process designed by Resolution 1/XI, it has to be acknowledged there are various reasons for thinking that going down this route could be premature and not very realistic. The first factor concerns what ought to be its main strength, namely the existence of a social majority in favour of independence, because at the present time we do not know if there is a majority and the only objective data that might help us in that regard, the election results of 27 September 2015, do not prove it either.[25] The second factor is the State's capacity for reaction. It has important political and legal instruments at its disposal for opposing and stemming the disconnection decisions announced. And the third factor could be the limited receptiveness to the *Catalan cause* shown thus far by the international community, which is usually resistant to any change in the status quo and also committed to the Spanish State as a recognised international player, especially as a member of the European Union. The international community, therefore, does not seem particularly favourable towards recognising the unilateral route, and even less so the European Union, which attaches special importance to legality as a founding value, together with the democratic principle.

24 The possibility has been raised of contrasting the conduct of the Spanish State with respect for the founding values of the European Union recognised in TEU Article 2, since the values of democracy and legality have to maintain a balance which could be broken if formal legality unjustifiably compromises a legitimate expression of democracy that has broad social support. See: Bayona, Antoni. "El "dret a decidir" i els valors fundacionals de la Unió Europea". *REAF,* No. 20 (October 2014), p. 132ff.

25 The percentage of votes received by the political forces that declared their support for independence (Junts pel Sí and the Candidatura d'Unitat Popular - Crida Constituent) was 47.8% [Consulted: 8 May 2017].

8 The Constitutional Court's position on Resolution 1/XI, of 9 November 2016

Resolution 1/XI was declared unconstitutional, null and void by STC 259/2015, of 2 December.[26] The first point that should be noted about this judgement is the fact that the Court views the new resolution in a different light to Resolution 5/X, in the sense that it only declared one part of the latter unconstitutional (specifically, the declaration of sovereignty), while in the case of the former the declaration of unconstitutionality has a general scope, because it considers the whole resolution depends on a single guiding thread that affects all of it. This fact is important because it makes it easier to link future declarations of intent by the Catalan Parliament with STC 259/2015.

The second, and more important point, is that the judgement regards the resolution as a "founding act" of a process for creating an independent Catalan state that claims to be based on a "sovereign quality" that neither Parliament not the people of Catalonia have. In the Court's view, Parliament's self-proclamation as the holder of sovereignty and expression of a constituent will are manifestations that could have legal effects outside the Constitution and compares them to a "de facto" route that claims to be unaware of, and expressly excludes, the regulatory value of the Constitution and, more specifically, the principle of the unity of the State and the sovereignty of the whole of the Spanish people established by SC Articles 1 and 2.

The Court recalls that Resolution 1/XI, unlike Resolution 5/X, seeks to expressly ignore the necessary condition that the legitimate defence of any political project, even those that are contrary to or incompatible with the Constitution, is possible within the framework of the Constitution itself, which does not impose "militancy" or adherence to its postulates (STC 42/2014) but does obligate public powers to respect its status as the supreme law, in that it only allows projects incompatible with the Constitution to be given effect and turned into a legal reality if the latter is reformed beforehand. In that sense, the judgement emphasises the democratic principle that constituted powers may legitimately appeal to can never serve to legitimise ignorance of constitutional legality, because all legitimacy is precisely based on the actions of public powers conforming to the Constitution.

The Court therefore considers that in a democratic state based on the rule of law, it is not possible to oppose democratic legitimacy and constitutional legality, and that the democratic principle cannot be conceived in isolation, decoupled from the established constitutional order. For this reason, STC 259/2015 concludes that Resolution 1/XI, as a parliamentary decision, is a constitutional infraction that is not the result of a misunderstanding of what the Constitution allows or enforces but, rather, of a will that implies an "outright rejection" of the Constitution's binding power, which it purports to set at odds with a power that wants to be the depository of a sovereign quality and constituent dimension which allows it to question the existing constitutional order.

One could criticise the judgement on the grounds of the *constitutional fundamentalism* it expresses, firmly rooted in the principle of legality and not at all respectful towards other principles and basic values, such as democracy and pluralism (political and national). The Court is being very strict when it considers there is no legitimacy beyond legality or the democratic principle cannot be separated from the principle of constitutionality and, therefore, there is no legitimacy of any kind outside legality. It could also be argued that this perception prioritises the principle of legality and turns the Constitution into a kind of *straightjacket* that minimises the democratic principle's value as a driver for change.

We have already had occasion to refer earlier to the 1998 doctrine of the Supreme Court of Canada which deduced from some constitutional principles similar to ours both the possibility of a province democratically expressing its will to go down the road of independence and the duty of the federation to negotiate its leaving with the province. However, it is also true that the same Supreme Court made it very clear that the democratic principle does not cover a unilateral declaration of independence. In contrast to this Canadian scenario, the Spanish Constitutional Court has offered a very restrictive interpretation of the democratic principle compared to the importance it has given to the principle of legality. Despite invoking the role of

26 In this case, the Constitutional Court once again applies the doctrine established in the challenge to Resolution 5/X, in considering resolutions that result from discharging the parliamentary duty of driving political and government action have legal effects with regard to their impact on constitutional matters. On this question, see Parliament's pleadings in the procedure for challenging 1389/2013 of Resolution 5/X (BOPC No. 97, 10 June 2013).

politics to resolve these matters and the limits of the law in this case, we have seen above how the Court has so far stuck to a very rigid doctrine in the sense of not allowing a dialogue and political negotiation to culminate in holding a popular consultation which could, depending on the result, even be followed by initiating the constitutional reform processes. Where the issue at stake is a territorial independence process, it does not seem appropriate nor proportionate to limit the scope for political negotiation to such an extent that it is impossible to know if there is a social majority in favour, especially when it has been empirically demonstrated that a large part of Catalan society wants to be asked.[27]

Faced with this situation, the unilateral route expressed by Resolution 1/XI could be understood as the *last resort*, given the lack of a political and legal space for holding or even negotiating a consultation. However, that does not downplay the importance of the various problems outlined in this section and the previous one that the unilateral route poses from the perspective of respect for constitutional legality and the democratic principle as well.

9 The parliamentary actions subsequent to Resolution 1/XI

The conflict between the Catalan Parliament and the Constitutional Court has sharpened notably with the adoption of new parliamentary decisions after Resolution 1/XI, viewed by the Court as actions contrary to the duty to comply with its resolutions, specifically STC 259/2015. Such is the case with Resolution 5/XI, of 20 January 2016, which led to the setting up of the Committee to Study the Constituent Process, Resolution 263/XI, of 27 July 2016, which ratified the study committee's report and conclusions, and Resolution 306/XI, of 6 October 2016 (Section I.1.1 and 13 to 16 of Section I.2), following the general political debate.[28]

Although in strictly legal terms it is difficult to perceive a link or dependent relationship between these resolutions and Resolution 1/XI, given they are acts of an essentially political and parliamentary nature, which differentiates this case from the one which could arise between a law and a legal act that rolls it out or implements it, the Constitutional Court considered this relationship exists with regard to the duty comply with its resolutions set out in Article 87(1) of the Organic Law of the Constitutional Court (LOTC). The Court finds justification for that in the will of Parliament to "give continuity and support" to Resolution 1/XI, declared unconstitutional, null and void by STC 259/2015, and "insist" on going ahead with a political project to disconnect from the Spanish State outside the constitutional reform procedures. In that sense, the Court discerns the existence of a time sequence of events in Parliament that demonstrates an intention not to comply with Constitutional Court rulings.

These pronouncements have been made within the framework of enforcement proceedings relating to STC 259/2015, resolved by the interim rulings 141/2016, of 19 July 2016, 170/2016, of 6 October 2016 and 24/2017, of 14 February 2017. As has already been said, one could object that adopting the procedural approach of judgement enforcement proceedings is inappropriate in this case because it seems the duty of compliance has to be predicated on a legal act per se and not acts of an essentially political nature, such as parliamentary resolutions approved in discharging the duty to drive government action or, even more, in the internal workings of Parliament itself (for example, setting up a study committee). In these cases it is obvious that judgement enforcement proceedings involve the risk of limiting Parliament's decision-making capacity because, in reality, the duty to comply is transferred to a political project, or an expression of intent of that kind, and due to its very nature it is doubtful whether that could be considered non-compliance with a judgement in the sense established by the Organic Law of the Constitutional Court.[29] Judgement enforcement proceedings can be used with regard to laws or acts that implement a law previously annulled and declared unconstitutional, provided they are acts of a legal character, which ought to be the necessary condition for

27 The last opinion poll conducted by the Opinion Studies Centre (CEO) in March 2017 highlighted that 50.3% of those surveyed said they were in favour of a referendum (agreed with the Spanish State or not) and another 23.3% support a referendum if it is authorised by the Spanish Government.

28 Published, respectively, in the BOPC, No. 42, 25 January 2016, and the BOPC, No. 200, 1 August 2016.

29 On this question see sections II and III of the pleadings submitted in the enforcement proceedings relating to Resolution 5/XI, of 20 January 2016, on setting up parliamentary committees (BOPC No. 69, 29 February 2016).

determining a situation of non-compliance This *legality* does not exist in the strict sense in parliamentary acts to drive government action.

However it should not be forgotten that STC 42/2014 had already awarded legal effects to non-regulatory parliamentary resolutions and this doctrine has subsequently enabled the Constitutional Court to use judgement enforcement proceedings in this case too, taking STC 259/2015 as its reference, as a Court ruling that has been the object of non-compliance with the approval of parliamentary resolutions subsequent to Resolution 1/XI. It is worth saying in any case that the criticism which could be made of judgement enforcement proceedings in the context we are studying here could be nuanced by the constitutional importance of the matter. Although that should not be a decisive legal argument, it seems reasonable to think that it has weighed very heavily in the Constitutional Court's decision for accepting the very hypothesis of challenging these kinds of acts in constitutional matters and also for considering them ideal for being judged through judgement enforcement procedures. Because it is to be supposed that the Court did not want to ignore the risks that the opposite decision of not accepting control of these parliamentary acts might have caused, in that they themselves could give an appearance of legality and legitimacy and give implicit recognition of powers that Parliament does not have. However, the approval of resolutions 5/X, 263/XI and 306/XI, and the consideration they are contrary to the duty to comply with STC 259/2016, have had two particularly harmful consequences for the Parliament of Catalonia that it is necessary to comment on.

The first is that through judgement enforcement proceedings on parliamentary acts considered to be a continuation or development of Resolution 1/XI, Parliament itself has allowed the Constitutional Court to impose some exceptional constraints on parliamentary activity that affect a specially protected area, namely that of Parliament's internal affairs or operational independence. In that regard it is worth highlighting the fact that the interlocutory rulings relating to STC 259/2015 have not been restricted to declaring the parliamentary resolutions null and void, they have also been extended to warning the governing bodies of the chamber they have a future duty to prevent or stop any "initiative", legal or substantive, that directly or indirectly implies ignoring or avoiding the nullity of the resolutions concerned. That also means the right of parliamentary imitative is affected, if we exclude for this specific case the general doctrine established by the same Constitutional Court on the strictly formal and procedural criteria that the parliamentary bureaux have to apply exclusively when deeming whether parliamentary initiatives may be accepted.[30]

The second particularly negative effect from an institutional point of view is the criminal importance that enforcement proceedings have given rise to as a consequence of not carrying out the duty to impede or stop any parliamentary initiatives that might imply ignoring or avoiding STC 259/2015. The warning of possible responsibility was first given in the interim ruling 141/2016, of 19 July, and, after various individuals gave evidence to the Public Prosecutor, this led to actions being brought against the speaker of the Catalan Parliament (interim ruling 170/2016, of 6 October) and against the speaker and four other members of the Catalan Parliament Bureau (interim ruling 24/2017, of 14 February). So taking evidence from individuals has given way to the Public Prosecutor's Office starting criminal proceedings before Catalonia's Supreme Court of Justice, which has created an added, counterproductive tension to an already difficult and complex process which now displays clear and evident features of a grave institutional conflict, with the risk it will also have repercussions in the social arena, depending on future events.

10 Resolution 306/XI: call for a binding referendum on independence

Resolution 1/XI of 9 November 2015 laid the bases for the Catalan independence process in the terms analysed in Section 7. The basic logic behind this resolution was that the result obtained by the pro-independence forces in the elections held on 27 September 2015 made it possible to confirm there was a social majority in favour of independence, translated into a parliamentary majority. In this way those elections and their plebiscitary character acted as a substitute for the popular consultation that could not be held on the basis of the declaration of intent expressed in Resolution 5/X, of 23 January 2013, and in the parliamentary acts adopted after that (in particular Act 10/2014, of 26 September, on Popular Non-Referendum Consultations

30 Among others, STCs 124/1995, 38/1999, 203/2001, 40/2003, 202/2014 and 1/2015.

and Other Forms of Citizen Participation and the call for a consultation in accordance with that Act on 9 November 2014).

For that reason Resolution 1/XI makes no reference to holding a consultation or referendum and opts for a roadmap in which the process for achieving independence that Parliament initiates will culminate in the approval of the disconnection laws. It is therefore a roadmap in which the declaration of independence will depend on acts adopted directly by the Catalan institutions. That is confirmed by the later Resolution 263/XI, of 27 July 2016, which approved the report and conclusions of the Committee to Study the Constituent Process, which explicitly states that disconnection from the legality of the Spanish State will be by approval of the disconnection laws and by a unilateral mechanism for the exercise of democracy that will trigger the convening of the Constituent Assembly. Although this reference to a "unilateral mechanism for the exercise of democracy" might raise some doubts as to its nature, everything seems to indicate that in the initial wish expressed in resolutions 1/XI and 263/XI, the confirmation of the existence of a social majority in favour of independence is not necessarily conditioned by a holding a referendum or a consultation and that achieving this new status switches to disconnection laws and, possibly, a unilateral declaration of independence directly approved by Parliament.

However, Resolution 306/XI, of 6 October 2016,[31] introduced an important variable to this initial plan. In Section I.1.1 of this resolution Parliament affirms Catalonia's imprescriptible and inalienable right to self-determination and states once again that the elections held on 27 September 2015 produced a majority in favour of independence. But then it immediately introduces as a new feature a mandate addressed to the Catalan Government "to hold a binding referendum on the independence of Catalonia in September 2017 at the latest with a clear question and a binary [yes/no] answer". This, however, does not prevent Parliament from continuing the procedures for drafting the disconnection laws, especially the one that will have to regulate a succession of regulations on nationality, basic rights, the institutional system, the financial authority and the judicial power during the *transitory period* between the proclamation of the Catalan republic and the new constitution. Nor does it change the established plan for driving and defining the constituent process defined in Resolution 263/XI, which Section I.2 of Resolution 306/XI stresses.

It can thus be construed that by means of Resolution 306/XI Parliament has introduced an important change with regard to the roadmap initially set out by Resolution 1/XI, in the sense that the independence process itself now depends on holding a binding referendum to find out the citizens' opinion on independence and, although the resolution does not expressly say so, on a favourable result for independence.

An important aspect to consider here is the nature of this referendum from the perspective of the role the Spanish State and the Generalitat will have to play in it. Resolution 306/XI shows a calculated ambiguity on this issue that can be seen by comparing sections I.1.1 and I.1.2. Section I.1.1[32] makes it clear that there is no need for calling a referendum to be agreed with the State. It refers to a possible agreement with the Spanish Government but immediately goes on to say that, in the absence of this political agreement, the commitment to hold a referendum still holds. Section I.1.2[33], on the other hand, only envisages a scenario where the referendum is agreed with the State. The different approach to the referendum in Resolution 306/XI had an important consequence, namely, that Section I.1.2 was not included in the judgement enforcement petition that the Constitutional Court lodged against Resolution 306/XI for breach of STC 259/2015.

The ambiguity contained in this twin approach to the referendum was after repeated in Act 4/2017, of 28 March, on the Catalan Government's budget for 2017, because Additional Provision 40 has two sections that reflect the two options envisaged in Resolution 306/XI. As we are talking about a law here, there is an apparent legal contradiction, in that the Budget Act establishes two different authorisations or mandates to fund two consultations that are also different, as one depends on an agreement with the Spanish State while the other in theory does not.

31 Published in the BOPC, No. 237, 18 October 2016.

32 Approved on the initiative and with the support of the parliamentary groups of Junts pel Sí and the Candidatura d'Unitat Popular - Crida Constituent.

33 Approved on the initiative and with the support of the Catalunya Sí Que es Pot parliamentary group plus the support of the Junts pel Sí group.

Two essential conclusions can be drawn from the latest parliamentary proceedings in relation to the process on Catalonia's political future. The first is that Parliament has felt it necessary, or at least convenient, to reinforce the democratic legitimacy of the independence process by holding a referendum (or at least by making a final attempt to do so) in order to confirm the existence of a social majority in favour of independence. There can be no doubt that holding a referendum offers that extra legitimacy which the mere reference to the election results of 27 September 2015 lacks for the reasons outlined above. However, the second conclusion is that the independence process does not depend on holding a referendum, because it does not follow from Section I.1.1 of Resolution 306/XI that it will be an indispensable condition for culminating the independence process, in line with the political will expressed in Resolution 1/XI, which it does not appear Resolution 306/XI is purporting to change as far as the roadmap set out by the former is concerned if it is not possible to hold the referendum.

Thus, the way in which the issue of the referendum is posed in this final leg of the process seems to indicate that it is more of a tactical movement, ultimately designed to reinforce the legitimacy of the unilateral route envisaged in Resolution 1/XI by demonstrating a continued willingness to hold the referendum but, if this is not held, that will not be for reasons attributable to the Catalan institutions. However, this tactic could have a problem of credibility given Parliament has already clearly expressed its will, in the final analysis, to go down the road of a unilateral disconnection. From the point of view of the conditions required to show a willingness to begin a process of frank and honest negotiations, the background of resolutions 1/XI and 263/XI plus the *dual* content of Resolution 306/XI and Additional Provision 40 of the Budget Act do not appear to give the willingness to negotiate any special credibility. Nor does it help that, short of a radical change of doctrine, constitutional case law will certainly not allow any of the referendums referred to in Resolution 306/XI to go ahead.

The recent Constitutional Court Judgement (STC) of 10 May 2017 (Ground 5) on Act 4/2010 of 17 March, on Popular Consultations via Referendum, expressly recognises the possibility of autonomous region referendums if these are envisaged by an organic law but, at the same time, it reiterates the doctrine already known that they can only deal with issues that fall within the remit of autonomous regions and may not raise issues resolved in the constituent process, which are subject to the decision of the constituent powers. That means the application of Resolution 306/XI would only have constitutional support in the context envisaged in Section I.1.2 and provided the question formulated respected both those requirements.[34]

With regard to calling a unilateral referendum, it is understood that this is legitimised by the democratic principle and has to be possible as the final alternative for exercising the right to decide in the political and social circumstances Catalonia finds itself in, but it cannot be denied that it faces obstacles that are difficult to overcome. The first is the legal position that constitutional case law affords the State in defending constitutional legality. The second concerns the alternatives introduced into the process roadmap which, as we have outlined, could weaken it in a scenario of breaking away and conflict. Lastly, it should not be forgotten that the determination to go ahead with a referendum in such a hostile context could have consequences as regards recognising its effects here and abroad, as it seems obvious that it will not be possible to fulfil the requirements and minimum applicable standards of a participatory procedure of this kind.[35]

A further decision by the Catalan Parliament also needs to be added to the new scenario regarding the implementation of the independence roadmap opened up by Resolution 306/XI which does not help to clarify it. Motion 122/XI, of 18 May 2017,[36] on implementing Section I.1.2 of said resolution calls on the Catalan Government to reiterate to the Spanish Government its willingness to conclude an agreement and politically

34 This referendum would be possible with the prior modification of the Organic Law regulating the different kinds of referendums held in autonomous regions and formulating the question on the issue indirectly, for example: "Do you agree with Parliament initiating a process of constitutional reform so Catalonia could become an independent state?". A question of this type would not directly contradict the Constitution. It should also be borne in mind that the Catalan Parliament has the power to initiate a constitutional reform, as STC 42/2014 expressly recalls in relation to the "right to decide" (Ground 4*c*).

35 On this, see the Code of Good Practice on Referendums drawn up by the European Commission for Democracy through Law (Venice Commission), Council of Europe, 17 March 2007. See also Section 69 of the Venice Commission Opinion of 13 March 2017 on the Law Amending the Organic Law of the Constitutional Court in 2015, in which the Commission recalls that constitutional court judgements are binding and, given the Constitution is the supreme statute, they have to be respected by all the political powers.

36 Published in the BOPC, No. 416, 22 May 2017.

agree with it on holding the referendum on the political future of Catalonia. It also calls on the Catalan Government to set in motion opportune initiatives for obtaining the advice, recognition and endorsement of the European Commission for Democracy through Law (Venice Commission) as regards the conditions that the call for this referendum would have to fulfil to meet the requirements set out in the Code of Good Practice on Referendums.

Parliament's latest pronouncement raises various doubts in relation to the validity of Resolution 1/XI and Resolution 306/XI as far as Section I.1.1 is concerned: does it mean that the unilateral route without any need for a referendum that flows from Resolution 1/XI has finally been abandoned? Does it entail the rejection of the unilateral referendum envisaged in Section I.1.1 of Resolution 306/XI in favour of the agreed referendum envisaged in Section I.1.2 of the same resolution? What level of commitment would an eventual decision by the Venice Commission mean for the independence roadmap?

As outlined above, it cannot be said that Parliament's conduct in relation to the strategy that needs to be followed on this important issue has been entirely consistent throughout the course of this legislature, above all because Resolution 306/XI and the more recent Motion 122/XI do not clearly express a willingness to modify the postulates previously adopted by Parliament, in particular those that flow from Resolution 1/XI (as well as Section I.1.1 of Resolution 306/XI). This helps to confirm the idea that the tactical position of leaving various options open, including a unilateral call for a referendum and/or approving disconnection laws, has prevailed in this conduct, with all the weaknesses and drawbacks that have already been mentioned. One point to bear in mind is the Venice Commission's swift response to the letter which the President of the Generalitat sent to the President of the Council of Europe on 2 June this year, in compliance with Motion 122/XI. In its reply, the Commission stated it was unable to intervene in this case without the Spanish State's agreement and recalled that calls for referendums have to respect the Constitution and legality.[37]

11 To sum up

The Catalan Parliament's actions regarding the right to decide and the Catalan independence process have essentially been characterised by the adoption of parliamentary resolutions that have expressed the willingness to carry out this political project and the forms of doing so.

These parliamentary declarations have been legitimised by the democratic expression that Parliament represents with the aim of giving this fact a relevance and effects that have brought it into conflict with the principle of constitutional legality. That has been made clear in the successive challenges brought before the Constitutional Court since Resolution 5/X, of 23 January 2013, which have given the Court the opportunity to make a pronouncement on this resolution and those that Parliament has approved during this 11th legislature.

The fact that the independence process has been based on the democratic principle and, at the same time, the principle of legality has been given less importance, is one of the basic reasons for the constitutional conflict and also one of its main problems because, objectively, it puts the rule of law and the need for political projects to respect the constitutional rules second. This problem has become particularly serious as a result of the direction the process has taken since Resolution 1/XI.

Parliament's actions also mean the strategic lines for driving and culminating the independence process are somewhat vague and this is particularly evident in the latest resolutions it has adopted (Resolution 306/XI and Motion 122/XI). The unilateral path of "disconnection" based on the election results of 27 September 2015 (without the need for a prior consultation of the citizens) envisaged by Resolution1/XI, has been replaced by a new scenario in which this consultation seems to be a decisive element. But this option gives rise to uncertainties that stem from convening a consultation in the face of opposition from the Spanish State and constitutional case law that is contrary to a referendum when its purpose is to ask citizens if they are for or against the independence of Catalonia.

And, despite this determination to hold a referendum and to try to agree that with the State, it cannot be concluded that the independence process has fully overcome the concurrence of this requirement. Resolution

37 Paragraph updated by the author after the double blind review of the article [editor's note].

1/XI and Resolution 306/XI appear to indicate that the Catalan institutions have not renounced, should it come to this, calling a unilateral referendum and, if that is not possible, to follow an alternative unilateral channel for culminating the process based on the election results of 27 September 2015.

If it does come to that scenario, it goes without saying it would take the current conflict with the Spanish State and Constitutional Court to a new political and legal level with uncertain results, because it would mean breaking with the political and social framework the State is founded on. Also, because of the risk implied by basing the unilateral route on a peculiar interpretation and understanding of the democratic principle and its relationship with the principle of legality.

Lastly, returning to the roadmap initially designed by Resolution 1/XI, after having considered it necessary to consult the citizens on such a vital question as independence without having been able to do that, could have the paradoxical effect of weakening a decision solely based on the election results of 27 September 2015, still only elections to the Catalan Parliament despite the plebiscitary character attributed to them.

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