The Independence Referendum and Debates on Catalonia’s Constitutional Future

E. CASANAS ADAM*

1. Introduction

On the 11th September of 2012, (the national day of Catalonia, or Diada, commemorating the fight for Barcelona in 1714), one and a half million people came out into the streets in Barcelona in support of independence for Catalonia. The Catalan Prime Minister, Artur Mas (Convergencia i Unió - CIU), called new elections to secure a mandate to hold a referendum and to lead the process of national transition to ‘Catalonia’s own state’. The Spanish Government, headed by Mariano Rajoy (Partido Popular - PP), responded that the holding of such a referendum was incompatible with the 1978 Constitution, which states that national sovereignty resides in the Spanish people, and campaigned strongly against it. The election results gave a clear victory to the pro-referendum parties, strengthening in particular the more hard-line nationalists Esquerra Republicana de Catalunya (ERC), with whom Artur Mas negotiated an agreement to take the process forward. As a first step, on 23 January they submitted a ‘Declaration of Sovereignty and of the Right to Decide of the People of Catalonia’ to the Catalan Parliament, which was strongly endorsed.1 This paper will analyse the main legal and constitutional issues arising from this process and the current debates on Catalonia’s constitutional future.

2. Background and context

The Spanish model of ‘State of the Autonomies’ was established by the 1978 Constitution, resulting from a peaceful transition to democracy after a 40 year dictatorship.2 The provisions on the territorial organisation of the state were included to provide some recognition and accommodation for Spain’s historical national minorities, Catalonia, the Basque Country

---

* Dr. E. Casanas Adam is a lecturer in Public law and Human Rights at the Edinburgh Law School.

1 Catalan Parliament 2012.
and Galicia, in the new settlement. In this sense, the Constitution states that it is based on the ‘indissoluble unity of the Spanish nation’ but also that it ‘recognises and guarantees the right to self-government of the nationalities (a compromise term used to refer to the minority nations) and regions of which it is composed’ (Art. 2). This was initially understood to suggest that there would be a difference in the treatment of the ‘nationalities’ in relation to the ‘regions’. A distinctive feature of this model is that it is not fully defined in the Constitution, which simply established the framework within which specific territories could initially constitute themselves as Autonomous Communities (ACs), through the enactment of a Statute of Autonomy. As a result, the Statutes of Autonomy played a fundamental role in completing the constitutional framework by defining the specific features and the scope of self-government of each AC. The Constitution provided for a multi-speed process, which would allow the historical nations to attain a high level of self-government from the start, and which would initially allow for the transfer of fewer competences for the rest. It was initially unclear how the model would develop, but all the territories followed the lead of the historical nations, and by 1983 Spain was a fully decentralised state with 17 ACs. During its first 25 years of functioning, the model was largely considered a success. However, and as a consequence of the actions of the two main state-wide parties (PP and PSOE), the initial distinction between the ‘nationalities’ and ‘regions’ was blurred, denying Catalonia and the other minority nations the recognition they desired. Two sets of agreements between the two main state-wide parties in 1981 (at the time, UCD and PSOE) and 1992 also resulted in an equalisation of the competences of all the AC’s.

Within the above framework, Catalonia enacted its Statute of Autonomy in 1979, and it was endorsed by the Catalan people in a referendum. Its creation of a new Catalan Parliament and Government was seen as the restoration of Catalan autonomy, which with some notable exceptions had been the object of ongoing struggles since 1714.3 During the initial years of the AC’s model, Catalan institutions were governed by moderate nationalist parties with a desire to further develop their self-government, but not to break away from Spain. In 2003, and taking advantage of a favourable Socialist Government at the central level (as of 2004), the Catalan parties initiated a process of reform of their Statue of Autonomy, with a double aim: first, to further expand their competences to the maximum allowed by the Constitution, and at the same time to resolve some of the problems with the system; and second, to provide for a better recognition of their specific Catalan national identity within the statutory framework. The Catalan initiative, followed by other AC’s although with less intensity, was very strongly opposed by one of the two state-wide parties, the PP,

3 Guibernau 2013. These notable exceptions were the Commonwealth of Catalonia (Mancomunitat, 1914-1935) and the republican Catalan Government (1931-39).
which considered it to be in violation of the Constitution and threatening the unity of the state. As the PP was unable to block the reform politically both at the AC and the central level, it challenged a substantive part of the outcome before the Constitutional Court. After a long and contentious process, the Court de-activated most of the new reforms. In order to do so, it went back on much of its previous case-law and devalued the constitutional role and functions of the Statutes of Autonomy, extending its own and the central legislator’s discretion in the definition of the Constitutional model of territorial organisation of the State (STC 31/2010). The decision was extremely controversial, as the new Statute had been negotiated on and approved in both the Catalan and the Spanish parliaments, in strict compliance of all procedural requirements, and had been endorsed by the people of Catalonia in a referendum. It was also notably harsh in its consideration of the new provisions regarding the recognition of Catalonia as a minority nation.

The Constitutional Court’s decision largely left the ACs, and Catalonia in particular, at a crossroads: as a result of the Court devaluing the role of the Statutes of Autonomy in completing the very open constitutional framework, not only had Catalonia’s main avenue for improving their self-government been blocked, but the key elements of its autonomy had been left at the discretion of the central legislature. The decision also damaged the faith of the institutions and citizens of Catalonia in the Constitutional Court as a mediator between both levels of government. Two additional developments added to the general feeling in Catalonia that it was impossible to reach a satisfactory constitutional settlement with the rest of the state: the refusal of the Spanish Government to re-negotiate Catalonia’s unbalanced financing system in the context of a grave recession; and a Supreme Court decision overruling Catalonia’s established language policy in education (STS, Section 3, 12 June 2012). All the above led to a bottom up process aimed at attaining independence for Catalonia, which became clearly visible in the protest march of 11 September 2012.4

3. The initial Catalan agreement and the main constitutional debates

The elections held in response to the 2012 protest march became a pre-referendum in themselves, with Catalonia’s right to decide and the different options for its constitutional future being the central focus of all parties (the austerity measures as the other important element). As noted, the results supported the holding of a referendum but strengthened the more hard-line ERC. It is also worth highlighting that the most notable losers

4 Guibernau 2013.
were the PSC, which put forward an intermediate federal option, proposing a reform of the Constitution in order to improve the position of Catalonia within the overall system. After the elections, CIU and ERC agreed that the referendum on Catalan independence was to be held in 2014. Their agreement also set out a plan for the process of ‘National Transition’ of Catalonia, in several steps: first, a Declaration of Sovereignty of the People of Catalonia (first plenary session of the Catalan Parliament); second, the Enactment of a Statute on Consultations (this was seen as an alternative instrument to ‘referendums’ themselves, as will be explained below); third, the start of negotiations with the Spanish State in order to reach an agreement on holding a referendum; fourth, the creation of a Catalan Council for National Transition as an advisory body to promote, coordinate and advise the Government’s work in this process; and fifth, to have everything set up by the end of 2013 in order to hold the referendum in 2014. This could, however, be postponed by agreement between both parties.

Following the above, the ‘Declaration of Sovereignty and of the Right to Decide of the People of Catalonia’, adopted on the 23 January 2013, provided that, in accordance with the will of the people of Catalonia, the Catalan Parliament agreed to start the process towards them exercising their right to decide their collective political future. It then set out the principles that were to guide this process: sovereignty, democratic legitimacy, transparency, dialogue, social cohesion, Europeanism, legality, a principal role for the Parliament and participation, and finally encouraged citizen action and engagement. Once the process was set in motion, the constitutional debate focused largely on two issues: whether Catalonia could be considered a nation that can decide on its own future; and what (if any) legal avenues were available for Catalonia to hold a referendum on independence.

1. Is Catalonia a ‘nation’ in the legal-constitutional sense that would enable it to hold a referendum on its independence?

The main constitutional argument against the referendum is that there is no Catalan nation with a right to decide its own constitutional future. This is based on Arts. 1 and 2 of the Constitution, which provide that ‘National sovereignty belongs to the Spanish people’ and that ‘The Constitution is based on the indissoluble unity of the Spanish Nation’. It has therefore been put forward that if it were to go ahead, the referendum would require the consultation of the entire Spanish people, or that it could not be held without a previous reform of the Constitution in this sense. Arguments in support of the referendum are also based on Art. 2, which at same time recognises and guarantees ‘the right to self-govern-

5 CIU and ERC 2012.
ment of the nationalities and regions’. As seen above, this distinction between nationalities and regions has been largely blurred with the development of the model and there is currently no constitutional legal definition of the term ‘nationality’ as included in the Constitution. The opportunity for the Constitutional Court to provide an interpretation of Art. 2 in accordance with Spain’s pluri-national reality actually arose in the Catalan Statute case, when the PP challenged the Statute’s careful articulation of these principles for Catalonia, stating in the Preamble that the Catalan Parliament had defined Catalonia as a nation and then that the Constitution recognised its ‘national reality’ as a nationality. However, although the Court acknowledged that Catalonia could be considered a nation in the wider sociological or political sense, it distinguished this from the strict legal-constitutional sense. It then went on to state that, ‘in this (legal-constitutional) sense, the Constitution does not recognise any other than the Spanish nation’ (STC 31/2010).

As a result of the above, arguments in favour of the possibility of Catalonia to be able to hold a referendum within the current constitutional framework are based on the democratic principle contained in Art. 1 of the Constitution, which is one of the foundations of the system and informs the interpretation of the rest of the constitutional text. The strong citizen support for the referendum is clear both from the intensity of civil society movements and activities and the outcome of the 2012 elections. The strength of the democratic argument is also reflected in the current solid majority in favour of the referendum in the Catalan Parliament.

ii. What legal avenues are available for Catalonia to hold a referendum?
The second set of constitutional arguments against Catalonia’s capacity to hold a referendum on independence are that the current constitutional framework does not grant it such competence. These arguments are based on the constitutional regulation of referendums and, in particular, on the exclusive competence of the central state over the ‘Authorization of popular consultations through the holding of referendums’ (Art. 149.1.32). In addition, there is also a general provision enabling the central Government to submit political decisions of special importance to a consultative referendum (Art.92). Within this framework, the Catalan Parliament took the initiative and enacted a Catalan statute on referendums in 2010, which included the requirement for any referendum to be held in Catalonia to be authorised by the central Government. This was challenged before the Constitutional Court by the central government at that time for violation of the above provisions and the Act was temporarily suspended. Currently, the Act is back in force with the challenge still pending (the Constitutional Court decided that it was not necessary to
maintain the suspension). Yet it is still unclear if the Act is compatible with the Constitution in the opinion of the Court. An alternative would be to hold a ‘consultation’ of citizens, which would not require the authorisation of the central Government. The Constitutional Court has accepted that Catalonia has the competence to hold ‘consultations’, as is included in its Statute of Autonomy (STC 31/2010). However, in accordance with the Court’s case law, these could then not be based on the electoral register and could not involve the institutions or benefit from the safeguards of the ordinary electoral procedure, which are associated to referendums (STC 103/2008). In a recent opinion, the Council for Statutory Guarantees of Catalonia (providing advice on the compatibility of Catalan bills and draft instruments with the Statute of Autonomy and the Constitution) declared that a popular initiative presented to the Catalan Parliament proposing to hold a referendum on independence under the above 2010 Act was in violation of the Statute of Autonomy, as it addressed an issue that was outside the competences of the Catalan Parliament (Dict.15/2010). The opinion also stressed that any consultation held by the Catalan institutions of self-government must be on issues within their field of competence.

In a recent report, the Institute of Autonomic Studies of Barcelona, a prestigious research institute linked to the Catalan Government, highlighted 5 different procedures through which Catalonia could hold a referendum on its constitutional future. Their aim was to highlight that any reasons put forward by the central government or parliament against holding the referendum were political rather than legal. The first is to base it on the Catalan statute on referendums mentioned above; this would allow the referendum to be designed and organised in Catalonia, with the authorisation of the central Government. The second is to use the procedure for consultative referendums in Art. 92 of the Constitution; in this case it would be held and at least minimally designed by the central institutions. The third would be the constitutional mechanism for the transfer of competences to the Catalan institutions of self-government, so that they would have competence to either hold or hold and design the referendum (Art.150). The fourth would be to use a statute on ‘consultations’ of citizens, which was submitted to the Catalan parliament as part of the new process, where the consultation could be fully designed and organised by the Catalan authorities. The fifth and final mechanism would be to reform the Constitution to include consultative referendums for AC’s. The report then recommends that the Catalan authorities negotiate with the central ones to determine which of these procedures is the most adequate.

6 Institut d’Estudis Autonomics 2013.
4. The process so far: the ‘Declaration of Sovereignty’, the Advisory Council’s Report, and the exchange of letters

So far, there has been a lack of dialogue between the Catalan and central institutions, and the latter have used all possible legal instruments to prevent the process going ahead. As seen above, the first step in the process was the adoption of the Declaration of Sovereignty by the Catalan Parliament. Despite this being a political document, the Spanish Government challenged the Declaration of Sovereignty before the Constitutional Court, for stating that ‘Catalonia is a legal and political sovereign subject’. Interestingly, the Court has tried to avoid deciding on the issue by writing to the Catalan Parliament to inquire if this resolution was still valid, or had been replaced by a second strongly endorsed resolution, put forward by the PSC, which supported the right to decide of the people of Catalonia and the holding of a consultation with the previous agreement with the central Government. The Catalan Parliament responded that both were valid, and that the second one did not nullify the first. The Constitutional Court then accepted to hear the challenge and declared, and then unanimously ratified, the suspension of the first Resolution until the final decision in the case. It is to be noted that this is the first time that the Constitutional Court has suspended a political document and opinions are divided on what (if any) effects this actually has. Yet, the process is continuing irrespective of the suspension and in order to comply with the Declaration and ensure a central role for the Catalan Parliament, a cross-party Parliamentary Committee for the Study of the Right to decide was set up on 4 July 2013, including members of all political parties, except the PP and the minority party Ciutadans. The Parliament is considering the Bill on popular ‘consultations’ submitted by the Catalan Government through its urgent procedure and initially meant to complete it by the end of 2013.

As provided in the initial agreement, the Catalan Government set up the Advisory Council for National Transition in February 2013 as an advisory body to the Government in the process leading up to the consultation in 2014. It is composed of well-known and respected Catalan academics in the fields of law, political science, economics and sociology. Its establishment was challenged in the ordinary administrative courts, by an association linked to one of the minority centralist parties (Ciutadans), but the Higher Court of Justice of Catalonia refused to provisionally suspend it until the matter was fully considered and decided. The Council’s President, Carles Viver Pi i Sunyer, announced that its work would consist of preparing 19 reports on various issues, including the legal avenues available to hold the consultation, the relationship of the new Catalan
state with the EU and the international community, the future relationship with the remaining Spanish state, a new constituent process, the judicial branch, and commercial, economic and financial matters. It published its first report on 25 July 2013, ‘The Consultation on the Political Future of Catalonia’, which considers the arguments that legitimate the consultation, discusses the different possible legal avenues as well as the consequences of a victory for the ‘yes’ and ‘no’ votes. What is particularly notable is that it also considers the option of holding a plebiscite election (where all parties would stand, and citizens would vote, on the single issue of Catalonia’s constitutional future), if it is impossible to hold a consultation or referendum through the above legal avenues, and of a unilateral declaration of independence, setting out the requirements for this to be legitimate. The Council submitted four more reports to the Catalan Government in December.

The Catalan Government and the parties favouring the referendum have also tried to negotiate with the central state institutions though formal and informal means. In February CIU presented a resolution in the Spanish Congress, asking the Spanish Government to enter into a dialogue with the Catalan authorities with a view to holding the consultation. The resolution was not adopted, losing by 60 to 275 votes, but what was striking was that for the first time the Catalan section of the Socialists voted against the other members of their party (and in favour of the resolution). Following the Spanish Prime Minister’s refusal to discuss the possibility of the referendum, the Catalan Prime Minister sent him a formal letter asking him to engage in a process of dialogue and negotiation which could lead to the holding of a consultation of the people of Catalonia in the shortest term possible. The Spanish Prime Minister responded by letter, highlighting his openness to dialogue within the existing legal framework, pointing to the ties between Catalonia and the rest of Spain, and offering to work together to offer the best response to the real needs of all citizens. However, he avoided addressing the consultation issue directly.

Because the central authorities have refused to even consider the possibility of the referendum from the beginning, the process has also been very much directed at persuading the European Union and the international community more generally of the legitimacy of the Catalan claim. The most important documents linked to the process are available in English and the European Union itself is also playing a central role in the debate, to the extent that ‘Catalonia, new state of Europe’ was the slogan of the initial pro-independence march of 11 September 2012. In the same vein, Artur Mas’s first proposed question for the referendum was ‘Would you like Catalonia to be a new state of the European Union?’, and the Decla-
ration of Sovereignty also refers specifically to the holding of a consultation on Catalonia becoming a new State ‘of Europe’ or ‘within the European Framework’.

**Some final considerations**
In December 2013 the pro-referendum parties announced that they had reached an agreement on the questions and the date for the referendum. It is to be a multi-option referendum, asking first ‘Would you like Catalonia to be a state?’ and second ‘Would you like Catalonia to be an independent state?’ The date is to be 9 November 2014. The Catalan Prime Minister also sent letters to the leaders of the European Union Member States, and a memorandum to a further 45 states, asking for their support. Due to the Spanish Government’s refusal to accept the referendum, the Catalan Government’s current preference seems to be to use the legal avenue of the ‘consultation’ of citizens. This could lead to a ‘yes’ vote, without the process having been recognised by the Spanish institutions. Hypothetically, both the Catalan and Spanish institutions could then pursue extreme options: Catalonia proceeding to a unilateral declaration of independence and the Spanish Government attempting to make use of its powers in the Constitution to deploy the army to protect the integrity of the state. However, so far both sides have avoided taking extreme measures and hopefully this is an indication that a democratic and dialogued solution can be found.

**Literature**

**Advisory Council for National Transition 2013**

**Catalan Parliament 2012**

**CIU and ERC 2012**
Guibernau 2013

Institut d’Estudis Autonomics 2013

Nagel 2006

Tierney 2004
S. Tierney, Constitutional Law and National Pluralism, Oxford: OUP 2004