

## The democratic principle and constitutional justification of the right to decide

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### Abstract

*In this article, the author defends the right to decide, meaning that holding a referendum on the political future of Catalonia is not banned by the Spanish Constitution (SC). The principal reason cited is that the principle of indissolubility (section 2.1 of the SC) and the principle of national sovereignty (section 1.2 SC) should be adequately balanced with the principles of liberal democracy (as defined in sections 1.1., 23.1., 9 and 10 of the SC). In light of this perspective, the article provides justification for two main aspects: 1) holding a referendum on Catalonia's independence on the grounds of an evolutive interpretation of democratic rights linked to a dense conception of democracy; and 2) holding a referendum exclusively in Catalonia, in order to avoid shifting from the principle of the majority to the dominion of the majorities.*

**Key words:** right to decide, evolutive interpretation, liberal democracy, personal autonomy, inviolability, human dignity, dominion of the majorities

### 1. Introduction

In recent years, support for the right to decide in Catalonia has risen exponentially. To avoid peering too far back in time, after the Constitutional Court's ruling 31/2010 on the Statute of Autonomy, a social movement has coalesced with the main goal of debating this issue. We merely have to recall the massive demonstrations on the 10th of July 2010 with the slogan "*Som una nació. Nosaltres decidim*" (We are a nation. We decide), the one on the 11th of September 2012 with the slogan "*Catalunya, nou Estat d'Europa*" (Catalonia, new European state) and the *Via Catalana cap a la Independència* (Catalan

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Way towards Independence)<sup>1</sup> on the same date, Catalonia's national holiday, in 2013.

Generally speaking, this social outcry has forced the political parties to take a clearer stance on the right to decide, which has spurred a social and political debate that is still ongoing.<sup>2</sup> Within this tendency, we should also factor in the election results in favour of the parties that made the right to decide part of their platforms, as well as all the social indicators that show the sustained existence of a vast societal majority in favour of this right.<sup>3</sup> The legal sphere cannot be excluded from this discussion, and at some times it has even been brought to the forefront, which seems fitting if what we are discussing is rights, constitutions and legal rules. However, the way it has been conducted so far, the legal debate has not been very enlightening. Many times the only thing that it has done is allude to the purported evidence that can be used to legitimise either position chosen in advance. There has been a plethora of adamant declarations on either side by jurists or even by people who have no legal background. Some articles are mentioned, but they lack constructions with the theoretical solidity that should be required in an issue of this importance.

Anyone who wishes to deny the possibility that the Spanish legal system protects the right to decide primarily refers to article 2, where it says that the Constitution is grounded upon the indissoluble unity of the Spanish nation, and article 1.2, which states that national sovereignty is held by the Spanish people. To the contrary, anyone who believes that the right to decide is protected by the Constitution stresses that we must take article 1.1 into account, which states that the Spanish state is established in a democratic State, along with other precepts, such as article 23, which recognises that citizen have the fundamental right to participate directly or indirectly in public affairs. Despite this, in such a complex legal problem as this one, simply citing articles is not enough to settle the interpretative disputes.

In this sense, the purpose of this article is twofold. First, I shall try to clarify the terms of the discussion in order to provide a *legal* meaning to a claim that was first shaped based on postulates outside the law. In section 2, we shall

<sup>1</sup> Inspired by the Baltic Way or Baltic Chain, which joined the capitals of Estonia, Latvia and Lithuania in 1989, on the Eleventh of September 2013 a human chain in favour of independence for Catalonia 480 kilometres long was made from Le Perthus to Alcanar. According to figures from the Department of the Interior of the Generalitat, 1.6 million people participated in it.

<sup>2</sup> As highlighted in the "Informe sobre els procediments legals a través dels quals els ciutadans i les ciutadanes poden ser consultats sobre llur futur polític" (Report on the legal procedures through which citizens can be consulted on their political future) by the Institut d'Estudis Autònoms, 11 March 2013 (henceforth, the "IEA Report"), the resolutions of the Parliament which have contained the right to decide have gone from being highly abstract formulas (Resolutions 98/III from December 1989, 229/III from September 1991 and 679/V from October 1998), to expressing the will to establish mechanisms that would enable this right can be exercised (Resolutions 944/V from June 1999 and 1978/VI from June 2003), to emphasising the decision to use this right since 2010 (Resolutions 631/VIII from March 2010, 6/IX from March 2011, 742/IX from September 2012 and 5/X from January 2013). See "IEA Report", p. 5, note 4.

<sup>3</sup> In the regional elections held on 25 November 2012, 73.47% of the electors voted for parties that had included the right of Catalonia's citizens to be consulted on their political future in their platforms. The different surveys published since then have only proven that this phenomenon is continuing to gain momentum.

see that the “right to decide” is an ambiguous expression which conceals two different concepts with different legal implications: the right to be consulted on one’s own political future and the right to self-determination. After that, I will demonstrate that it is possible to mount a solid defence of the right to decide in the first of these concepts without altering the wording of the 1978 Constitution. This defence is grounded upon the democratic principle, which is why I shall point out its potentialities and limitations by analysing the problems that affect the object and subject of the consultation, following the order I believe is the most suitable, as I shall explain in section 3.

In section 4, which examines the problem of the object, I shall justify one possible balance of the principle of indissolubility and the democratic principle. I shall advocate an evolutive interpretation of democratic rights linked to a dense conception of democracy. The conclusion of this section is that, just as the principle of indissolubility prevails in the exercise of the right of self-determination through a unilateral declaration of independence, the democratic principle prevails in the possibility of holding a consultation: the Constitution does not forbid a consultation on the independence of Catalonia.

Section 5 analyses the problem of the subject. Here we should weight the principle of national sovereignty against the different principles that help to define liberal democracy. The conclusion in this case is that it should be possible to hold the consultation among the Catalans to avoid shifting from the principle of the majority (part of the definition of democracy) to the dominion of the majorities (which runs counter to any reasonable conception of democracy). The principle of national sovereignty, however, also plays a role if we bear in mind that the Constitution allows the State non-negligible intervention in referendum processes.

Finally, we should note that my observations will primarily be grounded upon the tools of the philosophy of law with the goal of providing elements that can serve as a hinge between general legal theory or political philosophy on the one hand and constitutional theory on the other.

## **2. The right to decide**

### *2.1. The aptness of an expression*

It has been stressed more than once that the phrase “right to decide” is a neologism that sprang from politics or the media but is in no way recognised as a technical concept in law. This statement is partly true.

On the one hand, if what we mean is that it had not been used technically in legal contexts before, this is true. However, outside of Catalonia, its use can be detected in Scotland and Euskadi (Basque Country) when the *Lehendakari* (regional president) Ibarretxe proposed a new Statute of Autonomy and a subsequent consultation on the peace process. In both cases, the initiative came from the institutions, either to drive home the unspoken possibility of consulting the people (Scotland) or as an attempt to remove themselves from a violent context (Euskadi) (López, 2013). However, in Catalonia it appeared within the context of the statutory debates shortly after the joint declaration by the Parliament on the 30th of November 2005. Unlike the two aforementioned cases, in Catalonia the expression “right to decide” gained permanent impetus

from social movements. Specifically, one of these movements, the Plataforma pel Dret de Decidir (Platform for the Right to Decide), organised in late 2005, explicitly used this slogan, and after that the expression spread (Vilaregut, 2013). Therefore, generally speaking we can state that outside Catalonia, the expression “right to decide” has been used primarily by representatives of institutions in top-down processes, while in Catalonia it has primarily been used in social movements in a grassroots or bottom-up process.

On the other hand, if the goal is to sustain that the fact that this expression has not been used in legal circles until today means that we can infer that it cannot be used in the future, this holds no water whatsoever. Let us think about how absurd it would be if we applied this same standard to all legal concepts: it would have been impossible to have innovated the conceptual arsenal in any way since Roman law! In short, the justification to use a new term lies simply in the fact that it is needed to refer to new situations or claims which are not reflected in the vocabulary that has existed until then. The supposed immutable nature of things does not dictate what concepts should be used; rather, usefulness is what provides us with the criteria to coin new terms when needed.

Therefore, the question we should ask is not whether the body of legal knowledge contains the concept of the right to decide but whether we need it and why. Some people claim that anything legally important is already covered by appealing to the right of self-determination. This would indeed be a familiar concept: it appears in international declarations and treaties and has been amply developed by doctrine.<sup>4</sup> But when one proceeds in this way the goal is usually to shut down the debate simply by definition. One is often intentionally playing with the fact that peoples’ right to self-determination has highly contextualised connotations because of their origin, which is related to the process of decolonisation. It then becomes easy to deny that it is applicable in any other context, such as in Spain today. Despite this, someone else might assert that if the same concept is to be used outside the context in which it was formed it would require further argumentation and a disadvantageous point of departure that there are no good reasons for accepting. For example, they could be forced to provide new proof that all of the features that characterised the old colonies can be found in Catalonia today.

In reality, the fact that the expression “right to decide” is a neologism, unlike what it might seem, makes it the perfect candidate for embarking upon a legal discussion with no prejudices. Its meaning is not conditioned by a connotation-laden concept from a foreign historical context and thus lends itself to better adaptation to the problem currently being debated. So what is the problem that the right to decide aims to solve?

The first thing to be considered is that this problem, no matter what it may be, has emerged in democratic contexts, that is, in states whose underpinning is popular sovereignty and which recognise and respect

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<sup>4</sup> The right to self-determination, like the right of peoples, has been valid in international law since the United Nations Charter of 1945 (arts. 1 and 55) and is expressly proclaimed in article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights approved by the UN General Assembly on 16 December 1966 and in force since 1976. Regarding doctrine, see Deci & Ryan (2002).

fundamental rights, including its citizens' right to political participation in public affairs. However, in addition to being democratic, these states are multinational, that is, they contain territorialised minorities. It is in the space delimited by these features where it makes sense to formulate the problem or problems that the right to decide brings to the fore. When we try to do so, we realise there is an ambiguity which must be examined.

## *2.2. Two concepts of the right to decide*

One obstacle that affects the use of this expression in a technical sphere, such as legal discourse, is its ambiguity. There is no doubt that speaking ambiguously about the right to decide has a major strategic advantage. The use of this term within both the social movements that defend it and the political statements that include it enables different positions to easily be accommodated. In this way, one surely attains a broader consensus than if an expression with a single meaning were used. However, this strategic reason, which might be justified in the sphere of social movements and even politics, cannot validate a wholesale transposition into academia. Technical knowledge, such as legal knowledge, requires clear distinctions and a rigorous use of terminology, aims which fit poorly with the use of ambiguous expressions.

But what are the different meanings expressed by this term and what legal importance might they have? In my opinion, "right to decide" expresses two legal situations that are different but joined by the prominent role assigned to the democratic principle: citizens' right to be consulted on their political future and the right to self-determination.

These are different legal situations for two reasons: first, the right to be consulted is an individual right (the holder of this right is every citizen), while the right to self-determination is a collective right (the holders of this right are entire peoples). Secondly, they are different because they are linked to two different usual ways of being exercised, namely consultations in the former and unilateral declarations of independence in the latter. Finally, their legality takes two different legal systems as their reference: state and international, respectively.<sup>5</sup> In this article, I am concerned with the right to decide only in the first sense.

Yet despite this ambiguity, as long as one is meticulous regarding these distinctions, it is useful to keep using the expression "right to decide" as an umbrella term that covers both meanings, given the essential role that the democratic principle plays in both of them. I will further explore the first meaning here, and regarding the second I will only add that people's right to self-determination is increasingly acquiring a connotation that detaches it from its colonialist origin and focuses on the exercise of democracy, mainly after the advisory opinion handed down by the International Court of Justice on Kosovo in 2010.<sup>6</sup>

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<sup>5</sup> From the perspective of international law, see Seshagiri (2010).

<sup>6</sup> See López (2009) and López (2011). This is leading people to beginning to wonder whether we might be witnessing the fourth wave in the creation of new states, in which the distinct feature may be that it takes place within democratic states and via democratic methods. The previous three waves were first the dismantlement of the Ottoman, Austro-Hungarian, Russian and

### **3. The right to decide as citizens' right to be consulted on their political future**

#### *3.1. Delimiting its meaning*

In order to specify the legal scope of this issue, it should be formulated bearing in mind that today there are institutions that represent the citizens in the autonomous community of Catalonia, namely the Generalitat. Thus, the practical question we should ask is: Does the Spanish Constitution *allow* the Generalitat to hold a consultation among Catalans on their political future? The advantages of framing the issue in this way is that it connects the holder of the right (citizens) to the way it is usually institutionally exercised (the consultation) and helps to shed light on an ambivalence which might remain hidden if we ask the question simply in terms of citizens' rights.<sup>7</sup> I am referring to the typical ambiguity of permission.

Whenever we speak in terms of "permission", we should bear in mind that there are two different meanings at play. Permitting a behaviour in the *weak* sense is equivalent to stating that in the legal system at hand there is no rule that explicitly forbids this behaviour. In contrast, when someone claims that a behaviour is permitted in the *strong* sense, they mean that the relevant legal system contains a rule explicitly stating this permission. Therefore, the former entails proving the absence of a rule (of prohibition), while the latter must show the existence of a rule (of permission).<sup>8</sup> As we shall see in this article, there are good reasons for thinking that the Generalitat is permitted, at least in the weak sense, to hold a consultation of the citizens of Catalonia about their political future.

#### *3.2. Lexicographic order of the problems*

Once we have determined the meaning of the question we are asking, we must carefully elucidate the problems faced by those who, like me, are seeking to justify the aforementioned possibility. There are three justification problems: the object, the subject and the procedures of the consultation. Below we shall briefly outline them in order to show that the order in which they should be addressed is not random.

The problem related to the object of the consultation emerges basically from the doubt as to whether the Constitution allows a consultation on the question of if a territory within the state can secede; the problem of the subject refers to which group should be asked to express their opinion on this matter; and the problem of procedures consists of ascertaining whether the Constitution stipulates the ways in which a consultation of this kind should be carried out.

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German Empires; second, decolonisation; and third, the fall of the Soviet bloc. On this topic, see Gagnon (2012) and Sanjaume (2012).

<sup>7</sup> Actually, these formulations are not equivalent. Theoretically, it is imaginable for citizens to exercise their rights outside the institutions. However, as noted in this text, here I shall only take into account the exercise of rights carried out through the institution of the Generalitat, which was created in accordance with the Constitution.

<sup>8</sup> The first person to formulate this distinction was Von Wright (1963: 10).

We must realise that problems have a given lexicographic order. By this I mean that it only makes sense to answer the second question once the first has been resolved and the third one once the second has been resolved. Similarly, when discussing one of the subsequent problems, we are implicitly accepting a given resolution of the previous ones. For example, if we reach the conclusion that there is no way to constitutionally justify a consultation on the topic of secession, then it makes no sense to discuss what subject should be consulted or the right procedure to carry out this consultation. Likewise, if one embarks upon a discussion on which individuals should be asked to participate in the consultation, this implicitly assumes it may legitimately be held. This lexicographic order is not always respected in discussions on this topic. Thus, we find some people launching into a debate on procedures without having first resolved the other two questions. Even more frequently, once it has been adamantly stated that the Constitution does not allow a consultation because the object is unconstitutional, then a discussion ensues on how the subject of the consultation cannot be the Catalan people but the Spanish people, thus admitting that the consultation can indeed be held.

Henceforth I shall analyse the problems of the object and the subject, in this order. I will not discuss the procedures stipulated because I believe that this has already been studied in an exemplary fashion.<sup>9</sup> My intention is to show the potentialities and limitations of the democratic principle when constitutionally grounding the right to decide meant in the sense of justifying that the Generalitat can indeed hold a consultation. I shall demonstrate that, when understood properly, the democratic principle legally justifies that this consultation on the secession of Catalonia can be held (and therefore, *a fortiori*, a consultation can be held on any issue regarding Catalonia's fit within Spain) and that it can be held only among Catalans.

#### **4. The problem of the object**

This problem can be described in this way: Can one argue that the Constitution protects, that is, allows, albeit in a weak sense, citizens to vote in a consultation on whether Catalonia should become an independent state?

The first thing we should say is that there is no rule that explicitly provides the answer to this question. For this reason, we must examine the principles. When dealing with the problem in this way, we must be aware that the distinction between rules and principles is structural. Rules have conditions of enforcement, while principles are categorical (Dworkin, 1978). Therefore, what we could say to begin with is that there is no constitutional wording which can reasonably be construed as a rule that regulates this case and thus provides the regulatory solution. This leaves us with the problem of having to seek the solution in principles. We then realise that once we have determined that we have to deal with the problem using principles as tools, it is essential to complement the structural approach, which enables us to distinguish principles from rules, with the *functional* approach, which tells us the goals sought when regulating human behaviour through principles.

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<sup>9</sup> For a study on the procedures, see the "IEA Report". For an analysis of the possible scenarios that determine the different means, see Feliu (2013) and Bossacoma (2012).

#### 4.1. How legal principles work

Volumes have been written on legal principles in general and on constitutional principles in particular.<sup>10</sup> In this article, I shall simply provide a few broad strokes that will help to explain how I am using these terms here. I shall review what prescriptive and constitutive rules are, as well as technical rules and ideals. I shall also conceptualise the main principles, which I will later interpret, as ideal rules.

#### 4.2. Different meanings of “rule”

The word “rule” has no single, unequivocal conceptual meaning. One of the most common meanings associates it with prescriptions, that is, with behavioural guidelines which are considered compulsory, forbidden or permitted. However, in other contexts a “rule” is linked to the determination of what is proper or defining of an institution. This is true of games. In this case, we could speak about constitutive rules.<sup>11</sup> This kind of rule is canonical: “In C context, X counts as Y”.<sup>12</sup> For example, “in football, the ball crossing the goal line counts as a goal”.

The Constitution offers clear cases of sentences that might be construed in both ways. We could understand the rule contained in article 22.5 as prescriptive: “Secret and paramilitary associations are forbidden”. And we could construe the rule expressed in article 12 as a constitutive rule: “In the context of the 1978 constitution, a person who is (at least) 18 years old is considered a legal adult”.

Another meaning of “rule” which might be relevant is what we call “technical norms or rules”. *Technical* rules stipulate the conditions needed to achieve a given purpose. The law does not tend to directly contain technical terms. However, sometimes, we can understand that based on the establishment of constitutive rules, their associated technical rules can be inferred. For example, article 22.2 of the Constitution (“Associations that seek or use means classified as criminal are illegal”) may be understood as a constitutive rule according to which “in the context of the Constitution, associations that seek or use criminal means will be considered illegal”. Based on that, one could construct a technical rule something like: “Anyone wanting to set up a legal association should not seek criminal purposes nor use criminal means”. Given that making an association with or without these features falls within our decision-making capacity, one could formulate this technical rule as a kind of user’s guide. Strictly speaking, the technical rule is not part of the

<sup>10</sup> For the different meanings in which we have discussed legal principles, see Guastini (1999, Ch. 5).

<sup>11</sup> However, we should note that, purely speaking, it is not right to speak about a common class (the class of rules), in which prescriptive and constitutive rules are subclasses. A more suitable way to pose the question would be to understand them as two different *meanings* of the word “rule”. For the sake of ease, in this text I will refer to “prescriptive rules” and “constitutive rules” when I should say “rules *in the prescriptive sense*” and “rules *in the constitutive sense*”. On this topic, see Moreso & Vilajosana (2004: 65-68).

<sup>12</sup> This is the formula coined by Searle (1995).



Constitution, but it does conceptually assume the presence of a constitutive rule, as in the article transcribed above.

Finally we come to ideal rules, which, according to Von Wright, have an immediate relationship not with our actions, that is, not with “should do”, but with a given state of affairs, that is, with “should be” (Von Wright, 1963). This is what happens when, for example, we say that a car should be quick, comfortable and safe. Ideal rules establish the pattern of excellence of something. In this sense, they resemble constitutive rules, given that they define what we understand as a good individual within a given category (a good car, in our example). However, they also bear similarities with technical rules, given that making an effort to achieve an ideal is similar to pursuing a goal. Constitutional principles can be understood as ideal rules (Moreso & Vilajosana, 2004: 91-92).

#### *4.3. Principles as ideal rules*

Principles, viewed as ideal rules, establish certain dimensions of ideal states of affairs which the world should have in order to be in conformance with the law. Similar to our example when we said that the ideal car should be stable, quick and safe, the ideal state of the affairs regulated by the Constitution should be such that, for example, they lead to favourable conditions for social and economic progress (article 40), they allow everyone to enjoy a proper environment (article 45.1) and they respect the freedom of information and the right to privacy. It is obvious that these aspects of the ideal may conflict with each other (in the case of the car, speed may run in detriment to safety; in the case of the state of affairs promoted by the Constitution, a proper environment may run counter to economic progress, and the extent of freedom of information may run in detriment to personal privacy). In this sense, ideal rules must be complemented by mechanisms that establish the acceptable degree to which these conditions should obtain and eliminate the conflicts. The way that constitutional interpreters do this, as is common knowledge, is through the technique of balancing.

Thus, legal principles are guidelines that establish not so much what should be done but what should be. On the other hand, we can infer a kind of technical rule from these ideal rules that point to which measures should be adopted to draw near the ideal. This is how we can understand Robert Alexy's position when he states that legal principles are mandates of optimisation: they require one to do what is necessary so that the ideal state of affairs is realised to the greatest extent possible (Alexy, 1993: 87-94). However, legal principles are not detailed rules and must often be complemented by these detailed rules. Generally speaking, legal principles appeal to the reasons that justify having a certain rule or another: they help to shape what we could call the identity of the object which they cover. A person's principles confer on them a given identity; similarly, we could say that the legal principles in a given system shape the system's material identity. This holds true with constitutional principles, and especially with the ones at hand: they shape the identity of a liberal democratic system, meant as outlined below.

#### 4.4. *The weighing of the relevant principles*

Once we have examined the most appropriate conceptualisation of the principles, we must analyse those that might collide with the situation at hand. Someone opposed to a consultation on the secession of Catalonia cites one of the principles contained in article 2 of the Constitution, the one on the indissoluble unity of the Spanish nation. To the contrary, someone who believes that this consultation is allowed alludes to the democratic principle contained in article 1.1.

Before examining the possibilities of weighing these two principles, we should question whether in this case they actually collide. Indeed, the mere fact of holding a consultation, strictly speaking, does not rupture state unity (Ferrerres, 2012). However, how the result is used is what might give rise to a conflict with unity. If the result of the consultation on secession were negative, it is obvious that it would not affect this unity; however, if it were positive, then the articulation of this result is what might enter into conflict with the principle of indissoluble unity.

From the conceptual standpoint, I find it very difficult to object to this argument. However, I believe that the discussion on justifying the consultation based on the object cannot be regarded as resolved because it does entail a kind of trivialisation of what a democratic consultation of this magnitude means. We could expect that those who participate in it would want their desires to be respected and treated with the dignity they deserve, as I shall argue below. They would believe that they are not participating in a mere opinion survey but that the question they are being asked is of the utmost importance in their lives.<sup>13</sup> I believe that this assessment of the importance of what is at play is also shared by those who oppose the legal justification of the consultation (and they oppose it for precisely this reason). Therefore, we can conclude that it still makes sense to discuss the weighing of these two principles, namely the principle of indissolubility and the democratic principle. Thus, we could say that strictly speaking they do not collide or only do so *tangentially*.

Those who deny a constitutional justification of the consultation cite the two principles through two arguments which I shall call, respectively, the argument of the absolute primacy of the principle of indissolubility, and the argument of the petrification of the democratic principle. Regarding the former, I shall defend the fact that just like all principles, indissolubility also has limits; and I shall oppose the latter by upholding an evolutive interpretation of the Constitution and specifically of the rights that are directly tied to the democratic principle.

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<sup>13</sup> As the Canadian Supreme Court says: “Le rejet clairement exprimé par le peuple du Québec de l’ordre constitutionnel existant conférerait clairement légitimité aux revendications sécessionnistes, et imposerait aux autres provinces et au gouvernement fédéral l’obligation de prendre en considération et de respecter cette expression de la volonté démocratique en engageant des négociations et en les poursuivant *en conformité avec les principes constitutionnels*” (*Renvoi relatif à la sécession du Québec*, from 20-I-1998, sect. 88).

#### *4.5. The limits of the principle of indissolubility*

The argument on the absolute primacy of the principle of indissolubility would mean that there is no conceivable circumstance under which the democratic principle could prevail. A consultation on the secession of part of the state territory affects the principle of indissolubility (even if just tangentially, as mentioned above). Therefore, the argument would conclude, a consultation of this kind could not be supported under the democratic principle.

This reasoning, however, is puzzling. Until now, both the doctrine and the jurisprudence of the Constitutional Court have admitted that the tool of weighing principles is used so that neither is viewed as unlimited. Under certain circumstances, one would prevail; while under other circumstances, the other would prevail. Now, however, it seems that if we accept the plausibility of this argument, there is one principle that never budes, namely the principle of the indissoluble unity of the Spanish nation. And we could say that it never budes because if it has never buded before the democratic principle under any circumstance, it should not be able to do so before any other principle. Indeed, it is difficult to imagine other cases of collision that might give rise to reasonable discussion. However, if we bear in mind the conception of principles as ideal rules and the mechanism of weighing used in the arguments of the constitutional courts in all democracies around us, the view of the principle of indissolubility as absolute loses ground.

In any event, to be consistent, we should add the cases in which the principle of indissolubility prevails over the democratic principle. Otherwise, we might believe that I am falling into the very error that I am criticising: a kind of argument of the absolute primacy of the democratic principle. What we must ascertain now is in what case the democratic principle would budge before the principle of indissolubility. I believe that this situation occurs in relation to the right to secession. Everyone agrees that the Constitution does not recognise this right.<sup>14</sup> Therefore, a unilateral declaration of independence by the Generalitat, as the typical example of the exercise of that right, would not be covered by the Constitution, even if it were done by the democratically elected representatives.<sup>15</sup> Thus, neither of these two principles can be understood in an unlimited fashion and both have to be considered when determining the identity of the Constitution in a balanced fashion.

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<sup>14</sup> Today there is a debate, primarily in political sciences, around the reasons which would, generally speaking, make a constitutionalisation of the right to secession advisable. Contrary to appearances, some people with “unionist” positions are in favour of this option because of the legal security it would provide. However, it goes without saying that the cornerstone in the defence (or not) of a constitution that explicitly includes the right to secession is knowing what the specific mechanism for doing so would be. As always, the devil is in the details. See Kreptul (2003).

<sup>15</sup> As upheld by the aforementioned opinion handed down by the Supreme Court of Canada as well. Another matter would be debating its legal status from the standpoint of international law, but this is an issue which, as I stated at the beginning, fits within the second sense in which the right to decide can be understood, and analysing this perspective falls outside the scope of this article.

#### 4.6. *An evolutive interpretation of democratic rights*

The argument of the petrification of the Constitution is based on the premise that if the principle of indissolubility and the democratic principle must be weighed, they already were by the constituent lawmakers. Thus, the expression of the democratic principle in article 1.1, within what the Constitutional Court has called the “structural principles”, would admit one and only one structure, one and only one specific expression: the one that is expressed in the remaining the articles in the Constitution. Since this kind of consultation is not mentioned explicitly, this would mean that the way the constituent lawmakers understood democracy is this way and it cannot be altered.

The argument of the petrification of the interpretation of the Constitution is correlated with the use of a psychological or originalist interpretation. Thus, the constituent lawmaker’s desire to provide content and scope to the Constitution’s precepts would be prioritised when interpreting the content and scope of the democratic principles in the specific case at hand. Is this way of reasoning plausible?

We should admit that psychological arguments are an interpretative tool available to jurists. Nonetheless, their weight in argumentation tends to lose force as we get further from the time when the lawmakers’ will was expressed. We can accept the fact that, when the constitutional text was approved, the idea that the Constitution would support a consultation like the one being considered today was not present in the minds of the majority of members of the constituent Courts.<sup>16</sup> We could also admit that the constituent lawmakers did not imagine that the instruments of direct democracy recognised in the Constitution, such as referenda, would be used in a more active way, given the logical predisposition against it, which I shall discuss further on. However, we cannot infer that the Constitution, interpreted 35 years later, cannot go further merely by the fact that this perception did not exist at that time. This adaptation to the changing times is precisely what the evolutive interpretation allows.<sup>17</sup>

The use of the evolutive interpretation has a longstanding tradition in international jurisdiction, and more specifically in the jurisdiction of the European Court of Human Rights when interpreting the European Convention on Human Rights.<sup>18</sup> It has also been used by, among others, the International Court of Justice,<sup>19</sup> the Court of Justice of the European Union,<sup>20</sup> the Inter-

<sup>16</sup> However, some people think that a pact was reached at that time which included the potential development of Catalan autonomy, which was subsequently thwarted since Constitutional Court Ruling 31/2010.

<sup>17</sup> Let us recall that article 3.1 of the Spanish Civil Code says, in effect, that the rules shall be interpreted according to “the historical and legislative antecedents”, but also in relation to “the social reality of the time when they are being applied”. In any case, as we shall see further on, the Constitutional Court did not link the evolutive interpretation so much with this provision as with those contained in article 10.2 of the Constitution, which is quite relevant to what I am arguing here.

<sup>18</sup> It was approved on 4 November 1950 and entered into force on 3 September 1953.

<sup>19</sup> Some cases where this can be found include: *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, [1971] ICJ Reports 16, para. 53. *Aegean Sea Continental Shelf* [1978] ICJ Reports 3, para. 77. *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* [2009] ICJ Reports 213, para. 64-66.

American Court of Human Rights<sup>21</sup> and the United Nations Human Rights Committee.<sup>22</sup> The European Court of Human Rights, at least since its ruling on the Tyrer case,<sup>23</sup> has developed a doctrine in which human rights should be interpreted in an evolutive way.<sup>24</sup> This means that a rule's content and scope cannot be limited by appealing to the fact that when it was passed (in the case of this Court, the Convention), the law in question was interpreted in a restrictive way or with certain connotations. What is important in these cases is not the goal in mind when the regulations were made but the connotations and scope that the concept has acquired over time.<sup>25</sup>

Lately, the Spanish Constitutional Court has used the evolutive interpretation as well. In its ruling 198/2012 dated the 6th of November 2012, the high court used this interpretation to deem Law 13/2005, which changed the Civil Code by allowing same-sex marriage, fully constitutional. The eighth point of law in this resolution reads: "In 1978, when it was written, article 32 SC [which regulates marriage] was primarily understood as marriage between people of different sexes, even within the constituent debates". But despite this statement, and alluding to the Canadian Supreme Court's ruling from the 9th of December 2004, the Constitutional Court defended the evolutive interpretation to justify this opinion's distance from the that of the constituent lawmakers, and it does so in the ninth point of law in such a way that deserves a full citation:

*"The Constitution is a "living tree" which, through an evolutive interpretation, accommodates the realities of modern life as a means of ensuring its own relevancy and legitimacy, not only because it is a text whose main principles are applied to situations which its writers did not imagine, but also because the public authorities, and particularly lawmakers, gradually update these principles and because the Constitutional Court, when it monitors the Constitution's adjustment to these updates, endows the rules with content which enables the constitutional text to be read in light of contemporary problems and the demands of today's society to which the fundamental rules of the legal order must respond, at the risk, otherwise, of becoming mere rhetoric."*

What is more, the high court adds that the suitability of this kind of interpretation of the Constitution is confirmed by article 10.2: "the hermeneutic rule of article 10.2 SC is associated with an evolutive interpretative rule" (ibid).

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<sup>20</sup> Case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415, para. 20.

<sup>21</sup> *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion, OC-16, Inter-American Court of Human Rights Series A No. 16 (1 October 1999), para. 114.

<sup>22</sup> *Roger Judge v. Canada*, Human Rights Committee, Communication No. 829/1998, U.N. Doc. CCPR/C/78/D/829/1998 (2003), para. 10.3.

<sup>23</sup> *Tyrer v. The United Kingdom* (1978) Series A, no. 26, para. 31.

<sup>24</sup> For exhaustive information, see Jacobs, White & Ovey (2010).

<sup>25</sup> See Helmersen (2013) and Dzehtsiarou (2011).

The argument which leads to this conclusion may be reconstructed as follows. Article 10.2 states that rules on the fundamental rights and freedoms recognised by the Constitution must be interpreted according to the Universal Declaration of Human Rights and international agreements on these matters which have been ratified by Spain. Given that according to the doctrine of the Constitutional Court itself,<sup>26</sup> this appeal to international law includes the relevant bodies' interpretation of the Declaration and these treaties, and given that the evolutive interpretation plays a decisive role in these bodies' hermeneutic processes, as highlighted above, then we can conclude that when the Constitutional Court uses it, it is simply complying with the mandate of article 10.2.

Once we have seen the fundamental role assigned to the evolutive interpretation in both international jurisprudence and the Constitutional Court's jurisprudence, what is left is transferring it to our case. In order to do this, we should be sensitive to the evolution that the institution of democracy has experienced in recent years and be capable of applying the results to the rights and freedoms which are clearly associated with it. On this long journey, we should not lose sight of the interpretative mandate contained in article 10.2, as the Constitutional Court itself has interpreted it. For this reason, below I shall propose a "dense" conception of democracy which fits in perfectly with the evolutive interpretation and from which we shall later infer important consequences when interpreting the rights and freedoms associated with it, such as the fundamental right recognised in article 23.1 or human dignity and the free development of the personality contained in article 10.1.

#### *4.7. A dense conception of democracy*

Democracy is not an institution created once and for all. Its main body has been augmented with different layers which have been added over time through conquests that tend to be viewed as permanent, not in the sense that empirically they cannot be lost but that this potential loss would not be justified. This is the dense conception of democracy which I uphold. The metaphor of density helps us to visualise a dynamic idea of democracy as a series of superimposed strata which are not the outcome of mere accumulation, rather they are integrated into a compact, perpetually unfinished whole. For our purposes, this conception would be manifested in two facets: procedures and contents.

Regarding the procedural facet, a dense conception of democracy helps us to understand that it makes no sense to suggest that there are two irreconcilable democratic systems: the representative and the direct, as is sometimes suggested precisely to deny the possibility of justifying the consultation. According to this line of argumentation which I am criticising, the Constitution has enshrined a representative model of democracy in which any element of direct democracy would be viewed with apprehension and thus limited to its minimal expression.

This caution in the use of instruments of direct consultation, usually through referenda, can be explained by the context in which the Constitution

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<sup>26</sup> Constitutional Court Ruling 116/2006 dated 24 April 2006, and Constitutional Court Ruling 38/2011 dated 28 March 2011, among many others.

was founded. The way referenda had been used by the Franco dictatorship was still too recent. We can surely understand why this mistrust existed at that time, but does it still make sense more than three decades after the instatement of a democratic system?

There are times when people seem to want to claim that calling a referendum is anti-democratic, forgetting that what makes a referendum a truly democratic instrument is not the mechanism itself but the institutional context in which it is framed. The referenda held during the Franco regime were anti-democratic not because they were referenda but because they were held within an authoritarian regime. The ones that can be called now, however, are fully democratic because they would be held within an environment with full electoral guarantees and respect for fundamental rights. This means that expression through this instrument is as genuinely of the people as the expression used to choose representatives in ordinary elections. If we view it thus, we also understand that yet again that we would interpret there as being no radical contrast between representative democracy and direct democracy. Elections and consultations can coexist with no problems without the use of one procedure at the exclusion of the other. This coexistence does not denature the supposedly immutable representative essence of the Constitution but instead enriches it with more components, making it higher quality and “denser”. And this is perfectly compatible with citizens’ fundamental right to participate directly in public affairs, as recognised in article 23.1 of the Constitution.

This density of democracy is also expressed in its content. Today’s democracies are the outcome of successive conquests in the rights of the individuals and groups making them up. The number of rights recognised has never stopped growing. We could trace the historical line of how new references to rights have been added to the others which had previously been recognised, not as mere superimpositions but in an integrated way. For example, we can recall the famous reconstruction conducted via what are called generations of rights. These range from the first generation of civil and political rights, which date back to the American and French Revolutions (the underpinning of the rule of law), to the generation of economic, social and cultural rights (the underpinning of the social state) and finally what are called the third-generation rights, which include the rights to self-determination and national identity. Our awareness today of the importance that this latter set of rights has acquired can be seen not only in contemporary political theory<sup>27</sup> but also in the vision of international bodies.<sup>28</sup>

What I would like to highlight within this phenomenon, within the line I am defending, is not only that it is a new vision but that it can be seamlessly integrated into the previous ones. The perspective of liberal democracies is changing, but not because the importance of these new rights does not fit within them; instead, it is precisely changing to make room for them.<sup>29</sup> In short, there

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<sup>27</sup> For all of them, see Requejo (2010).

<sup>28</sup> See, for example, *Human Development Report*, United Nations, 2004, which upholds that cultural and national freedoms are important components of the quality of democracy.

<sup>29</sup> The United Kingdom’s behaviour towards Scotland’s demands, and Canada’s reaction to Quebec’s are good proof of this. On this point, it is imperative to mention yet again the Canadian Supreme Court’s 1998 ruling in which it created an obligation for the parties to negotiate in

are visions that integrate these latest conquests within the same liberal-rooted current. There is no need to look for an objective entity higher than individuals to justify “national” rights. They are pertinent for democracy precisely because they matter to citizens, who have the right to develop their own life plans.<sup>30</sup> Effectively offering the real possibility of participating directly in the political future of their own community becomes indisputably important in the content of these life plans, once again according to the fundamental right recognised in article 23.1. Below I shall focus more on this liberal component, properly interpreted.

In short, the dense conception of democracy serves to fill the evolutive interpretation that this institution requires with content, as explained above. It follows from everything that I have upheld in this section that the interpretation of the democratic principle (fleshed out in article 23.1) weighed with indissolubility allows (at least in the weak sense) a referendum to be called on the independence of Catalonia, but it vetoes a unilateral declaration. This is a reasonable way of taking these principles as ideal rules which define the democratic state instated in article 1.1 of the Constitution.

## 5. The problem of the subject

### 5.1. *The principle of national sovereignty*

Even though I have reasoned that the Constitution allows a consultation, we must still discuss who should be consulted: only Catalans or all Spaniards?

Yet again we find different, conflicting constitutional principles. For someone who believes that the subject of the consultation cannot be just Catalan citizens but should instead be all Spanish citizens, the underpinning would be the principle that states that sovereignty lies with the Spanish people (article 1.2). There are at least two arguments opposing this position, a simpler one and a deeper one.

Indeed, there is an easily understandable argument that can refute this position: if we want to know whether the Catalans want independence, whom should we ask if not the Catalans? This seems to have been understood in the thirty or so referenda which have been held around the world on this issue.<sup>31</sup>

However, the very simplicity of the argument means that it contains a trap. To wit, if the only reason for constitutionally endorsing the consultation is to ascertain the Catalans’ desires, then there is a temptation to equate this with a kind of survey of truly limited value. Therefore, it is easy to take this expression for something that it is not and understand it simply as a statement

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good faith if the question and outcome of the referendum are clear. This is the strength that the democratic principle is acquiring today, as reflected quite clearly in this ruling.

<sup>30</sup> As can be seen, I am sticking to strictly liberal argumentation which fits in perfectly with the consideration of individual right which I postulate for the meaning of “right to decide” which I am analysing in this study. Regarding the possibilities of fitting the “national” protests, usually understood as collective rights, within a liberal scheme, see the texts compiled in Requejo & Caminal (2009). One of the pioneers in proposing this way was Kymlicka (1995).

<sup>31</sup> From the referendum in Liberia in 1846 to the one in Puerto Rico in 2012.



that there is more or less widespread malaise in Catalonia regarding its fit within Spain.

In this case, the proposal of those who have upheld this kind of argument is to channel this “malaise” as if it were the expression of an intention to reform the Constitution.<sup>32</sup> Once this is assumed, then the result is rather similar to those who uphold that the consultation should be held among all Spaniards, given the extreme difficulty involved in a constitutional reform.<sup>33</sup> What is more, we must establish what kind of constitutional reform would result if the majority of Catalans expressed their desire for independence. This would surely be a false expression: what was voted on was independence; what is allowed is the start of a reform process with different content and with required majorities that place the Catalan voters in a totally unjustified position, as I shall argue below. For these reasons, a deeper kind of reasoning is needed, which once again brings us back to the democratic principle.

### 5.2. *The principle of the majority and dominion of the majority*

I suggest a mental experiment. Imagine that the entire electorate in Catalonia wanted to vote yes on a referendum on independence. This 100% of Catalans would still be a minority in Spain. Therefore, we can predict that they would systematically lose any vote on this issue whose subject was all Spaniards.

Now let us ask not how the Catalans would feel (the answer is obvious) but how someone who belongs to the perpetual majority might feel in a situation like this. Could they still be content with the state of affairs? Could they say that they live in a liberal democratic state?<sup>34</sup>

The answer to the first question would depend on each individual’s degree of moral conscience and does not concern us presently. However, the second question confronts us with a fundamental circumstance that does not depend on subjective factors. The reason is this: democracy implies the *principle* of the majority, but it is the opposite of *dominion* of the majority over the minority, in this case a minority, the Catalans, with delimited territorial confines and with their own language, culture and institutions.<sup>35</sup> Dominion of the majority perverts democracy and is opposed to the defining principles of liberal states. Let us briefly review these principles, and afterward we shall see how they occupy a prime place in the European Union treaties and the Constitution. They are the principles of the autonomy, inviolability and dignity of the individual (Nino, 1989).

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<sup>32</sup> This has been done, for example, in Francisco Rubio Llorente, “Un referéndum para Catalunya”, *El País*, 8 October 2012, and Francesc de Carreras, “Un referèndum?”, *La Vanguardia*, 20 September 2012.

<sup>33</sup> This is the vision at the root of Constitutional Court Ruling 102/2008 on the “Ibarretxe Plan”.

<sup>34</sup> I use the adjective “liberal” as the opposite of “fundamentalist”, not as the opposite of “social”. For a more in-depth analysis of this distinction and the defining principles of a liberal society, see Vilajosana (2007, Ch. 6).

<sup>35</sup> The distinction between the principle of the majority and the dominion of the majority can be found in Kelsen (1954: 412-413), although this author had obviously not thought about applying it to regionalised minorities. But if we bear in mind the dense conception of democracy that I am upholding in this text, then there is nothing preventing us from doing so.

### *5.3. The principle of the autonomy of the individual*

This principle states that the State should not interfere in the individual choice of life plans. Instead, it should limit itself to designing institutions that facilitate the pursuit of these plans and fulfillment of the ideals of virtue that each individual upholds, while preventing mutual interference. The corollary of this principle is that the State is only authorised to interfere in a person's life plans when they could harm another person, that is, when they prevent another person from being able to freely pursue their own life plan.

In contrast, perfectionism sustains that what is good for an individual, or what meets their needs, is independent of their own desires or their lifestyle choices. Through a variety of means, the State gives preference to those interests and life plans that are objectively "better". Perfectionism is peculiar to fundamentalist states. If for some reason, religious or otherwise, it is determined that a moral truth has been reached, then it follows that the State has the duty to impose the behaviours prescribed by this moral truth in order to make its subjects "better" according to the ideal.

In a liberal conception of society, individuals have to be responsible for choosing their life plans according to their preferences and not see that choice as something to which they fall victim. This is a principle that enables us to justify the grounds on which certain fundamental rights are based in our contemporary societies. These grounds are indispensable for choosing and pursuing the life plans that individuals may set for themselves. They include the freedom to behave in any way that does not harm third parties, the right to physical and psychological integrity, the right to education, the freedom of expression, the freedom to develop one's private life, the freedom of association and many other rights and freedoms. They are joined by the rights that imply political participation in the future of the society where the individual lives, as acknowledged in article 23 of the Constitution.

This would be applied to the case at hand as follows: if for many Catalans, being consulted on their political future, and even being consulted on the possibility of setting up an independent political entity, is extremely important in the pursuit of their life plans, they cannot be deprived of this by saying that they are a minority within a state.

### *5.4. The principle of the inviolability of the individual*

This principle holds that sacrifices and privations that do not benefit people cannot be imposed on them. It is based on the premise that when someone is required to be deprived of something without major benefit, this sacrifice is a means to an end outside the wellbeing of the person who must make the sacrifice, and this cannot be justified. In this vein, we should recall the second formulation of the Kantian imperative even though it is a more general idea than what I have just articulated: "Act in such a way that you treat humanity, whether in your own person or in any other person, always at the same time as an end, never merely as a means" (Kant, 1983).

The idea of not using people for purposes other than their own wellbeing is clearly what lies behind the ban on dominion of the majorities. If a majority is

to control a minority, especially in perpetuity, the people belonging to this minority are being used and treated as the mere recipients of the other's policies, not as subjects whose preferences must be borne in mind. By requiring a consultation on the independence of the Catalans to be voted on by all Spaniards, the Catalans are being made a perpetual minority on a matter that has a heavy impact on their life plans. They would never be able to reverse the situation and would thus be treated as mere instruments in a policy on which they would never be able to decide.

To this we could add that it is easy for those who claim that a constitutional amendment is needed or that the consultation must be held among all Spaniards to fall into democratic hypocrisy. Often they are the same people who over the years of democracy in Spain have argued that parties that defend any idea can run in elections, as long as they do so peacefully.<sup>36</sup> What is more, one of the arguments used the most against the terrorists in Euskadi is that what they were fighting for, namely independence, could be peacefully defended according to the Constitution. The example they always referred to was Catalonia. Therefore, should we understand that all of these arguments, upheld over this entire time to neutralise ETA's violence, have only been valid as long as the pro-independence movement was in the minority in Catalonia? Do they cease being valid when there are signs that it might be supported by the majority?

### 5.5. *The principle of the dignity of the individual*

Treating people with the dignity they deserve as individuals means taking their *beliefs* and *opinions* seriously, as well as their *decisions*. But each of these spheres has a slightly different scope.

Taking a person's beliefs and opinions seriously means that if we want to propose a change we have to do so using arguments and proof, that is, by influencing the factors that the individual has taken into consideration when forming their own beliefs or opinions and not, for example, by manipulation.

Likewise, taking an individual's decisions seriously consists of allowing them to accept the consequences of these decisions. In other words, they must allow these consequences to be incorporated into the course of their lives. However, and this is very important for the issue at hand, unlike beliefs, it is not admissible to offer arguments or proof unless they refer to the beliefs that underpin the decision. I wish to underscore the importance of this because it connects – even terminologically – with the right to decide. The idea is for people to take decisions with dignity, regardless of the reasons why they decide.

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<sup>36</sup> In fact, this is nothing other than what the European Court of Human Rights says: the only rules on what political parties can defend is that the means they use be legal and democratic and that the changes they propose be compatible with the fundamental democratic principles (ECHR ruling dated 30 June 2009). On the other hand, in her testimony to the Parliament's study commission on the right to decide dated 26 November 2013, Mercè Barceló reminded us of the position of Constitutional Court in Ruling 48/2003, which states that any idea, even one that runs counter to the Constitution, can be defended as long as it is put forward with respect to democracy and fundamental rights, given that the Constitution does not enshrine a "militant democracy". The formal reason for sustaining this is that the Constitution admits that any of its precepts can be modified.

This is a vital point in understanding the underpinning of contemporary democracies in their proper measure: the legitimate vote regardless of the reasons that each person may have for voting one way or another.

So what do these principles mean for the topic at hand? Fulfilling the principle of the autonomy of the person means being sensitive to the life plans that each individual has freely chosen. Respecting the principle of the inviolability of the person means that a series of individuals cannot permanently be used with the argument that they are a minority. Finally, valuing human dignity requires the State to take adult citizens' free expressions of their will seriously. In short, if for any reason adults believe that it is extremely important for them to decide on their collective political future, then their desire must be taken into consideration. Otherwise, they would become a permanent minority dominated or treated with unjustified paternalism.

But are all of these arguments mere "philosophy"? Were we not talking about the legal principles recognised in the Constitution? Well, let's talk about them. Does the Constitution recognise these principles as ideal rules and necessary links shaping identity? Indeed, they are recognised in the Constitution. We can find them there, and in quite a prominent place: "The political powers are in charge of promoting the conditions so that the freedom [...] of the individual and the groups to which they belong is real and effective" (article 9); and "The dignity of the individual [...], the free development of the personality [...] are the underpinning of the political order and of social peace" (article 10).<sup>37</sup>

What is more, it should be borne in mind, for example, that the Treaties of the European Union recognises them explicitly by relating them to respect for minorities. Thus, in article 2 we can read: "The Union is founded on the values of respect for human dignity, freedom, democracy, [...] and respect for human rights, including the rights of persons belonging to minorities".<sup>38</sup> Before concluding, what remains is to examine the proper weighing of the principles that shape a liberal democracy, like the one defined by the Constitution, with the principle of national sovereignty. After what I have just said, it should be clear that the weight of this latter principle is not enough to prevent the consultation, but it means that the citizens from the rest of the state should participate in it in some way.

This participation can be accomplished by these citizens' representatives in the Parliament, which would be done, in my opinion, by accepting any of the ways in which the right to decide in the sense that I am using it here could be constitutionally articulated. Both the way contained in article 92, directly, and

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<sup>37</sup> Regarding the relevancy of this article, it has been said that "without hyperbole, this article in our Constitution can be regarded as the *cornerstone* of the entire legal system that it institutes", in Ruiz-Giménez Cortés & Ruiz-Giménez Arrieta (2006).

<sup>38</sup> I have taken the citation from the consolidated versions of the Treaty of the European Union and the Treaty on the Functioning of the European Union, whose rules, as is common knowledge, belong to the Spanish legal order by virtue of article 96.1 of the Constitution. They also serve as the interpretative criteria, according to the provisions of article 10.2 of the Constitution. Earlier, we saw that precisely the appeal to the hermeneutic rule contained in this article was used by the Constitutional Court to argue for the use of the evolutive interpretation that I am defending.

the way contained in article 150.2 through Catalan law 4/2010, call for this participation whether by proposing, delegating, transferring or authorising participation via referendum. The appeal to national sovereignty cannot weigh so much as to render useless the call for a consultation on such an essential issue for the development of the people who live and work in Catalonia because of their inviolability and dignity. In an interpretation that can bring these principles to their extreme, the ways that the Constitution stipulates allow the consultation to be held among the Catalans, while they also make it possible for non-negligible participation by the democratically elected representatives of all Spanish citizens, in order for the principle of national sovereignty to be honoured the way it deserves to be, weighed proportionally to the other relevant principles.<sup>39</sup>

## 6. Conclusion

Throughout this article I have shown that if we accept that the Constitution, through different principles viewed as ideal rules, enshrines a liberal democracy, then there are good reasons to believe that it does allow the Catalans to be consulted on their political future, including a question on independence. These reasons entail understanding that an evolutive interpretation that upholds a dense conception of democracy is the most appropriate means to weigh the relevant principles a fair, balanced fashion. This is a way of evolving without losing identity, a way of resolving the challenge facing those who wish to have a Constitution on par with today's times, a Constitution which, to use the Constitutional Court's own words, does not become "mere rhetoric". In this way, it could fulfil the maxim that Pindar left us centuries ago: "Learn what you are and be such" (Pindar, 1987: 125).

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<sup>39</sup> This does not exclude the possibility of using the way of a potential Catalan law on non-referendum consultations should the State block a referendum. This is because a consultation on independence whose subject is the Catalans is not banned by the Constitution; there is at least permission for it in the weak sense, as argued above.

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