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Referendums and popular consultations in the Spanish constitutional system: reflecting on the possibility of holding a referendum on the independence of Catalonia from Spain*

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ABSTRACT: This article aims to assess the possibility of convening a referendum linked to the initiation of a constitutional amendment to recognise Catalonia's right to secede from Spain. With this purpose in mind, we will analyse the legal institution of the referendum and other forms of popular consultations provided for in the Spanish legal system, with particular emphasis on the institution of the "consultative referendum on issues of special political importance" enshrined in Article 92 of the Spanish Constitution. This will serve to bring knowledge and rationally challenge the theoretical proposals of some authoritative sources in the legal doctrine, who have argued that before formally initiating a constitutional reform process in Spain, it would be convenient to verify whether such a desire for independence actually exists in Catalonia by holding a consultative referendum in this region, which would be in accordance with the Constitution.

KEYWORDS: Referendum – popular consultations – constitutional reform – representative democracy – direct democracy.

* All quotations included in this paper that were not originally written in English were freely translated by the author.

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1. Introduction

Five years after Catalonia's attempt to secede from Spain in October 2017, political relations between the region and the Spanish government are still at a complete stalemate. The literature on this issue remains largely concerned with a major problem: can a political issue of such special importance (as in the case of the secession of a regional unit of a democratic country), be the subject of a popular consultation? If so, what type of popular consultation would be feasible, what would be the procedure for its convocation, and who would have the right to vote (only the concerned Autonomous Community or the Spanish people as a whole)?

Addressing these points requires a legal analysis on the institution of the referendum and the other forms of popular consultations allowed in the Spanish legal system, with a special focus on the so-called 'consultative referendum on questions of special political importance' enshrined in Article 92 of the Spanish Constitution (hereinafter, SC).

In this context, considering that a referendum is, by definition, one of the main instruments known under the notion of "direct democracy", this analysis will assess how democracy is conceived by the jurisprudence of the Spanish Constitutional Court. Finally, the conclusions from this will address the issues above from our viewpoint, challenging other authoritative sources among the legal doctrine.

2. Representative democracy, direct democracy, participatory democracy

On multiple occasions, the Spanish Constitutional Court has reiterated that the main form of political participation within the Spanish constitutional system is representative democracy. Also known as 'indirect democracy', this form of government allows citizens to participate in the national community's public life, through periodical elections of politicians who will represent them in the General Courts (Articles 68 and 69, SC), the regional parliaments [Article 152(1) SC] and the municipalities (Article 140 SC).[1]

Nonetheless, alongside this formula of political representation, the SC also admits – albeit in a residual form – the direct participation of citizens in public affairs as a channel of expression of the general will "*in those cases in which the political decision involves a direct appeal to the people, sole and exclusive holder of sovereignty*".[2] This is what is known as 'direct democracy'; a form of government that, in the SC, finds its expression in the open council system (Article 140 SC), the popular legislative initiative [Article 87(3) SC] and the instrument of referendum. With regards to this latter tool of direct (or 'pure') democracy, the SC foresees various types of referendum: the consultative referendum in Article 92; the referendums of constitutional amendments falling under Articles 167(3) and 168(3); the regional referendums mentioned in Articles 151 and 152; and the popular consultations through the holding of referendums referred to in Article 149(1)(32).

All these forms of direct participation stem from and are strictly linked to Article 23(1) SC, whose literal formulation, among other things, suggests that the SC does not consider representative democracy and direct democracy as opposing

[1] Constitutional Court's Judgment no. 103/2008, 11 September 2008, FJ 2.

[2] Constitutional Court's Judgment n. 119/1995, of 17 July, FJ 3, which refers to Judgment n. 76/1994, 14 March 1994, FJ 3.

entities, but rather understands them as complementary elements for achieving the ultimate end, that is, in any case, the political participation of citizens.[3] However, and despite the fact that the Constitution does recognise Spain as a democratic State [Article 1(1) CE] and proclaims in its Article 23 the fundamental right of citizens to participate in public affairs, it is clear from the Constitution itself, as well as from the debates held in the Constituent Assembly in 1978, that the authors of the *Magna Carta* prioritised a system based on mechanisms of representative democracy over mechanisms of direct democracy (due to the potential 'dangers' that these latter mechanisms could entail). This has been extensively emphasised by the jurisprudence of the Spanish Constitutional Court which, throughout its existence, has adopted a rather restrictive and exceptional conception of this form of citizen participation, highlighting its extraordinary nature within the Spanish legal system. In this context, the Constitutional Court has repeatedly pointed out that "*even admitting that the law could expand the cases of direct participation, such cases would have to be exceptional in a system such as the one established by the Spanish Constitution, in which the mechanisms of representative democracy prevail over those of direct participation*".[4]

In line with these considerations, Bueno Armijo[5] has explained that, among the members of the Constituent Assembly, there was a major debate between the possible "sovereignty of the parliament" and the "sovereignty of the people". This debate reached its climax in the discussions surrounding the figure of the referendum as a source of direct legitimation of the people and, at the same time, an instrument capable of becoming a politically dangerous "weapon" – as the long experience of Franco's dictatorship had shown in the past.[6] Consequently, when drafting the 1978 Constitution, the members of the Constituent Assembly did not only consider the risk that such instrument could be used for populist ends, but also the dangers of simplification (since "*the submission of any issue to popular ratification entails a simplification of the terms in which this issue has to be formulated before the citizens*")[7] and polarisation (given "*the dialectical effect that a referendum may have on society, creating an unnecessary and sometimes risky division of public opinion*")[8] that its use could entail. All the above explains why, in the final redaction of Article 92, it was only included the consultative referendum on "political decisions of special importance" while the other two types of referendum originally proposed in the draft of Article 85[9] disappeared; it would also justify why

[3] To put it into the words of Luigi Ferrajoli: "*In the absence of direct democracy, representative democracy can only rely on an empty and passive consensus and is exposed to all possible dangers and perversions. (…) In the absence of representative democracy, direct democracy is destined to collapse, reproducing within itself the forms of representation and succumbing in the long term to a lack of legal and political guarantees*". See Luigi Ferrajoli, *Derecho y razón. Teoría del garantismo penal*, trans. Andrés Ibáñez P. (Madrid: Trotta, 1995), 64 and following.

[4] Constitutional Court's Judgment no. 119/1995, 17 July 1995, FJ 3, citing Constitutional Court's Judgment no. 76/1994, 14 March 1994, FJ 3.

[5] Antonio Bueno Armijo, "Consultas populares y referéndum consultivo: una propuesta de delimitación conceptual y de distribución competencial", *Revista de Administración Pública,* no. 177, Madrid (2008): 195-228; 200 and following.

[6] It should not be overlooked that, under Franco's dictatorship, referendums were used, effectively, as elements of legitimisation and affirmation of both the dictatorial regime and its Head of State.

[7] Antonio Bueno Armijo, "Consultas populares y referéndum consultivo: una propuesta de delimitación conceptual y de distribución competencial", 205.

[8] Antonio Bueno Armijo, "Consultas populares y referéndum consultivo: una propuesta de delimitación conceptual y de distribución competencial", 205.

[9] This article provided for three different types of referendum. In addition to 'the referendum on political decisions of special importance', it also provided for the referendum prior to the adoption

"the power to authorise the calling of referendums" was explicitly included among the exclusive competences of the State listed in Article 149(1)(32)a) of the SC.

It is true, however, that those mentioned so far are not the only instruments that, within the current system of representative democracy, would help to reduce its deficiencies.[10] To these constitutional provisions should be added, in fact, all those formulas of citizen participation established by the ordinary legislator – either at the State or at the regional level – as part of their competences,[11] which cannot properly be classified as a tool of either representative democracy or direct democracy, but rather as "*part of a tertium genus known as participatory democracy*",[12] which is linked to Article 9(2) of the SC. According to this provision, the public authorities (executive, legislative and judicial) undertake to promote the conditions for real and effective freedom and equality of all individuals by removing the obstacles that prevent or limit the exercise of their right to vote and, thus, facilitate the participation of all citizens in political, economic, cultural, and social life.[13]

It follows from the above that the SC recognises three types of democracy: representative democracy, that is, the ordinary form of democracy (*sine qua non* – it could be said) in which all citizens participate through periodic elections in the designation of representatives in public institutions; direct democracy, whose main (but not only) tool is the referendum, [possibly the highest expression of the right to political participation of citizens laid down in Article 23(1) SC]; and, finally, a third type of democracy, also known as "deliberative" or "participatory" democracy, which plays a complementary role in the democratic system and whose ultimate foundation lies in Article 9(2) of the SC, which incorporates a mandate addressed to the public authorities.

3. Referendum and other forms of popular consultations

Once a distinction has been drawn between the different manifestations of the fundamental right to political participation – direct or indirect – recognised in Article 23(1) of the SC and those forms of simple citizen participation (such as surveys, public hearings or participation forums, among others), which are a reflection of the broader mandate addressed to the public authorities by Article 9(2) of the SC, it is necessary to apply this distinction to the category of referendum and the other popular consultations provided in the Spanish political system.

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of laws approved by the *Cortes Generales* (that is, the Spanish Parliament, which consists of the Congress of Deputies and the Senate); and the referendum for the repeal of existing laws.

[10] These include the separation and distance between representatives and represented; the excessive ritualism (elections are only held every few years, with a consequent lack of mechanisms for political accountability); the monopolising role of political parties; and the increasing difficulties for citizens to identify their own political options.

For an exhaustive analysis of representative democracy's dysfunctions, see Antonio Pérez Luño, "Democracia directa y democracia representativa en el sistema constitucional español", *Anuario de filosofía del derecho*, no. 20 (2003): 63-82.

[11] Among which it could be mentioned the institution of the so-called "consultations without referendum but with a popular vote" foreseen by the Catalan law through the Act 10/2014, of 26 September, on popular consultations without referendum and other forms of citizens participation. «BOE» no. 64, 16 March 2015.

[12] Doctrine reiterated in the Constitutional Court's Judgment no. 119/1995, 17 July, FJ 6; See also: Constitutional Court's Judgment no. 31/2015, FJ 5.

[13] Constitutional Court's Judgment no. 119/1995, 17 July 1995, FJ 6.

On repeated occasions,[14] the Spanish Constitutional Court has reiterated that the referendum is a species included in the wider category of 'popular consultation' whose object refers strictly to the opinion of the electoral body[15] formed and externalised through an electoral procedure – that is, based on a census, managed by an electoral administration and guaranteed by specific jurisdictional guarantees – on a certain public matter which, directly or indirectly, falls within the scope of the fundamental right enshrined in Article 23(1) of the SC.[16]

Having clarified, therefore, that the referendum is a type of popular consultation, it is now a question of determining what requirements a popular consultation should meet in order to qualify as a referendum.

There are several ways to approach this issue. First of all, if we stick to the literality of the norm, it could be argued that only those popular consultations expressly provided for as such in the Constitution can be considered referendums – in other words, only those consultations that the Constitution literally designates as such. The referendums constitutionally recognised in the Spanish legal system would then be reduced to seven: the aforementioned consultative referendum on political decisions of special importance [Article 92(1)]; the referendum for the ratification of the initiative for the achievement of self-government [Article 151(1) CE]; the referendum for the approval of the Statutes of Autonomy approved through following the procedure set forth in Article 151 SC [Article 151(2) SC]; the referendum for the reform of the Statutes of Autonomy [Article 152(2) SC]; the referendums on constitutional reform [Articles 167(3) and 168(3) SC], the referendum referred to in the Fourth Interim Provision of the SC for the eventual incorporation of Navarre into the Basque province.

As the Spanish Constitutional Court has pointed out, it is unquestionable, however, that the provision by the Constituent power of these specific forms of referendum does not exhaust the list of those that would be considered admissible in the Spanish legal system.[17] In this vein, Bueno Armijo has stated the following: "*There can be (and, in fact, there are) popular consultations called by referendum, apart from those expressly mentioned in the Constitution,*[18] *which, however, stick to the modalities of referendum set forth in the Constitution*".[19] It follows that, in order to find an answer to the question raised before, it is not sufficient to simply consider the wording of the constitutional provision

[14] See, among others, Constitutional Court's Judgment no. 31/2015, FJ 2.

[15] "*The electoral body expressive of the will of the people*", according to Constitutional Court's Judgment no. 12/2008, 29 January 2008, FJ 10.

[16] See, among others: Judgment no. 103/2008, 11 September 2008; on the Basque Law of popular consultation, 27 June 2008, and Judgment 31/2010, 28 June 2010, FJ 69, on the Statute of Autonomy of Catalonia of 2006. See also: Judgments no. 119/1995, 17 July 1995 and no. 31/2015, 25 February 2015, FJ 3.

[17] Constitutional Court's Judgment no. 31/2015, FJ 5.

[18] To these seven referendums should be added, for example, the referendums foreseen in the Statutes of Autonomy of the Basque Country and Castilla y León (Article 8 and Third Transitional Provision, respectively); also, the two referendums provided for in the Autonomy Statutes of Valencia and Aragon [Articles 81(5) and 115(7), respectively) for the approval of future reforms that may occur in said Statutes of Autonomy.

[19] However, the Constitutional Court has expressed a different opinion, stating the following in Constitutional Court Judgement no. 103/2008, FJ 3: "*referendums are only possible when they are expressly provided for in State legislation (including regional Statutes of Autonomy) and are in accordance with the Constitution*". This is without prejudice to the holding of different forms of popular consultations, although such consultations will not have the same legal value as referendums.

(which, among other things, does not clearly set out the general characteristics of a referendum that would allow this figure to be identified and distinguished from other kinds of popular consultations); hence, a reference to the jurisprudence of the Spanish Constitutional Court becomes mandatory.

In this regard, the Supreme interpreter of the SC has had the occasion to explain that the key to the distinction between a referendum and other forms of popular consultation lies in the identity of the subject called upon to express his or her opinion, so that "*as long as this is the electoral body, we will be dealing with a kind of referendum consultation.*"[20]

On the basis of this case-law, the majority doctrine has interpreted that in order to identify the legal elements of a referendum, it is crucial to follow an "organic-procedural" criterion.[21]

Therefore, the first defining feature of a referendum would be: an appeal by the public authority to the entire electorate to exercise the fundamental right to participate in public affairs recognised in Article 23(1) SC – whereby "electorate" has to be understood as the subject (*i.e.*, the group of citizens with the right to vote, in a given territorial area) called upon to express the popular will on a given matter of general (rather than "sectorial") interest.[22]

According to the case-law of the Spanish Constitutional Court,[23] a referendum is, then, a general consultation addressed to the entire electorate (whether of the State as a whole or of an Autonomous Community). By contrast, a sectoral consultation does appeal to a legal subject more restricted than the electorate, which is called upon to express its opinion on a particular or collective – but not general – matter, (meaning "*not attributable to the entire electoral body*"),[24] "*by means of any procedures other than*

[20] In Constitutional Court's Judgment no. 31/2015, FJ 5; (a doctrine reiterated in the Constitutional Court's Judgment no. 31/2010, 28 June 2010, FJ 69), it was clarified that: "*The referendum is therefore a species of the genus 'popular consultation', which does not seek the opinion of any group on any matter of public interest, by means of any procedure, but a consultation whose object refers strictly to the opinion of the electoral body (expressive of the will of the people: Constitutional Court's Judgment no. 12/2008, 29 January, FJ 10), shaped and expressed by means of an electoral procedure, that is to say, based on the census, managed by the electoral administration and ensured by specific jurisdictional guarantees, provided that it is always ensured by specific jurisdictional guarantees. 12/2008, of 29 January, FJ 10) shaped and expressed through an electoral procedure, i.e. based on the electoral roll, managed by the electoral administration and ensured with specific jurisdictional guarantees, always in relation to public matters whose management, directly or indirectly, through the exercise of political power by citizens, constitutes the object of the fundamental right enshrined in the Constitution in Article 23(1) (thus, Constitutional Court's Judgment no. 119/1995, of 17 July). In order to classify a consultation as a referendum or, more precisely, to determine whether a popular consultation takes place "by way of referendum" [Article 149(1)(32) CE] and its calling then requires an authorisation reserved to the State, the identity of the subject consulted must be taken into account, so that whenever this is the electoral body, whose own means of manifestation is that of the different electoral procedures, with their corresponding guarantees, we will be dealing with a referéndum*". (FJ 2)

[21] In this sense, see Nicolás Pérez Sola, "La competencia exclusiva de las comunidades autónomas en materia de consultas populares", *Teoría y Realidad Constitucional*, no. 24 (2009): 433-454: 438; Antonio Bueno Armijo, "Consultas populares y referéndum consultivo: una propuesta de delimitación conceptual y de distribución competencial", 209; Javier Tajadura Tejada, "Referéndum en el País Vasco: comentario a la STC 103/2008", *Teoría y Realidad Constitucional*, no. 23 (2009): 363-385; 369.

[22] Constitutional Court's Judgment no. 31/2015, FJ 8.

[23] The Spanish Constitutional Court has also clarified that this concept should not be confused with the subject of sovereignty, that is, the Spanish people [referred to in Article 1(2) CE]. See: Constitutional Court's Judgment no. 31/2015, FJ 5, which mentions the following Constitutional Court's Judgments: no. 12/2008, FJ 10, no. 31/2010, FJ 6 and no. 31/2015, FJ 5.

[24] Constitutional Court's Judgment no. 103/2008, 11 September 2008, FJ 2.

those that qualify a consultation as a referendum."[25] It is, in sum, a different channel of participation *"whose regulation by the regional legislator [...] would be possible.*"[26]

Secondly, the legal regime of the referendum is subject to two constitutional clauses: one, which is generic, linked to the development of fundamental rights;[27] and the other, which is specific, associated with the institution of the referendum. Pursuant to Article 81(1) SC, "*the development of fundamental rights and public liberties is subject to an organic law approved by an absolute majority of the members of Congress in a final vote on the bill as a whole"*. In addition to this, there is the provision of Article 92(3) SC, according to which *"an organic law shall regulate the terms and procedures for the different kinds of referendum provided for in the Constitution.*"

The competence to authorise popular consultations through the holding of referendums is, therefore – as it will be further discussed in the following sections – exclusive of the State[28] and always requires an organic law.[29] Moreover, in accordance with the case-law of the Spanish Constitutional Court, this competence is not limited to the State's authorisation to call a referendum, but rather "*extends to the entire discipline of this institution, that is, to its establishment and its regulation.*" [30]

Finally, in order for a consultation to be considered a referendum, a series of procedural guarantees that ensure its implementation and the accuracy of its result must be met. Such guarantees are those inherent to electoral systems. It could even be argued that without electoral guarantees, that is, without a real electoral process, there is not authentic expression of the popular will, and therefore, no valid referendum.

Referendum is, hence, a form of direct expression of the popular will[31] (organic criterion) that requires specific procedural channels (authorisation and convocation by the competent body) and must be covered by all the guarantees of the electoral process. Both criteria (organic and procedural) must be met, therefore, for a popular consultation to be considered a referendum.

In this regard, it is not superfluous to recall that also the Venice Commission has placed particular emphasis on the need for any referendum to be conducted in full compliance with the Constitution and applicable law.[32]

[25] Constitutional Court's Judgment no. 31/2010, FJ 69; and no. 31/2015, FJ 6.

[26] Constitutional Court's Judgment no. 31/2015, FJ 8.

[27] As a referendum would imply the exercise of the fundamental right to participate recognized by Article 23(1) SC, it is subject in its development to the reserve of organic law provided for in Article 81(1) of the Spanish Constitution.

[28] As reiterated, inter alia, in Article 149(1)(32) SC.

[29] This state competence has been developed by Organic Law 2/1980, of January 18, regulating the different modalities of referendum.

[30] Constitutional Court's Judgment no. 31/2015, FJ 5.

[31] Neither a mass demonstration, nor a massive collection of signatures, nor a consultation with only a part of the electoral body can have such a consideration.

[32] In response to a request from the Parliamentary Assembly, the Council for Democratic Elections and subsequently the Venice Commission adopted the Code of Good Practice in Electoral Matters in 2002 (European Commission for Democracy through law, *Code of Good Practice on Referendums*). This document was approved by the Parliamentary Assembly at its 2003 session (first part) and by the Congress of Local and Regional Authorities of the Council of Europe at its Spring 2003 session. In a solemn declaration dated 13 May 2004, the Committee of Ministers recognised "*the importance of the Code of Good Practice in Electoral Matters, which reflects the principles of Europe's electoral heritage, as a reference document for the Council of Europe in this area, and as a basis for possible further development of the legal framework of democratic elections in European countries*".

4. The "consultative" referendum of Article 92 of the SC

Having clarified the meaning of the concept of referendum, it is worth defining the notions of "consultative referendum" referred to in Article 92 SC, given that recognised constitutionalists – such as Carreras, Rubio Llorente, Vintró and Castellá, among others – have advocated that, before formally opening the necessary constitutional reform process to recognise the right of Catalonia to separate from Spain, it would be convenient to verify that such a desire for independence does actually exist in this territory, and that the way to determine this would be through the application of the constitutional provision of Article 92 SC.[33]

The first aspect to underline that has drawn the attention of the doctrine relates to the systematic location of this modality of referendum in Chapter II of Title III of the SC under the title "Drafting of laws", that is, within the framework of those precepts that refer to the legislative procedure, despite the fact that this type of popular consultation has little to do with legislative procedures.[34] As Gutiérrez Vicén[35] has observed, such a systemic location finds its explanation in that Article 85 of the Preliminary Draft Constitution included, in addition to this modality of consultative referendum, two other modalities of legislative referendums by which the electoral body could pronounce on a bill drafted by the Courts, as well as on the repeal of an existing law.[36] However, after several changes, the text finally approved by the Courts excluded the two modalities of legislative referendum (of ratification and repeal) and granted a merely advisory nature to the remaining referendum on political decisions of special importance, which the Constituent Assembly decided to maintain – perhaps out of inertia – in the Chapter regulating the process of drafting laws, although this type of referendum cannot deal with legislative acts.[37]

Following the literality of Article 92 of the SC, this article prescribed that only "political decisions of special importance" can be subject to this modality of referendum. It is an ambiguous expression however, that – as Lopez González has pointed out – does not help in determining whether or not the objective pursued with this kind of referendums can be expanded also to those decisions adopted under

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[33] It is striking that, at a comparative level, referendums similar to that of Article 92 of the Spanish Constitution are allowed only in Finland [Article 22(a) of the Instrument of Government of 17 July 1919] and in Greece [referring to "national questions of a crucial nature" within the meaning of Articles 44(2) and (3) of the Greek Constitution of 1975]. See Carlos Gutiérrez Vicén, "Sinopsis artículo 92", December 2003. Available at: https://app.congreso.es/consti/constitucion/indice/sinopsis/sinopsis.jsp?art=92&tipo=2, accessed June 5, 2021.

[34] As López González observed, "*it is a referendum modality that operates outside the ordinary process of adoption of state acts.*" See José López González, "El referéndum consultivo sobre decisiones políticas de especial trascedencia: reflexiones desde el principio democrático en relación al referéndum sobre la Constitución europea", *UNED. Revista de Derecho Político*, 233, no. 65 (2006): 233 -256; 236.

[35] Carlos Gutiérrez Vicén, "Sinopsis artículo 92".

[36] The full text of Article 85 of the Draft Constitution is as follows: "*1. Approval of laws voted by the Cortes Generales but not yet passed, political decisions of special importance, and repeal of laws in force, may be submitted to referendum of all citizens. 2. In the first two cases of the preceding paragraph, the referendum shall be called by the King, at the proposal of the Government, on the initiative of any of the Houses, or of three Assemblies of Autonomous Territories. In the third case, the initiative may also come from seven hundred and fifty thousand electors. 3. The term provided for in the previous Article, for the actual sanction, shall be counted, in this case, from the official publication of the result of the referendum. 4. An organic law shall regulate the conditions of the legislative and constitutional referendum, as well as the popular initiative referred to in the present article and the one established in article 80.*"

[37] José López González, "El referéndum consultivo sobre decisiones políticas de especial trascedencia: reflexiones desde el principio democrático en relación al referéndum sobre la Constitución europea", 237.

the form of laws. Nevertheless, this argument, in the opinion of the cited author,[38] must be rejected for two reasons. First, because being parliamentary democracy the general rule of the Spanish legal system, the direct intervention of the people in the legislative power has to be expressly recognised by the Constitution. The other reason, complementary to the previous one, is that if the constituent power had intended that the popular consultation of Article 92 SC could deal with laws, would then have exempted from these, at least, those related to tax or international matters.

Hence, it follows that the consultative referendum of Article 92 SC can only refer to the adoption of a specific decision, which, however, is still falling outside the legislative process, that is, at a previous stage, which will require the adoption of subsequent legislative measures for its implementation.[39]

As for the procedure for holding this type of referendum, pursuant to the second paragraph of Article 92 SC, the consultative referendum on political decisions of special importance shall be called by the King. It should be noted, however, that the intervention of the Crown has a merely formal character as it is a mandatory (and formal) act that, in accordance with the provisions of Articles 56(3) and 64(1) and 64(2) SC, always requires that it be endorsed by other institutions. Such a type of referendum, in fact, is convened at the proposal of the President of the Government, previously approved by the Council of Ministers, and authorised by the Congress of Deputies. In addition to this, Article 6 of the Organic Law 2/1980 (regulating the different modalities of referendum) establishes that such authorisation must be granted by absolute majority of the Congress at the request of the President of the Government and also that the request "*must contain the exact terms in which the consultation shall be formulated*".[40] Thus, following authorisation by the Congress of Deputies,

[38] José López González, "El referéndum consultivo sobre decisiones políticas de especial trascedencia: reflexiones desde el principio democrático en relación al referéndum sobre la Constitución europea", 242 and following.

[39] It is no coincidence that, to date, only two national consultative referendums were held under Article 92 and Organic Law 2/1980 (which legislatively develops this constitutional precept): the one on the permanence of Spain in the Atlantic Alliance, and the one held for the ratification by Spain of the Treaty establishing a Constitution for Europe, signed in Rome on 29 October 2004. In the first case, the request for its convocation was submitted by the Government and debated before the Plenary of the Congress of Deputies, which authorised it on 5 February 1986. In the consultation, the following question had to be answered: "*Do you consider it advisable for Spain to remain in the Atlantic Alliance, under the terms agreed by the Spanish government?*" These terms were as follows: Spain's participation in the Atlantic Alliance will not include its incorporation into the integrated military structure. The prohibition on installing, stockpiling or introducing nuclear weapons on Spanish territory will be maintained. The United States military presence in Spain will be progressively reduced. As is well known, the result of the referendum, held on 12 March 1986, was in favour of the Government's proposal. The results of this referendum were as follows: out of an electoral census of 22,024,494 voters and a total of 17,246,880 voters, 9,054,509 affirmative votes were counted against 6,872,421 negative votes. As for the referendum on the ratification of the Treaty establishing a Constitution for Europe, this was held in Spain on 20 February 2005. The question asked to voters was: "*Do you endorse the Treaty establishing a Constitution for Europe?*" The 'yes' vote won with 77% of the votes. It was ratified by Organic Law 1/2005 of May 20. However, as is well known, the Treaty did not enter into force as it was not ratified by either France or the Netherlands. For a deeper analysis on this topic see: Aguiar De Luque, L. "Referéndum", in *Temas básicos de Derecho Constitucional*, ed. M. Aragón Reyes (Madrid: Ed. Civitas, 2001).

[40] According to Article 3 of Organic Law 2/1980, the Royal Decree of convocation must contain the full text of the decision to be the object of consultation; clearly state the question or questions to be answered by the electoral body summoned; and determine the date on which the vote is to be held, which must take place between thirty and one hundred and twenty days after the publication of the Decree. For its part, the Rules of Procedure of the Congress of Deputies, of 10 February

agreed in the Council of Ministers and endorsed by its President,[41] the referendum convocation by Royal Decree proceeds.

Thecentral problem raised by the referendum on political decisions of special importance under Article 92 SC is to determine the scope and meaning of the term "consultative". In other words, it is a question of clarifying whether the result of such a referendum would be legally binding on public authorities or whether, on the contrary, its outcome would only have a guiding character.[42]

Doctrine is divided on this point. Some authors have argued that although the character of the referendum on matters of special importance is 'consultative' – meaning 'non-sanctioning' – its result would be binding in any case.[43] In this vein, a negative result of the referendum would prevent a decision from being adopted, as the State would not act in contrast with a veto formally expressed by the popular will; on the contrary, should the result be positive, the decision would still not be effective, as it would require subsequent ratification and adoption by the competent body.

In our opinion, however, similar arguments can hardly be shared: granting a binding nature to a *consultative* referendum would mean, in fact, misinterpreting the Constitution to the point of reading into it things that it does not actually say. This article adheres, instead, to Remotti's thesis,[44] according to which:

> "*Faced with the results of a consultative referendum, the General Courts can act with absolute freedom, even against the vote of the electoral body, notwithstanding that they will assume the corresponding political responsibility for such a decision when, in the next general elections, the citizens will determine with their vote whether their representatives acted politically correctly or not.*"

1982, sets forth in Title VII the granting of authorisations and other acts of the Congress with direct legal effectiveness, and within it, Chapter II, comprising Article 161, refers to the consultative referendum. This precept establishes in its section 2 for the prior authorisation that: "*The message or communication that the President of the Government addresses to Congress for this purpose shall be debated in the Plenary of the House. The debate shall be held in accordance with the rules laid down for the debate on the whole. The decision of Congress shall be communicated by the President of the House to the President of the Government, according to paragraph 3.*"

[41] The approval of this regulation must therefore be adapted to the provisions of Law 50/1997, of 27 November, of the Government, whose Article 2(2)e) includes among the functions of its President that of proposing to the King the calling of a consultative referendum.

[42] To dispel this doubt, it is necessary to carry out a systematic analysis by relating the Article in question to the rest of the Magna Carta. Specifically, the referendum contemplated in Article 92 SC has to be analysed in combination with the democratic principle enshrined in Article 1.1 of the Constitution and always placed in relation to all the other constitutional precepts.

[43] From this perspective, Torres de Moral has concluded that "*when the people speak, they do not advise, nor suggest, nor recommend: they decide*". See Antonio Torres de Moral, *Principios de derecho constitucional español*, 4th ed. (Madrid: Universidad Complutense de Madrid, 1998), 413.

López González has argued that the advisory referendum would not necessarily be equivalent to "non-binding", but to "non-sanctioning". In the author's words: "*In a constitution such as Spain's, which is part of the attribution to the people of sovereignty, the result of the national referendum is always binding on the organs of the State, even if it is a consultative referendum. The consultation of the people is optional, but this does not mean that the result is stripped of its binding character. The negative result of the referendum prevents the decision from being adopted, since a State organ cannot act in the face of the formally expressed veto of the popular will. On the contrary, if the result is positive, it does not make the decision itself effective, since it must be 'ratified', adopted, later (i.e., necessarily) by the body competent for this purpose.*" See José López González, "El referéndum consultivo sobre decisiones políticas de especial trascedencia: reflexiones desde el principio democrático en relación al referéndum sobre la Constitución europea", 245.

[44] Remotti, J.C., personal lecture notes on the constitutional organisation of the State, Bellaterra, curso 2016-2017.

5. The powers of the State and the Autonomous Communities in the fields of referendum and popular consultations

Having described the legal nature and the main characteristics of a referendum-type consultation, it is now necessary to analyse how the Constitution defines the distribution of powers in this area between the State and the Autonomous Communities.[45]

In this context, the first data to be considered is that, pursuant to Article 149(1)(1) SC, which is linked to the exercise of the fundamental right to direct participation in public matters expressly enshrined in Article 23(1) SC, it is up to the State to establish "*the regulation of the basic conditions guaranteeing the equality of all Spaniards in the exercise of their rights and in the fulfillment of their constitutional duties*".

Secondly, the State is also responsible for *establishing* "*the bases of the legal regime of public administrations*" [Article 149(1)(18)a) SC]; it is up to the State to determine "*the regulation of the bases of the legal regime*", both of the electoral and local administration.[46]

Thirdly, the State shall, in any case, be responsible for the decision concerning the authorisation of any popular consultation called by way of referendum in accordance with Article 149(1)(32)a) of the Constitution and Article 2(1) of Organic Law 2/1980.[47]

Finally, reference should be made to Article 81 SC, which establishes a reserve of Organic Law in favour of the State in relation to certain matters, including the development of fundamental rights and public freedoms. This entails the regulation of the fundamental right to participate in public affairs enshrined in Article 23 of the SC and, by virtue of the latter: the right to direct participation through holding a referendum; the fundamental right to privacy enshrined in Article 18 of the SC (which includes the regulation of the protection of personal data, among others); the regulation of the general electoral regime (further regulated in Organic Law no. 5/1985, of June 19, on the General Electoral Regime, known under the acronym of LOREG); and "*other laws provided in the Constitution*" [which is a general provision that is further developed in Article 92(3) SC].[48]

Once clarified that the regulation of a referendum is an exclusive competence of the State, it remains to determine which (if any) are the competences of the Autonomous Communities in this field.

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[45] The following is an extract of the appeal for unconstitutionality filed by the State Lawyer against Title II and the Additional, Transitory and Final Provisions of the Law of Catalonia 10/2014, of 26 September, on Non-Referendum Popular Consultations and Citizen Participation, published in the D.O.G.C. no. 6715, of 27 September 2014.

[46] Under this title, the State has regulated the so-called municipal popular consultations that may be held by local administrations on relevant matters of a municipal nature in their respective territories. These consultations are expressly excluded from the scope of Organic Law 2/1980, of 18 January 1980, by its Additional Provision, and their regulation is referred to Local Regime legislation (provided for in Article 71 LBRL), prescribing, in any case, the exclusive competence of the State for their authorisation.

[47] As already pointed out, such competence is not limited to state authorization to convene, but extends to the entire discipline of this institution, *i.e.*, to its creation and regulation, including prior authorization or abstract provision of the type and modalities of referendum – as expressed by the Constitutional Court in its Judgment no. 31/2010.

[48] This provision determines that "*an Organic Law shall regulate the conditions and procedure for the different types of referendum provided in this Constitution*" and which, as already noted, was implemented through the approval of Organic Law 2/1980, of 18 January 1980.

As the Constitutional Court has explained: "*there is no implicit competence of the Autonomous Communities in the Spanish constitutional order in matters of referendum (…). In a system such as Spain, where the general rule is representative democracy, only those referendums expressly provided in the laws of the State, (including the Statutes of Autonomy adopted at the regional level), and called in accordance with the Constitution, can be considered legal.*"[49] In other words, the Autonomous Communities, according to what is laid down in their own Statutes of Autonomy, can call for popular consultations (such as surveys, public hearings, participation forums and any other popular consultation that is not a definable as a referendum) on various grounds; however, these consultations cannot enter into the realm of referendums and shall be subject to certain restrictions.[50] Among these restrictions, as the Constitutional Court has stated, are the implicit prohibitions for an Autonomous Community to call for a popular consultation – albeit not under the *nomen iuris* of 'referendum' – that: *a.) exceeds the scope of their regional competences*[51] or *b.) affects fundamental issues resolved by the constituent power and that are, therefore, precluded to the decision of the constituted powers.*[52]

6. Conclusions

In the light of the above, it is clear that a decision concerning the independence of an Autonomous Community from the rest of the Spanish State would not only fall outside the competences of the Autonomous Communities (for being a question of "special political significance" that would require a referendum called by the State in accordance with Article 92 SC), since it would also be "*capable of affecting fundamental issues resolved by the constituent power*" that, as such, could not be dealt with without the participation of the Spanish people (of the electoral body as a whole); otherwise, the right of citizens to participate in the shaping of political decisions or in matters of collective interest guaranteed by Article 23 of the SC would be undermined.

On the notion of "fundamental issues", in Judgment no. 103/2008, the Constitutional Court, when analysing the grounds of unconstitutionality of the Basque Law establishing a consultation on the Basque people's "right to decide", held that a popular consultation on a similar issue would affect the basis of the constitutional order; for this reason, a matter of such importance could never be addressed by regional or State legislation, as it could only be capable of being the object of the popular referendum for constitutional revision enshrined in Article 168.[53]

Similarly, in Judgment no. 42, 25 March 2014, on the Resolution 5/X issued by the Parliament of Catalonia, approving a "Declaration of Sovereignty and a right of the right to decide of the People of Catalonia", the judges of the Constitutional

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[49] Constitutional Court's Judgment no. 103/1998, FJ 3.

[50] Constitutional Court's Judgment no. 31/2010, 28 June 2010, FJ 69.

[51] It should also be recalled that the Constitutional Court has declared in Judgment no. 103/1998, that "*the convocation (of such consultations) cannot be covered by generic implicit powers linked to the democratic principle, when these come into collision with powers expressly attributed to another entity, as happens in the present case with which the State attributes Article 149(1)(32) SC.*"

[52] See Constitutional Court's Judgment no. 138/2015, FJ 4.

[53] In the following Constitutional Court's Judgment no. 42, 25 March 2014, on the Resolution 5/X issued by the Parliament of Catalonia, approving a "Declaration of Sovereignty and a right of the right to decide of the People of Catalonia", the judges of the Constitutional Court had the occasion of reiterating this doctrine.

Court had the occasion of reiterating that:

> "*Any approach that intends to change the very grounds of the Spanish constitutional order is acceptable in law, as long as it is not prepared or upheld through an activity that infringes democratic principles, fundamental rights or all other constitutional mandates, and its effective achievement follows the procedures foreseen for constitutional reform, given that these procedures are inexcusable.*"[54]

More recently, in Judgment no. 136 of 13 December 2018, the Constitutional Court, had, once again, the occasion of reiterating the following: "*Sovereignty is indivisible, and, consequently, decisions on that sovereignty and on the unity of the nation, can only be adopted by the constituent power, never by the constituted powers. They can never divide what the Constitution has proclaimed as 'indivisible', nor dissolve what the Constitution has declared as 'indissoluble' - without modifying the Constitution before.*"[55]

Therefore, according to the jurisprudence of the Spanish Constitutional Court, the people of an Autonomous Community – a constituted entity which is not entitled to exercise sovereignty, only autonomy – does not have any constituent power, only the capacity to participate in a list of strict and limited competences, as reiterated by the Spanish Constitutional Court.[56]

However, given the practical difficulties and unpredictable effects of carrying out a constitutional reform, authoritative sources of legal doctrine have considered less legally burdensome alternatives to constitutional amendment.[57] Rubio Llorente,[58]

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[54] Constitutional Court's Judgment no. 42, 25 March 2014, FJ 4 c). See also Constitutional Court's Judgments no. 259/2015, FJ 7, and no. 136, 13 December 2018, FJ 6.

[55] It follows that, as long as the Spanish people (as a whole) does not decide a different configuration of the Nation through Article 168 of the Spanish Constitution, the nation will remain indivisible. Nonetheless, and unlike what happens in other constitutions at the European level (for example, the German, Italian or French Constitutions), the Spanish Constitution does not establish any material limits to its reform; by means of the procedure of the aforementioned Article 168, it is possible, in fact, to dispose of the whole *Magna Carta* itself. In this sense, Article 2 of the Spanish Constitution, which proclaims that "*the Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards*", does not establish any material limit to its reform. There is no clause of intangibility, neither expressly nor tacitly, in the Spanish Constitution, as the Spanish Constitutional Court has repeatedly stated. Within the Spanish constitutional system, the democratic principle is, thus, limited only procedurally, never materially. Moreover, the procedure foreseen in Article 168 of the Spanish Constitution (two-thirds majority of the *Cortes Generales* in two successive legislatures, with intermediate participation of the national electoral body in elections of undeniable constituent character, and final compulsory referendum of all the Spanish people), as any procedure, more than a limit is a "guarantee"; a guarantee of veracity, ensuring that the Constituent power will express its will, always in compliance with the procedure foreseen in the Constitution, and that this power will never be supplanted by eluding the constitutional consensus or by replacing the Spanish people at the time of adopting a decision on sovereignty.

[56] Constitutional Court's Judgment no. 136/2018 of 13 December 2018, FJ 3.

[57] See Joan Vintró, "El Tribunal Constitucional y el derecho a decidir de Cataluña: una reflexión sobre la STC de 25 de marzo de 2014", *RCDP blog*, April 2, 2014. Available at: https://eapc-rcdp.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/.

[58] Francisco Rubio Llorente, "Un referéndum para Cataluña", *El País*, October 8, 2012. Available at: https://elpais.com/elpais/2012/10/03/opinion/1349256731_659435.html.

Certainly, this precept and the Organic Law that develops it (Law 2/1980 on the different types of referendum) do not expressly provide for this type of referendum. For this reason, as Rubio Llorente has noted, it would be necessary to reform this organic legislation in the Spanish Parliament, through a legislative initiative that could be driven by the Catalan Parliament under Article 87.2 of the Constitution. This modification should incorporate the new form of referendum and the regulation of some essential issues, such as: the requirement for clarity in the question

for example, has theorised about the application of a consultative referendum different from that envisaged in Article 92 SC, but created it following its main lines: equally consultative, on political decisions of special importance, with authorisation from the Parliament or the Spanish government. The distinguishing feature would be its regional dimension.[59] Such a proposal, to be approved, would have the obvious advantage – as Castellá[60] highlighted – of requiring a broad parliamentary consensus between the majority forces in the State as a whole and in Catalonia.

However, unlike these authors, we do not consider that this solution could save the constitutional reform process. On the contrary, we believe that a prior (consultative) referendum on the collective future of Catalonia linked to the start of a constitutional reform procedure would be possible, convenient, and in accordance with the constitutional framework;[61] however, the separation (secession) of a part of the national community would only be legally feasible through the constitutional reform procedure provided for in Article 168 of the SC.[62]

and its connection to the constitutional reform process, the percentage of voter participation for approval of the proposal, and the consequences of a favourable result. Regarding this last point, the referendum should be considered legally consultative, but the organic law could provide for meetings between the governments concerned in order to evaluate the results of the referendum and to report on their positions before their respective parliaments.

[59] Nonetheless, the doctrine proclaimed in Constitutional Court's Judgments no. 136/2018, 13 December; no. 124/2017, 8 November and no. 90/2017, 19 July – in addition to Constitutional Court's Judgments no. 259/2015, FJ 7, no. 90/2017, FJ 6 b) and no. 114/2017, FJ 5 c) – rules out the fragmentation of sovereignty through its unilateral attribution to the citizens of an autonomous community. Furthermore, it rules out any means of reform that goes beyond the legal mechanisms predefined in the constitutional text itself.

[60] Josep M. Castella, "Democracia, reforma constitucional y referéndum de autodeterminación en Cataluña", in *El Estado autonómico en la perspectiva del 2020*, ed. E. Álvarez Conde and C. Souto (Madrid: IDP, 2013), 184 and following.

[61] For further analysis, see Joan Vintró, "Legality and the referendum on independence in Catalonia", *Institut de Dret Public*, 2017. Available at: http://idpbarcelona.net/docs/blog/legality_referendum.pdf.

[62] As the Spanish Constitutional Court has ruled: "*Respect for the Constitution requires that any amendment of the constituted order – especially those that affect the foundation of the identity of the sole holder of sovereignty – be openly and directly substantiated by the Constitution. There is no place for actions through other channels, either of the Autonomous Communities or of any organ of the State, because the will of the Spanish people – who is the exclusive owner of national sovereignty – is always above all, the foundation of the Constitution and the origin of any political power.*" See Constitutional Court's Judgment no. 103/2008, 11 September 2008, FJ 4.