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Constituent power and independence processes: problems and perspectives in the light of the Catalan experience

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ABSTRACT This paper focuses on the potential reconfiguration of constituent power in the context of multinational States. It takes the view that sub-state claims pose relevant challenges to the traditional vision of constituent power as a unitary and monolithic essence. This seems all the more topical in Spain, where the Spanish Constitutional Court adheres to a unitary conception of constituent power. By contrast, our research has looked at whether and to what extent it is possible to accept that such a unitary vision of constituent power may be challenged with the emergence of new social forces calling into question the ultimate allocation of competence. The so-called sovereignty process in Catalonia invites constitutional scholars to engage in this debate, particularly in the light of the last unilateral referendum on independence from Spain that took place on 1st October 2017. Whereas the referendum has often been framed within the so-called theory of the right to decide, we ask whether it is possible to understand it instead as an expression of an emerging constituent power.

KEYWORDS Federalism and secession; constituent power; right to decide; independence referendums.

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1. Introduction

What is the meaning of constituent power today? Is this concept stuck with its original meaning or is there room to reconsider its relevance in current legal debates? First and foremost, it is not rare to come across scholars who urge an abandoning of the study of constituent power, arguing that it drives jurists from the field of law and into the domain of political fact.[1] Nevertheless, the significance of constituent power appears today as the object of numerous attempts at reconceptualization. Recent investigations, moreover, illustrate the emergence of new cleavages that overlap with earlier ones.[2] Two intertwined phenomena seem recently to challenge the classical assumptions of constituent power: first, the people's plea for a democratization of the political process and, second, the pluralisation of decision-making centres. On the one hand, social movements call into question the legitimacy of the authority of decisions. This is perhaps evident in the context of financial crisis-era protests against neoliberal policies.[3] On the other hand the "locus"[4] of constituent power, i.e. where it lies, is subject to constant debate. A parallel attempt to consider the multiplicity of constituent powers is currently in the works, both in the supra- or international arena and the subnational one. This is just to show that far from being a dormant concept, there are many attempts afoot to reconsider the value of constituent power at present (see below).

One of the main conundrums posed by the notion of constituent power is defining which subjects are those entitled to trigger a new constituent process. Among the different perspectives that have taken shape over the years — from normativism to decisionism[5] — this paper adheres to those which emphasise the strict relationship between constituent power and the current challenges to pluralist and plurinational societies. In this regard, the works of prominent scholars such as Peter Häberle or more recently Martin Loughlin may represent a meaningful point of reference to the extent that

1. See for this account Dyzenhaus, "Constitutionalism in an Old Key", 229-260.

2. Walker, "The return of constituent power", 906-913.

3. See Pisarello, *Procesos constituyentes*, 115 ff.

4. For this expression, see Krisch, "Pouvoir constituant and pouvoir irritant in the postnational order".

5. For a comprehensive account, see Loughlin, "The concept of constituent power", 219 ff.

both highlight the importance of the open, dynamic and undefined nature of constituent power. Häberle rejects the idea of the people as a unitary entity and draws attention to the multiple actors that shape the constituent process[6]. More recently, Loughlin conceptualized a "relational approach", according to which "constituent power is not engaged only at the (virtual) founding moment but continues to function within an established regime as an expression of the open, provisional and dynamic aspects of constitutional ordering". Such a definition may be useful for the purposes of this paper to the extent that it refuses to identify constituent power with the constitution itself or with any given and aprioristic political entity. By contrast, understanding the "open, provisional and dynamic aspects" of constituent power allows us to consider the inextinguishable nature of the subject of constituent power and the possibility that in the evolution of a given political community the legitimacy of the constituted powers can be put into question.

In order to problematize certain classical assumptions about *pouvoir constituant* some of the aspects which historically inform the concept must be considered.[7] On the one hand, constituent power has traditionally been qualified as unlimited and extra-legal.[8] However, a countervailing phenomenon illustrates the possibility of transforming such a feature, for there are two points which have yet to be demonstrated. The first is that constituent power necessarily involves the exercise of an exclusively political force which operates outside the scope of the legal framework, and, second, that such a force can be considered unlimited or disruptive. Indeed the opposite has been shown by recent constitution-making processes, such as those that occurred in Eastern Europe[9] and have to a certain extent illustrated that constituent

6. Häberle, Potere costituente, especially at 4 for the juxtaposition between "the will of the *constituent*" (in singular that he rejects) and the pluralism of the *constituents* (in plural), which characterizes the notion of constituent power in the contemporary constitutional State.

7. On the traditional debate and definition of the pouvoir constituent, see Sieyès, *Qu'est-ce que le Tiers-État?*; Hauriou, *Précis élémentaire de droit constitutionnel*; Kelsen, *Teoría pura del Derecho*; Schmitt, *Teoría de la constitución*, Lasalle, *¿Qué es una Constitución?* And see also Carré de Malberg, *Contribution à la théorie générale de l'État*; Jellinek, *Théorie générale de l'État* and *Fragmentos de Estado.*

8. Cristi, "Carl Schmitt on sovereignty and constituent power", 189-201.

9. For this account, see Palermo, "Dichiarazione di indipendenza del Kosovo e potere costituente nella prospettiva della Corte internazionale di Giustizia": "Il potere costituente non è più qualcosa che possa esaurirsi in un unico atto. Esso si esercita, piuttosto, in modo graduale, per atti incrementali e successivi, attraverso una combinazione di atti e fatti di

power can be expressed through a progression of acts or events involving both internal and international actors. In that context, it seems also relevant to stress that — for the same reason — the very identification of the constituent process is perhaps worthy of debate, as nuanced by the phases that, ex post, can be referred to as exercises of constituent power.[10]

Furthermore, that the unitary or monistic character of constituent power, seen to express the will of the nation, is aligned with the very origin of the concept, has heretofore been taken for granted. Yet, it goes without saying that the current form of the State has deeply evolved since the emergence of the concept of constituent power.[11] In particular, contemporary constitutionalism has been conceived through the same lens of pluralism that prompted the definition of a new type of State, according to the prevailing historical classification of the form of the State. Since the progressive affirmation of pluralism in modern and contemporary democratic regimes it has been possible to reframe several constitutional concepts under the light of pluralism. Federations admit the coexistence of constitutions and constitutional courts within the same unity. Rights can either be granted under the constitution of the State or according to sub-state constitutions and, to a certain degree, sub-state standards may be higher than those enshrined by the national Constitution. In this context, it is perhaps worthwhile to ask whether pluralism also calls into question the historical unitary assumption of constituent power and, in turn, attempts to put together a pluralist vision of constituent power.

Such is the conceptual framework adopted by this paper in an effort to ultimately analyse the current Spanish debate over the constitutional future of the Autonomous Community of Catalonia from Spain. On the one hand, constituent power has been identified as existing within the Spanish people.

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rilievo costituzionale, con strumenti che non si esauriscono nel lavoro di un'assemblea elettiva ma coinvolgono attori di legittimazione diversa (in primis internazionali), e rendono difficile operare una distinzione netta tra il prima e il dopo. Tale complessità e gradualità. nell'esercizio del potere costituente fa sì che la dottrina più. accorta distingua ormai tra processo costituente ed evento costituente, e tra potere costituente e funzione costituente. Il processo costituente, insomma, pur nella diversità di ciascuna esperienza, tende a caratterizzarsi come processo conoscibile, giuridicamente guidato, garantito, procedimentalizzato e pluralista. Tutto l'opposto rispetto al potere costituente tradizionale, libero nei fini e nelle forme, esercitato in via esclusivamente politica".

10. *Ibidem*.

11. See Jaklic, *Constitutional Pluralism in the EU*.

As a matter of fact, Article 1.2 lays out that national sovereignty relies on the Spanish people, a unit from which all State powers emanate. The Constitutional Court echoed this position in several judgements.[12] However, it is important to bear in mind that the prevailing interpretation of Art. 1.2 CE is now challenged by sizeable movements in Catalan society which defend their claims by asserting the existence of a strong democratic aspiration in opposition to the traditional reading of the Spanish Constitution. Political and academic debates have often understood the legitimacy of that claim on the grounds of the so-called "right to decide", the origins of which — according to a part of the doctrine that backs it — may be traced to the constitutional text itself.[13] In this paper it will be argued that the theoretical framework within which the secessionist claims must be framed is different from the one adopted by the theorization of the right to decide. Both perspectives have common features, insofar as they challenge a monistic conception of sovereignty and emphasize a procedural conception of democracy, which relies on the potentialities of triggering negotiations between the countervailing actors. However, the theory of the right to decide insists on a somewhat legalistic approach, anchoring the claim for a potential new institutional framework for Catalonia in the principles enshrined in the Spanish Constitution. Unlike the latter approach, the constituent-power perspective allows us to shift the focus from legality to legitimacy and to consider that the core issue here is to assess whether it is admissible to

12. See STC 103/2008, FJ 4, where the Court stated the following: "La Ley recurrida presupone la existencia de un sujeto, el "pueblo vasco", titular de un "derecho a decidir" susceptible de ser "ejercitado" [art. 1 b) de la Ley impugnada], equivalente al titular de la soberanía, el pueblo español, y capaz de negociar con el Estado constituido por la Nación española los términos de una nueva relación entre éste y una de las Comunidades Autónomas en las que se organiza. *La identificación de un sujeto institucional dotado de tales cualidades y competencias resulta, sin embargo, imposible sin una reforma previa de la Constitución vigente*" (emphasis added). See also STC 42/2014 where the Court affirmed that the right to decide was conceivable as a political ambition that may be reached through the legal avenues provided by the Spanish constitutional system (see FJ4). For a remarkable study on the relationships between Constitutional Courts and secession see Martinico, "Identity conflicts and secession before Courts".

13. While the right to decide itself has already been conceived in several ways, one of the most authoritative studies defines it as a constitutional right: see Barceló, cit., "el derecho a decidir… puede formularse en sede académica como un verdadero derecho constitucional, si se define como un derecho individual al ejercicio colectivo de los miembros de una comunidad territorialmente localizada y democráticamente organizada que permite expresar y organizar mediante un procedimiento democrático la voluntad de redefinir el estatus político y marco institucional fundamental de dicha comunidad, incluida la posibilidad de construir un estado independiente".

adhere to a pluralistic and dynamic conception of constituent power and to consider it relevant and applicable to the Catalan experience.[14] Indeed, the paper will explore whether the quarrel over the constitutional future of Catalonia might instead concern the potential reconceptualization of constituent power today. The notion of constituent power will be put into the perspective of the regional State's historical evolution in Spain drawing on principles of pluralism and democracy to problematize the unitary and monistic nature of constituent power.

To this end, we will proceed as follows. After a short theoretical look at contemporary theories regarding constituent power and sovereignty (2), we will consider the way in which this theoretical debate is relevant to the Spanish case through the analysis of some "turning points in the evolution of regionalism in Spain" (3). Finally, we will dissect the concept and regulation of independence referendums, wrestling at once with the unilateral referendum held in Catalonia on October 1ST and the debate over the institutional relations between Catalonia and Spain in Catalonia (4 to 7).

2. Supra- and subnational challenges to the unitary nature of constituent power

The traditional unitary and monistic nature of the concept of constituent power is currently a subject of dispute both at the international and subnational level. As for the first, thanks to contributions to the so-called global constitutionalism and the increasingly-complex nature of the exercise of public authority in the context of globalization, growing legal literature illustrates that the source of constituent power can no longer be accepted as a given fact. As for the second, the enduring debate over the contested nature of constituent power in federal States seems to have gained relevance and momentum in the context of plurinational States such as Scotland and Canada. In the following paragraphs both questions will be examined in turn.

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14. For exceedingly original and deep insight, see Bossacoma, *Justícia i legalitat de la secessió*, 40 ff.

2.1. The international dimension: constituent power and interdependent State relationships

Notwithstanding this paper's focus on the sub-national level, it may be appropriate to highlight current debates on the possibility of referring constituent power to the transnational arena. Indeed, this entails relativizing the unitary essence of constituent power and its coessential nexus with the State.[15] According to Kumm — one of this recent trend's most vocal observers — the self-standing legitimacy of national constitutions is under attack; State legitimacy, Kumm asserts, cannot stand on its own. Circumstances exist under which internal policies may affect external interests unjustly. Those national policies may therefore be qualified as lacking legitimacy. In such conditions, internal policies produce what Kumm defines as "justice-sensitive externalities", meaning that in certain cases public policies may reverberate outside State *A* despite taking place inside its borders, and this in a way that unbearably offends the interests of State *B*: "national sovereigns can claim no legitimate authority to address questions involving justice-sensitive externalities unilaterally". The leap from this reformulation constituent power is a straightforward one: "a constitution established by *We the People* can only claim legitimate authority over a domain in which there are no justice-sensitive externalities". In other words, in the context of interdependent State-relationships, where public policies have direct implications in external domains, the authority of constituent power is relativized or even constrained to the extent that it does not unjustly affect external instances. This vision regards obligations imposed by the international community as "global constitutive power" that "compete[s]" (Krisch) with national constituent power in shaping the boundaries of the State's authority.[16] From a different perspective, Nico Krisch recently framed the issue of the multiplication of constituent power, reaching a different conclusion nevertheless. Krisch argues that "structural constraints of the transnational realm" lead us either to conclude that constituent power is absent from such spaces or to accept a more nuanced account of constituent power, qualifying it as merely "irritant". This means there are societal forces at play, which,

15. See Kumm, "Constituent power, cosmopolitan constitutionalism, and post-positivist law".

16. *Ibidem*, 708: "the legitimacy of the state in a world of sovereign states depends on its integration into an appropriately structured legal system which must be conceived as constituted by the international community as a global *pouvoir constituant*".

though able to influence the role of global governance and international institutions, still fail to slot into the definition of constituent.[17]

Also, the unitary essence of constituent power has been critically considered by scholars grappling with the evolution of EU law from a constitutional standpoint. Take for instance the position of Peter Häberle. Some years ago, Häberle described national constitutions as "partials", in that they require conceptual integration within the EU Constitutional system and none can claim to have the "last word". In recent times the debate over constituent power in the EU has been revitalized.[18] The EU crisis, to the extent that it has brought about a new phase of supranational constraints on national policies, may have played a crucial role in triggering this doctrinal debate. A meaningful contribution to problematizing the magnitude of national constituent power has been made by Habermas, who offers an interesting account of what he defines as "mixed constituent power", composed by citizens that act as both state citizens and EU citizens.[19]

Such examples may appear to divert attention from the focus of this work — the subnational domain, rather than supra- or international challenges, to constituent power. In fact they do not, as they actually demonstrate the fragility of a monistic view of constituent power from the perspective of growing integration between the national and the EU or international level. Global and EU constitutionalism also helps to illustrate the coexistence of different constituent powers, as a reflection of the overlapping nature of constitutional subjects (citizens acting as state or as EU or world citizens). Furthermore, the above-referenced literature helps challenge a positivist account of constituent power and sovereignty and move towards an updated reading of those concepts.

17. Krisch, "Pouvoir constituant and pouvoir irritant in the postnational order": "yet this does not mean that constituent power does not have any purchase at all in this order, only that it will largely operate as a challenge to institutional action, as an irritant".

18. Häberle, *Costituzione e identità culturale*, 62.

19. See Habermas, *The Crisis of the European Union*. See also the special issue of the Journal of Common Market Studies, 2017.

2.2. The subnational dimension: constituent power between the right of resistance and revolutionary processes

If we now consider how constituent power is allocated at the internal level we can likely find further clues as to the unitary nature of constituent power and indications that sovereignty can no longer be taken for granted. To better clarify this point, we propose differentiating the analysis according to the intensity which subnational claims may acquire. Thus, we will separately cover those sub-state claims directed at internally modifying the constitutional settlement of rights and powers between centre and periphery from those aimed at creating a new constitutional order by virtue of secession.

The constitutive nature of decentralized and particularly federal countries has been contested since the very beginning of federalism in the US, Germany and Switzerland and essentially concerns the question of dual, shared or divided sovereignty. In the Federalist Papers, Hamilton affirmed that States would retain their rights of sovereignty for those acts not delegated to the federation.[20] Later on, Calhoun defended the idea that the political organization of the US was a confederation by arguing that sovereignty was not conceivable as divided or shared and it still belonged to the States. During the 19TH century the German literature addressed this problem as well: some authors (Waitz)[21] insisted on the ability of sovereignty to be interpreted as limited or divided, according to the sphere of competence of the entity in

20. *Federalist Papers*, no. 32, Alexander Hamilton: "An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them, would be altogether dependent on the general will. But as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they had before, and which were not, by that act, EXCLUSIVELY delegated to the United States. This exclusive delegation, or rather this alienation, of State sovereignty, would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the same authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally CONTRADICTORY and REPUGNANT" (emph. in the original text).

21. Waitz, *Grundzüge der Politik*. See on the thought of the Georg Waitz recently Di Martino. "Il federalismo tedesco e Georg Waitz".

question, whereas others (Seydel) rejected this theory.[22] In particular, one of the most solid and well-known objections is the one formulated by Jellinek[23] and based upon the distinction between sovereign and non-sovereign States: whilst the former can self-determine their activity, the latter's right to self-determine their activity depends on their sphere of competence. In this sense, the sovereign State is entitled to withdraw competences from the non-sovereign State, whereas the non-sovereign State cannot operate beyond its assigned competences.[24]

Olivier Beaud re-opened this debate not long ago, first in his *Théorie de la Fédération* and subsequently in more recent works. His doctrine is anchored by an emphasis on the peculiar nature of federal constitutions, characterized as they are by conceptualisation as a "compact" law and not, as in unitary States, a supreme one. He then advocates a reworking of the types of State, offering a peculiar vision of the differences between States, Federations and Confederations. According to Beaud, Federations refuse a hierarchical relationship between the central State and its periphery, as Federations are structured on an equal relationship between their component parts.[25] As a consequence, the traditional difference between Federations and Confederations disappears. As for the subjects of the Federation, Beaud argues that a distinction must be drawn between federalism by segregation and federalism by aggregation. Indeed, the prevailing literature effectively rests on the existence of a unitary constituent power in both cases. However, according to professor Beaud, different entities agree to shape a federation based on the plurality of constituent subjects expressing the will to be part of a wider federal entity. The question of who is the constituent power in such a system must be resolved insofar as "in a federative compact, the holders of the constituent powers are the federating states" and "it remains a fact that when a Federation is created, there is not, historically speaking, a single people, the federative people ... but a sum of peoples, those of the federating states, that decide to unite to form a new political unity".[26]

22. For a synthesis, see Garcia Pelayo, *Derecho constitucional comparado*, 220 ff. and more recently Grimm, "La souveraineté", 547-606.

23. Jellinek, *Teoría general del Estado*, 377 ff.

24. *Ibidem*, 372.

25. For a recent analysis of Beaud's theory, see Ferraiuolo, *Costituzione, Federalismo, Secessione*.

26. Beaud, "The founding Constitution. Reflection on the Constitution of a federation and its peculiarity", affirming: "In other words, the federative people is a *compound people*. Thus,

Beaud's is an interesting perspective that fits within the purpose of this paper. His position however leaves open the opposite question: in the case of federalism, can plurality as regards constitutional subjects be conceived by dissociation as well? The question may indeed arise in the course of a federation's evolution, or even in the case of a decentralized country, a circumstance which would be especially relevant for the Spanish case. Stephen Tierney has recently tried to answer this question with a set of arguments that bring us closer to the very essence of the relevance of constituent powers in the context of independence processes. Tierney has persuasively problematized the uncontroversial unity of sovereignty and constituent power in multinational experiences.[27] The author illustrates the possible coexistence between the preservation of the constitutional form and the entitlement of sub-state entities to be part of the constituent power. This last aspect, far from undermining the constitutional contract, helps underpin the legitimacy of the constitution when majority forces undermine the pluralist nature of the constitution. This is a seemingly paradoxical effect, as Tierney himself recognizes.[28] And in this regard a parallel with the right of resistance might be drawn: subnational forces, in Tierney's perspective, "resist" the undemocratic development of the constitution and help re-establish the constitutional order. However, this might be at odds with the traditional vision of constitutionalism, according to which constituent power creates new powers and constitutions rather than limiting (or in the sense of Tierney, "revising") old ones. But taking into account Beaud' s previously-stated position, it may be said that if in the Federation rules are constituted by the sub-state entities that compose it and no hierarchy exists amongst them, then those sub-state entities should be entitled to resist every deviation from the shared system of rules.

More generally, Tierney's position is the closest attempt at pinning down the problem in the context of independence processes. However, he deliberately considers non-secession nationalism in order to demonstrate the existence of a sub-state constituent power dedicated to revising possible violations of sub-states' rights. In so doing he gets at a longstanding issue of constitutionalism:

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even in a Federal Republic, we must talk of a plurality of subjects of the constituent power if we wish to describe the political holders of that power properly", 52.

27. See Tierney, "We the peoples".

28. *Ibidem,* 239 ff.

the difference between the right of resistance and revolutionary processes. It may be interesting to ask whether sub-state non-secession instances, on the one hand, and independence claims, on the other, can symmetrically reflect those concepts. In substance, it could be argued that where sub-state non-secession interests claim a right to resistance inasmuch as they endeavour to preserve the existing constitutional order, secessionist claims are conceptually aimed at going beyond the legal bounds of the State/Federation scheme, determining to create a new constitutional framework. In this second case, when the efforts of sub-national forces fail to prevail upon their counterparts', a new understanding of the sub-state future may take hold, in which case a gradual process from resistance to revolution may then arise. This second scenario involves the formation or consolidation of a new constituent power — here conceived in its strictest sense — whose ultimate aim is no longer to limit the existing constituent power but to determine a new one.

In this case a new question emerges. Whereas what is at stake in non-secession scenarios is the limitation of power —federal or central—, in secessionist quarrels, the ultimate question of the legitimacy of power remains unresolved. In this case people or the constituent power are tasked with resolving the question of what fundament of the constituted power exists. The shift from the former to the latter may amount to a series of gradual acts directly or indirectly contradicting the legal order, the most consequential of these being a unilateral referendum on independence from the State. Here, legitimacy-related claims challenge the relevance of legality by virtue of practices, claims and discourses that might walk a tightrope along the constitutional order or transcend its limits outright. It is clear that in such a situation formalistic approaches will not contribute in the long run to defusing the crisis. Rather, cooperative effort between law and politics is required. Interestingly, Tierney and other authors have also often drawn parallels between legal methodology and subnational claims of potentially great relevance as a means of untangling the constitutional crisis. In substance, sub-state nationalism presents a twofold challenge to constitutional law, for it not only encourages a re-negotiation of constitutional content but also challenges a formalistic reading of the constitution, often proposing "a historically or sociologically contextualized account".[29]

29. Tierney, above, 237.

3. The Spanish case: Article 2 in the constituent process and its interpretation

The purpose of this section is to verify whether the assumptions of the above-referenced literature are useful to better understanding the ongoing standoff between the Catalan and the central government. We seek to answer the question of whether doctrines that problematize the unitary notion of constituent power — such as those advanced by Tierney and Beaud — might be relevant to recognizing that some portion and fragments of constituent power are perhaps detectable at the subnational level, too. In other terms, our task is not only to question whether it is admissible to challenge the unitary conception of constituent power and sovereignty in Spain, but also to argue that denying the process of fragmentation of both concepts is at once counterproductive and anachronistic. This cannot be answered in abstract terms. Rather, we must consider the role of Autonomous Communities (hereinafter ACs) and particularly of Catalonia over the course of the transition and consolidation of the State in Spain. In order to better frame current debates on the alleged existence of a right to decide we must first go back to the constituent moment in which an agreement on the final wording of Article 2 — and the form of the State — was ultimately reached. It is suggested, indeed, that that constituent moment is crucial to current Catalan claims because it crystallized the adoption of a specific concept of sovereignty, rejecting other interpretations thereof.

The 1978 Constitution — like many other constitutional transitions — involves a series of compromises between countervailing forces, the most challenging of which is likely the territorial structure of the State and particularly the drafting of Article 2.[30] It is widely recognized that the agreement reached by the constituent courts on this provision — and on the VIII Title more generally — marked a turning point in the constituent process, representing the mediation between opposing conceptions of the structure and finality of the State. As Solé Tura clearly puts it, this provision allowed "combining in the same definition, the concept of Spanish unitary notion and those of nationality and region, as its essential components".[31] The importance of the

30. So Alzaga Villaamil, "Articulo 2", 77.

31. Solé Tura, "Nazionalità e nazionalismo in Spagna. Autonomie, federalismo e autodeterminazione", 74, recognizing later on that Article 2 "richiama seppur in forma disordinata

compromise is difficult to overstate, but the argument could be made that Article 2 concluded the issue of the allocation of sovereignty on paper alone, striking what was only a temporary balance as to the territorial and identity issue. That balance has however come under continuous assault ever since, hence this paper's concern about the question of whether the right to decide might be challenged, given that the Catalan claims are closely entwined with the structure and interpretation of the territorial compact reached at the origins of the Spanish democracy. Indeed, regional forces —Catalonia in particular— contributed both to the framing of the constitution and to its development.[32]

Article 2 of the Constitution received much attention during the early years of the Spanish democracy and was the object of analysis by legal[33] and political science scholars.[34] Prevailing scholarship reads it as a provision that ultimately places the locus of sovereignty and constituent power in the Spanish people. This is particularly clear in the words of one constituent assembly member, Peces Barba, who stated "we absolutely did not want the constitution to provide quarter to original (and not exclusively organizational) federalism that consisted in advocating the sovereignty of nations based on a skewed application of the 'romantic principle' whereby every nation possesses the right to independent statehood and is ignorant as regards the historical realities of Spain".[35] A close reading of this statement has been used repeatedly to advocate for the evolution of the *Estado Autonómico*. More recently, Solozabal has confirmed this prevailing interpretation of Article 2 by stating that "en

due diverse idee della Spagna, storicamente contrapposte non solo sul piano ideologico, ma anche su quello politico militare: da una parte la concezione della Spagna come nazione unica ed indivisibile e, dall'altra, come un insieme articolato di popoli diversi di nazionalità storicamente formate e di regioni".

32. See González Casanova, "Cataluña en la gestación constituyente del Estado de las Comunidades Autónomas".

33. See Solé Tura, "Nazione e nazionalismo in Spagna", for an in-depth account of the drafting of article 2; Alzaga Villaamil, "Articulo 2"; Bastida, *La nación española y el nacionalismo constitucional*. For a recent account, see Dominguez, *Más allá de la nación*.

34. See, for example, the works of Ferran Requejo.

35. "no queríamos en ningún caso que se pudiese apoyar en la constitución, un federalismo originario y no solo organizativo consistente en defender una soberanía propia a las nacionalidades basada en una torcida aplicación del principio romántico de que cada nación tiene derecho a ser un estado independiente y en un desconocimiento de la realidad histórica de España".

nuestro ordenamiento soberano es el pueblo español en su conjunto, y ninguna fracción" and that "el titular de la soberanía es un sujeto homogéneo, no un sujeto múltiple" (p. 53). As a matter of fact, this is anything but the literal interpretation of Article 2. The need to reaffirm what already clearly stands from the Constitution of course has ancient roots, and dates back to the constituent debates, as we will see shortly. This position has immediate consequences where the *Estatutos de Autonomía* are concerned, as it holds that their legitimacy relies uniquely on the Constitution ("la procedencia última del Estatuto del poder constituyente español"). The TC, as it is known, has endorsed this interpretation, advocating the unitary conception of the constituent power, as seen in the previous section, as well as the fact that the *Estatutos* derive their legitimacy from the Constitution.

However persuasive and solid this conception might be, it is generally held that different assumptions of sovereignty and constituent power permeated the constituent debates. Current debates on the alleged constitutional foundation of the right to decide and unitary conception of constituent power must acknowledge the fact that during the framing of Article 2 "the real battlefield was the concept of sovereignty", as astutely pointed out by Gonzalez Casanova.[36] The question is not only whether they are still defendable; the question seems rather to be, on the one hand, how they fit within Tierney and Beaud's assumptions, and, on the other hand, whether they help to clarify the terms of the debate on the right to decide.

To consider the constituent process of the 1978 Constitution, indeed, is to detect the different conceptions of nations, people, constituent power and sovereignty that are present. Parliamentary reports indicate that several political forces challenged the draft of article 1.2 and article 2 CE. Simply put, many parliamentary groups, in varying degrees of intensity, defended the idea that the future State would be composed of several nations or peoples, each preserving its sphere of sovereignty, i.e. each maintaining its fraction of constituent power. At least three different conceptions of sovereignty can be identified apart from the final version.

First, at one end of the spectrum, this conception was strictly conceived as the right to self-determination. Consider, for example, the amendment

36. González Casanova, "El articulo 2 y el debatido caso de las nacionalidades".

submitted by Basque deputy Letamendia,[37] which proposed a series of provisions (articles 149 bis and ter)[38] to recognize and proceduralie the right to self-determination within the Constitution. Though the amendment was ultimately rejected by the other political forces, the proposal had rested on a multiple conception of sovereignty according to which traditional nations under the new Constitution would have maintained a quota to their sovereignty. In another amendment the same deputy proposed a different wording of current article 1.2 which affirmed "The prerogatives of the powers of the State emanate from the peoples that compose the State, in which the sovereignty is vested".[39]

Yet, the idea that the new Constitution was given structure and substance by different peoples integrating the new State was not espoused by independence proponents alone. It was also not necessarily linked to the need to constitutionalize the right to self-determination. A second version, defended by progressive forces such as the PSUC, favoured a federal entity. In a slightly different vein, Miquel Roca, from the group Minoria Catalana, expressly referred to the plurinational reality of the Spanish nation, whereas Heribert Barrera, representing Esquerra Catalana, affirmed that "The draft proposal ignores the true nature of the Spanish State and insists on the serious mistake of not giving back the essential part of sovereignty to each one of the nations that compose it".[40] Thus, according to that position, the only way to resolve the identity conflict was to conceive of the new State as one formed through "partial and express cession of sovereignty to the nations that compose it".[41] To charge that such initiatives aimed to create a confederation of States rather than a federal or unitary State is perhaps tempting. However, even as some deputies defended that purpose, the prevailing spirit in constituent courts seemed to favour an abandoning of the State's previous centralist structure, whether federal or confederal. Could this be read as a confirmation of the

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37. *Diario de sesiones,* 16 de junio de 1978, no. 91, p. 1693.

38. *Ibidem.*

39. "Los poderes de todos los órganos del Estado emanan de los pueblos que lo componen, en los que reside la soberanía".

40. *Ibidem.* "El anteproyecto ignora la verdadera naturaleza del Estado español y persiste en el grave error de no restituir lo esencial de su soberanía a cada una de las naciones que lo integran".

41. H. Barrera i Costa, *Diario de Sesiones,* 8 May 1978, p. 2071 and 2081 respectively. "Cesiones parciales y expresas de soberanía por parte de cada una de las naciones que la integran".

need to problematize the differences between federation and confederation as assumed by Beaud?

In this context, it is also worth remembering the socialist parliamentary group's various endorsements of the contested idea of Spain as a nation of nations[42] — even if this expression has been contested by many authors of contrasting centralist, federalist and even secessionist perspectives.[43]

Further, the monolithic character of the sovereignty of the Spanish people was also challenged by socialist representatives. Distancing themselves from the existence of original sovereignty within the new State, these voices nevertheless maintained that the nationalities would share exclusive sovereignty by means of their political (i.e. not administrative) powers.[44] Under those terms, which differed from the Basque vision, the ACs would not exercise *a quota* of *their sovereignty* but would be entrusted with *a quota of the State sovereignty,* i.e. they would be co-holders of the State sovereignty. The advantage of this position would be to avoid a strict identification between the State and the central government. In short, this view meant that when the sub-state entities did exercise their authority within a given territory they would have done so in their capacity as co-holder of State sovereignty.[45]

Simply put, one common feature among those political forces might have been the awareness that the unity of Spain stemmed from the Constitution itself, which therefore recognized (not created) the pre-existing nature of the historical regions. According to that view, this right to autonomy was indeed at least in part based on pre-existing tradition and experiences. As Casanova interestingly puts it, article 2 should have been worded the other way round. Rather than casting the Constitution as grounded upon the indissoluble unity

42. Peces Barba: "la existencia de España como nación no excluye la existencia de naciones en el interior de España, naciones-comunidades, pero la existencia de estas naciones-comunidades no debe llevarnos a una aplicación rígida del principio de las nacionalidades tal como se formuló por los liberales en el siglo XIX, de que cada nación debe ser un Estado independiente".

43. See, for instance, F. Requejo, "¿Nación de naciones?", *El País,* 19.03.1996.

44. This is particularly evident in the words of Martin Toval, quoted in Casanova, "El artículo 2", 1677, who affirmed that: "No hay problema de soberanía con la palabra nacionalidades porque esas nacionalidades constituidas en comunidades autónomas son participes de la soberanía de España".

45. González Casanova, "El artículo 2".

of the Spanish Nation, the article would have done better to contend that the Constitution frames and guarantees the unity of Spain.[46]

Be that as it may, constituent courts, rejecting the idea that different subjects were part of the constituent power, drew a rigid distinction between the concept of sovereignty and that of self-government, dismissing the claim that "national sovereignty of the State is distributed among the Autonomous Communities".[47] Even so, among the range of conceptions of sovereignty that emerged during the constituent process, it might be interesting to ask whether a different outcome would have been better aligned with the reality of ACs in Spain. To this end we will elaborate on the nexus between co-sovereignty and democracy. In particular we are interested in the question of whether traces of those alleged original or co-constituent sovereignties remained somehow quiescent or latent and continued to influence and shape the evolution of the Spanish structure of the State.[48] Or, put another way, whether constituted powers nullified or prevented the existence of that latency despite the democratic principle, according to which no democratic State can without denying that principle show indifference towards the aspiration of part of its territory to exercise or recuperate its latent sovereignty. This will be achieved through the selection and analysis of certain "constitutional moments", such as the initial proposals and reform of the *EAC* in 2006. In so doing we will ultimately seek to demonstrate how the issue of the original sovereignties or co-sovereignties during the constituent process re-emerged repeatedly over the development of the *Estado Autonómico.*

4. The evolution of the Estado Autonómico and the sovereignty/decentralization nexus

In this section, we will see how the issue of the original sovereignties during the constituent process re-emerged repeatedly over the evolution of the *Estado Autonómico.* Not an easy task, particularly since the relationship between sov-

46. Casanova, *Cataluña. Federación o independencia,* 42.

47. *Ibidem,* "La soberanía nacional del Estado se distribuye entre las Comunidades Autónomas".

48. As for the Catalonia case, see Viver and Grau, "The Catalan Parliament's contribution to the consolidation and development of self-government and the defence of Catalonia's national identity", 10.

ereignty and decentralization remains a relatively under-researched subject in Spanish legal scholarship. Indeed, though some authors are regarded as crucial to interpreting the role of sovereignty in the Spanish Constitution (Muñoz Machado, Gonzalez Casanova), the debate seems rarely to have focused on this issue and literature on the concept of nation clearly dominates. Nevertheless, it seems impossible to assume an uncontested notion of sovereignty in the Spanish State from reading Article 1.2 and 2, given that both relate to the constituent process and the asymmetry of Spanish decentralization. A systematic approach to that question can be found in the above quoted works of Ruiperez who, on many occasions, provided a broad account of shared sovereignty in federal States and dismissed the concept as inapplicable in both Federal States and Spain.[49] This is the prevailing interpretation and it has been taken up by many authors, Solozabal included.[50] Some attempts, albeit scarce, have been made to illustrate a contrary opinion. This is particularly the case of the (contested) works of Herrero y Rodríguez de Miñón. These argue for the existence of co-sovereignty, a theory based on the First Additional Provision, but were intended by the author to refer to the Catalan case as well. This has been seconded by other Basque authors, Canyo among them, who explicitly recognize that "The intended freedom of the constituent power in the Basque and Catalan case was predetermined by the power of the historical process".[51]

Arguably, the relevance of this issue is best appreciated in the debates on the nature and role of *Estatutos*, the quintessence of the Spanish structure of the State. On the one hand, solid arguments have been presented to dispel any doubt as to the non-constitutional nature of the *Estatutos*. This is clarified in the rigid distinction between *poder constituyente* and *poder estatuyente*.[52] Muñoz Machado clearly framed the question of whether the *Estatutos* could be construed as expressions of a constituent power. The response—"no"—held that they can only be interpreted as legal norms derived from and subordi-

49. See the essays collected in Ruipérez, *Proceso Constituyente, Soberanía y Autodeterminación*.

50. Solozábal, *Nación y constitución*.

51. "La pretendida libertad del poder constituyente en el caso vasco y catalán, estaba predeterminada por la del proceso histórico". This author recognized that "estas interpretaciones que ni son mayoritarias ni están respaldadas por la jurisprudencia constitucional en cambio son constitucionalmente posibles aunque resulten políticamente incomodas. Es un problema en todo caso de interpretación".

52. Solozábal, *Nación y constitución*.

nated to the Constitution.[53] However, Machado himself acknowledges that a greater complexity exists, for those norms complement and limit constituent power. Most interestingly, the author elaborates on the (ir)reversible nature of self-government and considers that, while revoking powers of the ACs is perhaps possible in principle, it remains unfeasible politically.[54] Thus, constituent power is factually constrained by subnational powers. This interpretation seems to have much in common with theories of fundamental rights aimed at showing the irreversible nature of rights' recognition. There exists a growing body of literature,[55] particularly in the German context, contending that once social rights are recognized by the legislature subsequent limiting or abiding of those rights could be the source of serious constitutional concerns, and some authors argue that the German Fundamental Law implicitly provides for a prohibition to repeal (*Rückstrittsverbot*) social rights when they have been recognized by the Parliament. One wonders whether such a *Rücktrittsverbot* is relevant to the discourse on decentralization, a demonstration of the fact that the sovereignty of constituent power, though conceivable from a purely legal point of view, may present both practical and constitutional hurdles.

The foregoing is challenged by a small segment of the Spanish scholarship. Herrero y Rodriguez de Miñon in particular addressed this question most frequently. Drawing on his previous studies on the historical rights and the interpretation of the First Additional Provision in some recent studies, Herrero de Miñon explicitly affirmed the existence of co-sovereignties or shared sovereignty in Spanish democracy. He relies on the studies of constitutional pluralism, such as those conducted by Häberle or Zagrebelsky, to underpin the position according to which the Constitution requires a constant renewal of its content. In particular, if sovereignty can be defined as the *Komptenz-Kompetenz*, it might be said that "co-sovereignty is anything

53. Muñoz, 3666, "Siendo este el régimen constitucional, el poder estatuyente solo puede ser considerado como un poder derivado, limitado y sometido a la Constitución".

54. "Bien es cierto que como el poder soberano es irresistible, siempre podría recuperar esta fragmentación y reintegrarla a la plena unidad e indivisibilidad. Sin embargo, aunque pudiera hacerlo en Buena teoría, resulta difícil que lo haga, ya que la desarticulación del sistema de autonomías, mediante decisión constituyentes revocatorias de lo establecido en los Estatutos supone una convulsión política y jurídica de enorme envergadura".

55. Sarlet, "Proibição de Retrocesso, Dignidade da Pessoa Humana e Direitos Sociais: manifestação de um constitucionalismo dirigente possível".

that the co-decision on its own competence (?)".[56] The author ultimately concludes that the different national subjects of the constituent agreement contribute to the constitution's transformation into a living instrument.[57]

The issue of sovereignty has emerged frequently and the declaration of Barcelona is perhaps one of the most famous instances. However it is in the context of the last wave of reforms of the *Estatutos* that the issue of sovereignty arguably played the most significant role. It is broadly accepted that constitutive elements of self-government were an element common to several *Estatutos.* Andalucía included many references to the history and identity of its community. In this context of reforms, the new *Estatut de Catalunya* clearly stood out. The preamble and the first provisions of the new text notably reinforced the relevance of identity and history, strengthening the so-called "quasi-constitutional" nature of this source of law.

In particular, the emphasis on the issue of identity in the last wave of reforms could be construed as symbolic of the effort to highlight the pre-constitutional origins of autonomy. The *Estatutos* could, in such a context, be regarded as the expression of a fragment of those original sovereignties denied during the "constituent instant" that lead to the final draft of Article 2 and re-emerged over the evolution of the *Estado Autónomico*. One could make the argument that the aspiration for the recognition of that portion of sovereignty once denied and still latent can be appreciated in the preamble and Article 5 of the *Estatut.* Those provisions are aimed at affording the *Estatut* an added measure of legitimacy, linking it to its pre-constitutional epoch. This also reflects the existence of a constitutional life of the ACs that proceeds in parallel to the State constitutional life. The *Estatutos* are the clearest example of this sub-state constitutional life.[58]

Sovereignty discourse played a substantial role in the context of proposals to reform the Statute, well before negotiations to reform it began. Consider for example the seminar *Autonomia i sobirania*, where representatives of

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56. Herrero y Rodríguez de Miñón, "Soberanía y derechos históricos".

57. Herrero, op. cit., 2548, arguing for the necessity that the constitutional agreement has to be constantly renovated by the national forces underpinning it.

58. For a severe critique of the "Nou Estatut" see Caja, "Estatuto de Cataluña y soberanía española", *El Noticiero de las Ideas,* 2006, arguing that it implies a threat to the sovereignty of the Spanish people.

Catalan parties expressed their views on "shared sovereignty" ("sobirania compartida"),[59] a concept used to promote a new Federal State as an alternative to independence. Later, in the context of the reform of the new *Estatut*, political parties engaged again with sovereignty both in the *Parlament* and, subsequently, the *Cortes*. One example is the draft presented by *Esquerra Republicana*, which recognised in article 1 that "la sobirania radica en el poble català i es manifesta a traves de la voluntat que emana de les urnes". Although this provision was not adopted, many deputies and senators argued that other provisions of the final text, particularly the preamble, the references to the nation and article 5, posed threats to Spanish sovereignty and were thus in breach of the Spanish Constitution.[60]

The Constitutional Court took part in this debate, setting forth its understanding of sovereignty under the Spanish Constitution in at least three landmark judgements: first in the STC 103/2008 when it struck down the law of the Basque Parliament calling for a popular consultation in the Basque country (see footnote 11); second in the STC 31/2010 when it declared unconstitutional and devoid of legal effect a number of provisions of the *Estatut*; third in the STC 42/2014, when it declared the resolution on the sovereignty of the Catalan Parliament unconstitutional. In the STC 31/2010 the TC took the view that the provisions of the *Estatut* threatened the unitary notion of the constituent power and its sovereignty. For the purpose of this paper it is useful to look briefly at how the TC considered Article 2.4 of the *Estatut*. The plaintiff claimed that the provision ran afoul of the national sovereignty enshrined in Article 1.2 of the Spanish Constitution. Yet, the Court took the opportunity to affirm that "El pueblo de Cataluña no es ... sujeto jurídico que entre en competencia con el titular de la soberanía nacional cuyo ejercicio ha permitido la instauración de la Constitución de la que trae causa el Estatuto". This statement has been dismissed as superfluous, for Article 2.4 did not in any way challenge national sovereignty. In the poste-

59. This is particularly clear in the words of Narcís Serra i Serra, from the PSC, who favours both shared sovereignty and federalism: "per tant estem en situació de sobirania compartida. L'estat-nació esta desplaçant la seva sobirania i l'està compartint. I cada cop la compartirà més amb els municipis", p. 28.

60. See, for instance, Diario de Sesiones del Senado, 5 de mayo de 2006. Viver affirmed: "Jo sempre he mantingut que el terme nació aplicat a Catalunya podia formar part de l'articulat de l'Estatut sense incórrer en inconstitucionalitat; el problema de la seva incorporació o no a l'articulat és més polític que no pas jurídic". From the same author, see also Viver, "Soberanía, autonomía, interés general...".

rior ruling on the resolution of sovereignty (STC 42/2014), the TC declared it unconstitutional, holding that the Catalan people cannot be recognized as sovereign: indeed, this “no puede suponer la simultanea negación de la soberanía nacional que, conforme a la Constitución, reside únicamente en el conjunto del pueblo español”. Concerning the STC 31/2010, critics of the Court’s judgement and the Attorney of the Catalan Parliament argued that none of the provisions of the *Estatut* represented a defence of Cataluña as a sovereign nation. Perhaps convincing as a strategy to impede the *Estatut*’s declaration as unconstitutional, the claim does not fit with parliamentary discussions of the issue, nor does it appear to be the best conceptual theoretical reconstruction. Parliamentary reports — as previously noted — revealed the aim of the framers to be movement towards a new conception of sovereignty. The objective, not necessarily recognition of a right to self-determination among sub-state entities, was, rather, a questioning of the dogma of the unitary notion of the sovereignty accepted in 1978. In other words, both the Statute and the parliamentary resolution challenged the traditional conception of sovereignty according to which sub-state entities could be deemed sovereign in their sphere of competence; the TC — and the prevailing scholarship — refused to accept that position at their own peril, as demonstrated by the backlash those judgements produced.[61] Yet, denial of this alternative vision of the centre-periphery relationship in contemporary constitutionalism seems counterproductive for the purposes of the alleged unitary nature of the unitary sovereignty. In the case of Spain, it may be asserted that the Court sought somehow to reproduce the intention of the constitution-makers in order to remove any doubt as to the plurinational conception of sovereignty.[62] However, the evolution of the *Estado Autonómico* has already shown that such an interpretation is scarcely equipped to handle plurinational tensions within the regional State.

It might be tempting to read historical and identity-based references in the last wave of reforms as a potential disruptive phenomenon liable to strengthen nationalism and secessionist claims. However, as we saw in the previous section, sovereignty claims are not a unitary phenomenon. Moreover, they reflect either an effort to achieve recognition for a potential separation from

61. See Ferraiuolo, *Costituzione, federalismo, secessione*.

62. See Albertí, “El Estado de las Autonomías después de la STC sobre el Estatuto de Cataluña”: “Con la STC 31/2010 que despliega aquí principalmente su carga preventiva se cierra el paso a esta posible concepción del Estado Autonómico”, 94.

Spain or create a different form of the State, whether federal or confederal. This is to say that the attempt to recognize history as a further criterion of legitimacy of the *Estatutos* cannot be necessarily interpreted as a preliminary stage of separatism. It could also be seen differently, as the product of a more multifaceted elaborate phenomenon. First, this is a clear manifestation of the differentiated reality of the Spanish articulation of vertical powers, seemingly inextricable from the Spanish system. In this sense, one may contend that regional differences and national claims are accommodated rather than suspiciously interpreted. Second, this trend shows the reaction or "resistance" to the way the regional State was developed and interpreted by the Constitutional Court. Third, this trend might also be understandably seen as a manifestation of quiescent and "latent" sovereignties. While not necessarily imbricated with separatist claims, these can be coupled with the recognition of the ACs' role as co-founders and interpreters of the *Estado Autonómico*, seemingly either strengthening nationalist claims or opening up the possibility of the Spanish State's advance towards a federal or confederal system.

5. Original sovereignties and the referendum. The need to reconsider Article 150.2

Having grappled with the tension between single and multiple sovereignties in the origin and evolution of the *Estado Autonómico*, it remains to be seen whether and how this discourse is relevant for the Catalan 2017 referendum. When a widespread coalition appeals for the separation of a given territory from its larger institutional context, referendums, it is generally accepted, are the most appropriate legal instrument to address this conflictive situation. In Spain, with both parts failing, as they did, to reach an agreement on the territorial dispute, the celebration of a negotiated referendum seemed inescapable. Yet, as it is known, a unilateral referendum has taken place and the ways to handle the quarrel between Catalonia and Spain remain unclear. Consequently, the following considerations may appear outdated. However, it is also true that legal reasoning cannot be hijacked or impeded by the political situation. Some years ago, the *Consell Assessor per a la Transició Nacional* proposed five ways to legally hold a referendum in Catalonia.[63] I would like to focus on just one of them, the most reasonable, in my opinion, for both parts. According to Article

63. "La Consulta sobre el futuro político de Catalunya", 48 ff.

149.1.32, referendums fall within the competence of the national government, the only entities allowed to hold "consultas" being the ACs. In spite of this, the possibility that the central government delegate or transfer the "faculty" to hold a referendum in Catalonia as per Article 150.2 of the Spanish Constitution has for years been the subject of political and constitutional feuding.[64] The interpretation of the Article gave rise to many debates among constitutional scholars: in particular, legal scholars have raised questions about the scope of the delegation, the interpretation of the expression "by their very nature", the revocation of the delegated powers, and the interplay between Article 150.2 and Article 149.1.1.[65]

Constitutional scholars have already expressed their views on Article 150.2's potential usefulness towards celebrating a referendum on the right to decide. Some have made the case that Article 150.2 cannot be invoked in order to hold a referendum in Catalonia. Without a list of "non-transferrable" subjects, the case had been made for reviewing whether the delegation of a given subject would represent a violation of constitutional principles. Then, if Article 150.2 is invoked to allow a referendum on the "right to decide", such a delegation of powers would infringe on Articles 2 and 1.2 of the Spanish constitution.[66] By contrast, a different interpretation has been submitted on the following grounds: "no hi veig base ni raons per a una interpretació restrictiva ni de les atribucions de les autoritats que compten amb el suport dels representants dels ciutadans, ni del dret de participació consultiva directa dels ciutadans."[67] In addition, a third position holds that a referendum via Article 150.2 CE might possibly find an additional source of legitimacy in comparative law: in the case of the Scottish referendum, the Parliament of Westminster delegated to Scotland the possibility of holding the 2014 referendum. Despite Spain and the UK's deeply different constitutional systems, as the doctrine itself

64. See on this three different opinions: Viver, "Una reflexión desde Cataluña sobre el 'Derecho a decidir'", Montilla Martos, "La vía del artículo 150.2 para la convocatoria del referéndum" and Arbós, "Els límits naturals i els artificials de l'article 150.2 CE".

65. See Rodrigues de Santiago, Velasco Caballero, "Límites a la transferencia o delegación del artículo 150.2 CE", 97-132 and Bassols Coma, Serrano Alberca, "El artículo 149 de la Constitución en relación con el artículo 150.2".

66. Montilla Martos, "La vía del Artículo 150.2", arguing that "no resulta posible por su propia naturaleza al contradecir su objeto principios constitucionales como los de unidad o soberanía nacional".

67. Arbós, "Els límits naturals i els artificials".

recognises, the argument represents an additional means of problematizing the seemingly static assumption according to which Article 150.2 cannot be used to hold a referendum in Catalonia.[68]

Be that as it may, the Spanish Parliament has voted several times against transferring the competence to call for a referendum on its independence from Spain to the Catalan Government, the last time being in 2012.[69] Yet, most striking in the debate on Article 150.2 is the uncontested nature of the disparity between the ACs and the central power. Whereas the former are entitled to submit requests according to article 150.2, the latter are under no obligation to either consider them or even provide a reasonable (i.e. non-arbitrary) response on the subject. This is because the wording of Article 150.2 sets out that the power to transfer or delegate powers according to Article 150.2 is an act of sovereignty. The wording of Article 150.2 is, for its part, quite concise, stating simply that the State "may transfer" — a sweeping allocation of discretionary power.[70] However, things need not be like this per se. Such an imbalance of powers, between the regional parliament that requests the transfer (or exercise) of a competence and the bare discretionary nature of the decision of the *Cortes,* is at once anachronistic and seemingly at odds with the concrete evolution of the *Estado Autonómico.* In this regard the authoritative doctrine of García de Enterría may be instructive. Many years ago the renowned professor of administrative law wrote on the interpretation of the possibility for the State to revoke delegated or transferred powers. He raised the question of whether "las transferencias o delegaciones que se realicen por medio de Leyes de ese tipo ¿son luego revocables ad nutum por las mismas Cortes Generales que las otorgaron?" Whereas the article did not cover the separate issue of the initial delegation or transfer of powers,

68. Viver, "Una reflexión desde Cataluña sobre el 'Derecho a decidir'".

69. See Proposición no de Ley sobre la transferencia a la Generalitat de Cataluña de las facultades de ejecución de la legislación del Estado para la autorización de la convocatoria de consultas populares por vía de referéndum. 276 deputies voted against the proposal and 42 in favour of it. For the previous proposals see https://citafalsa.com/2016/09/21/las-dieciocho-veces-que-dicen-que-se-ha-solicitado-un-referendum-de-secesion-en-el-congreso/.

70. In this regard, see Montilla, "Article 150", where he draws an interesting parallelism between the powers of the Government in Article 87.2 and those of the *Cortes* in Article 150.2: "Una vez formulada *queda sometida a la voluntad de los órganos estatales:* los órganos postulan y los estatales, las Cortes Generales, deciden si transfieren o delegan determinadas facultades competenciales de titularidad estatal. Las Cortes Generales *no están obligadas a tomar en consideración la propuesta autonómica*" (emph. added), p. 2056.

the conclusion of the author might be relevant for our purposes. Interestingly, he concluded his analysis by stating that "me permito afirmar que una revocación ad nutum de una transferencia o delegación, sin una causa objetiva identificable, sin razonabilidad acreditada, sería un supuesto claro de arbitrariedad".[71] According to that view, the revocation of the transferred powers cannot be the expression of an arbitrary and unchallengeable act but it has to be based on reasoned arguments. Thus, one wonders whether such an interpretation should be deemed relevant also for the case of the first delegation. In other terms, we argue that the refusal of the *Cortes* to delegate a specific function must be reasonably motivated and cannot be based on an arbitrary assumption. This is above all a consequence of the rule of law, which requires State powers to perform their tasks avoiding arbitrary or capricious acts or behaviours.[72] The Congress may certainly reject a request from regional parliaments. However, to constrain this regional prerogative, the rule of law or the "imperio de la ley"[73] declared in the preamble of the Spanish Constitution requires that the *Cortes* substantiate that decision and base it upon legal arguments. Such an interpretation is further confirmed if we regard the principle of self-government as enshrined in Article 2 and of the "principio dispositivo". Otherwise, one might equally ask whether the relevant ACs should be entrusted with the power to challenge the Constitutional Court by virtue of a conflict of competence. Now, for what concerns the debate on Article 150.2 in the context of the potential referendum in Catalonia, the Catalan Parliament adopted several resolutions asking the *Cortes* to empower it with the faculty to hold a referendum. However, those resolutions, too, have been rejected by the national parliament, albeit with

71. García de Enterría, "Las Leyes del artículo 150.2 de la Constitución como instrumento de ampliación del ámbito competencial autonómico", 26-27.

72. On this subject, see Tamanaha, *On The Rule of Law*. The following fragment seems emblematic to that end: "At a minimum, the procedural requirements of the rule of law prohibit the government from acting in an entirely ad hoc arbitrary fashion", p. 95. On non-arbitrariness as a crucial element of the rule of law see also Saunders, "Interpretative rules with legislative effect: an analysis for public participation", p. 350, legislative rules may be set aside only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law… [or] in excess of statutory jurisdiction, authority, or limitations, or short of statutory right".

73. For a discussion on the scope and significance of the "imperio de la ley" under the Spanish Constitution, see Clavero, "Imperio de la ley, regla del derecho y tópica de Constitución", 41-78 and Laporta, *El imperio de la ley*.

stated motivations that are anything but persuasive.[74] This is problematic. The ACs' ability to expand their powers under Article 150.2 cannot entirely be at the mercy of the national institutions. In the light of regional forces' relevance, further legitimized by their historical roots, in the constitutional life of the Spanish State, the limitations of their spheres of liberty ought conceivably to require proper justification and well-founded legal arguments.

6. The problem of regulating a referendum in Catalonia

Having discussed the notions of constituent power and co-sovereignty and considered how those concepts interact with the principle of self-government and the "*principio devolutivo*" in the constitutional experience of Spain, still absent is any look at the unilateral 2017 Catalan referendum as an expression of an emerging constituent power and co-sovereignty of the Catalan people. To that end, we will first briefly outline the theoretical framework concerning this kind of referendum. Second, after having clarified the kind of referendum at hand we will consider its regulation. It is important to highlight the nexus between both aspects, as the nature of the referendum has (or should have) a strong bearing on its regulation.

First and foremost, it is worth remembering that from a constitutional standpoint the Catalan referendum requires us to address the issue of unilateral secession, since, contrary to other independence processes, the centre and the periphery in this case failed to strike a balance between their countervailing interests and reach any agreement over the issue of the plea for Catalonia's independence.[75] This longstanding issue has received much attention in the literature with a wide array of legal material, including — inter alia — legal doctrine, constitutional jurisprudence, (Catalan) parliamentary resolutions,

74. In this perspective, see the report of the Institut d'Estudis Autonòmics, stating the following: "les raons adduïdes per les Corts per refusar les propostes van ser o pràcticament inexistents, per tautològiques, o d'una debilitat tal que la reiteració de la petició podria resultar perfectament justificable", 54. For the debate on the last resolution by the Catalan Parliament see *Diario de Sesiones,* X legislature, no. 180, 8.04.2014. See also Institut d'Estudis Autonòmics, *Tres informes de l'Institut d'Estudis Autonòmics sobre el pacte fiscal, les duplicitats i les consultes populars,* 431-437.

75. See in this sense also Bossacoma and López Bofill, "The secession of Catalonia", 107 ff.

and reports from institutional and non-institutional research centres. At the risk of simplifying a more complex matter in this scenario, two visions of the independence process compete with one another. On the one hand, the Catalan Government, armed with the approval of a broad segment of the legal scholarship, accepts the legal challenges and political backlash of a unilateral referendum, relying upon the existence of the people of Catalonia's right to decide on their constitutional future. As it has been rightly pointed out, the right to decide has two meanings: the right of Catalans to hold a referendum and the right to secede should a majority of voters cast their ballot in favour of independence.[76] Based on the first meaning, the right to decide has legal relevance despite its lack of inclusion in any specific legal provision. Its defenders argue that this interpretation is indeed very much intertwined with the theory of the constitutionalization of new rights.[77] Despite the possibility that the Catalan people will hold a referendum on the region's independence in the absence of a legal framework, scholars supporting the right to decide argue that its normative force can be traced to constitutional principles inscribed in the Spanish Constitution, such as the democratic principle (Article 1 CE), freedom of speech (Article 20) and the right to participate in public affairs (Art. 23).[78] Furthermore, comparative law and numerous international legal documents and jurisprudence plea in favour of a normative — rather than political — account of this right, which ultimately works to strengthen the position.[79] Furthermore, according to the prevailing doctrine, a unilateral secession would fall outside the scope of this right.[80] Lengthy disputes of this position have been articulated by large segments of the Spanish doctrine and, the legal strength of the right to decide has been undercut by the Spanish Constitutional Court's determination that independence referendums represent not a right but rather mere political

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76. Barceló, "El Dret a decidir".

77. *Ibidem*. "Se trata de un derecho no positivizado. No existe ninguna referencia explícita a él en la legislación interna o internacional".

78. Barceló, "El Dret a decidir": "El que s'ha articulat a Catalunya com dret a decidir, doncs, no és més que una formulació de drets que ja existeixen constitucionalment en un estat democràtic", 1.

79. *Ibidem*.

80. *Ibidem:* "No tendría el efecto de una secesión unilateral para el territorio proponente; porque el principio de constitucionalidad y de primacía del derecho exigen en este proceso la presencia del titular de la soberanía de acuerdo con el art. 1.2 CE".

ambition.[81] In particular, one possibly overlooked objection to the right to decide is the countermajoritarian question, which relates to the problem of internal political, social and linguistic minorities in Catalonia that do not want to secede or — at least — demand a more articulated and inclusive process. One could argue that, were the referendum to be regulated without any quorum or qualified majorities, the position of non-seceding forces in Catalonia would be severely affected. Thus, the seceding movement, which represents a minority within Spain, would impose a sort of unequal power relationship on the Catalan territory. Lastly, it could be said that with unilateral secession now in process, the theory of the right to decide is unfit to properly frame the current situation.

This paper has sought to go beyond the above-mentioned positions, exploring the so-called theory of the right to decide and some of its principal counter-arguments. It seems indeed that both positions share a common weakness in that they stake the resolution of the Catalan claim on a purely legal vision, failing to account for the crucial aspect at stake in secession processes, i.e. constituent power and the related issue of sovereignty. Whereas the attempt to emphasize legal aspects over legitimacy is clearer in the case of opponents of the theory of the right to decide, a similar feature also characterizes the arguments of right-to-decide supporters. In defending the constitutionality of the right to decide, the question of whether there is legitimacy in celebrating a referendum and separating from Spain is eclipsed by the attention afforded to the analysis of the constitutional norms underpinning the theory. It might even be argued that pro-right-to-decide positions have deliberately or, say, strategically abandoned this aspect, relying instead on the existence of a constitutional right as a more convincing political strategy. Such is made clear in a recent contribution from Aláez Corral, adding a measure of depth to that perspective. In the words of Corral, "el derecho a la secesión del que aquí se habla no pretende ser un derecho prejurídico que conservan las entidades territoriales federadas como inherente a una soberanía de la que carecen, ni al ejercicio de un poder constituyente originario por parte de estas, sino la expresión democrática de la voluntad popular de seccionarse bajo las ciertas condiciones legales reconocidas por un sistema constitucional federal a una parte de los ciudadanos del Estado para garantizar la máxima estabilidad

81. The TC defines the right to decide as an "aspiración política" in the judgement STC 42/2015, FJ no. 4.

y eficacia del ordenamiento jurídico".[82] This position essentially draws its strength from a discourse based purely on legality. By contrast, it would seem that the issue at stake must be framed first and foremost theoretically, emphasising the relevance of legitimacy in such a context.

In particular, many defenders of the right to decide tend to draw a rigid distinction between the moment in which the right to decide will be exercised and the constituent process that will take place thereafter if a majority of voters cast their ballot for independence.[83] In other words, a constituent process will be triggered once the people of Catalonia are allowed political expression. However, even assuming this position to be acceptable in the context of a negotiated referendum, it has no place when the solution is a unilateral path to secession, as this is a non-legal instrument that would operate outside any legal framework.

From the opposing viewpoint, the right to decide has been stripped of its legal force. In particular, the Spanish Constitutional Court has disputed the legal nature of the right to decide, qualifying it as a political aspiration whose exercise is subject to the will of the people of Spain, i.e. its potential consideration is conditioned on prior constitutional reform.[84] Interesting to note in this context is the relationship between constituent power and what is perhaps one of the most emblematic reflections of the Catalan institutions' will to trigger an independence process, i.e. the declaration of sovereignty approved by the parliament of Catalonia.[85] In the STC 42/2014, the TC — after acceding to a review of the merits of that declaration and despite its non-legal nature — [86] considered the resolution in question unconstitutional because — inter alia — it represented "an act of constituent power" and

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82. Aláez Corral, "Constitucionalizar la secesión para armonizar la legalidad constitucional y el principio democrático en estados territorialmente descentralizados como España", 136.

83. See Institut Estudis Autonòmics, Informe sobre els procediments legals a través dels quals els ciutadans i les ciutadanes de Catalunya poden ser consultats sobre llur futur polític col·lectiu, 2013. The link between the right to decide and the beginning of the constituent process may be dated back to the Resolution 1/X1 expressing the will of the majority of the Catalan Parliament to trigger the independence process. The Resolution was challenged by the Government before the TC and declared unconstitutional (STC 259/2015).

84. See STC 103/2008, FJ 4, quoted above at fn 20.

85. Resolución 5/X del Parlamento de Cataluña, por la que se aprueba la Declaración de soberanía y del derecho a decidir del pueblo de Cataluña.

86. For a critical appraisal, see J. Vintrò, El Tribunal Constitucional y el derecho a decidir de Cataluña: una reflexión sobre la STC de 25 de marzo de 2014 — Joan Vintró, https://eapc-rcdp.

thus contradicted the Spanish Constitution (and, according to the TC, the Statute of Autonomy of Catalonia, as well).[87] In that ruling, the TC also offered an interesting definition of constituent power, qualifying the Spanish people as an "unidad ideal de imputación del poder constituyente y, como tal, fundamento de la Constitución y del Ordenamiento jurídico y origen de cualquier poder político". This definition deserves careful attention. It is perhaps not a stretch to deem monistic or static the vision of the people as constituent power it puts forth. In fact, when a part of that people repeatedly calls into question such "ideal unity" the State must respond accordingly. In short, the Catalan independence claim has been addressed thus far in two ways. First, by resisting its labelling as a constituent process, instead focusing attention on the democratic evolution of the right to self-determination in liberal democracies. Second, in view of the declaration of certain specified acts as unconstitutional (propositions of the Catalan Parliament, the 2014 "consulta"), the constitutionality of acts undermining the unitary essence of the constituent power remains a subject of debate.

That said, and considering the nature of the unilateral referendum, it seems important to highlight the nexus between the nature of the referendum and the regulation of the same. The relevance of that nexus was moreover underscored some years ago by the Venice Commission, which, in the context of the Montenegro referendum, declared the suitability of participation quorums insofar as the referendum at issue addressed a crucial issue, such as the independence of the country.[88] In particular, meditations on how such referendums are regulated now become all the more topical. During this paper's drafting, the Cata-

blog.gencat.cat/2014/04/02/el-tribunal-constitucional-y-el-derecho-a-decidir-de-cataluna-una-reflexion-sobre-la-stc-de-25-de-marzo-de-2014-joan-vintro/.

87. See STC 32/2015, FJ 2: "El significado esencial de la Declaración estriba en que el Parlamento de Cataluña, que 'representa al pueblo de Cataluña' (art. 55.1 EAC), declara soberano al pueblo catalán ('Declaración de soberanía y del derecho a decidir del pueblo de Cataluña') y, consecuentemente, el pueblo catalán, por sí solo, tiene derecho —todo en presente indicativo: 'en términos de efectividad actual e incondicionada' y 'como una realidad actual y efectiva' dice el Consejo de Estado— a 'decidir su futuro político' justamente porque es soberano como 'sujeto político y jurídico'. Esta afirmación de soberanía del pueblo catalán —como un quid existente 'de manera actual y efectiva'— es, ni más ni menos, que un acto de poder constituyente. Planteada en estos términos, el contenido de la declaración viola con total evidencia los arts. 1.2, 2, 9.1 y 168 CE y los arts. 1 y 2.4 EAC".

88. Venice Commission, Opinion on the compatibility of the existing legislation in Montenegro Concerning the organization of referendums with applicable international standards: "it has to be taken into account that the proposed referendum is one dealing with the crucial

lan parliament approved the Law of the referendum of self-determination,[89] which included details about the unilateral referendum on independence from Spain held on October 1st.

To begin with, some clarification of our concept of referendums is required. It goes without saying that they embody an extremely large spectrum of decisions. As such, it is necessary to focus attention on comparable instruments and experiences. Review of current constituent and political science doctrine reveals increasing interest in what have been called sovereignty referendums. The precise definition and scope of this label differ from one author to another.[90] The recent definition offered by Mendez et al can be illustrative:[91] the authors conceive of sovereignty referendums as "direct popular vote[s] on a reallocation of sovereignty between two territories". However, for the purpose of this paper, an even more circumscribed formula seems appropriate, one in which referendums are understood as "constituent power" referendums or independence referendums as expressions of constituent power. This seems adequate for the following four reasons. First, to do so permits to us to exclude certain referendums that fall outside the scope of this work and that are sometimes considered by authors wrestling with sovereignty referendums, such as those related to the definition of borders between countries or those related to the adhesion to the EU/other supranational or international organizations. Second, the concept of constituent power appears better equipped to describe the process that accompanies the referendum and allows for a clearer conceptualization of referendums as a stage in the exercise of a new constituent power. Third, it seems preferable if our aim is to clarify the constitutional approach of this work. Indeed, as the category of sovereignty referendums is also adopted by political science theorists some confusion regarding the exact approach of this study may arise. Fourth, the potential Catalan referendum begs the question of whether a new constituent power is emerging and the conditions under which it is possible to speak about such an emergence.

issue of the independence of the country", http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2005)041-e.

89. Llei de referèndum d'autodeterminació.

90. See Laponce, *Le referendum*.

91. Mendez, and Germann, *Contested sovereignty*.

7. Conclusion

This article has sought to propose a different interpretation of constituent power and sovereignty in the Spanish constitution by first looking at how the unitary vision of constituent power and sovereignty have been challenged by legal scholars in the recent literature and then discussing its relevance for the Spanish constitutional reality. As the analysis illustrates, the issue of co-sovereignty and sub-state entities' claims to constituent power in the new State emerged during the constituent debate. We have argued that despite the initial failure of such sub-state claims, several phases of the Spanish democracy allow for a problematizing of the "allocation" of sovereignty. It is possible to identify the periodically resurfacing presence of latent or quiescent co-sovereignty during the evolution of the *Estado Autonómico*. Studying those phases, we reached the conclusion that the struggle to achieve recognition for those co-sovereignties, though not easily rejected, must be integrated in the political and constitutional discourse rather than disregarded or denied, for they are closely bound up in the principle of democracy. As seen in the second section, the co-sovereignty/democracy nexus appears to have concrete implications, as it lays the foundations for negotiation between the central State and a slice of its territory that yearns to recuperate or trigger acts expressing an alleged co-sovereignty.

In this regard the need to "integrate" the struggle for the recognition of co-sovereignty into the political and constitutional discourse — and this, as an alternative to indifference or adversity — seems crucial. Many years ago Professor Solé Tura emphasized the risks of recognizing the right to self-determination, asserting that it would open the State up to attacks on its stability. In this perspective he posed the question: "Is it possible that a democratic State can sustain a constant threat of being disintegrated and a permanent institutional pressure?" There is no doubt that a legal recognition of a potential separation of one entity from the State may touch off an uncertain evolution in the institutional framework. That might appear particularly risky, especially at the beginning of a constitutional transition. However, the lack of legal democratic pathways to give voice to identity-based and nationalist interests can give rise to serious drawbacks, as the evolution of nationalist claims in recent years in Spain illustrates. Whilst the interest of the State is to avoid pressures and threats by secessionist forces, the lack (or prohibition) of a legal framework for the right to self-determination is not necessarily the best device. Indeed, in ordinary circumstances neglecting to

legalize or constitutionalize the right to self-determination undoubtedly affords States protection against the power of secessionist forces. That, however, may not always be the case. In exceptional circumstances, when different political forces of a sub-state entity express their disaffection with the way in which the central State interprets the articulation of powers between the centre and the periphery, the lack of a legal framework on the right to self-determination might set off undesired effects. In that case, it is likely that the absence of a legal instrument may reinvigorate arguments of secessionist forces. Put another way, from the point of view of the State the dilemma appears thus: the existence of a legal framework governing the future of a sub-state entity opens the State up to continuous forms of contestation, albeit not necessarily aimed at separation from the State; at the same time, the lack of a legal framework and legal democratic instruments to give voice to sub-state claims is, especially under rigid constitutions, also a work-around for sidestepping procedural options in channelling strong dissent emanating from sub-entities, prompting them, as this void does, to seek expression outside the constitutional order.

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