

CATALONIA'S LEGITIMATE RIGHT TO DECIDE

PATHS TO SELF-DETERMINATION

EXECUTIVE SUMMARY

**THE LEGITIMACY OF CATALONIA'S EXERCISE OF ITS RIGHT TO
DECIDE**

A REPORT BY A COMMISSION OF INTERNATIONAL EXPERTS

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The academic paper on *The Legitimacy of Catalonia's Exercise of its Right to Self-determination* discusses the legitimacy of the Government of Catalonia's current efforts to let the Catalan people exercise their *Right to Decide* on their political destiny. These efforts build upon Catalonia's previous attempts to consolidate representative governance for Catalan citizens within and conjointly with the Spanish democratic state. Four internationally recognized experts were invited by the Government of Catalonia to examine the controversy generated by the call for a self-determination referendum. This has been convened in the face of the opposition of the Spanish authorities which contest its legality, unlike the recent examples of the trend towards the recognition of self-determination, of which the most salient is that of Scotland's referendum on independence. The experts have analyzed the dispute and the arguments at several levels of discourse, simultaneously debating the respective relevance of the different legal corpora in which the applicable rules are to be found and implemented, and on the substance of the rights to be respected or fostered.

EXPERTS' CONCLUSIONS

As a result of their research and reflections, the authors come to the following conclusions and recommendations on the Right to Decide and the Catalan Government's call for an independence referendum in October the 1st:

1. The evolution of the negotiating process between the Catalan and Spanish governments since the re-establishment of democracy in 1977 through time has allowed us to identify key moments of a deteriorating political relationship where the **Spanish government has gradually renounced the accommodation of Catalan territorial demands**. The evolution of this relationship sheds a new light on the tortuous path towards the legally binding referendum on political independence to be held on the 1st October 2017.

2. The **upsurge in territorial demands towards political independence** was put on the political agenda by organized Catalan civil society immediately **after the passing of the Constitutional Tribunal ruling in 2010**. Additionally, there has been a clear shift in popular territorial preferences, moving from preferences asking for the maintenance of the current "status quo" to demands of "political independence," irrespective of people's age.

3. Catalan popular demand for a referendum on political independence has been largely justified by the democratic "*Right to Decide*", which has evolved from the more traditional and long-standing legal framework to the "national right to self-determination". In other words, **demands for political independence have been legitimized by a democratic principle invested in the Catalan people**, reinforced by the repeated denial to accommodate Catalonia's demands by the Spanish government.

4. From an international law perspective, it appears clearly **that there is no international legal prohibition barring a sub-state entity from deciding its political destiny**

by assessing the will of its people. Both case law and state practice support this conclusion. State practice demonstrates that numerous geographically diverse sub-state entities have expressed the will of their people regarding independence. The practice occurs both with and without the consent of the national state. Many sub-state entities have achieved independence after assessing the political will of their people. **EU member states have recognized many former sub-state entities that assessed their people's political will and decided to pursue independence.**

5. As regards European Law, in the absence of specific Treaty provision on the right of Self-determination for a European people without a State in the territory of the EU, EU law does not forbid the exercise of its Right to Decide for a European people within the EU. There are even numerous Treaty provisions that indicate that if such Right were to be exercised, EU and its member States would react positively to a new European State candidacy to join the EU. Recent and consistent practice clearly points that way. Further, both as a collectively exercised human right and as a fundamental norm of international Law, **EU recognizes the Right to Decide.**

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

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

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

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

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

EXTENDED SUMMARY

BACKGROUND FOR THE CURRENT SITUATION IN CATALONIA

In the first section, the paper provides a detailed political history of Catalonia's quest for greater representative government within the Spanish state since the re-establishment of democracy in 1977 and beyond. It discusses Catalan efforts to gain greater autonomy, both within and independently from Spain, while in parallel recognizing the notable Catalan contribution towards the stabilization of the democracy in Spain after 1978. It simultaneously describes Spain's consistent, sometimes anti-democratic, responses to these efforts and also explains the political, social, economic, and historical pressures leading to Catalonia's upcoming independence referendum on 1 October 2017.

Historically, in Catalonia there had been five main political parties achieving representation both in the regional and national parliaments. Firstly, *Convergència i Unió* (CiU), a federation of a center-right party and a Christian-Democrat party. The federation headed the Catalan government uninterruptedly from the first Catalan elections until 2003, while working for a system of gradually increasing self-government. However, discrepancies between them meant dissolution of the federation in 2015 and each went its own way. The second party in importance has traditionally been a center-left and pro-federalist *Socialist*

party federated with the Spanish PSOE, historically winning the elections to the Spanish Parliament in Catalonia.

These were historically followed by the regional branch of the Spanish PP, a rightist party in favor of the status quo or even recentralization, and is the heir to the former *Alianza Popular* created by leaders of the Franco dictatorship. *Esquerra* (ERC), a leftist pro-secession party, was founded in 1931 just before Spain's Second Republic, and headed the government in Catalonia until the Franco coup d'état. They entered government briefly from 1984-87, and again in 2003 in coalition with PSC and ICV-EUiA, the latter a leftist, green, pro-federalist coalition of parties. ERC now forms part of the governing *Junts pel Sí* coalition.

The freshmen are *Candidatures d'Unitat Popular* (CUP), a left-wing, pro-independence party which first ran for the Catalan Parliament in 2012 after focusing traditionally on municipal politics. Another new party, *Ciudadanos* (C's), first ran for a Catalan election in 2006 on a pro-unionist ticket constantly denouncing presumed excesses and lies of Catalan pro-sovereignty parties and collectives, arguing that Catalonia is constitutionally a *nationality* and already enjoys substantial self-government, while the independence debate is unconstitutional. *Podemos*, a nationwide left-wing party established in 2004 with a regional replication, forms part of the *Catalunya Sí que Pot* (CSQP) coalition along with ICV-EUiA. They show no clear position in regard to territorial policy, but they agree on the fact that Catalan people have the right to vote in an independence referendum.

Since the reestablishment of democracy, negotiations with the different Spanish governments have gone through three different strategies: the first one is popularly known as "fish in the bag" or horse trading (1980-2003); then a "hard ball" strategy (2003-2012) and finally the "chicken strategy" (2012-today). The political pay-offs have been increasingly unsatisfactory on the Catalan side, leaving a strong sense of dissatisfaction among Catalan people which has contributed to fueling increasing demands of political independence since 2010, after the Spanish Constitutional Court sentence dramatically eroding the Catalan Statute of Autonomy voted by the Catalan people in 2006. This led to an agreement between CiU and ERC by which they committed to consulting the Catalan people, as well as parliamentary passage of a Declaration of sovereignty and the *Right to Decide* of the Catalan people. This paved the way for an unofficial consultative referendum for which the Parliament of Catalonia made a formal petition asking the Spanish Government to transfer the necessary powers. This was denied by the two major parties, PP and PSOE. The consultation took place anyway, despite its legal prohibition and rejection by Spain, with 80,8% showing support for secession.

Given the show of popular discontent, President Mas called a snap election for September 2015 as a *de facto* plebiscite on independence, with an agreement between CDC—one of the former partners in the CiU coalition, as the party federation was dissolved in June 2015—and ERC, with *Assemblea* and *Òmnium*—major grass roots organizations

supporting self-determination—to form the *Junts pel Sí* (Together for Yes) coalition. The coalition won the elections and allied with *CUP* to form a parliamentary majority. This was considered a democratic mandate to begin the process of secession. However, the parliamentary resolution supporting this was brought before the Constitutional Court by the Spanish government, which automatically suspended it. Since the Spanish Government has repeatedly proved itself unwilling to negotiate, the parliamentary majority have committed to a legally binding referendum to be held on the 1st October 2017 as a definitive step to let Catalan people democratically decide on their future political status.

INTERMEDIARY CONCLUSION

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

FOUNDATIONS FOR CATALONIA'S RIGHT TO DECIDE

In this second section, the paper discusses the sociological, philosophical and constitutional origins of the *Right to Decide*. It observes that the *Right to Decide* flows from the liberal-democratic principle of individuals' right to democratic self-expression and that both political philosophy and constitutional practice increasingly supports sub-state entities exercising this right via referendum. In recent history, sub-state entities have challenged states' constitutional orders by exercising the *Right to Decide*. These challenges often lead to negotiated constitutional changes that better reflect the principle of representative government.

If anything characterizes and distinguishes social and political life in recent years in Catalonia, it is the emergence of the debate on *sovereignty*; the idea that the citizens of Catalonia must decide their own destiny. It shows the intensification of the political process towards further demands of self-determination and the *Right to Decide* cannot be dissociated from the role of organized civil society on one hand, and a growing dissatisfaction with the degree of autonomy on the part of Catalan public opinion on the other.

In face of the political deadlock imposed by the Spanish government after the attempt to reform the Statute of Autonomy of Catalonia and the tense process experienced by the Catalan population once the bill entered the Spanish Parliament, a vibrant and politicized civil society tried to progressively push the Catalan government and political parties into taking a stance on the issue of independence. An important part of the population—both civil society and the political elite—started to defend Catalonia's *Right to Decide* its own future, as well as the option to become an independent state. With a series of political events, protests and other massive rallies, a large proportion of the Catalan population put pressure on politicians. The massive demonstrations in 2006 and every year since have shown the stages of what has become a vigorous and ideologically transverse and active civil society supporting the right of the Catalans to decide their future. In 2010, the massive movements claiming independence reached the front lines and went on relentlessly organizing massive rallies on 11 September, Catalonia's *National Day*. The slogan "*We are a nation. We have the Right to Decide*" rapidly became a massive pro-independence claim.

This new Catalan mobilization upsurge also identifies a second shift in Catalan protest as political and civil groups for Catalan sovereignty used to be traditionally known for gathering forces to oppose the idea of a Catalan independent state; both groups used to concentrate their demands on making it easier for Catalans to keep their distinctive character while still being part of Spain. However, in the contemporary independence movement, the combination of top-down and bottom-up mobilization for the independence cause clearly emerged as a protest against the way power has been exercised by the Spanish State.

It should be noted that the question of nationalism is moot. Although Catalan national identity has a significant influence on support for independence, this notion of nationalism needs to be clarified in order to avoid misleading conclusions. Identity is not the full story to account for independence support. In this respect, the *Centre d'Estudis d'Opinió* (CEO) public survey Barometer of January 2013 provides evidence that national identity was stated as motivation by half of the respondents who said they would vote *against* independence, while reasons of identity are given by less than a quarter of those who say they would vote in favor. On the other hand, a great majority of those who would vote favorably would do so to achieve a greater capacity and to fulfill a desire for economic self-management.

However, the overarching reason to vote for independence in a referendum is founded in the democratic idea of the "*Right to Decide*" which embodies a civic/democratic/liberal conception of a national project, rather than the materialization of the essentialist version of the right to self-determination of nations. The polysemic motto of the *Right to Decide* is thus founded on democratic theories that provide a democratic approach to secession based on the right to individual self-determination or autonomy.

In this respect, it would be worth mentioning the definition of nationalism suggested by Montserrat Guibernau by which it "is both a political ideology and a sentiment of belonging

to a community whose members identify with a set of symbols, beliefs and ways of life, and have the will to decide upon their common political destiny". Thus, while nationalism is on some occasions associated with backward ethnic political discourses, in others it stands as a new progressive social movement in favor of the political emancipation of peoples.

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

Contemporary constitutionalism echoes the political aspects of social contract theories. The question of self-determination, understood as the possibility to collectively choose the institutional structure of one's life, is thus intrinsically connected with the ideal of political autonomy, both for individuals and for groups.

In contrast, "The [Spanish] Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards; it recognizes and guarantees the right to self-government of the nationalities and regions of which it is composed and the solidarity among them all." This provision was heavily relied upon by the Spanish Constitutional Tribunal to bar any claims that the Catalan people could be understood as a sovereign body. But the justifications for granting or refusing this right at the level of legal norms are necessarily based on metalegal (i.e. political, moral, ethical, or philosophical) arguments. That is why purely legal considerations are no obstacle to a principled discussion. From this perspective, several justificatory doctrines exist for the right to self-determination through independence and, if the collective previously belonged to a larger State, secession. According to political scientist Margaret Moore of Queen's University, Canada, three major types of normative theories can justify a right to secession.

The first is the *just-cause theory* whereby the right to secession is understood as a remedy to a situation of injustice whose cause is, at least partially, the belonging of the oppressed collective to another, oppressive, one. The *Right to Decide*, and eventually the right to secede are thus understood as collective forms of the right to resist oppression. This prerogative is central to contemporary constitutionalism, and appears for example in Article 2 of the French *Declaration of Man and the Citizen*.

The idea of an unjust annexation may be difficult to use in the Spanish context, due to the fact that Catalonia became part of the State three centuries ago. No massive violation of human rights is currently caused by the Spanish State. Nevertheless, even though no massive exploitation can be identified, it appears that several analyses of the financial relations between Madrid and Barcelona tend to prove that there exists a kind of structural and long-lasting imbalance between the two. What is more, the right of the Catalan people

to self-determination within Spain, i.e. what is known as “internal self-determination” is only imperfectly guaranteed.

In April 2014, the Spanish Parliament denied once again the possibility to organize a referendum that would have been constitutionally valid. The last attempts of the Catalan government and Parliament in order to initiate a participatory procedure regarding the right to decide were rejected by the Constitutional Tribunal as incompatible with the supreme norm. The very fact that for the last years Madrid has resorted to all the possible legal and constitutional means to bar any discussion of the Catalan claims has led to political and institutional deadlock.

Madrid went so far as to sue political authorities for organizing a popular consultation. To present a telling example, the former president of the Catalan government was sentenced to two years of disqualification and a fine of 36,500 euros for the crime of disobedience. Contradicting basic constitutional principles of free and democratic societies, several members of the Catalan parliament, including the Speaker, have been charged with the approval in Parliament on October 6th, 2016 of a resolution regarding the celebration of the referendum on the political future of Catalonia, as well as with allowing certain parliamentary votes and publishing inquiry reports. It appears that a kind of systematic policy of obstruction to the Catalan *Generalitat* government has appeared, depriving the Catalans of a crucial part of their right to self-determination as a collective who are denied any possibility of debating their future with the legitimate authorities.

The second theory is based on the *Right to Decide on choice*, i.e. on the fundamental liberal idea of individual autonomy, whereby individuals who are the members of a political community have a legitimate right to define the territorial limits of the collective in which they exercise their right to self-government. This does not require any specific injustice to justify claims to the *Right to Decide* and, ultimately, secede. A clear link is established between individual autonomy, which allows an individual to join a group in the state of nature and the right to withdraw from it, simply making use again of the fundamental freedom on which the birth of the political unity was made possible in the first place.

Lastly, the theory of *collective autonomy* abandons the individual perspective and prefer a communitarian approach of political subjects whereby groups enjoy a specific moral status, sometimes deducing that self-determination can be understood as a human right of groups. The collective link between individuals is made evident for example in a shared language, a shared culture, a shared religion, a shared way of life, etc. Values and collective feelings and aspirations cannot be reduced to individual choice or individual well-being. They are valuable in themselves. In international law, this reasoning is connected to the “principle of the nationalities”. This kind of justification is perfectly applicable to Catalonia, whose specific cultural characteristics are widely acknowledged, especially, from a legal viewpoint, in the Autonomous Community’s *Estatut*. Nevertheless, the “collective autonomy” thesis needs to

confront certain objections. One difficulty is related to the reification of collective identities that it may entail. This thesis downplays the fluidity of cultures and the possibility for them to evolve. It also neglects the fact that exchanges, contacts, etc., necessarily imply that no culture is self-contained and totally fixed. Moreover, the individuals who compose the group have “multiple selves”, many of them overlapping. Finally, several incompatible conceptions of how a collective identity is formed exist. Insisting on culture, history, ethnicity, religion, and language, a deterministic conception of a nation can be proposed, so that one can hardly change her own belonging.

But because it is related to very fundamental principles of human governance and expresses a core value of constitutionalism, the autonomy or the *democratic argument* appears to be a premise that cuts across all the theses justifying secession. This argument is simple: if the majority of the Catalans wants to have the right to decide about their future, then they must have it; if the majority of the Catalans want independence, then they must have it.

But the reasoning may not be that evident.

The most pressing issue is that of the stakeholders, that is, those with an interest in decision-making, and who must therefore, according to the logic of autonomy, pronounce on the right to decide or the right to secession. This democratic principle obliges the existing State in a certain way. Indeed, the refusal to defer to the popular will would itself be a violation of several fundamental rights that are intrinsically rooted in the project of constitutionalism as it has been joined by Spain in 1978, and therefore a cause legitimizing secession.

However, it is possible in such a case to claim that everyone has to vote, including the members of the non-autonomous state that claims autonomy. The question, therefore, is that of the interests which must be regarded weightier. *Prima facie* and at the stage of fundamental principles, no clear answer seems possible. Many arguments can be developed for one solution or the other. That is why they need to be debated and thought out properly. Only a careful and fair deliberation, like the ones that led to the definition of who could participate in the independence referenda in Quebec, in Scotland, or in New Caledonia can provide one.

Second, a “slippery slope” of some sort could emerge as a result of the choice-based autonomy argument. It would lead to the general dissolution of political units. If the majority of Catalans chooses independence, there will be in Catalonia a minority of hostile people or disgruntled non-Catalans. Should they also be entitled, in the name of the principles which justified the independence of Catalonia, the right to claim their own secession? If the independence movement is doctrinally coherent, this must be admitted, unless cogent arguments can be made to justify the opposite answer. In this respect, Catalans seem to be

quite coherent. In the “Vall d’Aran”, which is included in the territory of Catalonia, lives an Occitan minority. A whole chapter of the Catalan Estatut is dedicated to this territory. It makes clear that, considering the specific national personality of Aran, the rights of the Aranese people are acknowledged and respected.

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

It may also be worth underlining that the practice of self-determination never really confronted the issue. Most, if not all, past cases of the exercise of the right to self-determination have been implemented within the existing borders of an administrative or political unit of the currently existing sovereign power (State, Empire, Colonial possession), whether the population of such territory was homogeneously composed as regard identity, language, religion or other common characteristics. This practice is labeled in international law the *uti possidetis principle*; it prioritizes the use of existing territorial borders to define the constituency over the delimitation of a “people” on sociological, historical, linguistic or other grounds.

At several points in the above, things were said to be unsettled, in need of further discussion to lead to a situation where one knows where one’s partners stand and what their arguments are. But due to all these uncertainties, one may be hesitant as to the possibility of devising a precise procedure to decide on these issues.

Fundamentally, the issue of the *Right to Decide* can very legitimately be regarded as being beyond the reach of the law. Indeed, it is the right to have one’s say on the very possibility of creating a new state. As a consequence, it can hardly be regulated by law, for it is precisely the process by which a new state, i.e. a new entity producing law, can come to exist. This is why one could contend that, because of its revolutionary dimension, the debate involves the so-called of *pouvoir originaire*. All that is at stake here could be regarded as pure facts, *de facto*, or pure politics, as opposed to norms, *de jure*, or law. That is why the discussion can very well be framed in political, ethical, or philosophical terms, and not exclusively in a legalistic perspective.

Nevertheless, several legal norms and documents explicitly address the issue of self-determination, independence, secession, etc., and offer clues for crafting the modalities of

the implementation of a *Right to Decide*, including United Nations resolutions, acts of the Conference on Security and Co-operation in Europe, advisory opinions of the International Court of Justice and the European Court of Justice, etc. From the viewpoint of living law, the legal actors that dealt with the *Right to Decide* have made reference, if not always to precise legal norms, at least to fundamental principles that are intrinsically connected to a constitutional organization of political controversy, with a form of emerging transconstitutional jurisprudence regarding the *Right to Decide*. Although it does not result in a determined body of binding law, let alone a code for secessionist processes, it offers a blueprint for a process of deliberation and decision-making as “constitutional” as possible.

Is such a promise of constitutionalism totally out of reach in Spain? Even though Madrid has shown some evident reluctance, and even the most recent case law of the Constitutional Tribunal is rather hostile, it seems not. In its ruling regarding the Resolution of the Catalan Parliament approving the Declaration of sovereignty and the right to decide of the people of Catalonia, the Spanish Constitutional Tribunal refused the idea of Catalan sovereignty. Nevertheless, regarding the *Right to Decide*, it drew inspiration from the Canadian Supreme Court, which it quoted explicitly, making clear that this political initiative was related to the constitutional principles of “democratic legitimacy,” “pluralism,” and “legality”, shared principles between Spain and Catalonia. These were presented by the latter as framing all the process of the right to decide, which was described as based on democratic legitimacy, transparency, social cohesion, euro-friendliness, parliamentary representation, participation, dialogue, and legality. The Constitutional Tribunal noticed that most of these principles were proclaimed by the Spanish Constitution. It also connected them with what the fundamental commitment that the Spanish people had expressed since 1978, which is why it finally decided that there was no violation of the Constitution when the Catalan Declaration invoked a *Right to Decide*.

INTERMEDIARY CONCLUSIONS

In an initial conclusion—or more exactly, not to conclude but on the contrary to open the space for rational deliberation—this section proves that there is no truth of the matter. Nothing is fixed, nothing is for sure, except the need to discuss and debate according to what has grown as a trans-constitutional body of shared values that only unveil the preconditions of the most cherished values of contemporary constitutionalism. This does not make things easier, but at least it allows every stakeholder to know where she stands and what her responsibility is. Directly confronting the legitimacy of the Right to Decide is necessary because as René Lévesque once wrote: “À côté des forces aveugles et de tous les impondérables, il faut croire que ce sont encore essentiellement les hommes qui font l’histoire.” (Alongside the blind forces and all the imponderables, we must believe that it is still essentially men who make history.)

CAN THE “RIGHT TO DECIDE” BE LEGALLY DENIED?

In a third section, this paper finds that expressing the *Right to Decide*, even via unilateral referendum, is legitimate under international law. This section analyzes the ICJ's 2010 Advisory Opinion on Kosovo, which holds that international law does not forbid unilateral declarations of independence. It also surveys thirty years of international state practice and finds that 24, or half, of the sub-state entities that exercised the *Right to Decide* did so without parent state consent. In addition, 18 of these 24 unilateral attempts successfully led to the emergence of new States. That said, state practice shows that those exercising the *Right to Decide* unilaterally should expect to negotiate with the parent state after exercising this right.

As shown above, this paper propounds that the *Right to Decide* lays on substantial and solid sociological, political, moral and philosophical foundations. Nevertheless, the exercise of this right by Catalonia in 2017 is being contested (and eventually denied) to the Catalans by the Authorities of the Spanish State.

The Spanish constitutional legal order may not be interpreted outside of its European and international contexts. In that respect, neither international positive law nor international practice forbid the exercise of the right to self-determination by Catalonia. Quite on the contrary, extensive and recent practice show the emergence of new States in Europe, even without the approbation of the parent State. Identically, European Law—mostly EU law but also the ECHR—not only does not forbid the exercise of the right to self-determination by European peoples willing to join the “ever closer Union among the peoples of Europe”, but allows to ground the exercise of such a right into European Human Rights Law, and maybe even to derive it from EU citizenship rights.

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

No liberal constitutional order reserves the right of constitutional interpretation to the Constitutional Tribunal. The Spanish constitutional order has until now been no exception to this rule, and the current constitutional meaning of the constitutional text has to be co-constructed among several institutional actors, since Constitutions are by function enshrining “essentially contested norms”. Thus the process of Constitutional interpretation

needs to take into account European values such as “the respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities”, as stated in Article 2 of the Treaty on European Union (TEU). Accordingly, the current obsession of the Spanish Government to ask the Constitutional Court for a definitive interpretation of the Constitution is anomalous.

International law is well-developed on the first phase of the process towards independence, namely a sub-state entity's right to decide its political destiny up to and including a declaration of independence. International law is also well-developed on the third phase, namely what is required for a state to be considered independent and legitimate. The second phase, namely the legal framework between a declaration of independence and recognition of statehood, is less developed under international law. That is why we advocate in our conclusions to resort to the “earned sovereignty framework” to manage the intermediary phase.

INTERMEDIARY CONCLUSION

As this section showed, it is necessary from an empirical viewpoint, and fruitful from a normative one, to give up the quest for a supreme constitutional interpreter. What is crucial in a constitutional state that is faithful to the ambitions of constitutionalism is the ongoing dialogue about, and engagement with, constitutional values and principles. Only this makes the constitution a living document, infused by the competing interpretations of values and principles that, by their very nature, admit various readings and conceptions. The quest for the final word is useless, illusory and possibly lethal from the political viewpoint of a sane deliberative community. The debate is much more open than what one might think at first sight by examining too rapidly the basic features of contemporary constitutionalism, especially as it is illustrated by the Spanish constitutional system. Far from being disruptive of the constitutional project that was adopted in 1978, the Catalan claim to a right to decide on its political future precisely testifies to a genuine commitment to the ongoing constitutional dialogue that is legitimate in an open society. This is why simply dismissing this claim as “unconstitutional” cannot be an attitude that lives up to the high standard of political morality that is imposed by the ideal of constitutionalism.

In the end, it appears that contemporary constitutionalism as a means to organize political coexistence and to promote collective projects based on the limitation of political power and the protection of fundamental rights cannot fruitfully be understood as a device for rigidification, possibly leading to political stalemate. As the American scholar Louis Michael Seidman suggested, constitutions should be understood as structures of unsettlement, even granting every group and every individual a “right to unsettlement” that

guarantees an ongoing fair and healthy deliberation on the global community's self-understanding as a historical actor.

IS THE ORGANIZATION OF A REFERENDUM ON 1ST OCTOBER 2017 BY THE CATALAN AUTHORITIES LEGITIMATE?

In a final section, this paper considers how Catalonia could exercise its *Right to Decide* within the context of the European Union. This section suggests that Catalonia could pursue a “constrained sovereignty” strategy with the EU. The section observes that EU treaties do not prevent sub-state entities from exercising their *Right to Decide*. Rights in the Treaty on the European Union, such as the right to equal access to EU institutions and to full participation in the democratic life of the EU, further legitimate Catalan citizens' *Right to Decide* their political destiny via unilateral referendum.

The right to self-determination was initially successfully claimed and exerted by the residents of the North American Colonies who declared independence on 4th of July 1776. During the XVIII century, most colonies in the Americas exerted a right to self-determination and became independent States. The principle of self-determination was later progressively transposed to international Law by the end of the World War I and played an important role in the creation of new States in Eastern Europe.

After the 2nd World War, the UN Charter lays down as one of its most fundamental aim, “to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”, therefore recognizing in positive international Law the equal rights and self-determination of peoples. This will later be transposed as a right to all peoples, grounded in Human's right Law.

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

European Law in no way forbids the exercise of the right to self-determination by European peoples. Quite on the contrary, European Law recognizes and EU Treaties even encourage the right of self-determination of peoples both through Treaty provisions and long-lasting practice of EU institutions and member States.

Furthermore, EU membership does not provide any additional “protection” to member States national identity or territorial integrity. The protection of territorial integrity of the State only applies in relationship *between* States, and not to deter the *Right to Decide* on their future for a nation included in an existing State. In fact, EU member States are not free to exert their own competencies as regard their national identity or territorial authority as they wish; they remain bound by their membership to the EU, and notably by the duty to respect “European values” as they are explicitly enunciated in Article 2 of the TEU. EU law therefore provides a legal framework within which this situation has to be dealt with.

EU law makes some references to “peoples” and clearly recognizes a right to self- or co-determination to those European peoples that have their own European State. Further, EU law is not classical international law, which mainly deals with relationship between States and international organization, but constitutes, as the ECJ stated in 1963, “a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member States but also their nationals. Independently of the legislation of member States, community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.”

INTERMEDIARY CONCLUSION

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

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

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