

THE CATALAN AFFAIRE IN A CONSTITUTIONAL PERSPECTIVE.
FROM REASONABLE ARGUMENTS TO IDENTITY-BASED
CLAIMS: SQUANDERING LEGITIMACY RESOURCES

*Giuliano Vosa**

Abstract

The Catalan issue has come again to perturb the Spanish institutional and sociopolitical environment. It seems to follow constant historical patterns referring to the manifold matrix of the Catalan movement and leading to a radicalisation of opposite nationalist claims. The most serious crisis of the last decades has brought the King and the Constitutional Court into the scene. However, increasing institutional complexity has been of little help in smoothing out plausible solutions to the problems arisen; to the contrary, it has brought about a dissipation of institutional resources, as those organs have been incapable of preventing the radicalisation of the conflict.

The article looks at the recent controversies in a threefold perspective – the political debate, the King’s sovereign stance, and the position of the Constitutional Court – in light of the multifaceted composition of the Catalan movement. It argues that the reiterated confrontation of identity-based claims has suffocated the negotiations on the merits by replacing rational arguments with emotional ones based on *non-dialogable* identity claims; this has squandered the legitimacy resources of the Spanish constitutional system, which is now in urgent need of a new begin.

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* Investigador ‘García Pelayo’, Centro de Estudios Políticos y Constitucionales, Madrid.

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1. Introduction. The Catalan *affaire*: patterns of continuity¹

Within the vast landscape of European resurgent nationalisms, the Catalan *affaire* displays peculiarities of a 'Spanish thing' that is nevertheless worth to look at in a broader perspective². Both the historical grounds and the narrative that undergirds the pro-independence positions, as well as the responses coming from the other side, reveal certain clues as a *fil rouge* from past to present, which locate the Catalan *affaire* within its own evolutionary framework and paint the picture of an ever-returning plot³. Along this trajectory, the consumption of legitimacy resources for the Spanish political-constitutional system is a regular, inexorable consequence, which today urges to a new start the political bargaining⁴.

¹ The author wishes to acknowledge the valuable comments and suggestions this work received from the participants in the European Junior Faculty Forum for Public Law and Jurisprudence, 10-11 June 2019, at London School of Economics, particularly from Professors Iyiola Solanke and Thomas Poole, who took the trouble to comment on an earlier version of this article. All errors are his own.

² The peculiarity of the Spanish history, with special regard to the XIX century, has always been a *topos* for Spanish scholars; see, nonetheless, M. Santirso Rodriguez, *España en la Europa liberal (1830-1870)* (II ed., 2012) at 39f., giving a well-detailed comparative account of the liberal political movements around Europe, as well as of the changes in the national social structures and in the constitutional arrangements concerned.

³ See M. Iacometti, *La "questione catalana": un passato che sempre ritorna?* 4 Dir. pubb. comp. eur. 909-937 (2018) part. 910-911.

⁴ The exhaustion of the 'institutional frame of government' (J. Pinheiro, *What is Sub-National Constitutional Law?*, 7 Sant'Anna Legal Studies Working Paper, 1-11 (2010) 7) terminates the possibilities for a relationship between the State and the Autonomies. Spain is traditionally not listed as a federal country, but as an '*Estado de las Autonomías*' (see P. Biglino Campos, *Cataluña, Federalismo y Pluralismo político*, 37 Teoría y Realidad Constitucional 449-459 (2016) 451-452,

For the sake of clarity, it seems opportune to enter *in medias res* and to anticipate what these clues highlight.

One: political-economic matters lie at the core of the identity claim. Such a claim is purposely used to create a nationalist narrative capable of fostering a new cleavage, *alternative* to political and economic ones. In other words: it is moulded to push Catalans to cluster as a single people and combat the existing unitary order⁵. This claim conceals and is supported by a multifaceted array of interests, chief among which are those of a key part of a dynamic and enlightened Catalan *élite*⁶; yet, it overcomes class cleavages, for it does not cease to enjoy the favour of the masses.

Two: the political-economic order that the Catalan nationalist claim challenges invariably reacts by construing an opposed, specular nationalist claim based on a sense of *Spanishness*; which, on its own side, is hardly a simple identity claim, but rather conceals the interests of some groups, including Catalan ones. Both claims are raised in defence of mundane interest – nationalism being the last resource when political

and M. Iacometti, *La dottrina spagnola in tema di forma di Stato*, 2 Dir. pubb. comp. eur. 579-596 (2008). However, T. Ginsburg and E. A. Posner, *Sub-Constitutionalism*, in Chicago Law & Economics Working Paper 507/2010, wonder whether Spain (as well as Italy) may be incorporated (at 2, fn. 1; p. 27-28; 35). In Spain, the debate on the possibility to turn federalist has been reignited by the documentary ‘*Federal*’ by Alberto Solé, presented at the Atlanta Film Festival 2018: see J. Zurro, *¿Es el federalismo la única solución para el conflicto entre España y Cataluña?*, *El Español*, 1 July 2018. Yet, it is underlined that ‘the spirit’ that has animated political negotiations may not favour such an evolution: J.C- de Ramón, *Federalismo o catalanismo*, *El País*, 9 April 2019: ‘*Desde esta actitud hipocondriaca y recelosa no puede construirse la identidad dual, resuelta y robusta, necesaria para producir una lealtad federal, del tipo que acepta sin problemas que una parte del poder se ejerce por uno mismo y otra en común*’.

⁵ See A. Jutglar, *Els burgesos catalans* (1966); in Spanish, ed. by J. Doménech and L. Crispi, *Historia crítica de la burguesía catalana* (1984) at 41. J. Solé y Tura, *Catalanismo y revolución burguesa* (1970) at 35f., pursuant to a detailed analysis of the origins and developments of the *Catalanisme*, highlights that economic protectionism is one of the three lines that nurtured the Catalan claim – the others being federalism in politics, traditionalism stemming from the *Carlismo* and cultural renaissance; he quotes J. Pla i Casadevall, *Francesc Cambó: Materials per una història d’aquests últims anys I* (1928), 15.

⁶ Even those of a driving upper class that takes pride of being the powerhouse of Spain and pretends to accumulate credits over Madrid and the rest of the country: see G. Tortella (ed.) *Cataluña en España. Historia y mito* (2017), at 183f.

dialogue is deemed impossible or inconvenient for either party – and *then* radicalise as nationalist, encroaching on a constantly sensitive issue of the Spanish constitutional history.

Three: the Catalan cultural narrative has grown up independently of politics and has only occasionally unleashed its political potential. Thus, to support the inclusion of the identity roots of *Cataluña* within a Spanish State is not inconsistent with the Catalan claim; rather the opposite. Even in recent history, a self-proclaimed Republic of *Cataluña* stayed within, the frame of a Federal Republican Spain; independence was deliberated in reaction to monarchic and fascist imminent threats.

As a consequence of that, one may take account of the similarities in the Spain's governmental response from late 1800's to 2000's. Differences are obvious; Spain is committed to the constitutional framework of a parliamentary monarchy bound by fundamental rights since 1978 only. However, the way of countering the Catalan independence claim seems to unfold along lines of continuity from old to contemporary times.

The continuity patterns of the story look more or less as follows. As a result of stark political dissent, a nationalist Catalan claim turns political and is raised to threaten the political counterpart; the reaction is, invariably, the raise of another, specular nationalist claim, aiming to deny any sort of political relevance to the Catalan one and producing a counter-threat. Then, if no political solution is timely found, what was initially a simple political struggle on specific points turns to an ideological, identity-based conflict between two *non-dialogable* claims, to which reasonable solutions are unfeasible; and this is precisely what consumes the legitimacy resources of the constitutional system⁷.

In fact, such mutation of the political struggle has a specific implication: it pre-empts all the debates on the merits of the issue concerned, as priority is granted to the opposite nationalist

⁷ 'Incompatible' in the sense that they are unlikely to communicate within the pathways of a discursive reason, for they do not share a common rationality nor do they ensure mutual rational argumentation; therefore, they fall short of the law's 'procedural' moral substrate. See J. Habermas, *Moral Consciousness and Communicative Action* (1990) 43-115; a critical survey in M. Deflem, *Law in Habermas Theory of Communicative Action*, 20-4 Philosophy and Social Criticism 1-20 (1994).

narratives called on to support or discredit each identity-based claim respectively⁸.

In this vein, the present work suggests to look at today's Catalan *affaire* as a process that develops on a threefold stage.

First, political negotiations on specific issues are dragged to a dead end, and no solution appears practicable on either side. Then a Catalan independence claim acquires a political substance and is threatened, if not openly raised, against the Spanish Government, who condemns it and ignores its political substance.

Second, a specular identity-based claim, phrased in the language of national sovereignty, is raised in opposition to the Catalan one; this claim, supported by the parliamentary majority and by the Government, eventually comes to underpin a King's ultimate stance in defence of national unity.

Third, the judiciary is continuously called on by the Government and is forced into an increasingly awkward position. Its task is, first, to draw the constitutional boundaries of the identity-based debate; then, it turns into outlawing the *rebels* and paving the ground to their penal prosecution in order to ensure the survival of the State as a whole.

The work aims to proceed along this tripartite path. In the next section, a short, necessarily incomplete historical overview of the Catalan claim is sketched out in order to follow the clues anticipated above and to account for the continuity patterns just indicated. In the successive three sections, the most recent events are recalled in a logic-chronological order that replicates the three stages mentioned. First, the failure of political negotiations entails the rise of a nationalist Catalan claim ignored and discredited by a specular claim raised by the Government. Second, the King fully endorses the Government's claim and, in spite of his reportedly *inclusive* position as Head of State of a parliamentary monarchy, declares the Catalan claim illegal and in betrayal of the Spanish State. Third, the *Tribunal Constitucional* (TC), while vainly attempting to reanimate the political game, is prompted to gradually *shrink* the constitutional spaces for debate, which it does

⁸ Such a drift in the use of public reason would signpost from a State-framed perspective the decline of Europe as the place in which 'the alien' is dealt with in her *alienship*: see the well-known J.H.H. Weiler, *In Defence of the Status Quo: Europe's Constitutional Sonderweg*, in J.H.H. Weiler and M. Wind, *European Constitutionalism beyond the State* (2003), 7-23, 19.

by re-defining the concepts of 'right to decide' and 'national sovereignty' to the detriment of the Catalan position.

Conclusively, the work underlines the consumption of political and constitutional legitimacy resources that the Catalan *affaire* implicates, and exposes the wounds inflicted to the Spanish society.⁹ What was, is and should be a thorough debate on the merits – even constitutional merits, touching upon the very form of the Spanish State – and, as such, would require the highest possible grade of *inclusiveness* and *openness*, turns to an identity-based struggle, where rational arguments are ultimately to yield to emotional statements among which little dialogue is possible¹⁰.

2. Multiple roots: federal republicanism and anti-colonialism *vis-à-vis* the rise of a Barcelona-based modern bourgeoisie

During the 1860's the Kingdom of Spain faced a severe economic crisis¹¹; which was soon to be followed by a political one¹². As a result, Queen Isabel II Bourbon got ousted by a

⁹ See P. Kingsley, R. Minder, *A la par del independentismo catalán, en España revive el nacionalismo*, The New York Times (Spanish ed.) 5 October 2017; on the 'Spanish wound' that the Catalan *affaire* represents, see I. Camacho, *Cataluña, la herida de España. Mitos y claves de la Revolución independentista* (2017).

¹⁰ On the fallacy entailed by the so-called 'Appeal to Emotion' argument in logics, see A. Brinton, *Pathos and the "Appeal to Emotion": An Aristotelian Analysis*, 5-3 History of Philosophy Quarterly 207-219 (1988).

¹¹ The breakdown of cotton imports, due to the civil war blown up in North America, caused the collapse of the textile sector that was listed among the most crucial industries of Cataluña (A. Jutglar, cit., 153f). From 1862 onwards, the crisis became general and invested the financial branch. The mounting fear in the most dynamic layers of the Spanish society and the decreasing trustworthiness of the credit system coupled with the 1867-1868 terrible performance of the agricultural sector in the whole country, which directly affected the peasants' life conditions and the rural economy. See J.F. Fuentes, *El fin del Antiguo Régimen (1808-1868), Política y sociedad* (2007) at 227f.

¹² Queen Isabel II had to confront repeated insurrections and constantly renovated the composition of the Cabinet; eventually, she replaced General Leopoldo O'Donnell with General Ramón Narvaez, who adopted a policy of severe repression of political dissent – against democrats and progressists, as well as against genuine liberals like O'Donnell himself. As repressions turned harsher with Narvaez' successor Luis González Bravo, the other political factions – liberals, democrats and progressists – convened to a pact in Ostende (Belgium: 16 August 1866) under the direction of the Progressists' leader

threefold coalition of liberals, progressists and democrats that inaugurated what was called the *Sexenio Democrático* or *Revolucionario*¹³. At the same time, the colonies *Puerto Rico* and *Cuba* raised in revolt. *Cuba*, particularly, proclaimed both independence and the end of the slave-driven regime, which still had resilient ties with the motherland *Spain* – not least with the provinces of North-East, *Valencia* and *Cataluña*. As a result, a 10-year long *Cuban War of Independence* was waged on the whole island¹⁴.

Consequently, an intricate set of institutional and social issues came at debate at the dawn of the *Sexenio*. The abolition of slave-labour and the colonial question intertwined with the constitutional debate on the form of the State¹⁵.

After *Cortes Constituyentes* (Constituent Assembly) were elected (15 January 1869) Liberals and Progressists formed a *Provisional Government* and opted for a parliamentary monarchy under King *Amadeus I Savoy*¹⁶. Such a compromise excluded two groups: Democrats – who changed their name into *Federal Democrats* and committed to a ‘Federal Republic of Iberian Peoples’¹⁷ – and reactionary monarchists, who had already

General *Juan Prim*. *Prim* landed in *Cádiz* on 18 September 1868 and was joined by Admiral *Juan Bautista Topete* in the revolt known as *The Glorious* (*La Gloriosa*). See *P. Farías García, Breve historia constitucional de España (1808-1978)* (1981) at 44f.; *J. Vilches, Progreso y libertad. El Partido Progresista en la Revolución liberal española* (2001) at 21f. *J. Claret, M. Santirso, La construcción del catalanismo. Historia de un afán político* (2014) at 66f.

¹³ The decisive battle took place in *Alcolea*, near *Córdoba*, on 28 September 1868; on 29 September *Madrid* was taken and the *Queen* left the country. See *F. Marhuenda and T. Zamora, Historia político-constitucional de España* (2015) 317f.

¹⁴ The *Cuban 10-year War* started by the so called *Grito de Yara* held by *Carlos Manuel de Céspedes* – proclaiming on 9-10 October 1868 the *Manifiesto de la Junta Revolucionaria de la Isla de Cuba*. See *D. B. Wood, The Long Revolution: Class Relations and Political Conflict in Cuba, 1868-1968*, 34-1 *Science & Society* 1-41 (1970); in general, *J. Fontana, R. Villares* (eds) *La época del liberalismo. Vol. 6 - Historia de España*, (2007) 343f.; *J. Piqueras Arenas, cit.*, 259f.

¹⁵ *F. Martí Gilabert, La Primera República Española 1873-1874* (2007), 79f.

¹⁶ *F. A. Martínez Gallego, Democracia y República en la España Isabelina. El caso de Ayguals de Izco*, in *M. Chust* (ed.) *Federalismo y cuestión federal en España* (2004), 45-90, speaks of the republican movements arising in the provinces of the *Peninsula*. Cfr. *J. Piqueras Arenas, La Revolución democrática (1868-1874). Cuestión social, colonialismo y grupos de presión* (1992), 49f.

¹⁷ The Democrats changed their name into *Federal Democrats* and committed to a “Federal Republic of Iberian Peoples” as their prime political objective. See *F.*

sustained Carlos María Isidro Bourbon as a pretender to the throne against Isabel in the first two *Guerras Carlistas* (1833-1840; 1846-1849); they relied on the exploitation of the colonies and favoured an absolute monarchy supported by corporative representation in Parliament¹⁸.

The 1869 Constitution was thus opposed by both sides. On one hand, insurrections in *Navarra, País Vasco* and *Cataluña* were driven by reactionary forces - including a large part of Catalan aristocracy - aiming to restore a traditional Catholic *anti-liberal* Kingdom¹⁹. On the other hand, federal-republican oppositions gained increasing support. Eventually, in 1873 King Amadeus I abdicated and new constituent elections gave majority to a Republican-Federal Democrat coalition²⁰. However, fragmentation of political groups, personal rivalries among leaders, tenacious resistance from regions such as Andalucía, Murcia and Valencia and lack of agreement on the social measures to be implemented made the *Primera República* fragile and unstable. The *golpe* promoted on 3 January 1874 by General Manuel Pavía, a military commander in Madrid, paved the way to an autocratic regime premiered by General Francisco Serrano²¹; monarchy was soon

Bonamusa, *Republicanisme i federalisme. Catalunya, 1830-193*, in M. Chust (ed.) cit., 91-113, at 96-97.

¹⁸ See M.V. López-Cordón, *La Revolución de 1868 y la I República* (1976), 74f. J. Solé Tura, cit., 60f., traces back to the work of Jaime Luciano Balmes y Urpiá the first detailed account of the conflict between '*Cataluña rural*' and '*Cataluña industrial y urbana*' that he aimed to solve by '*una síntesis the clarividencia burguesa y de paternalismo social*' mixing up the dynamism of the urban bourgeoisie and the '*rural common sense*'. The works that Solé Tura referred to are articles published in *La Sociedad* (1843) and available in J.L. Balmes y Urpiá, *Cataluña*, in *Obras completas de Jaime Balmes* (1949), 923-953.

¹⁹ The revolt was primarily based in Navarra, Valencia, País Vasco and Cataluña, and took a few years before being tamed; it is known under the name of *Tercera Guerra Carlista*; *Carlismo* grew up in the 1830's as a strong political movement in the Spanish provinces, aiming to restore a Middle-Age like monarchy under the motto '*Dios, Patria Rey*'. See G. Tortella, cit., 127f.; F. Martí Gilabert, cit., 70f.; see also the dossier '*El rompecabezas carlista*' 77 *La Aventura de la Historia* 2005 (contributions by J. Canal, A.M. Moral Roncal, J.R. de Urquijo y Goitía, P.V. Rújula López) 45-66.

²⁰ F. Marhuend, T. Zamora, cit., 387f.; P. Farías García, cit., 57f.; F. Martí Gilabert, cit., 51. On the evolution of the Democrats, see also J. de Felipe Redondo (ed.) *Pensamiento utópico, republicanism y socialismo en España en el Sexenio Democrático: la obra de Elías Zerolo* (2018), 45f.

²¹ F. Marhuenda, T. Zamora, cit., 389f.; F. Martí Gilabert, cit., 112.

restored under Alfonso XII Bourbon (29 December 1874) and the consolidation of a conservative social block put an end to any republican-federal democrat ambition²².

In this turbulent political landscape, Catalan movements mainly arose from two grand channels.

First, the link between federal discourses and anti-colonialism: in Cuba and *Puerto Rico*, new-born political movements hugely benefitted from the impulse of many Catalans who lived or moved there due to the wars and the multiple crises, and wished to take part in the campaign against the same Spanish reactionary aristocracy that had forced them out of their native land²³. Such movements took inspiration from the cultural themes of *Cataluña's* origins and historical legacy as opposite to the absolutist, strongly centralistic claims of their rivals²⁴; they came to share the ideal of a Catalan Republic that could have enjoyed a certain degree of independence from a suffocating centralist State. Federalism and to some extent Republicanism merged in the

²² For an account of the consolidation of some bourgeoisie between Madrid and Barcelona at the end of the XIX and in the beginning of the XX century in support of the restauration of the monarchy, see A. Jutglar, cit., 273f., 282-285. J. Solé Tura, cit., 78f., refers to the Bishop Torras y Bages the most structured attempt to oppose the federal-liberal thought summarised in V. Almirall, *Lo Catalanisme. Motius que 'l' l'legítiman, fonaments científics i solucions pràctiques* (1886). The ideal counterpart to the urban-driven liberalism relying on political federalism from a traditional, rural-based and Catholic viewpoint was J. Torras y Bages, *La tradició catalana: estudi del valor ètic i racional del regionalisme català* (1892).

²³ See C. Llorens, *Els cent anys d'independentisme català en 10 punts*, in www.sapiens.cat, 15 July 2019 [17 July 2019].

²⁴ Such origins remounted back to the Early Middle Age *Catalan Counties* encompassing territories that today belong to South-West France and North-East Spain; these themes included the mythical "*Pau i Treva de Déu*", a reported *zone franque* created by the local peasants with the consent of Bishop Berenguer d'Elna to protect the area from continuous incursions by several mercenaries and other armed groups, and to establish a domestic jurisdiction (the Catalan Court: Roussillon (next to Avignon, France, 1207) which a few decades later gave rise to the reunification of Barcelona's County with the Kingdom of Aragon. It was under such a political compound that institutions such as the *Generalitat* developed as key political bodies of the region and adopted the yellow and red striped flag as a symbol of Aragon's crown. See G. Tortella, cit., 11f. and more bibliography.

rebellion against Spanish colonial *élites*, and became powerful vectors of a Catalan thought²⁵.

Second: in the last decades of the XIX century, the accomplishment of a *Révolution bourgeoise* in Spain combined with technological developments to decisively impulse the industrialization of *Cataluña*²⁶. The rapid economic growth of the region furthered the rise of a modern bourgeoisie, especially based in Barcelona²⁷, who abandoned the traditional, old-colonialist *Carlismo*'s moorings for a more dynamic worldview. Such rampant self-made men perceived Madrid's monarchy as somehow archaic, stagnant, hindering their social and economic ascension in the Catalan society²⁸.

²⁵ See J. E. Ruiz-Domenèc, *Informe sobre Cataluña. Una historia de rebeldía (777-2017)* (2018), 195f. For a more detailed analysis of the federal theories at debate during those years, see J. Cagiao y Conde, *Tres maneras de entender el federalismo: Pi i Margall, Salmerón y Almirall. La teoría de la federación en la España del siglo XIX* (2014) at 65f., on the Pi i Margall's theory as a philosophical effort to reconcile the Nation and the State, and 170f. on the purely juridical attempt led by Almirall to draw a *Union of States*. From a constitutional viewpoint, republicanism and federalism were not necessarily tied (*ibid.*, 231) although politically they often aligned with each other.

²⁶ J. Piqueras Arenas, *cit.*, 16f.; an account of the scientific progress along the whole XIX century is in J.M. de Luxán Meléndez, *Una política para la ciencia en el reinado de Isabel II* (2016) at 89f.

²⁷ The ancient division between *pequeña burguesía* and *alta burguesía*, and the respective evolution of the relationships with the Madrid's regime, is in A. Jutglar, *cit.*, 346f. See the overall account in J. Solé Tura, *cit.*, 66f.; J. Claret and M. Santirso, *cit.*, 49f.

²⁸ This feeling is visible at the beginning of the century. J.L. de la Granja, J. Beramendi and P. Anguera, *La España de los nacionalismos y las autonomías* (2001) 24-26 account for the debate in the Barcelona-based press during the *Primera Guerra Carlista* (1833-1840). In November 1836 Pedro Mata y Fontanet, a Catalan liberal, politician and surgeon, wrote in the newspaper *El Vapor* that if *Cataluña* declared independence from the Madrid's government "it would commit an economic suicide as the whole Spanish market would be lost"; which proves that ideological and historical grounds for autonomy were shared by a significant part of the Catalan society. It is worth noting that in the same year Domingo M. Vila, a Catalan member of the Spanish Parliament, construed the 'parallelism' between the *Cádiz* Constitution of 1812 and the ancient Catalan Laws, as both had been abrogated by "a foreign power", the French Kingdom, respectively in 1823 and 1714. Therefore, as the former had come again in force, 'nobody could see as unfair' that the latter may claim to be equally seen as valid. See also M. Ferrer, D. Tejera and J.F. Acedo, *Historia del Tradicionalismo Español*, IX (1947) at 63f.

Barcelona's vivid economic and cultural life conflated the Catalan cultural identity into increasing Catalan political awareness²⁹; newspapers such as *La Renaixença*, published since February 1871, made themselves vehicles of this flow³⁰. Countering Madrid's *conservatorism* led to igniting a Catalan nationalist cleavage which would have accelerated the modernisation of the Catalan *élite* to the detriment of the more conservative, mainly pro-unity factions³¹.

This is why Catalan pro-independence groups have arisen in a scattered fashion as a result of their multiple social, political and economic roots, ranging from liberal bourgeoisie to radical republicanism³². Nonetheless, their sense of compactness increased as they all suffered harsh persecutions under the dictatorship of Primo de Rivera, whose *manifiesto* proclaimed the necessity of "*neutralizar la des-españolización de Cataluña*" to recover a sort of common "*Spanishness*" (18 September 1923).³³ In October 1926 one of the most charismatic Catalan leaders, Francesc Macià,

²⁹ As described in Enric Prat de la Riba i Sarrà, *La nacionalitat catalana* (1906). See J. Solé Tura, cit., 137f., 195f.

³⁰ A. Jugtlar, cit., 286-288; J.L. de la Granja, J. Beramendi and P. Anguera, cit., 28f., account for the activity of the *Jove Catalunya*, of Mazzini-like ancestry, who added a political pro-independence layer to the Cataluña's cultural claims (1870-1875: p. 30) voiced through the review *La Gramalla*. J. Claret and M. Santirso, cit., 81f., report that, despite the fragmentation of the Catalan opposition, vivid cultural movements led to the blossoming of 'Catalan' publications in the fields of history and sociology as a ground for the debate on federalism (*supra*, n. 24), which proved conducive to 'politic Catalanism' (100f).

³¹ J.L. de la Granja, J. Beramendi and P. Anguera, cit., 27, report that in 1856 Juan Mañé y Flaquer, an influential Catalan conservative liberal, blamed the 'lack of cohesion' among 'brother peoples' on Madrid's '*uniformismo castellanizador*' which testifies to the cleavage between a pro-unity *élite* and a pro-independence more dynamic movement aiming to seek new social arrangements based on the independence issue. Leader of the Catalan movement was a Catalan residing in Cuba, Vicenç Albert Ballester, who designed the so called "*Estelada*", i.e. the Catalan flag with red and yellow alternate horizontal stripes and a white star on the left within a blue triangle – a quote from Cuba and Puerto Rico revolutionary flags. See C. Llorens, cit.; E. Ucelay-Da Cal, *Breve historia del separatismo catalán* (2018) at 43f.

³² See A. Balcells, *El projecte d'autonomia de la Mancomunitat de Catalunya del 1919 i el seu context historic* (2010), 11f., 79f.

³³ See S. Julià, *Las Constituciones Españolas. VIII: La Constitución de 1931* (2009) at 125 and E. González Calleja, *La España de Primo de Rivera. La modernización autoritaria (1923-1930)* (2005), 338f.

tried to promote a *golpe* against the dictatorship: his plan was to invade Spain from Catalan France, but he was smoked out, arrested in Prats de Molló and brought to Paris to face trial³⁴. On that occasion, his emotional speech in defence of the Catalan cause gained him the sympathies of most leftist parties around Europe; once free, Maciá travelled to Cuba and launched the *Constitución Provisional de la República Catalana*, to promptly come back to Spain when the *Segunda República* was being set in motion³⁵.

As in the municipal elections of April 1931 the party Maciá had founded, *Esquerra Republicana* (Republican Left) was the most voted, he declared *Cataluña* an “Independent State within either an *Iberian Republican Federation*, or a *Confederation of Iberian Peoples*”³⁶. The republican-federal democrat ideal seemed to turn real. Maciá agreed with the left-wing Cabinet to quit the independence path and to form a Catalan Government within the Republic of Spain under the historical name ‘*Generalitat*’ with the power to enact its own Statute. This compromise was not supported by the totality of the pro-independence groups, and more radical views prevailed when a more conservative block (*CEDA*) rose to government in Madrid: the new *President* Luis Companys took initiative and proclaimed the independence of *Cataluña* as a consequence of the ‘fascist and monarchic reaction taking place in Madrid’³⁷. However, the incapacity to join forces with the *Revolución Obrera* (Working Class Revolution) that was agitating the whole *Península*, as well as the energetic intervention by State forces, caused the end of the independence experiment and the restoration of the Spanish unity. Yet, victims in battle were

³⁴ E. Ucelay-Da Cal, cit., 114f.

³⁵ *Ibid.*, 84f.

³⁶ See E. Ucelay-Da Cal, cit., 122f.; G. Tortella, cit., 227f.; E. González Calleja, cit., 355f.; J.L. De la Granja, J. Beramendi and P. Anguera (eds.), cit., 124f. See also A. Ossorio y Gallardo, ‘*Discurso en el Congreso de los Diputados sobre el Estatuto de Cataluña – 19 de mayo de 1932*’, 90 *Cuadernos Republicanos* 101-12^o (2016).

³⁷ The *Confederación Española de Derechas Autónomas* (*CEDA*) presided by José María Gil-Robles took power after the elections of 19 November 1933. See J. Gil Pecharromán, *La Segunda República. Esperanzas y frustraciones* (1997) 70f., and J. Casanova, *República y Guerra Civil*, in J. Fontana and R. Villares, *Historia de España – Vol. 8* (2007) 100f. Cfr. J. Claret and M. Santirso, cit., 154f.

reduced to a minimum, and pardon was promptly granted to virtually all the leaders implicated³⁸.

The restoration of a centralised power, as well as the relentless struggle among the diverse Catalan groups, exposed the lack of unity within the pro-independence forces. Likewise, when Franco seized power,³⁹ the fragmentation among Catalan political groups and the internal rivalries caused the breakdown of the Catalan resistance, which led to the execution of *President Companys* straight after the end of the *Guerra Civil* (15 October 1940)⁴⁰.

During Franco's dictatorship all Catalan movements remained clandestine, mostly settling out of the Spanish boundaries; the regime secured a solid social compromise with part of the most conservative Catalan *élite* and persecuted all opponents⁴¹. As contrary to what happened in *País Vasco*, *Cataluña's* violent insurreccional movements were marginal even in the *Transición* and the region undertook a process of constitutional integration after the approval of the New Catalan Statute of Autonomy (1979)⁴². The Barcelona Olympic Games of

³⁸ E. Ucelay-Da Cal, *cit.*, 160f.; see D. Ruiz, *Insurrección defensiva y revolución obrera. El octubre español de 1934* (1988), 25f.

³⁹ See J.L. Martín Ramos, *La batalla de Cataluña*, in A. Reig Tapia, J. Sánchez Cervelló (eds.) *La Guerra Civil española, 80 años después: un conflicto internacional y una fractura cultural* (2019), 313-328.

⁴⁰ C. J. Villarejo, *El proceso militar contra el President Companys. Un paradigma de la barbarie*, 1 *Quaderns de Memorial democràtic* 23-33 (2010). See F. Vázquez Osuna, *L'anihilació de la República del general Franco i l'administració de justícia de Catalunya (1936-1939)*, 16 *Revista de Dret Històric Català* 297-319 (2017).

⁴¹ According to A. Jutglar, *cit.*, at 528-529, '*Mientras vivía Franco, existió un número importante de burgueses que eran franquistas (Franco 'les había liberado'; Franco les había devuelto sus fábricas) pero sería un craso error y una injusticia meridiana afirmar que, durante el franquismo, no existieron amplios núcleos burgueses acomodados que no compartían la realidad franquista y que incluso, muchos de ellos, lucharon contra ella*'. See G. Tortella, *cit.*, 275f.; J.L. De la Granja, J. Beramendi and P. Anguera (eds.), *cit.*, 165f.

⁴² Adopted by a *Ley Orgánica 4/1979, de 18 de diciembre, de Estatuto de Autonomía de Cataluña*'. See L. Cappuccio, *Los modelos de articulación territorial de los poderes públicos. Reconstrucciones (teóricas) y tendencias (concretas) en la jurisprudencia de los jueces constitucionales: el caso del Tribunal constitucional español*, in J. Cagiao y Conde, G. Ferraiuolo (eds.), *El encaje constitucional del derecho a decidir. Un enfoque polémico* (2016), at 93. See also F.J. Díaz Revorio, *Proceso constituyente y proceso descentralizador: ¿de dónde venimos y adónde vamos?*, in J.O. Araujo (ed.), *El*

1992 and the years leading to the European constitutional process were marked by relative political quietude⁴³: Catalan claims remained within the cultural-historical domain⁴⁴, and turned back to the political realm when the *Partido Popular Español* led by José María Aznar rose to the government at the beginning of 2000's – especially in occasion of the adoption of the new Catalan Statute (2006)⁴⁵. However, the Cabinet presided by the Socialist José Luis Zapatero engaged in negotiations to avoid a fracture; whereas the 2011 landslide victory of the centre-right opened the doors of *La Moncloa* to Mariano Rajoy, who had regularly blamed Zapatero for being too soft in bargaining with *Cataluña*⁴⁶.

Conclusively, the origins of Catalan pro-independence movements can be traced back to the 1800's, as republican-federal democrat groups collaborated with moderate forces in deposing the Spanish absolute monarchy but eventually remained excluded from the political compromise. It is rooted in the anti-slavery, pro-independence insurrections blown up in Cuba and *Puerto Rico*

futuro territorial del Estado Español (2013) and J. Amat, *La conjura de los irresponsables* (2017).

⁴³ On the long-lasting mayorship of the Socialist Pasqual Maragall i Mira (1982-1997) and on his mandate as a President of the *Generalitat* (2003-2006) after the durable presidency of the CDC 'Convergencia Democrática Catalunya' nationalist leader Jordi Pujol (1980-2003) see P. Maragall i Mira, *Mil dies que han canviat Catalunya* 13 FRC Revista de debat polític 7-17 (2006) and J. Rodríguez Teruel, *La rectificació o el futur tampoc no és ja el que era per al catalanisme*, *ibid.*, 40-45; cfr. E. Ucelay-Da Cal, *Catalonia Dreaming. The Rise of Catalan Mass Secessionism (2010-2015)* 3 *Tiempo Devorado. Revista de Historia Actual – Número monográfico: Processing the 'process': on the pro-independence Catalan surge* 328-372 (2015) at 339f.

⁴⁴ The Catalan movements kept hinging on the diffusion of the Catalan language and the consolidation of Catalan traditions as a specificity of Spain – sometimes with a zeal that was perceived as a forced 'catalanization': see G. Tortella, *cit.*, 305f.; but also E. Ucelay-Da Cal, *Breve historia del separatismo catalán*, *cit.*, 225f.

⁴⁵ The Statute was approved on 18 June 2006 by a referendum with a very low rate of participants, whereas on 18 February a huge manifestation had been celebrated in Barcelona which for the first time evocated the "right to decide of Catalans as a consequence of Cataluña being a nation". See J. Amat, *cit.*, 50-51; E. Ucelay-Da Cal, *cit.*, 254f.

⁴⁶ See U. Mezcuca, *La frase de Zapatero que acabó dando alas al independentismo*, ABC Cataluña, 26 September 2015.

and, at the same time, it has to do with the rise of a Catalan modern bourgeoisie in search of political hegemony⁴⁷.

This is why Catalan movements have affinity with radical leftists, on one side, and with more moderate groups, on the other; unsurprisingly, they have been continuously following what have been called “group-based logics” and have hardly managed to act as a single entity, bound by both a political programme and a plan on how carry it out⁴⁸. In principle, their ideological background refers to a progressist-like worldview infused with elements of *anti-monarchy* rhetoric and supports a narrative of a free *Cataluña* in a federal, often republican Spain or in a Europe of free nations⁴⁹. No surprise that dialogue is easier when Madrid’s political game is ruled by centre-left governments⁵⁰.

This brief history may perhaps highlight the peculiarities of the Catalan claim. It is a nationalist claim that meets with equal nationalism from its counterpart; it *does not* forcefully aim to secession, as independence is structurally *minoritarian* and only raised in reaction to alleged threats; it stems from political-economic conflicts and is fuelled by the most modern, dynamic bourgeoisie of Spain, but paints itself as left-winged by origin, social-democrat in inspiration, cosmopolitan in nature, supportive of a united Europe of peoples and nations⁵¹; it has blossomed in Barcelona and is nurtured by the city’s vitality but gains a consensus that reaches its peak in the neighbouring provinces⁵².

⁴⁷ Adde A. J. López Estudillo, *Federalismo y mundo rural en Cataluña (1890-1905)* 3 Historia Social 17-32 (1989).

⁴⁸ E Ucelay-Da Cal, cit., 77f.

⁴⁹ J. Claret and M. Santirso, cit., 188f., recall the times (since the first government that was sworn in by the restored Monarchy) ‘*cuando ser opositor era ser de izquierdas y catalanista*’; J.L. De la Granja, J. Beramendi and P. Anguera, cit., 214f., speak of a ‘*Cataluña de izquierdas*’ since the constitutional debate in the ‘70s and the construction of the Catalan Statute.

⁵⁰ L. Mayor Ortega, *El ascenso de Vox habla catalán*, La Vanguardia, 18 February 2019; see E. Ucelay-Da Cal, cit., 276f.

⁵¹ G. Tortella, cit., 472f.; A. Jutgar, cit., 533f.; J. E. Ruiz-Domènec, cit., 229f.; see also M. Mateu Vilaseca, *El Parlament de Catalunya, la representació d’un poble mil·lenari*, 13 *Revista de Dret Històric Català* 177-187 (2014).

⁵² As it appears from the 10 November 2019 elections, whilst in Barcelona the Socialists (PSOE) prevailed on the nationalist party ERC (*Esquerra Republicana de Catalunya*) albeit with a 20.000 vote margin (0.7%, 8 to 7 seats) the opposite is true for the other provinces. In Girona ERC thrashed PSOE (25.84% to 14.81%) battling with *Junts per Catalunya* (a more moderate list: 24.78%) as the most

In the next paragraphs, the three stages on which the Catalan claim develops will be dealt with to highlight the squandering of legitimacy resources that has once again hit Spain's political-constitutional system.

3. Cataluña's independence today: a dialogue of the deaf

Against the backdrop of the Western economic-financial crisis, early protagonists of a renewed, somehow unexpected episode⁵³ of the Catalan saga were the Prime Minister Mariano Rajoy (*Partido Popular*) the President of the Government (*Generalitat*) Artur Mas, leader of the moderate pro-independence force 'Convergence and Union' (*Convergència i Unió*) and the *Tribunal Constitucional* (TC)⁵⁴. The failure to reach an agreement on *Cataluña* fiscal-budgetary autonomy⁵⁵ led to the awakening of several pro-independence civic movements⁵⁶; the 2012 celebration of the *Cataluña*-day⁵⁷; orchestrated by a newly assembled pro-independence civic organisation (*Assemblea Nacional Catalana*) gave further impulse to the Catalan ambitions⁵⁸. Mas worked to anticipate elections on 25 September 2012, when he openly presented the question of autonomy in terms of a 'transition

voted list (both obtain 2 seats). Other nationalist lists perform well, too: *Candidatura d'Unitat Popular - Per la Ruptura* (more radical) 8.9%; *En Comú Podem-Guanyem el Canvi* (a leftist coalition for Cataluña) 9.48%. In Lleida, ERC largely doubles PSOE (31.46% v 14.44%) *Junts per Catalunya* coming second by a comfortable margin (22.59%). Only in Tarragona PSOE manages to be the second most voted list (19.1%) while ERC comes first (25.64%) and *Junts* third (13.35%).

⁵³ Mas in 2008 declared independence to be a 'rusty and out-of-fashion concept' (*'un concepto oxidado y pasado de moda'*). See R. Cotarelo, *La República Catalana* (2016), 148.

⁵⁴ For a detailed account of the events as occurred in those years, see G. Ferrajuolo, *La via catalana. Vicende dello Stato plurinazionale spagnolo* 18 *Federalismi.it* 1-40 (2013); cfr. the literature cited thereafter.

⁵⁵ J. Trigo Portela, *El año de las decisiones discutidas*, in O. Amat et al., *La cuestión catalana, hoy* (2013) 133-139.

⁵⁶ An account of the various social groups participating in the manifestation features in M. Candel and S. López Arnal, *Derechos torcidos. Conversaciones sobre el derecho a decidir, la soberanía, la libre determinación y la España federal* (2017) at 29.

⁵⁷ See J. Pi I Bofarull, *Cataluña para marcianos* (2018), 358-364.

⁵⁸ R. Cotarelo, cit, p. 153.

process⁵⁹ (*Procès*) toward the ‘building-up of State-like structures’⁶⁰. Pro-independence forces secured a majority in the Catalan Parliament (*Parlament*)⁶¹ and passed a Resolution on the ‘Sovereignty of the Catalan People and their right to decide’⁶² that the Government submitted for annulment to the TC⁶³.

That judgment marked the battlefield of a political game, harsh but still feasible, both parts negotiating under a mutual extreme threat⁶⁴: the claim for independence, on one side, and the legitimate use of force against rebellion, on the other⁶⁵. These two extremes stood to persuade the negotiators to make mutual concessions. Therefore, if one wishes to borrow the Hirschman’s categories that Weiler has famously deployed to explain Europe’s *transformation*, she may say that the Catalan *Exit* was an only abstract possibility that concretely worked to strengthen the reciprocal *Voice* options⁶⁶.

But, absent any improvement on the diplomatic side, Mas took the issue a step ahead: he signed an *Order* calling for ‘public consultations about *Cataluña’s* future’⁶⁷ relying on a *Ley de*

⁵⁹ Which is in itself a slippery concept: see E. Ucelay-Da Cal, *La transición como concepto en la ciencia política y la historia: Un juego de palabras*, in A. Reig Tapia, J. Sánchez Cervelló (eds.), *Transiciones en el mundo contemporáneo* (2016), 17-54.

⁶⁰ *Mas pone rumbo a la autodeterminación*, Editorial, El País-Cataluña, 26 September 2012; see also P.A. Navarro, *La cuestión catalana le estalla a Rajoy: Mas adelanta los comicios al 25 de noviembre y anuncia referéndum independentista*, 987 El Siglo de Europa 16-18 (2012).

⁶¹ A. Barrio López, J. Rodríguez Teruel, ‘*Pour quelles raisons les partis politiques en Catalogne se sont-ils radicalisés ? Le système des partis et la montée du souverainisme (1999-2012)*’, 40 *Pôle Sud* 99-120 (2014).

⁶² Resolution 5X of 23 January 2013 containing the *Declaración de Soberanía y del derecho a decidir del Pueblo de Cataluña*. See F. Rubio Llorente, *Un referendun para Cataluña*, El País, 11 February 2003.

⁶³ For an account of the Catalan institutional setting, see M. Barceló i Serramalera, J. Vintró i Castells (eds.), *Derecho público de Cataluña* (2008) at 269-426.

⁶⁴ E. Roig i Molés, *Proces sobiranista i Tribunal Constitucional. Anàlisi d’un impacte recíproc*, 54 *Revista Catalana de Dret Públic* 24-61 (2017).

⁶⁵ Judgment 42/2014 – *infra*.

⁶⁶ J.H.H. Weiler, *The Transformation of Europe*, 100:8 *Yale Law Journal*, 2403-2483 (1991); the reference is A.O. Hirschman, *Exit, Voice, and Loyalty* (1970) at 3-4, 19-20, *passim*.

⁶⁷ Decreto de Convocatoria de la Consulta sobre el futuro político de Cataluña, n. 129/2014.

Consultas adopted *ad hoc* by the *Parlament*⁶⁸. This was a political act of some relevance, although both the title and the content of the acts denied the *referendum*-like nature of those consultations; however, Madrid saw it as a challenge⁶⁹ and resorted again to the *Tribunal* that suspended and partially annulled the *Ley*, the *Order* concerned turning inapplicable⁷⁰. The conflict rapidly intensified⁷¹; Barcelona's answer was the celebration of a huge political manifestation on 9 November 2014⁷². A new list 'Together for the Yes' (*Junts pel Si*, whose confirmed objective was the Catalan independence) asked and obtained new elections, which it won; once entered the *Parlament*, it formed a coalition with another pro-independence list (*Candidatura d'Unitat Popular*, 'Popular Unity Candidacy') to secure absolute majority⁷³.

Negotiations on fiscal and budgetary issues gradually yielded to arguments speculating on concepts such as people's identity, right to self-determination and the like, the competing claims gradually turning *non-dialogable*. Notably, the Government refused to deal with such claims and denied political relevance to the Catalan arguments yet put forward with undeniable gravity – as a fully-fledged independence process was being set in motion⁷⁴.

Mas was prompted to leave his presidential office; his successor Carles Puigdemont soon abandoned his predecessor's 'moderate' approach to promulgate a *Ley* expressly calling for a *referendum* on 1 October 2017⁷⁵. The objective was unequivocal: to let Catalans decide whether to turn *Cataluña* an 'independent

⁶⁸ *Ley 10/2014, de 26 de septiembre, de consultas populares no referendarias y otras formas de participación ciudadana*. See *Masivo apoyo para la consulta*, Editorial La Vanguardia, 20 September 2014.

⁶⁹ M. Iceta, *¿Y ahora qué?*, *El País*, 23 September 2014.

⁷⁰ Á.-L. Alonso de Antonio, *Análisis constitucional de la Ley catalana de consultas populares no referendarias y otras formas de participación ciudadana* (2015) at 15.

⁷¹ F. de Carreras Serra, *La astucia como valor jurídico*, *El País*, 29 October 2014; cfr. *Id.*, *La escandalosa impunidad de Mas*, Editorial ABC, 1 November 2014.

⁷² El '9-N': see S. Gordillo, *Votar el 9-N es lo responsable*, *El Periódico*, 15 September 2014; E. Marín, *El 9-N ya ha ganado*, *El Periódico*, 6 November 2014; V. Gutiérrez Calvo, *La inaceptable vía de hecho*, *El País*, 28 October 2014.

⁷³ After the General Prosecutor (*Fiscalía General*) announced an enquiry on the Catalan independence process, Mas replied that it was going to occur in 18 months and, in that respect, the elections of 27 September 2015 had a 'plebiscitary character'. See C. Gil del Olmo, in *El País*, 14 January 2015.

⁷⁴ J. Ramoneda, *La negació de la realitat*, *Ara*, 28 November 2015.

⁷⁵ *Ley 19/2017 del Referéndum de autodeterminación*, 6 September 2017.

republican State'⁷⁶. Against that *Ley*, the Government brought another successful constitutional action; yet Puigdemont, in a speech at the National Council of the Catalan European Democratic Party⁷⁷, announced that in any case he was going to proceed with the organization and celebration of the *referendum* according to the *Ley* just suspended. That *Ley* – he affirmed – ‘protects rights of peoples such as self-determination’ and ‘cannot be buried by any de-legitimised Constitutional Court associated with the Government in this sort of conspiracy’⁷⁸.

This overt rupture exposed the lack of mutual political recognition and displayed tensions within the *Parlament* itself, leading the pro-independence majority to audacious interpretations of parliamentary rules of procedure to have the acts concerned quickly approved⁷⁹. Open conflict became unavoidable. The Government kept bringing successful actions before the *Tribunal Constitucional*, but this obviously did not persuade Puigdemont and his supporters to step back; rather it undermined the independence of the judges in the eyes of the Catalans leaders and people themselves.

⁷⁶ That *Ley* was included in a package of ‘*leyes de desconexión*’ (laws of disconnection) that epitomized the rupture between Cataluña and Spain while setting the bases for the legal transition towards an independent Catalan State. See F.M. Caamaño Domínguez, *Del Estatut a las leyes de desconexión: el dedo que escribe las tablas de la ley*, in X.M. Rivera Otero, J.M. Pereira and N. Lagares Díez (eds.) *Cataluña en proceso: las elecciones autonómicas de 2015* (2017), 17-33, and A. Torres Gutiérrez, *La larga marcha hacia la independencia en Cataluña: declaración de inicio del proceso político, leyes de desconexión y jurisprudencia del Tribunal Constitucional*, 36 *Civitas Europa* 227-240 (2016).

⁷⁷ On 9 September 2016: www.deia.eus [21 November 2018].

⁷⁸ In Spanish, from www.abc.es [22 November 2018]: “*La Ley catalana del Referéndum «sigue vigente», pese a haber sido suspendida por el Tribunal Constitucional, porque ampara «derechos de los pueblos como es el de autodeterminación, y este último se ampara en los derechos humanos». Entonces, esa ley «no puede ser tumbada por ningún Tribunal Constitucional deslegitimado y conchabado con el Gobierno del Estado».*”

⁷⁹ Parties that voted against it left the *Parliament* to protest against the infringement of their political rights, the *Tribunal* being addressed *en amparo* (Case 10/2018). See J. de Miguel Bárcena, *El proceso soberanista ante el Tribunal Constitucional*, 113 *Revista española de Derecho constitucional* 133-166 (2018) at 152-153 and J.C. Nieto Jiménez, *Los derechos de las minorías parlamentarias en el procedimiento legislativo: análisis del ‘ius in officium’ en la tramitación de las ‘leyes de desconexión*, 67-1 *Estudios de Deusto* 293-314 (2019).

The '1-O referendum' took place on the established date. As predictable, it saw an overwhelming majority of 'Yes' and left a major trail of quarrels on the veracity of the results as announced by the Catalan authorities⁸⁰. The reaction from Madrid was not to be waited for long: policemen and armed forces were sent to stop what was held a 'crime'. Footages of the *Guardia Civil* acting against the voters, yet causing no cruel events, instantly spread out all over the world⁸¹.

On 3 October 2017, under increasing pressure from both institutional officials and the general public to intervene in a controversy which had become ungovernable, the King took over to formulate what looked like the ultimate position of the Spanish State⁸².

4. The speech of King Felipe VI: an autarchic re-assessment of national sovereignty

Before analysing the King's speech, it is fit to briefly recall the constitutional framework in which the Spanish Constitution locates the Crown.

Being Spain a parliamentary monarchy, powers of political directions are embedded in the Parliament-Government circuit⁸³. According to Art. 56 Const., the King is 'Head of the State and symbol of its unity and permanence; he arbitrates and moderates the regular functioning of the institutions'⁸⁴. Under Art. 56.3 and Art. 64.1, all his acts are invalid unless provided with the counter-

⁸⁰ The Catalan authorities aired the following data: 90% 'Yes' on 42% of voters, 2,2millions https://elpais.com/ccaa/2017/10/02/Cataluña/150689-8063_586836.html [22 November 2018].

⁸¹ See <http://www.catalannews.com/news/tag/Guardia%20Civil> [22 November 2018] for various contributions.

⁸² See https://elpais.com/politica/2017/10/03/actualidad/15070-58161_929296.html [22 November 2018] for the chronicles of those days.

⁸³ G. de Vergottini, *Diritto costituzionale comparato*, I (IX ed., 2014) at 545; M. Herrero de Miñón, *Las funciones interconstitucionales del jefe del Estado parlamentario*, 110 *Rev. española de Derecho constitucional* 13-42 (2017) at 38f.

⁸⁴ P. Gonzales-Trevijano, *Art. 56*, in P. Perez Tremps, A. Saiz Arnaiz (eds.) *Comentario a la Constitución Española - 40º Aniversario 1978-2018*, I (2018) 981-992; E. González Hernández, F.J. Terrasa Ortuño, *El régimen de responsabilidad del Jefe del Estado en la Constitución española de 1978*, in A. Villanueva Turnes (ed.) 40 años de monarquía parlamentaria (2019) 65-86.

signature (*refrendo*) of the President of the Cabinet or, in case, of the competent Ministers⁸⁵.

Therefore, it can be held that the Crown's authority flows along two different channels and leans on two sources of legitimacy, both pointing to the people's sovereignty as 'the source of all legitimate powers' under Art. 1.2 Cost⁸⁶.

As arbiter and moderator amidst institutions, the King acts as a magistrate to ensure compliance with constitutional rules and practices in the inter-institutional game. In this light, he acts as Head of the 'State-apparatus' (or 'State-government'): the complex of organs and bodies exercising power under the Constitution's framework⁸⁷. Accordingly, the legitimacy of his action rests on the persuasive value of the rational arguments supporting his interpretation of the constitutional law ruling the interaction of such organs and bodies⁸⁸.

As 'symbol of its unity and permanence', the King directly communicates with the Spanish community⁸⁹: his Crown allows him to be the interpreter of the most profound voices of the Spanish society⁹⁰. In this case, he speaks to Spaniards as Head of

⁸⁵ C. Fernández-Miranda Campoamor, *La irresponsabilidad del Rey: Evolución histórica y regulación actual*, 44 *Revista de Derecho Político* 225-256 (1998) at 244f.; E. González Hernández, *El refrendo de los actos del Rey: evolución histórica*, in *La monarquía parlamentaria (título II de la Constitución)* (Congreso de los Diputados, 2011) 689-714; I. Torres Muro, *Refrendo y Monarquía*, 87 *Revista Española de Derecho Constitucional* 43-70(2009) at 57. For a comparison, see R. Blackburn, *Monarchy and the personal prerogatives*, 3 *Public Law* 546-563 (2004); M. Cavino, *L'irresponsabilità del Capo dello Stato nelle esperienze italiana (1948-2008) e francese (1958-2008)* (2008) at 59f. and A. Sperti, *Responsabilità presidenziale e ruolo costituzionale del Capo dello Stato* (2012), 30-33.

⁸⁶ M. Aragón Reyes, *Dos estudios sobre la Monarquía parlamentaria en la Constitución Española* (1990), 62.

⁸⁷ F.J. Díaz Revorio, *La monarquía parlamentaria, entre la historia y la Constitución*, 20 *Pensamiento Constitucional* 65-106 (2015) at 87f.

⁸⁸ For useful comparison, cfr. G. Scaccia, *Espansione di ruolo del Presidente della Repubblica e funzione di rappresentanza dell'unità nazionale*, 3 *Lo Stato* 101-115 (2014); M. Luciani, *La gabbia del Presidente*, 2 *Rivista AIC* 1-10 (2013).

⁸⁹ As a consequence of his prestige and moral authority: J.L. Cascajo Castro, *Materiales para un estudio de la figura del Jefe de Estado en el ordenamiento español*, 5 *Anuario de derecho constitucional y parlamentario* 44-45 (1993).

⁹⁰ Cfr. Y. Gómez Sánchez, *Art. 64* in P. Perez Tremps, A. Saiz Arnaiz (eds.) *Comentario a la Constitución española*, cit., 1061-1071.

the State-*community*⁹¹ and his actions are measured against a social benchmark for legitimacy – a feeling of ‘acceptable justice’ that they generate within the overall society⁹².

No need to underline that such channels must be well-balanced⁹³. If she did nothing more than strictly applying rules, the Crown would be nothing more than a pompous duplicate of the jurisdiction; if she did everything he wished on the ground of her majestic tutorial function toward ‘her’ people, she would act as an absolute monarch, i.e. in breach of the Constitution⁹⁴. Her powers are substantively limited by constitutional rules, and her responsibilities are, too, as a general discharge is provided by the *refrendo*. Consequently, she has narrow margins of manoeuvre, for all her acts need the Government’s assent⁹⁵; she may not overtly counter the majority’s position, though her stances can in no case be seen as a mere reiteration of the Government’s one⁹⁶.

The King’s *exordium* is blunt as for addressing all Spaniards directly, given the extreme gravity of the circumstances:

Estamos viviendo momentos muy graves para nuestra vida democrática. Y en estas circunstancias, quiero dirigirme directamente a todos los españoles.

⁹¹ This distinction is fully elaborated in V. Crisafulli, *La sovranità popolare nella Costituzione italiana*, in Id., *Stato popolo governo. Illusioni e delusioni costituzionali* (1985), 99.

⁹² A parallel with the idea of a Constitution as normative, historical and sociological concept can be drawn: M. García Pelayo, *Derecho constitucional comparado* (II ed. 2002), 33.

⁹³ J.J. Solozábal Echavarría, *La problemática constitucional de la formación del Gobierno y la intervención del monarca en nuestro régimen parlamentario*, 109 *Revista Española de Derecho Constitucional* 35-61 (2017).

⁹⁴ J.A. Sánchez Moreno, *El Parlamento en su encrucijada: Schmitt versus Kelsen, o la reivindicación del valor de la democracia*, 162 *Revista de Estudios Políticos* (2013) 113-148.

⁹⁵ J. M. Vera Santos, *Art. 62 y Art. 63*, in P. Perez Tremps, A. Saiz Arnaiz (eds.), *Comentario a la Constitución española*, cit., 981-992.

⁹⁶ In fact, notably, a year later, it was aired in the press that it was the King to urge the Prime Minister to let him make the speech. See P. Santos and J. Ruiz Sierra, *El Rey pronunció el discurso del 3-O pese a las dudas del Gobierno*, *El Periódico*, 3 October 2018; R. Piña, *3-O: El día que el Rey se impuso a Rajoy para serenar al país*, *El Mundo*, 3 October 2018; *Felipe VI fue por libre en el discurso del 3-O (Rajoy no pintó nada)*, *elnacional.cat*, 30 September 2018, and *Rajoy no quería que Felipe VI hablara el 3-O porque le debilitaría: así se gestó el discurso del rey sobre Cataluña*, in *lasexta.com*, 3 October 2018 [all: 22 February 2019]

It is not by chance that the King begins by an openly emotional statement: he wishes to present himself as speaking for the overall Spanish people, light of the symbolic force of his prerogative. Straight afterwards, he expresses his stance: the Catalan claim is illegal and in betrayal of the institutions of the State, and this judgmental attitude – in his own words – stems ‘from the events’ themselves, as ‘witnessed by all Spaniards’. Therefore, it’s clear that King’s interpretation of the relevant constitutional norms is not backed by legal arguments; it rather follows what looks like his ‘pre-comprehension’ of the facts, on which no discussion is allowed⁹⁷.

Evidence in support of this reconstruction is abundant in the speech. While calling all Spaniards as witnesses, he tends to present events in an ‘objective’ fashion, as to let facts ‘speak for themselves’ by virtue of their alleged self-evident nature⁹⁸. Notably, amid the institutions of the State the King includes the ‘historical institutions of *Cataluña*’: the *de-legitimation* of legitimate leaders as separated from the institutions they run comes close to a ‘replacement’ of who ‘failed’ to represent their community – a ‘classic’ of representation in absolute governments⁹⁹. Furthermore, evocations of a link between the Crown and the Spaniards are numerous, including a final, highly-emotional statement addressing the Catalans – which sound as another replacement addressing what Catalan leaders allegedly failed to do¹⁰⁰. In this line, the King accounts for the twofold infamous label attached to the Catalan claim; but his account has little argumentative background, for it sound more like a reprimand:

Han pretendido quebrar la unidad de España y la soberanía nacional, que es el derecho de todos los españoles a decidir democráticamente su vida en común.

⁹⁷ See S. Borutti, *Models and Interpretations in Human Sciences*, in D. Batens and J.-P. van Bendegem (eds.), *Theory and Experiment: Recent Insights and New Perspectives on their Relation* (2002), 229.

⁹⁸ P. Grossi, *L'ordine giuridico medievale* (1995; III ed. 2017), 56.

⁹⁹ H. Hofmann, *Repräsentation. Studien zur Wort-und Begriffsgeschichte von der Antike bis ins 19. Jahrhundert* (1974) ed.it. *Rappresentanza-rappresentazione: parola e concetto dall'antichità all'Ottocento* (2003), 206.

¹⁰⁰ E.H. Kantorowicz, *The King's Two Bodies: A Study in Medieval Theology* (1963 – II ed. 2016), 87.

The tie between the sovereignty argument and the claim to represent national unity appears in a gleaming fashion; however, it is hard to deny that the King's position, as for the arguments brought to debate, is a tautology, due to the biased approach he endorses. What he takes as a fact - that the Catalans aimed to destroy (*quebrar*) the unity of the State and the national sovereignty - is precisely what the Catalans strive to question: for they argued that they, too, are a 'sovereign' people, and/or that they, too, have the 'right to decide' for their own destiny. In this vein, the second part of the sentence displays a slight, unintentional irony: if national sovereignty is the right of all Spaniards to *democratically decide* on their own life *in common*, they cannot decide otherwise than to have a life in common - even if they were to decide democratically. Therefore, no procedure, even the most *democratic* one, may question the State's unity as protected by the Crown's sovereign prerogative.

This assumption, yet backed by a poor legal argumentative support, simply buries any debate on the independence issue and cast a definitive shadow on the actual points of political conflict, which eventually fallen into oblivion as *non-dialogable* nationalist claims occupy the whole table.

5. National sovereignty and the 'right to decide' in the case-law of the *Tribunal Constitucional*

The *TC*'s case-law aims to furtherly elaborate on the rules that have been left implicit in the King's speech¹⁰¹. Yet, overwhelmed by the fast-mounting political sensitivity of the *affaire*, constitutional judges have hardly been able to embed into coherent, well-defined borders these *per se* slippery concepts¹⁰².

After the Catalan Statute *affaire* settled years prior¹⁰³, the leading case on the issue is No.42/2014¹⁰⁴ on the abovementioned

¹⁰¹ J.M. Castellà Andreu, *Tribunal Constitucional y proceso secesionista catalán: respuestas jurídico-constitucionales a un conflicto político-constitucional*, 37 *Teoría y Realidad Constitucional* 561-591 (2016).

¹⁰² J. J. Solozábal Echavarría, *La autodeterminación y el lenguaje de los derechos* 46 *Revista Vasca de la Cultura y de las Ideas* 216-230 (2014).

¹⁰³ The judgment (Case 31/2010) was widely criticised from both sides (including in the *votos particulares* of distinct constitutional judges): J. Pi, *Los artículos declarados nulos, uno a uno*, *La Vanguardia*, 28 June 2010. C. Vidal,

*Parlament's Resolution of 23 January 2013. It dwells upon three points: the admissibility of the action, the concept of sovereignty and the right to decide*¹⁰⁵.

Reescribir el Estatuto de Cataluña, La Razón, 11 October 2010, affirmed that the Tribunal had re-written the Statute, *i.e.* had made it say what the Tribunal itself aimed to say. As for the Italian scholarship, R. Ibrido, *Il rebus dell'interpretazione conforme alla luce della recente sentenza sullo Statuto catalano*, 1 *Diritto pubblico comparato ed europeo* 54f (2011). assumes that the judges had pushed to the edge the consistent interpretation canon despite the high political sensitivity of the matter. The Spanish literature on the topic is immense: see L. Díez Bueso, *Bibliografía sobre el Estatuto de Autonomía de Cataluña* 13 *Revista General de Derecho Constitucional* (2011 – entirely devoted to the Catalan Statute after the judgment, edited by J.J. Solozábal Echevarría and C. Aguado Renedo) at 12. The Review *Teoría y Realidad Constitucional* also published a special number (27/2011) edited by R. Blanco Valdés, R. Canosa Usera, F. de Carreras Serra, M. Carrillo López, J. Corcuera Atienza, J. García Roca, L. Parejo Alonso – *cfr.* the *Repertorio Bibliográfico* edited by E. Gómez Corona, at 519-544. The same did the *Revista de Estudios Autonòmics i Federals* (n. 12/2011) while the *Revista de Estudios Políticos* dedicated n. 151/2011 to 'El Estado Autonómico en cuestión. La organización territorial del Estado a la luz de las recientes reformas estatutarias (2006-2010)' edited by A. López Castillo and J. Tajadura Tejada. Scholars from other disciplines also intervened: see *ex multis* M. Yzquierdo Tolsada, *¿Qué fue del artículo 149-1.8.^a de la Constitución? Diálogo entre tres civilistas a propósito de la Sentencia del Tribunal Constitucional sobre el Estatuto de Autonomía de Cataluña*, *Diario la Ley* 7649/2011, and A. Zabalza Martí, *Una Nota sobre la Sentencia del Tribunal Constitucional sobre el Estatuto de Autonomía de Cataluña, con referencia a los artículos 206.3 y 206.5*, 95 *Revista Española de Derecho constitucional* 407-433 (2012). On the political consequences of that judgment, see C. Viver Pi-Sunyer, *La voluntad de transformación del Estatuto de Autonomía de Cataluña*, in *Jornadas de Fundación del Estado Autonómico. La autonomía aragonesa treinta años después*, 2012, 1-16, 6, and G. Martín Martín, *Sobre las consecuencias jurídicas de la Sentencia 31/2010, del 28 de junio, del Tribunal Constitucional sobre el Estatuto de Cataluña*, 81 *Revista de Derecho Político* 275-288 (2011). See also C. Viver Pi-Sunyer, *Los efectos vinculantes de las sentencias del Tribunal Constitucional sobre el legislador: ¿puede éste reiterar preceptos legales que previamente han sido declarados inconstitucionales?*, 97 *Revista española de Derecho constitucional* 13-44 (2013) and the interview of the then constitutional judge Manuel Aragón Reyes with C.E. Cué, *El grave error fue el Estatuto de Cataluña, no nuestra sentencia*, *El País*, 3 July 2014.

¹⁰⁴ Case 42/2014, 25 March 2014.

¹⁰⁵ V. Ferreres Comella, *Cataluña y el derecho a decidir*, 37 *Teoría y realidad constitucional* 461-477 (2016). Admissibility is as crucial as the merits, for it draws the conceptual framework where the relevant arguments unfold. Under Art. 161.2 Const. the Government appeals to the Tribunal against provisions and resolutions adopted by the organs and bodies of the *Comunidades Autónomas*; the appeal normally entails the automatic suspension of the

As for the first point, in light of established case-law, not all resolutions can be appealed before the TC, but only those meeting both the following conditions: I) being not procedural but definitive; II) producing legal effects¹⁰⁶. Whether the challenged Resolution fulfilled both these conditions was questionable. As for the condition *sub I*) it was meant to be definitive; but, as for the one *sub II*) it produced no immediate binding effect. However, in the TC's view, to associate the 'Catalan people' with 'sovereignty' has an impact on the theoretical elaboration of the latter¹⁰⁷. Relying on the difference between *legal* and *binding*¹⁰⁸, the TC held that linking 'sovereignty' with the 'Catalan people' does entail legal (yet not binding) effects; therefore, the case was held admissible¹⁰⁹. It is worth to note that such reading refers to a *plural* concept of law¹¹⁰: in short, the TC understands that law is made up of multiple arguments stemming from diverse sources¹¹¹. Such a construction coheres with a plural, cooperative, if not forcefully

contested acts until the Tribunal decides to withdraw it or delivers the final judgment.

¹⁰⁶ Order 134/2004, *Fundamento Jurídico* (FJ) 4-7-8; see R. Ibrido, *Il "derecho a decidir" e il tabù della sovranità catalana*, 14 *Federalismi.it* 4-5 (2014).

¹⁰⁷ M. Della Morte, *Derecho a decidir, representación política y participación ciudadana: un enfoque constitucional* in *El derecho a decidir. Un dialogo ítalo-catalán* (2014), 13-31.

¹⁰⁸ Case 42/2014, FJ 2.

¹⁰⁹ E. Fossas Espadaler, *Interpretar la política. Comentario a la STC 42/2014, de 25 de marzo, sobre la declaración de soberanía y el derecho a decidir del pueblo de Cataluña*, 101 *Revista española de Derecho constitucional* 273-300 (2014) at 282.

¹¹⁰ *Plurinationalism* can be regarded as an emerging stream of federal studies: see M. Caminal Badia, *El federalismo pluralista: del federalismo nacional al federalismo plurinacional* (2002) and R. Máiz Suárez, *Federalismo plurinacional: una teoría política normativa*, 3 *Revista d'Estudis Autònoms i Federals* 43-85 (2006); references in G. Ferrajuolo, *La via catalana*, cit., 35f. and fn.; see also F. Requejo Coll, M. Caminal i Badia (eds.) *Liberalisme polític i democràcies plurinacionals* (2009); by the same authors, in English, *Political Liberalism and Plurinational Democracies* (2011); lately, F. Requejo Coll, *Plurinational democracies, federalism and secession. A political theory approach*, 54 *Revista catalana de dret públic* 62-80 (2017). On the typical pluralism of law see M. Croce, *All Law is Plural. Legal Pluralism and the Distinctiveness of Law*, 65 *Journal of Legal Pluralism* 1-30 (2012).

¹¹¹ More extensively, N. McCormick, *Institutions of Law: An Essay in Legal Theory* (2007) Part I. An account of the links between this concept of sovereignty and the Catalan *affaire* is X. Eceizabarrena, *La necesaria relectura del concepto de soberanía*, 90 *Cuadernos de Deusto* 91-98 (2017); cfr. C.K. Connolly, *Independence in Europe: Secession, Sovereignty, and the European Union*, 24 *Duke Journal of Comparative & International Law* 51-105 (2013).

federal, concept of sovereignty¹¹²; it is in any event inconsistent with a monolithic one¹¹³.

The same approach could have affected the reading of national sovereignty and of the right to decide. In such case, the declaration holding the Catalan people 'sovereign' would have been found 'legally relevant' and yet in compliance with the Constitution for lack of binding effects¹¹⁴. Nonetheless, the *TC* annulled it for incompatibility with Art. 1.2 (recognising that sovereignty only lies in the Spanish people, from which all powers emanate) and Art. 2¹¹⁵ (claiming 'the indissoluble unity of the Spanish Nation, common and indivisible homeland of all Spaniards')¹¹⁶. As it stands, this assumption rather implies a monolithic conception of sovereignty; no further reason is provided to account for the abandonment of the non-monolithic concept of sovereignty previously endorsed¹¹⁷.

¹¹² N. Walker, *Late Sovereignty in the European Union*, in N. Walker (ed.) *Sovereignty in Transition* (2003) 3-32; see Id., *Sovereignty Frames and Sovereignty Claims*, in University of Edinburgh School of Law Working Paper 14 (2013) 1-26. On 'cooperative sovereignty' see I. Pernice, *The Treaty of Lisbon: Multilevel Constitutionalism in Action*, 15 *Columbia Journal of European Law* 349-407 (2009); a critique in G. della Cananea, *Is Multilevel Constitutionalism really "Multilevel"?*, 70 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 283-317 (2010). More generally, on the cooperative constitutional framework, R. Bifulco, *La cooperazione nello Stato unitario composto* (1995).

¹¹³ M. Poiars Maduro, *The Three Claims of Constitutional Pluralism*, in M. Avbelj and J. Komárek (eds.), *Constitutional Pluralism in the European Union and Beyond* (2012) 67-84.

¹¹⁴ J. Corcuera, *Soberanía y autonomía. Los límites del derecho a decidir*, 86 *Revista Española de Derecho constitucional* 303-341 (2009).

¹¹⁵ J.A. del Real Alcalá, *Derecho a la autonomía del artículo 2 de la Constitución, autodeterminación y secesión*, in J.O. Araujo (ed.) *El futuro territorial del Estado Español* (2013) 197-220, at 203, underlines the 'ductility' of Art. 2 in many respects.

¹¹⁶ The *Tribunal* considered such statement as recognising, by virtue of a constituent-like power, the Catalan sovereignty – which looks contradictory with his assumed non-sovereign nature: E. Fossas Espadaler, *Interpretar la política*, cit., at 285.

¹¹⁷ The *Tribunal* quoted the Judgment 103/2008 (F.J.4) annulling a Basque Law (*Ley 9/2008*). It aimed to establish new relationships between the Basque Country (*Euskadi*) and Spain for it entailed a challenge to the established constitutional order (art. 2 Const.); although the challenged Resolution is 'only' a political declaration. In the same vein, it quotes the Canada Supreme Court (*Renvoi realtif à la sécession du Québec* [1998] 2 RCS 217, 20 June 1998) that was an opinion under request of the Federal Government (not a judgment) and

Eventually, the TC turned back again and declared the 'right to decide' compatible with the Constitution¹¹⁸. The judges resorted to a duty of 'consistent interpretation' to put that right within the appropriate constitutional pathways¹¹⁹ (a claim to sovereignty being excluded in *unilateral* terms)¹²⁰; the right to decide was legitimate as long as it resulted in a (mere) address to the Spanish Parliament (*Cortes Generales, CG*) that would be bound by 'a duty of constitutional loyalty' to 'consider' it¹²¹.

To recap: the judgment answered to the three points concerned - admissibility, sovereignty, right to decide - as follows: 1) the challenged resolution is a definitive act as it produces legal (though not binding) effects; 2) Catalan people's sovereignty is ruled out as sovereignty must be understood in a monolithic way; 3) the right to decide is compatible with the Constitution as long as it stays within the limits provided therein - *i.e.* resulting in a mere address to the CG.

However, set aside the dubious use of the consistent interpretation canon - duly criticised by some scholars¹²²- it appears that, conceptually, these assumptions hardly cohere in a single system.

The assumption *sub-1*) implies a pluralistic understanding of law entailing a non-monolithic, *quasi-federal* conception of sovereignty, pursuant to which powers are pooled among territory-based authorities endowed with some degree of political autonomy¹²³. Thus, as much as 1) enjoys a solid argumentative

declared unconstitutional the final act of secession without previous interlocution with the legitimate government (not the acts aiming to establish such interlocution). See X. Eceizabarrena, *Derecho de libre autodeterminación y derecho a decidir: nueva soberanía y derechos humanos en el siglo XXI*, 90 Cuadernos Deusto de Derechos Humanos 17-33 (2017).

¹¹⁸J. Vintrò i Castells, *El Tribunal Constitucional y el derecho a decidir de Cataluña: una reflexión sobre la STC de 25 marzo de 2014*, Blog de Revista Catalana de Dret Públic (2018).

¹¹⁹ J. Tajadura Tejada, *La introducción del derecho a decidir en el ordenamiento jurídico español*, in *Instituciones de derecho parlamentario, VIII - La última jurisprudencia relativa al Parlamento, Parlamento Vasco*, 57-90 (2016).

¹²⁰ F. de Carreras Serra, *El derecho a no decidir pero sí a salir del maldito embrollo*, 46-47 Cuadernos de álzate: Revista Vasca de la Cultura y de las ideas 99-110 (2013).

¹²¹ Case 42/2014, FJ 4.

¹²² R. Ibrido, *Il "derecho a decidir"*, cit., 7.

¹²³ J.J. Solozábal Echavarría, *La autodeterminación y el lenguaje de los derechos*, cit.

background, 2) lacks it, for it supports a monolithic sovereignty at odds with 1).

As for 3), the right to decide obviously refers to self-determination¹²⁴— thus entailing political autonomy. As far as the *TC* is concerned, the exercise of such right cannot replace constitutional procedures but only prepare the ground for a political request to be addressed to the *CG*; such request would produce a ‘duty of loyalty’ as legal (non binding) effect.

Now, the alternative is twofold. If such duty is a merely political one, the assumption *sub* 3) would be consistent with 2) but not with 1): the process corresponding to a legitimate exercise of the right to decide would lack legal effects to the extent that it would have no impact on the constitutionally-compatible process, which alone leads to the ‘definitive’ act. Instead, if this duty of loyalty has legal effects, the right to decide meets 1) but violates 2) as resulting in legally-relevant activities challenging the *CG*’s monolithic sovereignty. Hence, if the right to decide generates no legal effect, according to 1) it would not be matter for the *TC* to decide; but if it does, it would contradict 2).

The conundrum reveals that the *TC* accepted to pay the price of inconsistent legal argumentation in the hope to prompt political leaders to further negotiations. Eventually, it was up to them to strike a balance between recognition of political autonomy and loyalty to the Constitution, as well as to seek an agreement on actual political conflicts. A passage of the judgment is adamant in this respect: the *TC* says that ‘the Constitution does not, and cannot, deal with all constitutional issues, particularly with those related to the legal *status* of a part of the State’ nor can ‘the Constitutional Court solve such problems’ that ‘must be solved by public powers through dialogue and cooperation’¹²⁵.

Nevertheless, as negotiations went nowhere, the Government decided to continue the jurisdictional path. Urged by such actions, the *TC* re-considered the right to decide to the detriment of the Catalan position.¹²⁶ This neatly emerges from the

¹²⁴ X. Eceizabarrena, *Derecho de libre autodeterminación y derecho a decidir*, cit., at 51. Cfr. M. Barcelò i Serramalera *et alt.*, *El derecho a decidir. Teoría y Práctica de un nuevo derecho* (2015) at 24.

¹²⁵ Case 42/2014, cit., FJ 5.

¹²⁶ J. De Miguel Bárcena, *El proceso soberanista ante el Tribunal Constitucional*, cit.

2015 judgments¹²⁷ on the *Ley de Consultas* and the consequent Order calling for public consultations on the *Cataluña's* future¹²⁸.

The TC was called to establish whether such acts provided for a *referendum* in breach, *inter alia*, of the State's exclusive competence laid down in Art. 149 Cost¹²⁹. It assumed that *consultas populares* as provided in the Spanish constitutional order can be divided into two categories: those having the character of a *referendum* and those lacking it¹³⁰. Then, it defined the requirements for a *consulta* to possess a *referendum*-like character: strictly referring to 'the people's opinions' and being organised 'by a public administration with due guarantees'¹³¹ the *consulta's* binding nature *vis-à-vis* the law-making competent bodies being held irrelevant in this respect¹³².

This obviously led to the rejection of the Catalan argument, which defended the legitimacy of the *Consulta* relying on the fact that it was non-binding¹³³. As the nuanced distinction between legal and binding effects elaborated in Case 42/2014 was abandoned, the State's exclusive competence on the overall *referendum* subject-matter could easily be maintained in light of the *Euskadi Case* doctrine¹³⁴. Finally, the way was paved to declare the *referendum*-like nature of the *Consulta* in light of 'objective criteria' and to annul the *Ley* concerned¹³⁵.

Solving the constitutional conundrum to the advantage of the Government entailed the suppression of the pluralist value attaching to the right to decide; yet on legal grounds that proved friable. The justification was political, and the TC made it very

¹²⁷ Cases 31-32/2015, 25 February 2015.

¹²⁸ Á. Alonso de Antonio, *Análisis constitucional de la Ley catalana de consultas populares*, cit., 123.

¹²⁹ Case 31/2015, FJ 2-3.

¹³⁰ *Ibid.*, FJ 5.

¹³¹ *Ibid.*, FJ 5, quoted from Case 103/2008, FJ 3.

¹³² See I. Villaverde Menéndez, *La sutil distinción entre consultar y referendar. A propósito de las sentencias del Tribunal Constitucional 31 y 32/2015*, 1-18 *Foro* (Nueva época) 425-442 (2015).

¹³³ J. Ridao Martín, *La oscilante doctrina del Tribunal Constitucional sobre la definición de las consultas populares por la vía de referéndum. Una revisión crítica a través de cuatro sentencias*, 63-1 *Revista Estudios de Deusto*, par. 2 (2015). See also F. Bilancia, *Il "derecho a decidir" catalano nel quadro della democrazia costituzionale*, 4 *Le Istituzioni del Federalismo* 985-997 (2014).

¹³⁴ Case 103/2008, 11 September, FJ 3.

¹³⁵ Case 31/2015, *cit.*, FJ 8-10.

clear by a long quote from Case 42/2014¹³⁶ – the only quote from that judgment featuring thereby – reiterating the vigorous affirmation of the limits that a Court must respect when called on to disentangle such issues¹³⁷. Paradoxically, by that quote, the TC re-affirms the very same constitutional grounds for the right to decide that had virtually flattened one paragraph prior¹³⁸. If read in context, this looks like a ‘last call’ for political leaders to appropriately tackle the issue¹³⁹. A call that was issued in vain, as the events precipitated and criminal prosecution was carried out against the Catalan ‘rebels’.

6. Towards a conclusion. Identity-based, *non-dialogable* claims replacing reasonable arguments: a *lose-lose* deal

The overall picture of the events, as looked at from the threefold perspective hitherto elucidated, seems to match quite predictably the common patterns detected along the story of the Catalan claim.

In the middle of a failing negotiation, threatened by the raising Catalan claim, the Government hoped that a severe defence of constitutional orthodoxy would have stopped the *procès*; but its strategy failed and, crucially, squandered resources of political-constitutional legitimacy. In fact, by resorting to the TC to denounce what was labelled as an illegality, the Government forced the constitutional judges into a very uncomfortable position, as they felt they had no way out¹⁴⁰. In their view, to contradict the Government’s stance would have unleashed the *Cataluña’s* process of independence, which might have led to numerous similar claims threatening the integrity of Spain. Then, another approach prevailed, namely that it should not have been the task of a Court, yet of supreme dignity, to open the door to

¹³⁶ Case 31/2015, *cit.*, FJ 6 a).

¹³⁷ *Ibid.*, FJ 5.

¹³⁸ See T. Martines, *Governo parlamentare e ordinamento democratico* (1967) at 152.

¹³⁹ J. de Miguel Bárcena, *El proceso sobiranista*, *cit.*, 150; see S. Gambino, *Pretese sovranistiche della Catalogna e unità indissolubile della Nazione spagnola*, 3 *Diritto pubblico comparato ed europeo* 449-458 (2017).

¹⁴⁰ X. Antich, *Tres reflexiones sobre la Diada*, *La Vanguardia*, 15 September 2014, 21: ‘*Se le pide al Tribunal que adopte una decisión que necesariamente es política y no jurídica. Es un error colosal... Insistimos en que el Constitucional no puede ser utilizado sistemáticamente como cuarta cámara...*’.

what was perceived as a radical change in the constitutional *status* of the *Comunidades Autónomas* and of Spain as a whole¹⁴¹.

The *TC* initially sought to craft prudent solutions; but, failing to induce political leaders to successful dialogue, it found no better than shrinking the constitutional spaces for debate. However, this did not avoid the breakdown: and, although it tried not to, eventually it had to take a *political* stance – perhaps unavoidably, unfortunately for sure¹⁴². The price it paid, in terms of de-legitimation, was enormous¹⁴³: as the conflict exceeded the legal sphere, its judgments were openly repudiated and went regularly unaccomplished – not a negligible blow to its legitimacy and to the credibility of Spain's constitutional system¹⁴⁴. The successive fully-fledged denials of any form of right to self-determination of '*los pueblos de España*' were as severe as irrelevant, surpassed by the course of the events¹⁴⁵.

Contrarily to the Government's plans, the Catalan reluctance to 'surrender' caused a loophole in the Spanish constitutional order: a wound that only a supreme political level – the Head of State – could heal as a last resort of legitimacy. Nonetheless, the speech of the King was nothing more than the ultimate attempt to pursue the same strategy: to deny the Catalan claim *political* value, yet with poor *reasonable* argumentative background. It is worth noting that the King made no use of the legal reasoning put forward in the *TC* case-law: he preferred resorting to emotional arguments in light of the symbolic force of his prerogative. Perhaps, a deeper awareness of the political and

¹⁴¹ Yet, perhaps, legal, at least in its initial part: F. de Carreras Serra, interview at www.naciodigital.cat, 29 October 2013 [22 November 2018].

¹⁴² Several temporary measures (*medidas cautelares*) were taken *inaudita altera parte* against the pro-independence forces: *El Tribunal acorralla a Puigdemont y alivia al Gobierno*, *La Vanguardia*, 28 January 2018.

¹⁴³ G. Ferraiuolo, *Tribunal Constitucional y cuestión nacional catalana. El papel del juez constitucional español entre la teoría y la práctica*, in J. Cagiao y Conde and G. Ferraiuolo (eds.) *El encaje constitucional del derecho a decidir*, cit., 110-141, 122, ties it back to the Catalan Statute *affaire*. See J. Urías Martínez, *La peligrosa deriva del Tribunal Constitucional*, 110 *Éxodo* 20-26 (2011).

¹⁴⁴ M. Saralegui, *¿Puede solucionar el Tribunal Constitucional la crisis catalana?*, *Revista de Occidente* 27-40 (2018).

¹⁴⁵ See for instance Judgment 114/2017, 17 October 2017, on the *Ley Catalana de Referendum* 19/2017, FJ 2 b).

constitutional relevance of that claim¹⁴⁶ (as the TC repeatedly pointed out)¹⁴⁷ might have suggested the Crown a more inclusive approach.

What stands out is the replacement of rational arguments supporting each other's reasons on specific points with *identity-based* claims backed by *non-dialogable* arguments¹⁴⁸. Both claims resort to *incommunicative* narratives: the first clinging to the *mythical* origins of *Cataluña* and its enduring battle to be recognised as a nation, the second on the *venerable* concept of Spain's unitary sovereignty. Both are supported by few reasonable motives, as legal arguments look one-sided¹⁴⁹; both ill-conceal a troublesome political negotiation and well expose the mutual incapacity to carry it out successfully¹⁵⁰. All in all, this proves to be a *lose-lose* deal, one from which a way out must be sought as rapidly as possible to heal the wounds caused¹⁵¹.

¹⁴⁶ Á.-L. Alonso de Antonio, *cit.*, 52, reported that President Mas in a speech (20 December 2012) argued that 'the right to decide relates to sovereignty but to democracy first'.

¹⁴⁷ J. Ridao i Martin, *La juridificación del derecho a decidir en España*, 91 *Revista de Derecho político* 91-136 (2014); F. Spagnoli, *Il Tribunal Constitucional e la disputa sulla secessione della Catalogna*, 2 *Rivista AIC* 1-15 (2018) 6f.

¹⁴⁸ See I. Pardo Torregrosa with J. Cagiao y Conde, 'Cagiao, *El nacionalista siempre es el otro*, *La Vanguardia*, 22 October 2018; the same author detailed his position in J. Cagiao y Conde, *Micronacionalismos. ¿No seremos todos nacionalistas?* (2018).

¹⁴⁹ Which exasperated the tensions even among legal scholars: see M. Aragón Reyes, 'El desafío independentista en Cataluña: Comentario constitucional', 38 *Revista Electrónica de Estudios Internacionales* (2018) who qualifies as '*golpe de Estado institucional*' the 'disconnection process' culminating in the declaration of independence ratified by the *Parlament* on 27 October 2017 and annulled by the TC (*Auto* 144/2017); cfr. A. Mastromarino, *La dichiarazione di indipendenza della Catalogna*, 3 *Osservatorio AIC* 1-13 (2017) and B. Aláez Corral, *Constitucionalizar la secesión para armonizar la legalidad constitucional y el principio democrático en estados territorialmente descentralizados como España*, 22 *Revista d'estudis autonòmics i federals* 136-183 (2015).

¹⁵⁰ E. Albertí Rovira, *El conflicto de Cataluña como crisis constitucional*, 10 *Fundamentos* 301-341 (2019) speaks of (302f.) '*una crisis constitucional sin diagnóstico compartido*'.

¹⁵¹ C. Ruiz Rico-Ruiz, *Crisis territorial en Catalunya y apariencia jurídica: ¿Posverdad o pos-constitucionalismo?*, XVI *Congreso de la Asociación de Constitucionalistas de España* (2018).

What is coming next?¹⁵² The situation is utterly intricate¹⁵³. Catalan political leaders are being prosecuted and risk up to 20 years' imprisonment for rebellion and other minor crimes; it would be politically unfeasible – and, all things apart, plainly illegal – to stop prosecution in course without legal grounds¹⁵⁴. Yet, one may ask whether it is ethically acceptable that in a XXI century democratic State political leaders could face a 20 year-long sentence for *political* reasons. Be it as it may, it seems that responsibility for this situation – terribly *divisive* for the Spanish society – does not leave the Crown exempted either, despite the King being unaccountable under Art. 56 Cost¹⁵⁵.

The campaign for the 28 April 2019 general elections in Spain was infused with emphatic appeals to the 'unity of Spain' as a fundamental political issue, and the equally loud promises to trigger Art. 155 Cost.¹⁵⁶ against a neo-appointed *Govern* did not

¹⁵² It will not be attempted here to detail the reaction of the Spanish Government and the follow-up of the Catalan elections (21 December 2017) triggered by the actions undertaken pursuant to Art. 155 Const.: see B. Caravita di Toritto, *La Catalogna di fronte all'Europa*, 19 *Federalismi.it* 1-5 (2017); L. Frosina, *La deriva della Catalogna verso la secessione unilaterale e l'applicazione dell'art. 155 Cost.*, 3 *Nomos* 1-20 (2017); M. Cecili, *SPAGNA: L'investitura impossibile del Presidente della Generalitat catalana. Cronaca di una crisi istituzionale*, *ForumCostituzionale.it* 1-8 (2018). Cfr. M. Bak McKenna, *Spain's hard line on Catalonia is no way to handle a serious secession crisis*, <http://theconversations.com>, 24 October 2017 [10 May 2019].

¹⁵³ Declarations of the *Generalitat's* Vice-President Pere Aragones, *El Govern considera que la independència sólo llegará por la vía de la negociación*, in www.deia.eus, 9 September 2018 [28 November 2018].

¹⁵⁴ C.E. Cué, *Public Prosecutors uphold Rebellion Charge against Catalan Independence Leaders*, *El País-Cataluña*, 2 November 2018.

¹⁵⁵ See F.J. Díaz Revorio, *La monarquía parlamentaria*, cit., at 85; Y. Gómez Sánchez, *Art. 64*, cit.

¹⁵⁶ Art.155 empowers the Government, with the consent of the Senate's absolute majority, 'to take all the necessary measures' to avoid a serious prejudice to the Spanish interest or to compel a *Comunidad Autónoma* to fulfil its obligations. It was applied once (the Senate voted on 27 October 2017) until the *Govern* led by Quim Torra took office (2 June 2018). See J. Urías Martínez, *El artículo 155 CE: alcance y límites de una excepción constitucional*, 2(*Extra*) *Revista catalana de dret públic* 101-114 (2019); E. Vírjala Foruria, *La coacción estatal del artículo 155 de la Constitución*, 73 *Revista española de Derecho constitucional* 55-110 (2015). In general, see E. González Hernández, *El control estatal sobre las Comunidades Autónomas: las reformas estatutarias y el supuesto de control extraordinario del artículo 155 CE. El control subsidiario del Tribunal Constitucional*, 11 *Parlamento y Constitución. Anuario*, 161-194 (2008). Most recently, see the collection of essays

contribute to easing a profoundly painful political and social conflict¹⁵⁷. In the polls, right/centre-right parties suffered a defeat and the Socialist leader Pedro Sánchez was the candidate to form a Government;¹⁵⁸ yet, his failure to reach an agreement with any of his interlocutors has led the country to new polls (10 November 2019)¹⁵⁹. The numerous elections that have been repeatedly called for in such a short time and the difficulties in appointing a solid Cabinet prove that Spain is undergoing a moment of profound socio-political change, perhaps of a structural nature¹⁶⁰; which prompts scholars to reflect about constitutional modifications that may strengthen governmental stability¹⁶¹ - in order to escape the trumps of what has been recently dubbed 'a *hyper-minoritarian*

El artículo 155 de la Constitución in XXIV Jornadas de la Asociación de Letrados del Tribunal Constitucional (2019).

¹⁵⁷ Meanwhile, most Catalan leaders were inflicted pre-trial detention, while a 'permanent 155' spectrum was on the table. See J. Casquero and A. Díez, *Casado y Rivera exigen el 155 y elecciones: "La aventura acabó"*, El País, 12 December 2018; J. Lamet, *Casado pide agrupar el voto útil de la derecha en los senadores del PP para poder aplicar un 155 duro*, El Mundo, 19 February 2019. Significantly, right-wing leaders blame each other for being too tolerant: N. Junquera, *El PP: "Ciudadanos provocó que el 155 fuera blandito"*, El País, 26 February 2019.

¹⁵⁸ See A. Díez, *La investidura de Pedro Sánchez fracasa y se activa la cuenta atrás para nuevas elecciones*, El País, 25 July 2019; M. Cruz, *El fracaso en la investidura de Pedro Sánchez condena a España a la paralización*, El Mundo, 26 July 2019; L. Mayor Ortega, *La investidura fracasa por la imposibilidad de Sánchez e Iglesias para ponerse de acuerdo*, La Vanguardia, 25 July 2019.

¹⁵⁹ On the rise of the right-wing nationalist Spanish party *Vox* and the fall of the moderate liberal centre-right formation *Ciudadanos*, E. Delgado Sanz, *Vox «fagocita» a Ciudadanos en una España vaciada que dominan PP y PSOE*, ABC, 11 November 2019.

¹⁶⁰ See R. Bermejo García, *La crisis catalana y el desgobierno de los Gobiernos de España*, 35 Anuario Español de Derecho Internacional 13-60 (2019); E. Aranda Álvarez, *El nuevo mapa de partidos en las Comunidades Autónomas y sus efectos en la forma de gobierno: «Mucho ruido y pocas nueces»*, 43 Teoría y realidad constitucional 257-283 (2019); in general, M. Azpitarte Sánchez, *El poder como retórica: Crónica política y legislativa del año 2018*, 115-39 Revista española de Derecho constitucional 141-169 (2019).

¹⁶¹ *Ex multis*, R. Blanco Valdés, *El año que vivimos peligrosamente: del bipartidismo imperfecto a la perfecta ingobernabilidad*, 109 Revista española de Derecho constitucional 63-96 (2017) and D. Giménez Glück, *El bloqueo, evitable, de la formación de gobierno: una propuesta de reforma del procedimiento de investidura*, 99 Revista de Derecho Político 301-324 (2017).

government¹⁶². At the time of the writing, the celebration of an agreement between Pedro Sánchez and the leader of the left-wing party UP (*Unidas Podemos*) Pablo Iglesias seems conducive to a leftist Cabinet seeking abstention, at least, from other parties¹⁶³; uncertainty is high as for the chances that such an agreement will resist the daily practice of government¹⁶⁴.

The Catalan *affair* has followed its doomed trajectory. After the first 2019 electoral campaign, the independence issue went somehow silenced in the Spanish public debate, as the tentative formation of a Cabinet occupied the entire scene¹⁶⁵. Yet, the criminal trial against the Catalan leaders continued across the European elections¹⁶⁶ and has come to its natural end. On 14 October 2019, the Supreme Court has sentenced many of the Catalan leaders up to 13 years of imprisonment and relevant accessory penalties (like prevention from holding public charges) for sedition, embezzlement and misuse of public funds¹⁶⁷.

¹⁶² D. Giménez Glück, *El Gobierno hiperminoritario (y su relación con el Parlamento)* (2019).

¹⁶³ C.E. Cué, *Sánchez e Iglesias alcanzan un acuerdo para formar un Gobierno de coalición*, *El País*, 12 November 2019. Updates in *PSOE-Unidas Podemos: Coalición y nuevos pactos*, *La Vanguardia*, 14 November 2019 and *Pactos de investidura: El PSOE y Unidas Podemos se preparan para consultar su acuerdo a la militancia*, *El País*, 19 November 2019; on the possible terms of the agreement, P. Benito, *Estas son las claves del pacto de coalición que negocian sin vetos Pedro Sánchez y Pablo Iglesias*, *El País* 12 November 2019. Sánchez has eventually received the *Investidura* on 7 January 2020: see comments in V. Mondelo, *ERC bloqueará el Gobierno si Pedro Sánchez no acepta negociar la autodeterminación y la amnistía*, *El Mundo*, 8 January 2020.

¹⁶⁴ See L. Abellán, *El Rey bromea con Pedro Sánchez tras prometer el cargo: "Ha sido rápido. El dolor viene después"*, *El País*, 8 January 2020.

¹⁶⁵ See Ó. Mateos y de Cabo, *La elección parlamentaria del presidente del Gobierno en España: análisis normativo, estabilidad institucional y propuesta de reforma del artículo 99.5 de la Constitución española*, 111 *Revista Española de Derecho Constitucional* 155-184 (2017); D. Delgado Ramos, *El control parlamentario del Gobierno en funciones en España: La experiencia de la XI Legislatura*, 16-2 *Estudios constitucionales* 183-220 (2018) and M.R. Ripollés Serrano, *Gobierno en funciones y control parlamentario*, 109 *Revista española de Derecho constitucional* 155-183(2017).

¹⁶⁶ See M. Cecili, *Puigdemont candidabile per le Europee. I "rivoluzionari catalani" all'assalto delle istituzioni spagnole ed europee*, *Diritti comparati* (24 May 2019).

¹⁶⁷ See R. Rincón, *Sentencia del 'procés': penas de 9 a 13 años para Junqueras y los otros líderes por sedición y malversación*, *El País*, 15 October 2019, and the news in the press of that day; the whole judgment (in Spanish) is in P. Gabilondo, *Oriol Junqueras, condenado a 13 años de cárcel por sedición y malversación*, *El Confidencial*,

One may wonder whether a solution could be to grant an *ad hoc* pardon in exchange for the burial of the independence hatchet, as it happened already long ago. However, this requires both a political and a constitutional condition. First: a government backed by a stable majority that takes the *responsibility to politically* respond to the Catalan claim and to prompt an end to the penal issue while resisting to the criticism that will surely come from part of the Parliament and the society. Second: under the Constitution, pardon powers, although exercised in fact by the executive, fall within the royal prerogative, subjected to the admission of guilt from the pardoned person. Therefore, once an '*acuerdo de indulto*' has been reached with the Government, Catalan leaders must at least formally ask pardon by admitting that they have been guilty of the crimes for which they have been convicted; that is, they must bow to the same King that declared their stance '*illegal and in betrayal of whole Spain*'¹⁶⁸. It seems a hard political penitence for the Catalans, one which may have repercussions not only on the political-institutional relations – including the European Union level¹⁶⁹– but primarily in the

14 October 2019, and E. Naranjo, *Sentencia completa del juicio del procés*, *El Periodico*, 5 November 2019. Comments in E.A. Maya Moreno, *Sobre la sentencia del Proceso Catalán*, *HayDerecho*, 19 October 2019. See updates on the mass contestations: *Manifestación independentista en Barcelona: Última hora de los enfrentamientos*, *La Vanguardia*, 27 October 2019, and comments in A. Ferrero, *El soberanismo mantiene la capacidad de movilización contra la sentencia*, *Público*, 26 October 2019; L. Frosina, *Il conflitto catalano tra giustizia e politica. Prime osservazioni sulla sentenza del Tribunale Supremo sul cd. Procés*, 20 *Federalismi.it* 1-17 (2019).

¹⁶⁸ See Art. 62 (i) Const. The controversial nature of the *indulto*, confirmed by the TC on numerous occasions, has been duly highlighted by the relevant literature: see M.I. Serrano Maíllo, *¿Debe exigirse motivación a los acuerdos de concesión de indultos?*, 34 *Teoría y realidad constitucional* 609-624 (2014) and A. Ruiz Miguel, *Gracia y Justicia: Soberanía y Excepcionalidad*, 113 *Revista española de Derecho constitucional* 13-35 (2018).

¹⁶⁹ See, lately, the Judgment of the Court of Justice of the European Union, C-502/19, *Junqueras Vies*, 19 December 2019, ECLI:EU:C:2019:1115: the Court has maintained that Oriol Junqueras Vies – a Catalan leader, president of *Esquerra Republicana*, elected to the European Parliament in the 23-26 May 2019 polls while pending the criminal proceedings for rebellion (where he was sentenced to 13 years) – enjoyed, as a consequence of the proclamation of the results, personal immunity under Art. 9 of the Protocol n. 7 on *Privileges and Immunities of the European Union*, and was therefore to be released from temporary detention in order to allow him to move to Brussels and to fulfil the necessary

Spanish society. Perhaps, a step by the Government and even by the King himself, somewhat adjusting the terms of the debate by conciliatory public declarations, could be of help. In the long run, it might be useful to re-think of sub-state communities in view of a multifaceted (*pluri*)-national sovereignty¹⁷⁰; and to question whether a constitutional reform embracing a fully-fledged right to secession may help to rationalise future claims of that sort¹⁷¹.

Whether all these conditions will effectively concur in the next times, is a question that has no reliable answer yet.

formalities to take office. As opposite, should the Supreme Court hold that the case is for a withdrawal of his immunity, it should ask the European Parliament to suspend that immunity in accordance with Art. 9(3) of the mentioned Protocol. Cfr. the *Opinion* of the Advocate General Szpunar (12 November 2019) holding that once a member of the European Parliament is proclaimed, it is up to the European Parliament alone to decide on his immunity (par. 72f., 110f.); on that point, D.M. Herszenhorn, *Spain was wrong to impede Catalan candidate from taking MEP seat, says top lawyer*, *Politico.eu*, 12 November 2019. See the news in the press of 19 December 2019: adde E. Wax, *EU court: Spain wrong to stop Catalan separatist taking up MEP seat*, *Politico.eu*; E. Sánchez Nicolás, *Catalan party: release leader after MEP 'immunity' verdict*, *EuObserver*; cfr. M. Cecili, *Catalogna: Junqueras vince la battaglia alla Corte di Giustizia, mentre Torra rischia la Presidenza*, *Diritticomparati.it* (20 December 2019; indeed, the Spanish electoral Court – *Junta Electoral* – has declared void the credentials of Quim Torra, who was to be appointed President of the *Generalitat*, as a consequence of the ‘*inhabilitación*’ stemming from the criminal sentence, and held that Junqueras’ request to be released and to take office as a Member of the European Parliament is to be rejected. See L. Mayor Ortega, *La Junta Electoral inhabilita a Quim Torra*, *La Vanguardia*, 3 January 2020; F.J. Pérez, *La Junta Electoral acuerda destituir a Quim Torra tras su condena por desobediencia*, and Id., *La Junta Electoral sacude la investidura*, both in *El País*, 4 January 2020.

¹⁷⁰ See G. Delledonne, G. Martinico, *Legal Conflicts and Subnational Constitutionalism*, XLII(4) *Rutgers Law Journal* 881-912 (2011); a thorough comparative account of ‘subnational constitutionalism’ in G. Delledonne, G. Martinico and P. Popelier (eds.) *Re-exploring subnational constitutionalism*, 6-2 *Perspectives on Federalism* (Special Issue) 1-360 (2012).

¹⁷¹ These last two issues are also addressed, respectively, in S. Tierney, *Reframing Sovereignty? Sub-state national societies and contemporary challenges to the nation-state*, and W. Norman, *From quid pro quo to modus vivendi: can legalizing secession strengthen the plurinational federation?*, both in F. Requejo Coll, M. Caminal i Badia (eds.) *Political Liberalism and Plurinational Democracies*, cit., respectively at 115-138 and 185-205.