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THE CATALAN SOVEREIGNTY PROCESS AND THE SPANISH CONSTITUTIONAL COURT. AN ANALYSIS OF RECIPROCAL IMPACTS *

Eduard Roig i Molés**

Abstract

Since 2013 the Catalan sovereignty process and the Spanish Constitutional Court have increasingly been at odds with one another. This situation has altered the course of the Catalan sovereignty process, with the interventions of the Court notable for having a major bearing on sovereignty initiatives. The aim of this study is to analyse not just the constitutional jurisprudence, but also the transformation of the Catalan sovereignty process based on the decisions of the Constitutional Court, how these decisions have affected the course of action taken by Catalan institutions, and the effects and efficacy of the Court's judgments, court orders and rulings in curbing the intentions of Catalan institutions. Conversely, the Catalan sovereignty process has had a major impact on the position of the Constitutional Court and its functions, relating to the Court's jurisprudence and the political choices of regional and state institutions, and this impact is likewise analysed. Lastly, attention is given to the 'collateral' effects the Constitutional Court's intervention in the Catalan sovereignty process has had on a number of other areas of Spain's constitutional system.

Keywords: Spanish Constitutional Court; constitutional law; sovereignty; Catalan sovereignty process

Resum

Des de l'any 2013, el procés sobiranista s'ha enfrontat progressivament amb el Tribunal Constitucional i ha provocat una mutació del procés en bona part arran de les intervencions del Tribunal, que ha condicionat les iniciatives sobiranistes com cap altra institució. L'objectiu d'aquest treball és analitzar la jurisprudència constitucional i, sobretot, la transformació del procés a partir de les decisions del Tribunal, les implicacions que aquestes han tingut en l'actuació de les institucions catalanes, així com l'eficàcia i els efectes de les sentències, les interlocutòries i les providències del Tribunal per controlar i frenar les aspiracions de les institucions catalanes. El procés també ha tingut un gran impacte en la posició del Tribunal i les seves funcions fruit de la seva pròpia jurisprudència i de les opcions polítiques de les institucions autonòmiques i estatals, quelcom que també es recull en aquest treball. Finalment, s'apunten les conseqüències «col·laterals» de la intervenció del Tribunal en el procés sobiranista per a molts altres àmbits del sistema constitucional espanyol.

Paraules clau: Tribunal Constitucional; dret constitucional; sobirania; procés sobiranista

* This article is a translation of the original version in Catalan.

**Eduard Roig i Molés, professor of Constitutional Law. University of Barcelona. eroig@ub.edu

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The course of the Catalan sovereignty process, from its first official declaration in 2013 to the present day, has increasingly been at odds with the Spanish Constitutional Court, which has been at the forefront of the discussions between the State and Catalan institutions. Over time this relationship has altered the course of the Catalan sovereignty process, with the interventions of the Court notable for having a major bearing on sovereignty initiatives. The first objective of this study is to analyse the constitutional jurisprudence and to a greater extent the transformation of the Catalan sovereignty process based on the decisions of the Constitutional Court. Analysis of the jurisprudence is necessary but has already been well covered;[1] this work looks beyond this to focus on how said jurisprudence has affected the course taken by Catalan institutions and, as a result, how effective the Court's actions have been in spearheading efforts to monitor and curb the Catalan sovereignty process. The first section of the article pursues this objective under the title 'the Catalan sovereignty process faced with the Constitutional Court'.

The Constitutional Court has had a huge bearing on the Catalan sovereignty process. Conversely however, the Catalan sovereignty process has also had a major impact on the institutional position of the Constitutional Court and its functions. This impact has stemmed from the Court's own jurisprudence and the political choices of regional and state institutions – choices about how the Catalan sovereignty process has been pushed forward and about how the Constitutional Court has been employed, respectively. An examination of this impact is the second objective of this study, under the title 'the Constitutional Court faced with the Catalan sovereignty process'.

The Constitutional Court's intervention in the Catalan sovereignty process holds consequences for a number of other areas of Spain's constitutional system, as decisions taken in this context will influence the functioning of institutions and norms applicable in other areas. The final section of this article outlines these 'collateral' effects of the Constitutional Court's jurisprudence on the Catalan sovereignty process.

1 The Catalan sovereignty process faced with the Constitutional Court

Despite the Constitutional Court's jurisprudence on autonomous regions and its Judgment 31/2010 on the Statute of Autonomy of Catalonia in particular – understood as the culmination of an increasingly restrictive interpretation of the constitutionally recognised concept of regional autonomy, which are often highlighted as significant elements in the rise and strengthening of sovereignty movements,[2] and despite the existence of precedents in the Constitutional Court's jurisprudence, the Constitutional Court did not address the Catalan sovereignty process until 2013, when it challenged the Parliament of Catalonia's Resolution 5/X, of 23 January 2013, on behalf of the Spanish Government. This section of the article goes on to examine the development of the Catalan sovereignty process based on the rulings adopted by the Constitutional Court, which allow the process to be seen in four stages: its political expression (section 1.1), its legal regulation (section 1.2) and efforts to develop it within the constitutional framework (section 1.3), its open conflict with the constitutional framework (section 1.4), and recent actions to avoid intervention from the Constitutional Court (section 1.5). The basis for this order of stages corresponds to the chronological order of the Constitutional Court's

1 An overview of the jurisprudence is found in Bar Cendón, A., 'El proceso independentista de Cataluña y la doctrina jurisprudencial : una visión sistemática', in *Teoría y Realidad Constitucional*, no. 37, 2016, p. 208ff. and in Castellà Andreu, J. M., 'Tribunal Constitucional y proceso secesionista catalán: respuestas jurídico-constitucionales a un conflicto político-constitucional', in *Teoría y Realidad Constitucional*, no. 37, 2016, p. 561ff., or, for a more generic approach, Ferraiuolo, G., 'Tribunal Constitucional y cuestión nacional catalana. El papel del juez Constitucional español entre la teoria y la práctica', in Cagiao Conde, J., and Ferraiuolo, G., (coords.), *El encaje constitucional del derecho a decidir*, Libros de la Catarata, Madrid, 2016, p. 110ff.

2 An overview of the origins and evolution of the Catalan sovereignty process, including a range of different perspectives, can be seen in the works of Galán Galán, A., 'Del derecho a decidir a la independencia: la peculiaridad del proceso secesionista en Cataluña', in *Istituzioni del federalismo*, no. 4, 2014, p. 885ff., Ferreres Comella, V., 'Cataluña y el derecho a decidir', in *Teoría y Realidad Constitucional*, no. 37, 2016, p. 461ff, Barceló i Serramalera, M., 'El derecho a decidir como instrumento constitucional para la canalización de problemas territoriales', in *Fundamentos*, no. 9, 2016, p. 361ff., and from the same author, 'Reconocimiento y construcción del derecho a decidir en el sistema constitucional español', in Barceló, M., Corretja, M., González Bondia, A., López, J., Vilajosana, J. M., *El derecho a decidir. Teoría y práctica de un nuevo derecho*, Atelier, Barcelona, 2015, p. 91ff. Issue no. 37 of the journal *Teoría y Realidad Constitucional* (2016) also offers diverse and contrasting viewpoints from Albertí Rovira, E., Blanco Valdés, R., Fossas Espadaler, E., Freixes Sanjuan, T., García Fernández, J., Montilla Martos, J. A., Satrústegui Gil-delgado, M., and Vírgala Foruría, E., by way of an interview with common questions, 'Encuesta sobre la cuestión catalana', p. 16ff. In particular, on the significance of Constitutional Court Judgment 31/2010, much can be drawn from the varied contributions of Albertí Rovira, E., (p. 26ff.), Montilla, J. A. (p. 34ff.) and Vírgala, E., (p. 37).

interventions (with the occasional exception, which will be noted), and enables conclusions on the effects of the Constitutional Court's intervention in the Catalan sovereignty process to be drawn (section 1.6).

1.1 Political expression of the Catalan sovereignty process in the constitutional framework: Resolution 5/X, of 23 January 2013, and Constitutional Court Judgment 42/2014, of 25 March 2014.

Resolution 5/X, which was made directly after the regional elections for Catalonia in 2012, had two distinct elements that were challenged: a declaration of the sovereignty of the people of Catalonia and a push to exercise the same people's 'right to decide' (this concept is not defined by the Resolution, but is influenced by it).

There are two particularly relevant points to be made in order to give context to the first intervention made by the Constitutional Court: Resolution 5/X does not deliberately clash with the constitutional framework, rather its intention is to work within said framework; and, despite not being the first parliamentary resolution to contain a declaration of sovereignty, it was the first to do so directly and substantially, without binding itself to a specific claim (within the constitutional framework); it is also the first to initiate a process to be developed with actions likely to lead to legal consequences and results, through the inclusion of the 'right to decide'. These two elements are the likeliest explanation as to why, unlike its precursors, Resolution 5/X was challenged in the Constitutional Court.

Judgment 42/2014,[3] which settled this first conflict, adopted three decisions that were important to the development of the Catalan sovereignty process: firstly, the challenge was declared admissible, meaning that the Constitutional Court accepted its remit to intervene, not only in relation to the Catalan sovereignty process but also, very importantly, in relation to the parliamentary resolutions linked to it (section 1.1.1); secondly, recognition of sovereignty as an attribute of the Spanish nation, to be exercised through state institutions, but not an attribute of Spain's constituent nationalities (section 1.1.2); and lastly, recognition and constitutional protection of a political space for discussion and debate on exercising the 'right to decide', seen by the Constitutional Court as the possibility of carrying out institutional actions in preparation and promotion of constitutional reform in relation to sovereignty (section 1.1.3). These three elements form the initial constitutional framework for the Catalan sovereignty process, defined by the Constitutional Court with a certain amount of openness as well as a vigilant watchfulness (section 1.1.4), and they represent the conceptual frame of reference for the future development of said process (section 1.1.5).

1.1.1 Declaration of admissibility

The admissibility of the challenge to a parliamentary resolution is particularly controversial, as the Constitutional Court has repeatedly insisted that it is its intention only to deal with acts that have legal consequences. This protects the Court from the difficulty and consequences of ruling on disputes that are not based on legal reasoning while also protecting political pluralism and the freedom to discuss any aspect which is not the cause of legal effects.[4] Previously there had been discussion over the taking of this position in Judgment 31/2010 and its indictment of the preamble to the 2006 Statute of Autonomy of Catalonia, as the precise nature of what 'legal effects' are and what is capable of producing them is sometimes debatable. In this Judgment the Constitutional Court opened the door to a wide understanding of what 'legal effects' are, thus bringing this matter once again to the fore.[5]

3 Judgment 42/2014, of central importance to this topic, has been the subject of numerous specific commentaries, in addition to the works cited in note 1: in particular see Fossas Espadaler, E., 'Interpretar la política', in *Revista Española de Derecho Constitucional* no. 101 (2014), p. 273ff.; Ridao i Martín, J., 'La juridificación del derecho a decidir en España', in *Revista de Derecho Político* no. 91, 2014 p. 91ff.; and the works of Arbós Marín, X., 'El Tribunal Constitucional como facilitador' and Tajadura Tejada, J., 'La STC 42/2014, de 25 de marzo, respecto a la resolución del Parlamento de Cataluña 5/X, de 23 de enero de 2013, por la que se aprueba la declaración de soberanía y del derecho a decidir del pueblo de Cataluña: la introducción del "derecho a decidir" en el ordenamiento jurídico español', both in *La última jurisprudencia relativa al Parlamento*, Basque Parliament, Vitoria-Gasteiz, 2016, p. 21ff. and p. 56ff.

4 See Constitutional Court Judgment 48/2003, of 12 March 2003, and in particular Constitutional Court Order 135/2004, of 20 April (legal grounds no. 6).

5 Constitutional Court Judgment 31/2010, of 28 June, and most importantly legal grounds no. 7, in which the Court examines the constitutionality of the Statute's preamble, entailing the exclusion of any legal effects. On this matter, see Arbós Marín, X., 'La nació: un pas endavant i dos enrere', in *Revista Catalana de Dret Públic*, 'Especial Sentencia 31/2010 del Tribunal Constitucional sobre el Estatuto de Autonomía de Cataluña de 2006', p. 105ff.

The Judgment defined which resolutions may be declared unconstitutional by way of two characteristics: their definitive character (opposition to a ruling made in a parliamentary proceeding with a subsequent final ruling) and the causing of legal effects. This meant that previous elements of jurisprudence on this matter were maintained, avoiding an alternative route that might have focused on issues of key political importance in the Resolution,[6] something that could have prevented the difficult debate on 'legal effects' but would also have forced the Constitutional Court to fully address questions surrounding its capacity to interfere with (and block) a political debate.

The first of these characteristics mentioned (definitive character) essentially guarantees the possibility of discussions being generated on subjects or texts that contain unconstitutional elements, but when, over the course of the parliamentary process, these elements may disappear or be modified in such a way as to ensure compatibility with the constitution. The Resolution that was challenged did not have problems in this regard, as it was a definitive Resolution, not a partial decision in the framework of a wider parliamentary process (although this is a question that will have to be looked at again in the case of other more conflictive scenarios).

In contrast, the second characteristic (being the cause of legal effects) was much more contentious. The Constitutional Court completely ruled out the existence of legal effects on citizens and reiterated parliamentary resolutions' lack of binding effectiveness in terms of public powers. However, the Court also directly introduced an assertion of legal effects, not binding, but in this case stemming from the possibility of understanding the Resolution as 'the recognition (…) of attributes inherent to sovereignty' (legal grounds no. 2), and from the ruling's view that the Resolution appeared to seek to initiate a process 'demands the execution of specific actions and this execution is subject to parliamentary review…' (ibid). This assertion, besides its evident truth, poses the problem of being applicable to all parliamentary resolutions that, almost by definition, entail 'recognition' and the possibility of 'parliamentary review'. This was the basis for the acceptance of the challenge and for the Constitutional Court's jurisdiction. It was a decisive step forward for the Court, which thus became the primary and essential institution overseeing the decisions adopted, while also enshrining them as legally relevant.

Although it may have been hard at the time to envisage it, both aspects are highly relevant for the future: firstly, the Constitutional Court takes the lead in defining and defending the constitutional framework in relation to the Catalan sovereignty process, a position it cannot now abandon, something that is a disincentive to other institutions intervening and which directs the process towards a dynamic centred on its (legal) compatibility with the constitutional framework; and secondly, grounds are provided for a wider understanding of 'legal effects', opening the door to significant future discussions about the compliance with and execution of, the Constitutional Court's judgments.

1.1.2 The unconstitutionality of the declaration of sovereignty

Having accepted the challenge, the Constitutional Court had to address the meaning of the declaration of sovereignty contained in the first section of the Resolution. Without going into a debate on the theory of sovereignty or its configuration and effects in a composite state, the Constitutional Court limited itself to verifying how the Resolution describes sovereignty as a definite attribute belonging to the people of Catalonia, and comparing this with the constitutional arguments that attribute sovereignty to the Spanish nation, and with its own jurisprudence on this matter.[7] On these premises, there could be no other conclusion but the unconstitutionality of the declaration, based not so much on the general use of the concept of sovereignty but on its specific configuration, void of links

6 In contrast, this direction is signalled by Castellà Andreu, J. M., 'Tribunal Constitucional…', in *Teoría y Realidad Constitucional*, no. 37, 2016, p. 570, with reference to a 'declarative, revolutionary-type function'; a similar line is taken by Tajadura, J., 'La STC 42/2014…', p. 64. The arguments against the Constitutional Court's decision to admit the appeal can be seen initially in Vintró Castells, J., 'El Tribunal Constitucional y el derecho a decidir de Cataluña: una reflexión sobre la STC de 25 de marzo de 2014', [blog post, online] Revista Catalana de Dret Públic [accessed June 2017], and in the works of Fossas, E., and Ridao i Martín, J., cited in footnote no. 3, or the opinions of Vírgala, E., in 'Encuesta sobre la cuestión catalana', p. 72ff.

7 Constitutional Court Judgment 42/2014, of 25 March, legal grounds no. 3: 'A recognition of sovereign status in favour of the people of Catalonia (…) is incompatible with Article 2 of the Spanish Constitution; the partial subject that is entrusted with this power would be therefore able, at its discretion, to breach what the Constitution has declared as a basic principle: "the indissoluble unity of the Spanish Nation".'

or claims directly adhering to the constitutional framework, instead understood as a general assertion that could provide grounds for future actions outside of or against said framework.

In particular, the Constitutional Court rejected the Catalan Government's arguments defending an interpretation of the declaration of sovereignty essentially linked to the terms of the 'right to decide', introduced in the second section. According to these arguments, the declaration of sovereignty would not be a direct consequence of the Resolution, but rather a possibility specific to the proposal to give the people of Catalonia a means to decide their political future, meaning that the declaration should not be taken in isolation but rather as something that depends on the decision adopted on the 'right to decide'. The Constitutional Court's position, drawing a clear line between the two sections and considering them independently, inevitably brings it to declare the declaration of sovereignty as unconstitutional, for being incompatible with the constitutional attribution of national sovereignty in article 1.2. It does, however, allow for an interpretation of the second part of the Resolution, the highly ambiguous 'right to decide',[8] that is much more open and compatible with the constitutional framework.

1.1.3 The constitutionality of the 'right to decide' in the judgment's own terms

In point of fact, the Constitutional Court places particular emphasis on the open and non-combative nature of Spain's constitutional system, legitimising the defence of options that run contrary to said system, provided this defence (and not the options defended) is made via constitutionally appropriate procedures, without prejudice to constitutional decisions.[9]

As a result, the Constitutional Court can easily identify a constitutional understanding of the 'right to decide' as a political proposal that includes secession – in itself unconstitutional, provided this proposal is made in accordance with the procedure defined by the Constitution and, accordingly, is directed at the institutions capable of constitutional reform. The capacity for initiating constitutional reform that is open to Autonomous Communities as well as the direct annulment of any resolution challenged, in accordance with democratic and (in particular) legal principles, mean that the Constitutional Court is able to see the 'right to decide' as constitutional.

As such, the Constitutional Court defines the 'right to decide' included in the Resolution as a series of actions (to be determined) that:

a) do not constitute a new 'right', understood as powers to act guaranteed by the Spanish legal order, rather they are the exercising of rights and procedures already provided for by the legal order to propose political and legal changes in the correct fashion;

b) do not attribute or recognise a power to make legally effective decisions in favour of any new matters, rather they enable, where applicable, the raising of a matter (a 'political intention', according to legal grounds no. 3 b) to be decided by whoever holds the power to do so according to the constitution;

c) therefore lead towards a constitutional reform process that enables 'the *raising* of concepts that seek to modify the basis of the constitutional order (…) provided this is not prepared or defended through activities that breach our democratic principles, our basic rights or the rest of our constitutional mandates, and the efforts to achieve it are made *within the framework* of the procedures for Constitutional reform…'.[10]

8 The 'right to decide' has its background in constitutional jurisprudence, in relation with Law 9/2008 of the Basque Country Autonomous Community, which was addressed in Constitutional Court Judgment 103/2008 of 11 November. In relation to this, López Basaguren, A., 'Sobre referéndum y comunidades autónomas: La Ley vasca de la "consulta" ante el Tribunal Constitucional', in *Revista d'Estudis Autonòmics i Federals*, no. 9, 2009, p. 202ff., and Corcuera 'Soberanía y autonomía. Los límites del "derecho a decidir" (Comentario de la STC 103/2008)', in *Revista Española de Derecho Constitucional* no. 86, 2009, p. 303ff. Its definition in the case of the Catalan sovereignty process has been the object of detailed and controversial analysis in the works cited in footnote no. 2.

9 Particularly important here is the doctrine established in Constitutional Court Judgment 103/2008, which the Court cites when handing down Constitutional Court Judgment 42/2014 (legal grounds no. 3) that 'there is allowance for the raising of concepts that seek to modify the basis of the constitutional order in our system, provided this is not prepared or defended through activities that breach our democratic principles, our basic rights or the rest of our constitutional mandates, and the efforts to achieve it are made within the framework of the procedures for Constitutional reform…'.

10 This possibility is particularly relevant in its contrast with the Constitutional Court's emphatic statement in its Judgment 31/2010

As such the Constitutional Court achieves a double effect: firstly it recognises and protects a space for debate and the development of claims to independence that may legitimately be advanced, rejecting proposals that argue that the debate itself is unconstitutional. In this regard, the intervention of the Court can be seen as the opening of a means for political discussion, provided by the Court itself in recognition of the political nature of the debate, placing itself (and legal limitations) above this legitimate debate while also guaranteeing it. At the same time, however, this means is shown to be clearly subject to constitutional procedures and competences (and to control from the Court itself), leaving the definition of these procedures open to the future, a matter that would guide subsequent interventions by the Court and will quickly take centre stage.

1.1.4 The constitutional framework of the Catalan sovereignty process

At a first glance, the Constitutional Court construction that has just been described would appear contradictory. On the one hand it justifies its intervention on the basis of the consequences unfolding from the declaration as regards potential future actions originating from autonomous community institutions (the 'legal effects'), but on the other hand it rejects the connection between the first point of the Resolution (the abstract declaration of sovereignty) and its second point (the introduction of the debate on the 'right to decide'), considering the latter to be constitutional but, in contrast, the declaration of sovereignty to be unconstitutional, precisely because of its abstract nature and the possibility of it giving rise to unconstitutional elements. However, this is a way by which the Constitutional Court manages to 'constitutionalise' the right to decide (in fact distancing it from the exercising of sovereignty),[11] while clearly marking its 'constituted' character, limited by constitutional precepts. The position the Judgment gives to the Catalan sovereignty process is best expressed as follows:

a) The raising of political demands for independence by autonomous community institutions is legitimate, but there are no specific rights supporting special consideration for these demands. As a result, they must be expressed via the general legal channels, and represent a political proposal, subject therefore to whatever levels of support exist in the corresponding parliaments.

b) Therefore, the precise nature and conditions of these procedures firstly belong to the general legal framework for each case (legislative initiative, referendum, constitutional reform initiative, etc.), and secondly depend on a free political decision to be made by whoever is given the power to do so by the constitution, in accordance with the system of distributed powers.

c) In particular, the definition of independence (without regard to other decisions) requires constitutional reform, which may be proposed by Catalan institutions but which would be decided upon by state institutions, even though they can carry out actions to promote it *within the appropriate framework*.

As such, the Constitutional Court points to political negotiation as the appropriate route to provide the response that is considered politically convenient to the demands arising from the process of exercising the 'right to decide', this being understood as described herein.[12] It does so not only for an eventual decision on a constitutional reform relating to Catalan independence, but also for other matters that could arise in this process and require political agreement, with or without constitutional reform, and without ruling out the possibility of means for citizen participation in this process.

1.1.5 The frame of reference for the Catalan sovereignty process and its transformation

The Judgment does not just establish, initially, the constitutional framework of the Catalan sovereignty process; insomuch as it forms the first response from state institutions to the line taken by Catalonia's

(legal grounds no. 69), which excluded any possibility of state or regional referendums 'on matters fundamentally resolved by the constituent process'. This contrast appeared to open the door to popular consultation processes being developed in Catalonia, as per the interpretation in the cited works by Vintró, J., ('sufficient elements can be found in the judgment to defend (…) that, without prior constitutional reform, a consultative referendum agreed upon with the State could be held in Catalonia…') or Ridao i Martín, J., 'La juridificación del derecho a decidir en España', p. 96.

11 The criticism of this construction, for being incoherent with the Resolution itself and the right to decide as outlined by the Parliament of Catalonia (something leading to subsequent conflict), is explored in the works of Fossas, E., p. 298ff, and Tajadura, J., p. 73ff.

12 On this point, in particular see the cited work by Arbós Marín, X., 'El Tribunal Constitucional como facilitador', p. 41ff., on the concept of the Constitutional Court as a 'facilitator'.

autonomous community institutions, it also determines a frame of reference for the debate that, from this moment on, would focus on three matters stemming directly from the Judgment:

a) Firstly, the emergence of judicial review as regards the constitutionality of the process, with a permanent presence projecting over practically all autonomous community actions. In this regard, the first effect of the Judgment was to rule out a space for discussion that would be exclusively political and therefore separate from the constitutional framework, not established in legal terms. However, the admission of the challenge brought about this precise effect, regardless of subsequent attempts by the Constitutional Court to maintain a legitimate space for political debate. The Catalan sovereignty process's constitutionality thus became the central topic of discussion, both because it was the only area where a definite state response existed, and because it became the basic yardstick for the process's development and survival. In this sense the Judgment, which aimed to channel the conflict into political territory, paradoxically became a contributor to the judicialisation of the process,[13] especially faced with the rapid depletion of political openings, there being a shortage of responses and initiatives in equal measure.[14]

b) Secondly, rather than focusing on the causes of the underlying conflict and the alternatives for resolving it, the debate centred on how the decision on independence would be taken to the Spanish parliament and, specifically, the possibility of putting it to Catalan people first as a popular consultation. The political debate in the following months was monopolised by this matter, becoming the dominant focus of the Catalan sovereignty process. The primary objective thus stops being sovereignty or independence, instead becoming the holding of a consultation as the only effective way to politically channel the calls for independence. This illustrates and intensifies the judicialisation of the Catalan sovereignty process, as the focus turns to the means of expression rather than the political content.

c) Lastly, this demand for a popular consultation is made with the intent of using a legally correct channel offered by the possibilities the Constitutional Court presented. It seeks to legitimise the consultation and to surmount the control exerted by the Constitutional Court when it happens.

1.2 Legal channels for expression of the Catalan sovereignty process: laws on popular consultations

This changing course of the Catalan sovereignty process – as seen from the perspective of this study – is marked by the two judgments handed down by the Constitutional Court on the Parliament of Catalonia's laws regulating popular consultations. It is important, however, to distinguish these two judgments in terms of both their content and their context and impact on the process.

1.2.1 Judgment 31/2015, of 25 February, on the Parliament of Catalonia's Law 10/2014, of 26 September, on non-referendum popular consultations

The Constitutional Court's second intervention on the Catalan sovereignty process came about in a very different context. The discussion was no longer about a political debate and its potential channels, but about legislation that envisaged a popular consultation as a key element in exercising the right to decide, under a regime notable chiefly for its unilateral approach: it was the autonomous community that was regulating, defining and calling the popular consultation, and this unilateral approach would become the core aspect of the underlying debate on constitutional questions.

13 Not so much in the sense of forming a new right – an aspect emphasised by Ridao i Martín, J., 'La juridifcación…', p. 95, criticised by Fossas, E., 'Interpretar la política', p. 298, and essentially denied, correctly in my opinion, by Arbós Marín, X., 'El Tribunal Constitucional como facilitador', p. 37ff. and Albertí, E., 'Encuesta sobre la cuestión catalana…', p. 45ff. – but instead in the sense of a political claim, which until that moment had developed in the framework of political debate, converted into an action with 'legal effects', which as a result must give rise to legal acts, and above all is limited by a narrower legal framework and stricter judicial review.

14 Essentially just the proposal for an organic law delegating the Government of Catalonia the power to authorise, call and hold a referendum on the political future of Catalonia, which the Catalan parliament put before the Spanish parliament on 17 January 2014 (Official Parliamentary Gazette B-1598-1, of 24 January 2014), and which was debated and rejected on 8 April 2014 (Congress of Deputies Sessions Record, Plenary no. 192, of 8 April 2014).

a) The appeal, the automatic suspension and its effects

First of all, attention must be given to an aspect that appears for the first time in this process, but which will be of growing importance in the future development of such conflicts: the reasoning behind the Constitutional Court's decision is less important than the precautionary decision in favour of suspension, because what is at stake is not so much the validity of a general legal framework for diverse actions, but the possibility of holding a single specific consultation under the aegis of this framework, or at least of initiating the corresponding activities. As a result, all parties involved concentrate on defining their actions in such a way as to be able to bring about their effects as quickly as possible: from one side to avoid the suspension and prohibition from the Constitutional Court, and from the other side to ensure this precise result.[15]

These are considerations that help to account for certain characteristics of the Law on non-referendum popular consultations which are otherwise difficult to understand within the constitutional system: essentially this Law states that the decision over when the consultation is held is to be made by the President of the Government of Catalonia, using the question that he/she sets, and even with the additions to the scope of the electorate that he/she deems appropriate. These details are all very surprising in a parliamentary system, and in relation to a popular consultation, a decision of such importance to the balance of power. However, looking at it from another angle, these are decisions that enable immediate execution without any delays over authorisation to call the consultation, before the Law that enables it is challenged and suspended.

Thus for the first time, the Catalan sovereignty process adopted an approach (and legislation) aimed essentially at avoiding or mitigating the effects of the State's main means of reaction, i.e. its appeal to the Constitutional Court and the suspension of the actions or legislation that provides for the consultation. Therefore, the debate over the suspension, its continuation and its effects took centre stage, despite these being merely the automatic consequence of the appeal being brought before the Court. This initiated a dynamic whereby the nature of the Constitutional Court's intervention was not so much about defining the constitutional framework (an unequivocally fundamental duty of this court within Spain's system) as it was about preventing actions that run counter to the framework already defined. Further reference shall be made to these elements and their dynamic in subsequent sections.

b) The Judgment: the similarity between the consultation and a referendum and the need for authorisation from the State

However, at that moment there was still a background discussion on the constitutionality of the Catalan Law, which, by virtue of the form it took, was subject to the Constitution. The Constitutional Court therefore assumed its traditional role of defender of the constitutional framework, in this case focusing on classifying the consultations provided for by this Law as consultations that are, in effect, referendums. Consequently, the Court deemed it impossible for an autonomous community to unilaterally legislate for and call a consultation of this type.

As such, under terms coherent with Constitutional Court Judgment 42/2014, it ruled out the possibility of the 'right to decide' being developed and exercised in a consultation defined unilaterally by the government of an autonomous community and aimed at the general electorate to be carried out as a vote, as these are the defining elements of what the constitution sees as a referendum, the calling of which is to be legislated and authorised by the State alone (most importantly, see legal grounds no. 8 of Constitutional Court Judgment 31/2015).[16]

In this regard, the Judgment stated that the consultation in which the 'right to decide' is materialised must follow the constitutional rules of a referendum. This meant the reasoning of the Constitutional Court and its effects would be brought into force if there was a lack of agreement with the State, the competent authority

15 The Law that was challenged entered into force on the same day it was published in the Government of Catalonia's Official Journal, 27 September 2014, Decree 129/2014, on the calling of a consultation on the political future of Catalonia, being passed that same day. On the following day the Spanish Council of State took legal advice to lodge an appeal, which it did before the Constitutional Court on 29 September. The court then accepted the appeal on that same day, automatically overturning said law.

16 The immediate object of the judgment was definition of the referendum concept and the possibility of a citizen consultation outside of its legal system, as per the proposal in the law that was challenged. In relation to this, Castellà Andreu, M., 'Consultas populares no referendarias en Cataluña', in *Revista Aragonesa de Administración Pública*, no. 14, 2013, p. 121ff., Bar Cendón, A., 'El proceso independentista de Cataluña y la doctrina jurisprudencial : una visión sistemática', in *Teoría y Realidad Constitucional*, no. 37, 2016, p. 208ff., and Ridao i Martín, J., 'La oscilante doctrina del Tribunal Constiucional sobre la definición de las consultas populares por la vía de referéndum. Una revisión crítica a través de cuatro sentencias', in *Estudios de Deusto*, vol. 63, no. 1, 2015.

in this area, in particular as regards the authorisation specified in article 149.1.32 of the Spanish Constitution. As such, once the nature of the consultations had been established as being to all intents and purposes the same as that of a referendum, there was no doubt regarding their unconstitutionality, as per the strict limits set by the aforementioned article 149.1.32, thus reserving competence over referendums to the State.[17]

Other arguments of how the Law is unconstitutional, ones made in the appeal that were the cause of greater controversy, were, as a result, unnecessary for the ruling.[18] The constitutional possibility of consultations at autonomous community level (1), the state regulation needed for such consultations (2), the scope of competence over the consultation subject matter (3), the possibility of consultations on aspects that go against the Constitution (4), and the possibility and role of consultations (and particularly autonomous community consultations) in the framework of a constitutional reform process (5), are all questions that are left open, despite the Constitutional Court making various assertions about them which, in the absence of discussion and analysis, may be considered *obiter dicta*. This leaves open the possibility of the State making a pact for a consultation as a way of implementing the 'right to decide', as per its conception in accordance with the Constitution in Constitutional Court Judgment 42/2014.

c) The framework for the Catalan sovereignty process following the Judgment and its subsequent development

The consequences of the Judgment on the Catalan sovereignty process can be analysed from two perspectives: the definition of its constitutional framework as per the Judgment's legal grounds and its future relationship with the Constitutional Court as the controlling public authority.

In terms of the constitutional framework, the Judgment expands upon the legitimate spaces for developing the 'right to decide', ruling out the possibility of unilateral popular consultations. Despite various assertions that this space is also delimited by other constitutional precepts or even that it is subject to authorisation from the State, the Constitutional Court does not give clear indications excluding the possibility of autonomous community consultations under the current framework[19] or excluding preliminary popular consultations in the framework of constitutional reform, which, from the outset, has been established as the only context where a constitutionally legitimate declaration of independence would be possible.

As such, the Judgment maintains the possibility of constitutional development of the 'right to decide' and the Catalan sovereignty process, providing it entails political discussions with the state institutions and a final decision on the matter by state institutions.[20] The emphasis on guaranteeing this room for decision by the State

17 '…the Law (…) regulates an authentic referendum-like consultation. As such the autonomous community legislator has ignored the consequences stemming from articles 23.1 and 149.1.1 of the Spanish Constitution in relation to article 81.1 (…), from article 92.3 (…) and from article 149.1.32, (all aforementioned articles also from the Spanish Constitution) which attribute the State with exclusive competence…' (legal grounds no. 9).

18 Nevertheless, the Constitutional Court goes a lot further than just ascertaining that the Law fails to meet the requirement of authorisation from the State, also exploring the need for prior legislative intervention in the organic law, strictly speaking not necessary for its ruling. Relative to this it is interesting to note the contrast with the doctrine offered by the Council for Statutory Guarantees of Catalonia in its judgments 3/2010 and 19/2014 (and dissenting opinions), which the Constitutional Court ignores completely, without applying in this case the principle of dialogue between jurisdictions, so useful in other areas. The assertions put forward by the Court, essentially relating to that which is the preserve of organic law, could also be included in the *ratio decidendi*, which would then close the framework for the 'right to decide'. This is a matter that shall be looked at again in this article together with the Constitutional Court Judgment on the 2010 Law on consultations. As regards the remaining questions, the Court refers to statements from Constitutional Court Judgment 31/2010 (legal grounds no. 69), accompanied in some cases by citations from Constitutional Court Judgment 42/2014, which are more open and are not subjected to analysis or specific discussion (legal grounds no. 6) and which do not lead on to the judgment of the Law being unconstitutional, thus remaining clearly outside the *ratio decidendi.* Regarding these questions and in particular the joint consideration of limits to competences and limits relating to the need for constitutional reform, Constitutional Court Judgment 138/2015 and Constitutional Court Order 24/2017 refer to arguments from Constitutional Court Judgment 31/2010; these, however, raise doubts about comprehension and scope, doubts that shall be looked at again shortly.

19 Along these lines, readings with different emphases are found in Vintró Castells, J., 'El Tribunal Constitucional y la consulta en Cataluña: certezas, ambigüedades, decepción', [article, online] Agenda Pública [accessed June 2017], and Roig Molés, E., 'De expectativas, frustraciones y prudencia judicial. Comentario a la Sentencia del Tribunal Constitucional de 25 de febrero de 2015 sobre la Ley de consultas populares no referendarias de Cataluña' [blog post, online] Instituto de Derecho Público [accessed June 2017].

20 It is worth noting that the Constitutional Court limits itself to highlighting the constitutional precepts that are breached and making its corresponding interpretations, without explaining the meaning and function of said precepts. This significantly reduces the force of the Judgment in terms of its 'integrating' impact and its effectiveness in the context of political debate, a matter that

replaces the emphasis in the 2014 Judgment guaranteeing a space for debate and demands for sovereignty. Furthermore it accentuates the regulatory (and restrictive) aspects of the Constitution as opposed to its more enabling and pluralistic aspects, and corresponds to the steps taken by Catalan institutions towards unilateral action in detachment from state institutions.

Given this scenario, the Catalan sovereignty process was faced with just one choice: either to move forward through political dialogue to reach decisions, albeit accepting that the state institutions have the final say, or to enter a face-off with the judicial framework, by virtue of its unilateral approach, and as a result deprive itself of constitutional legitimacy, becoming an unlawful activity. The Judgment removed the possibility of defending any unilateral action that would limit the State's freedom to make a decision. It therefore meant that future sovereignty initiatives would have to accept either a limited capacity to put political pressure on the Spanish parliament or an open conflict with the constitutional framework – a fixed framework set to remain valid until the same Constitutional Court should decide otherwise.

This meant that if – as would go on to happen – Catalan Government institutions chose the path of conflict, their actions could only be effective as far as they managed to avoid interventions from the Constitutional Court or to happen in spite of said interventions. This would make it severely difficult for the process to advance in the context of publicity and pluralistic debate and would highlight questions about disobedience and the decision procedures aimed at avoiding the Court's interventions, questions that would grow into the defining axes of the subsequent actions initiated by the autonomous community authorities.

1.2.2 Constitutional Court Judgment 138/2015 and the scope of competence of an autonomous community referendum, with reference in particular to proposals for constitutional reform

These questions were brought into focus in the process against the actions initiated by the Government of Catalonia relating to the participative process that would finally be held on 9 November 2014. While the Constitutional Court's means of providing guarantees over its own decisions were already a central aspect in this process (something that is examined in section 1.3), the Judgment ruling on this matter also introduced certain elements relevant for the definition of the constitutional framework of the 'right to decide', focusing on the question of the scope of competence over the object of this consultation and, in particular, any effect great enough to require constitutional reform.

Constitutional Court Judgment 138/2015 considered the actions of the Government of Catalonia linked to the consultation of 9 November 2014 to be unconstitutional. This was grounded in the link between these actions and their objective (a non-referendum consultation), declared as unconstitutional in Constitutional Court Judgment 32/2015. However, alongside this reason, the Court introduced a second reason, stating that 'seeking a consultation with the questions indicated, the Government of Catalonia ignored the consequences stemming from articles 1.2, 2 and 168 of the Spanish Constitution'. The reference to the content of the questions relates to them being counter to the current constitutional framework, given that they demanded constitutional reform, meaning that they fell outside the scope of competence for Autonomous Communities as regards consultations (legal grounds no. 4) and pertained to 'the course provided for by the Constitution for these purposes' (legal grounds no. 3, citing legal grounds no. 69 of Constitutional Court Judgment 31/2010). By doing so the Constitutional Court appears to rule out any autonomous community consultation that suggests constitutional reform, and the question may be asked of whether this also applies for state referendums as per article 92 of the Spanish Constitution.[21]

shall be returned to later in this article. An explanation of the rationale behind article 149.1.32 of the Spanish Constitution and the need for state authorisation would have been particularly beneficial. The Court has been joined by most experts on the doctrine in its silence on these matters, failing to shed light on aspects such as the (political) effects on the sphere of state competence, the desire to avoid conflicts between two democratic legitimacies, or the problems a referendum poses in the context of a political stalemate. An exception to this is the work of Tajadura, J., 'La STC 42/2014…', p. 85ff., which presents criticisms of the concept of referendums based on its restriction and limitation.

21 In Constitutional Court Order 24/2017, relating to the parliamentary resolution raising the possibility of a referendum on independence, the Court would return to this matter with the same exact arguments (legal grounds no. 9), although the final decision was given based on non-compliance with the previous decisions of the Constitutional Court and not for its direct contravention of the Constitution. See section 1.4.3 of this article.

It is true that the Constitutional Court's assertions are made in addition to the other grounds for unconstitutionality and, as such, it may be considered that they are not definitive. In any case however, they signal additional closure to the scope for any autonomous community referendum; where the questions entail constitutional reform, the constitutional channel for the 'right to decide' cannot include any possibility of a preliminary consultation.[22]

As regards another wholly different aspect, the Judgment clearly states that 'the reason for the challenge is not the citizen participative process itself, but rather – as alluded to in the main plea in the text of the challenge – the Government of Catalonia's actions which are inextricably linked with the consultation referred to' (legal grounds no. 4). As such, no consideration is given to the consultation as a process developed at the level of the citizenry, without institutional links or support. This clearly opens the door to a social development of the 'right to decide' in the form of a consultation made by civil society.[23]

1.2.3 Constitutional Court Judgment of 10 May 2017 regarding Law 4/2010, on consultations via referendums

Before studying the dynamics of preventing and executing the autonomous community actions, the Constitutional Court briefly returned to its role of setting the limits to the constitutional framework during its recent Judgment of 10 May 2017, regarding Law 4/2010, of 17 March, on popular consultations via referendums.[24] The reduced amount of media and political attention given to this Judgment is evidence of how the debate has been completely shifted by the dynamic of conflict, compliance and sanctioning, leaving aside the underlying question of how the constitutional framework is defined.

The 2010 Law on popular consultations – challenged and awaiting judgment since 2011 – contained a general regulation on consultations that, unlike the 2014 Law, was not oriented almost exclusively towards exercising the 'right to decide' and which, above all, was completely removed from the dynamic of unilateral action and attempts to avoid constitutional control. This Law opted for a consultation model much closer to that of parliamentary systems (and, in particular, that of state referendums), featuring parliamentary decision-making and application of the standard norms in terms of the electorate, procedure and guarantees. The key element in this Law was the need for state authorisation for any consultation within its framework, in accordance with article 149.1.32 of the Spanish Constitution.[25] This gave rise to the need to resolve whether there are other general limits to the possibility of an autonomous community referendum, besides that of state authorisation. In contrast, the specific question of the link between the consultation, the 'right to decide' and the limits stemming from constitutional reform were not a focus of the appeal, at least not formally.

a) The Judgment's opportunity

The idea of a consultation among the citizens of Catalonia that would be promoted and called by the Government of Catalonia but authorised by the State has been one of the alternatives discussed as a way of channelling the constitutionally legitimate development of the Catalan sovereignty process. This could be under the auspices of the 2010 Law, or under a more complex arrangement such as the passing of an Organic Law for the Transfer of Powers or a reform of the Organic Law on Types of Referendum.[26] In this regard, the

22 Although Constitutional Court Judgment 42/2014 does not make explicit reference to this possibility for a preliminary consultation (with no defined framework or requirements), it seems difficult to refute that the points made mean the provisions in that Judgment lead to a dead end. For this reason, it may be considered possible to reopen these questions more directly in the framework of state regulation of an autonomous community referendum.

23 This is an opening that was not clear from the extensive jurisprudence handed down in Constitutional Court Judgment 31/2010, which prohibits all forms of consultation (referendums and non-referendums) relating to constitutional reform and state competences (legal grounds no. 69). This opened the possibility of prohibiting even civil actions, despite significant problems in terms of basic rights.

24 This essential role of defining the constitutional framework, in the face of autonomous community legislation seeking to conform to it, is behind the need to comment upon it at this point, disregarding chronological order; the next sections focus on the preventive or compliance-ensuring role assumed by the Constitutional Court, faced with development of the Catalan sovereignty process that is increasingly marked by confrontation with the jurisprudence and the constitutional framework previously defined.

25 Article 13 of the Law stated that 'once the Parliament has approved the proposal for a popular consultation, the President of the Government of Catalonia sends the request for authorisation to the Spanish Government'.

26 See the Report of the Advisory Council on the National Transition 'La consulta sobre el futur polític de Catalunya', from 25 July 2013, section 4.2. The four dissenting opinions in the Council for Statutory Guarantees of Catalonia's judgment 19/2014 (on Law

(relative) silence from the Constitutional Court in its Judgment 31/2015 meant this remained a possibility, despite the fact that politically it does not currently appear feasible.

The Constitutional Court's capacity for determining at which time it adopts its judgments is no secret. As such, there was nothing to stop the Court from carrying on without providing a decision on the appeal and, as a result, not prejudicating on potential future courses for the Catalan sovereignty process. However, this option was not taken, and the Judgment from May 2017 represents the blocking of one more of the potential constitutional channels for the process, a judgment handed down, of course, in a context of preventing the possibilities of an autonomous community consultation, with the Court itself clearly expressing the 'exceptional character' of referendums.

But unlike the rest of the proceedings, in this case, rather than the Constitutional Court's intervention relating to the political dynamics of the Catalan sovereignty process, it was the other way around, with the Court using a conflict quite removed from said process to set the limits for the political discussion, and raising clear questions about the Court's scope for bringing forward or delaying its decision on an appeal and how the decision's effects on a political discussion are taken into account.

b) The preserve of organic law and the requirement that referendums be regulated by the State

The Constitutional Court declared the 2010 Law to be unconstitutional for breaching the special condition given to the regulating of referendums, an activity that is the preserve of three figures: the State, organic law or, specifically, the Organic Law on Types of Referendum. To summarise, from the fact that developing the basic right of political participation (article 23 of the Spanish Constitution) is the preserve of the organic law, the Court infers the need that it be the State that establishes the possibility of any autonomous community referendum (legal grounds no. 5b), thus rejecting any idea that article 92 could directly provide constitutional grounds for one to be established. Although it assumes there is no obligation that organic law provide all the regulation, and that it may leave some aspects to the autonomous community legislator (legal grounds no. 5c) as is the case in municipal consultations, the Court adopts a more restrictive view as regards autonomous community referendums, as the autonomous community can only intervene in an 'accessory manner' (legal grounds no. 6a).

It is worth highlighting that the grounds for these assertions did not require great amounts of effort from the Constitutional Court, which limited itself to recalling the statements made in article 92 and in its own jurisprudence (which, it should be remembered, do not constitute the *ratio decidendi* for the corresponding judgments and, as a result, are not especially strong grounds),[27] and in particular its defence against referendums, stating that it is 'the exceptional character of referendums (…) that prevents the ordinary legislator – any legislator from our composite state – from freely deciding upon types of referendum, and which consequently establishes that only the organic law referred to in article 92.3 of the Spanish Constitution can introduce (…) new forms of popular consultation via this route' (legal grounds no. 6c). But neither the exceptional character of referendums nor the possibility of considering Autonomous community referendums as implicitly included in article 92 of the Spanish Constitution are subjected to proper analysis.[28]

Such analysis would have been very beneficial in relation to the surprising content of legal grounds no. 4, where the Court offers a brief review of European comparative law that shows precisely the opposite solution on the possibility of regional referendums. However, the Court does not see fit to explain which characteristics of the Spanish legal order justify its decision.[29]

10/2014) also refer to these alternatives. Informed views can also be found in Galán, A., 'Del derecho a decidir a la independencia…', p. 892ff., or in greater length in Ridao i Martín, J., 'El dret a decidir. La consulta sobre el futur polític de Catalunya', Institut d'Estudis Autonòmics, Barcelona, 2014.

27 Neither of them contained judgment on an action that would assume intervention for authorisation from the State: Constitutional Court Judgment 103/2008 referred to a 'unilateral' consultation, as did Constitutional Court Judgment 31/2015. Constitutional Court Judgment 31/2010 referred to abstract state regulation of referendums. In addition, the silence in Constitutional Court Judgment 42/2014 was a clear indication of the possibility for interpretations along the lines of Law 4/2010.

28 Constitutional Court Judgment 42/2014 had already mentioned the 'extraordinariness' of referendums (legal grounds no. 3), albeit without offering specific arguments. An interesting and very well developed discussion relating to this can be found in Tajadura, J., 'La STC 42/2014...', p. 85ff.

29 In this context, notable for its absence is reasoning from the Court specifying the intended purposes of state authorisation and the purposes that are not sufficiently fulfilled by this means, thus requiring organic law regulation. A literal interpretation,

As such, the Judgment breaks new ground by establishing the need for prior reform of the Organic Law on Types of Referendum before an autonomous community referendum is possible, thus ruling out any other potential means of holding a referendum with state authorisation, and putting an end to practically all considerations over questions relating to control over autonomous community referendums.

1.3 Exercising the 'right to decide' within the constitutional framework: the calling of the consultation for 9 November 2014 and the suspension of the corresponding actions

Following the challenge to Law 10/2014, a significant change can be seen in the political debate and the actions of both the institutions of the Government of Catalonia and the Constitutional Court. This matter in hand is no longer the definition of a legitimate constitutional framework for the 'right to decide', but rather the exercising of this right under the Government of Catalonia's conception of this framework,[30] centred on the calling of a consultation for 9 November 2014 and the subsequent development of actions relating to this participative process. As a result, the interventions from the State in general and the Constitutional Court in particular no longer claim to address legal doubts on the scope of constitutionally legitimate actions, rather they seek essentially to prevent actions that contravene the constitutional framework defined by the Court.

Initially the debate was channelled towards the suspension of the autonomous community actions as the key point of focus, essentially before the holding of the consultation on 9 November (Constitutional Court Judgments 31/2015 and 32/2015), and then later the debate turned to the disobedience towards the Court's decisions in relation to the actions to assist the holding of the participative process that took place (Constitutional Court Judgment 138/2015).

The automatic suspension of the autonomous community actions challenged by the State is nothing new for the Catalan sovereignty process, and its notable effects on the efficacy of the autonomous community actions has been highlighted repeatedly.[31] A suspension based on article 161.2 of the Spanish Constitution is normally made in cases where there are doubts over the constitutionality of an action, legislation in most cases, and there are therefore arguments for its suspension, meaning its legal effects are temporarily removed. However, its use in the context of the Catalan sovereignty process and the actions relating to the consultation on 9 November 2014 differed in certain respects, analysed in the next section.

Examination of this use of suspension (essentially in the three proceedings mentioned) brings up specific details worth highlighting as regards the object of the suspension (section 1.3.1), the delimitation of its content (section 1.3.2) and its censuring effects (section 1.3.3).

1.3.1 The objects (one-off pieces of legislation, parliamentary resolutions and executive actions relating to suspended legislation) and purposes (censuring or executive prevention) of the suspensions

Of the suspensions handed down on actions related to the Catalan sovereignty process, hardly any reflect the typical suspensions seen, where a piece of legislation that calls for a (new) trial of constitutionality is challenged and its legal effectiveness is suspended, or an act that, in itself, is considered to contravene the constitutional framework (not for developing or exercising suspended legislation, as by definition such legislation would not be applicable due to its suspension). In contrast, the suspensions on the Catalan sovereignty process actions have the following unique features:

- Suspension has essentially affected just one piece of legislation, the 2014 Law on non-referendum popular consultations.[32] However, even in this case there are specific elements, it being a piece of legislation aimed

something seldom used by the Constitutional Court and constitutional jurisdiction, in this case plays the main part without stating the constitutional purposes it is based upon. As such, in the political debate the Court's reasoning carries very little weight, a significant point that shall be returned to later.

30 A conception already rejected by the Constitutional Court, first as a precursory ruling (the suspension of Law 10/2014 and Decree 129/2014) and then definitively (Constitutional Court Judgments 31/2015 and 32/2015).

31 For a general view, see the works contained in Government of Catalonia (ed.), '*La suspensión de las leyes autonómicas en los procesos constitucionales*', Institut d'Estudis Autonòmics, Barcelona, 2005.

32 Ruling of 29 September 2014. Other pieces of legislation that for various reasons could be considered not very 'legitimate' have also been the object of suspensions: the precepts challenged in Law 3/2015, of 11 March, on fiscal, financial and administrative measures (with very minimal content, as shall be seen), the object of Constitutional Court Judgment 128/2016, of 7 July; the

at just a one-off use, the consultation of 9 November 2014, which was called and almost immediately suspended. As a result, its mere temporary suspension meant prohibition of the development of the Catalan sovereignty process (at least in the desired timeframe) and the suspension became the central focus of the case, albeit continuing with its purely preventive function as regards the specific action challenged.

- A significant number of the suspensions handed down have affected parliamentary resolutions.[33] Despite the fact that the challenging of parliamentary resolutions, as already noted, is based on said resolutions resulting in legal effects, the exact nature of these legal effects is sometimes a complicated matter. The Constitutional Court has emphasised in particular the legitimising effects of subsequent actions resulting from these resolutions, such that their suspension has essentially and increasingly been a way to censure the parliamentary authorities, aiming to avoid similar or related future actions. This clearly signals the idea of suspension of a process or abstract contents as opposed to the suspension of specific actions.

- Lastly, the suspension decisions in the recent proceedings have affected acts challenged on the basis of their non-compliance with previous judgments, for which decisions ruling unconstitutionality were returned (Constitutional Court Orders 170/2016 and 24/2017). Coming to the fore in these cases is the idea of a process that has already been declared totally unconstitutional, giving legitimacy to subsequent executive suspension decisions, as well as the function of preparation for future decisions and actions relating to compliance and execution of the affected measures, and as a result the idea of a reaction in the face of disobedience, an aspect examined in section 1.4 of this study.

1.3.2 The content of the suspension

The suspension and its content posed important questions for actions linked to the Catalan sovereignty process and, in particular, their content. While beforehand the result of suspensions was limited to removing the effects of the legislation or act challenged, the Constitutional Court subsequently began to develop a material effect from the suspension, defined not by the legislation or act, but by its objective, thus extending its scope to legislation or acts other than that suspended.

The first step in this direction came again in the challenge to the material actions relating to the 9 November consultation (Constitutional Court Judgment 138/2015), while the previous suspension of the Law and decree on the consultation had kept to the traditional parameters.[34] In contrast, the suspension of the material actions[35] relates to the actions challenged 'and to the rest of the actions for preparation of said consultation or linked to it'. As such, the Constitutional Court takes on a preventive role, linked not only to the actions it is aware of but also to an outcome to be prevented (avoiding Catalan institutions from participating in the consultation), something that is projected over any potential action.

The expansive range of implication that stems from this approach can be linked with the start of an impetus to search for alternative forms of actions and non-compliances, something examined shortly. However, it raises some problems about the effective scope of the suspension and the resultant obligations: the dividing line between justified uncertainty (derived from this abstract and *pro futuro* formula) and an excuse for conscious non-compliance is blurred, and this has already become a topic for legal debate, firstly in Constitutional Court Order 292/2014, in which the Court refused an appeal for clarification on the suspension of the decree calling the consultation, for

precepts challenged in the Law on Foreign Actions (likewise of minimal content in terms of legislation and mostly unrelated to the Catalan sovereignty process), the object of Constitutional Court Judgment 228/2016; and lastly, some precepts of Law 4/2017, on Budgets for 2017, which are basically forecasts of budgetary appropriations. The decrees that have been the object of suspensions (Decree 16/2015, of 24 February, creating the Commission for National Transition, as well as 2/2016, of 13 January, and 45/2016, of 19 January, regarding the creation and naming and functions of the Department of Foreign Affairs, Institutional Relations and Transparency) are almost exclusively related to organisational matters.

33 Of the five resolutions challenged, four have been suspended (in the proceedings of Constitutional Court Judgments 42/2014 and 259/2015 and Constitutional Court Orders 170/2016 and 24/2017).

34 Constitutional Court Judgment 31/2015 includes (background fact no. 2) the suspension of the precepts challenged 'and whatever acts or resolutions may have been created by virtue of its application'. Constitutional Court Judgment 32/2015 related to the suspension of the resolution challenged (background fact no. 3).

35 Ruling of 4 November 2014, recalled in the background facts of Constitutional Court Judgment 38/2015, no. 3.

effectively entailing an attempt to change the decision,[36] and secondly in the judgments of the criminal proceedings taken against the Catalan Government authorities accused of disobeying these suspension rulings.[37] Recent orders of execution from the Court (Constitutional Court Orders 140/2016, 171/2016 and 24/2017) show that this indeterminateness is also apparent in the content of the judgments, as shall be seen further on.

1.3.3 The censuring effects of the suspension and judgments and the route towards guaranteeing compliance with the rulings

The repetition of actions the Constitutional Court considered to be non-compliant with its decisions has increasingly lent its rulings a tone of growing censure, both in its suspension rulings and in its judgments on the challenges linked to the 9 November consultation.

Indeed, these censuring effects were central to the Constitutional Court Judgments 32/2015, on the decree calling the consultation, and 138/2015, on the material actions linked to the 9 November consultation; this was despite the cancellation of the objects of the challenge not having any effect, as the Law had already been cancelled and the actions completed. However, the Court emphasised particularly strongly the *pro futuro* obligations of the Catalan Government authorities. This involved not only formulations that clearly go beyond the actions that are the object of the proceedings, but also personalisation in the communications to autonomous community authorities. The sights were then already set on sure-fire ways to tackle disobedience, something that would be a feature of the future rulings (see section 1.5).

1.4 Political expression of intentional rupture with the constitutional framework: disconnection and the actions challenged

The interventions from the Constitutional Court, as discussed above, have met its objective of delimiting the legal framework in which the Catalan sovereignty process could run its course, and in doing so have prevented almost all of the actions contained in the Catalan Government institutions' road map. The definitive and binding nature of the Court's rulings has led autonomous community institutions to give up actions considered to be unconstitutional, or to change them for other actions different to those they had defended (before the Court, at least), proceedings conforming to the framework defined by the Court.

This pattern was broken when actions were initiated that were seen to be intentionally in contravention of the constitutional framework and the rulings adopted, regardless of whatever arguments could politically and legally justify[38] their approval and the actions of the people responsible. In this new stage of the process, the subject of the discussion changed, no longer being simply the consultation, but shifting to the actions that pursue independence (and which sometimes return to the topic of the consultation), thus reinforcing the dynamic of rupture. The matter debated is no longer about whether the actions are constitutional or not, but rather whether they can be brought about and achieve the sought-after effects. Meanwhile, the objective of the Court's intervention shifted completely, from the definition of the legal framework to guaranteeing said framework and the means of doing so.

These features, which had already been mentioned in some previous resolutions (section 1.4.1), are embodied chiefly in the Parliament of Catalonia's Resolution 1/XI, of 9 November 2015, on the start of the Catalan sovereignty process, and the corresponding Constitutional Court Judgment 259/2015, of 2 December (section 1.4.2), as well as subsequent rulings from the Constitutional Court that, by way of the orders of execution from this judgment, attempt to hinder the adoption or the effects of the subsequent actions of the Parliament (section 1.4.3) and Government (section 1.4.4) of Catalonia.

36 Constitutional Court Order 292/2014, of 2 December, rejecting the request for affirmative clarification that 'under the guise of a request for clarity, what in reality is requested is a new pronouncement on the scope of the suspension made, something that is of course inadmissible through a simple request for clarification. As such the clarification is not granted, as in this case it is not fitting to clarify moot points or to make up for any omission.' (legal grounds no. 5).

37 Supreme Court Judgment 972/2017, of 22 March (Criminal Court), Third legal grounding, III and IV; and Higher Court of Justice of Catalonia Judgment 1/2017, of 13 March (Criminal and Civil Court), First legal grounding, section 1.1.

38 While politically there have been attempts to justify these actions based on democratic principles and, above all, the legitimacy of disobedience in certain contexts – a question outside the aims of this study, from a legal perspective the approach taken has been to question the existence or clarity of an order (that was disobeyed), to defend the existence of duties to act against the Court's decisions, or to stress the importance of parliamentary inviolability.

1.4.1 Initial considerations of disobedience: criminal proceedings resulting from the 9 November consultation

The holding of the participative process on 9 November and the Government of Catalonia's actions in relation to it, in spite of the aforementioned suspension rulings from the Constitutional Court, led to the Court making its first pronouncements on the compliance and effectiveness of its rulings, limited as they were initially to the tone of censure described in previous sections. However, the matter of ensuring compliance with its rulings then begins to rule the debate, via two channels, which would be key to the Court's future moves:

- Firstly, criminal proceedings in relation to the disobedience against the Constitutional Court's rulings, brought against the President of the Government of Catalonia and three ministers of his government for their actions in relation to the 9 November consultation. Although the proceedings for disobedience would result in guilty verdicts,[39] the fact they were brought after the actions were taken (and as such the impossibility of preventing them), their lengthy duration, their effects on the political debate and the technical difficulties as regards defining the type of criminal litigation are reasons to believe alternative means of reaction to the disobedience need to be developed, ways that are quicker and shorter.

- In line with this, working with extraordinary speed the Spanish Parliament approved a motion to reform the Organic Law on the Constitutional Court, giving the Court the power to issue orders of execution to ensure compliance with its rulings.[40] Although the reform is still yet to be applied *sensu stricto*,[41] the fact that it has been passed undoubtedly boosts and reinforces the Court's intervention by way of its orders of execution and the statements given in the corresponding rulings – something that is examined shortly.

1.4.2 The Parliament of Catalonia's Resolution 1/XI, of 9 November 2015, on the start of the Catalan sovereignty process, and the corresponding Constitutional Court Judgment 259/2015

Resolution 1/XI was the first time an act was formally adopted in direct and intentional contravention of the constitutional framework.[42] The confrontation is so evident that the arguments made to the Constitutional Court make no attempt to defend the constitutionality of the Resolution's content, rather they focus solely on its nature as a parliamentary act, without legal consequences, merely the expression of a political position, returning to the matter already discussed in Constitutional Court Judgment 42/2014 and requesting that it be reopened with a change in the Court's jurisprudence.[43] The refusal to reconsider this jurisprudence, less debatable this time than in the previous case,[44] meant there was no alternative but to declare the Resolution

39 Supreme Court Judgment 972/2017, of 22 March (Criminal Court), and Higher Court of Justice of Catalonia Judgment 1/2017, of 13 March (Criminal and Civil Court). Both proceedings resulted in a considerable amount of media attention on the case and the elements contributing to the crime of disobedience, particularly the need (or lack thereof) of a personalised requirement for compliance with the ruling, and the clarity of the order disobeyed.

40 Organic Law 15/2015, of 16 October, on reform of the Organic Law on the Constitutional Court. In this regard, Constitutional Court Judgments 185/2016, of 3 November, and 215/2016, of 15 December, as well as the opinion of the Venice Commission on the reform (CDL-AD(2017)003-e, adopted on 10 March 2017). An initial view on Constitutional Court Judgment 185/2016 in Roig Molés, E,. 'Siete cuestiones y una conclusión a propósito de la Sentencia del Tribunal Constitucional sobre la ejecución de sus resoluciones', [blog post, online] Instituto de Derecho Público [accessed June 2017], and Nieva Fenoll, J. and Roig Molés, E., 'El Tribunal Constitucional y sus nuevas, e insólitas, facultades de ejecución', in *Diario La Ley* no. 8892, 2017. For greater detail, Villaverde Menéndez, I., 'Cumplir o ejecutar: la ejecución de sentencias del TC y su reciente reforma', in *Teoría y Realidad Constitucional*, no. 38, 2016, p. 643ff.

41 The Constitutional Court has repeatedly insisted that its powers to ensure compliance with its rulings are retrospective (for example Constitutional Court Order 170/2016, of 6 October, legal grounds no. 2), but has so far limited itself to issuing censure and transferring the matter to the Public Prosecutor, without exercising its powers to issue fines, suspensions of officials or substitute enforcement, as provided for in the reform.

42 Among other things, the Resolution refers to the 'start of a process to create an independent Catalan state' (2nd section), the lack of subordination 'to decisions from Spanish state institutions, in particular the Constitutional Court' (6th section) and the 'exclusive' compliance to legislation and mandates from the self-same Catalan Parliament (8th section). In relation to this see Montilla Martos, J. A., 'La sentencia del Tribunal Constitucional sobre la Resolución 1/XI del Parlamento de Cataluña', [blog post, online] Instituto de Derecho Público [accessed June 2017].

43 Constitutional Court Judgment 259/2015, background fact no. 4 and legal grounds no. 2.

44 Despite its identical nature, the definition of mandates and consequences explicitly detailed in Resolution 1/XI as well as its clearly imperative and solemn tone mean that the criteria of apparent effectiveness and legitimisation of subsequent actions, used by the Court to evidence the existence of 'legal effects', becomes much clearer in this case.

unconstitutional and to annul it. In doing so the Court reiterated its considerations from its previous jurisprudence regarding the unconstitutionality of the recognition of sovereignty, the fact that all public powers are subject to the Constitution, the need to understand that democratic principles exist within the constitutional framework and in conjunction with other principles such as the rule of law, and recognition of the freedom to propose and defend ideologies and proposals that go against the Constitution (a basic premise of pluralism) provided this follows the procedure for constitutional reform.

The line the Resolution takes, explicitly confronting the constitutional framework, also excluded any possibility of new definition of this framework by the Constitutional Court, which restricted its Judgment purely to a decision in favour of annulment. However, this decision would become fundamental to future rulings that, in the form of orders of execution, the Court would adopt over the following months in relation to actions initiated by the Catalan Parliament and Government to promote the sovereignty process.

1.4.3 The parliamentary resolutions promoting the Catalan sovereignty process

Over the course of 2016, in terms of parliamentary impetus the development of the Catalan sovereignty process was defined by three further resolutions,[45] confirming the course of express and direct confrontation with the Constitution and the Constitutional Court, and shifting the Court's subsequent actions fully into the terrain of guaranteeing the effectiveness of its rulings and reacting to non-compliance. Accordingly, where judgments for declarations of unconstitutionality proceedings were seen previously, order of execution rulings now took their place, a clear marker of the Court's changed standpoint.

However, because of the parliamentary nature of the resolutions, the Catalan sovereignty process continued to develop in the context of political claims without binding effects, a limitation that so far allayed the severity of the confrontation with the Constitutional Court and opened up considerable ambiguity and a lack of general effects as regards both the Court's rulings and the resistance to them.

a) The formation of the study commission on the constituent process and its conclusions, and the duties of parliamentary authorities

The formation of the study commission was challenged through an order of execution, this method being used for the first time. As such it was a chance to assess some of the elements in this type of proceedings, elements of particular importance to the function taken on by the Constitutional Court of monitoring the Catalan sovereignty process and ensuring compliance with the constitutional framework.

The order of execution enables the Constitutional Court to intervene quickly[46] and gives considerable flexibility as regards linking with the rulings on which it bases its executive actions. In this regard, the Court chooses to comprehend the Catalan sovereignty process in an almost global sense, regardless of which specific actions or contents are challenged: where an object declared unconstitutional can be identified in some way, the order of execution can be projected over other actions that, in a material sense, are quite separate from those considered in the judgment being executed.[47]

The order of execution also allows the Constitutional Court stricter parameters for its examinations. Firstly, this relates to the challengeable nature of the actions, as there can be considerable doubts over the definitive character and the causing of legal effects (general criteria allowing a challenge) in the formation of a study commission. And secondly it relates to consideration of the potential implicit purposes of actions: this is a factor that must be left aside in an 'ordinary' examination of unconstitutionality,[48] but in contrast it may

45 Resolution 5/XI, of 20 January 2016, on the creation of parliamentary commissions and specifically creation of a study commission on the constituent process; Resolution 263/XI, of 27 July 2016, ratifying the report and the conclusions of the study commission on the constituent process; and Resolution 306/XI, of 6 October 2016 on the general political orientation of the Government of Catalonia.

46 The Resolution on the formation of the commission was passed on 20 January, it was challenged on 1 February and the ruling was handed down on 19 July. But with the Resolution on the commission's conclusions, the process was even faster: it was passed on 27 July, challenged on 29 July, suspended on 1 August and the final ruling given on 6 October.

47 As such, Constitutional Court Order 141/2016 referred to the formation of a study commission and its works in terms of the execution of Constitutional Court Judgment 259/2015, which referred to the Resolution on the start of the Catalan sovereignty process.

48 This is particularly relevant to Constitutional Court Judgment 128/2016, of 7 July, which is referred to in the next section.

receive special consideration in the context of an order of execution, particularly when the specific situation shows a probability of non-compliance, despite it not having yet been manifested.[49]

In the first of these orders of execution the examination's strictness and intensity is complemented by express moderation from the Court in its ruling: the formation of the commission was not annulled and neither was it considered to contravene the previous rulings (thus rejecting the main point of the challenge); in contrast however, the order of execution was approved in its point that the commission serves the material purpose of assisting the Catalan sovereignty process as per the terms provided previously in Constitutional Court Judgment 259/2015. The corresponding decisions for censure and its communication to the parliamentary authorities were adopted, including an explicit warning that the commission's proposal for its conclusions, which the Court had seen before the judgment, was unconstitutional.

This position – still open to the possibility of the parliamentary actions for the Catalan sovereignty process developing constitutionally – is left behind in the second of the orders of execution,[50] when it was known that the commission's conclusions had been adopted. In this case there are fewer doubts about justification for executive action, due as a matter of fact to the previous order of execution. The Court had already issued a warning about the unconstitutionality of the commission's conclusions in the previous order, and its content once again confronted the constitutional framework and reiterated some of the provisions present in the parliamentary resolutions of 2013 and 2015 that had been annulled. This caused the Court to harden the tone of its ruling, to hand down a decision for annulment and repetition of its personal warnings regarding future actions, and, above all, to adopt two new approaches as regards its jurisprudence on the Catalan sovereignty process:

- Firstly, special emphasis on the matter of parliamentary authorities' duties to guarantee and ensure compliance with the Constitutional Court's rulings (an issue already introduced in the ruling from the previous order of execution),[51] in particular rejecting the existence of conflicts with procedural duties derived from parliamentary regulations, which should always be interpreted in terms of all power being subject to the Constitution and the judgments of the Constitutional Court.[52]

- And, as a result, the decision to inform the Public Prosecutor of the actions carried out by the President of the Catalan Parliament, for the eventuality of any criminal proceedings that could be brought.

This meant that for the first time the Constitutional Court took it upon itself to limit the political debate and people's rights, not as an institution providing control over decisions made elsewhere, but as a court of first (and only) instance, itself creating the restrictions, and what is more doing so in a particularly undefined procedural framework most notable for its speed and summary character, this being the nature of an order of execution.

49 In particular Constitutional Court Order 141/2016, legal ground no. 6, where there is an express hardening of the control parameter used in the proceedings for a resolution on the creation of parliamentary commissions, due to the similarity with some of the components of the resolution annulled in Constitutional Court Judgment 259/2015 and because of the sequencing of the Parliament's actions.

50 Order of execution 170/2016, of 6 October.

51 Specifically, the Court makes reference to the 'duty to impede or prevent any initiative that entails ignoring or evading the orders pronounced in Constitutional Court Judgment 259/2015 and in Constitutional Court Order 141/2016' (legal grounds no. 8).

52 The Constitutional Court denied the existence of a conflict in this specific case, asserting that the actions of the President and the members of the Board of the Parliament of Catalonia 'were under no obligation to scrupulously comply with regulations in a way that was incompatible with the warnings contained in Constitutional Court Order 141/2016' (legal grounds no. 8), and gives a general reminder that 'the contents of the provisions, resolutions or acts emitted by any kind of public power do not detract from the complete scope of competences the Constitution confers upon this Court' (legal grounds no. 8) and that 'the regulatory provisions from parliament cannot contradict the rule of the constitution as the highest law, nor can they be interpreted so as to contradict with the statements of the Court' (ibid). In contrast, the Constitutional Court gives no opinion on the position of civil servants working in the Catalan Parliament in the event of a conflict between the orders of the Court and the duty to obey the instructions and authorities of the Parliament, a matter raised by the Parliament's Secretary General in his arguments, detailed in background fact no. 14 from Constitutional Court Order 170/2016. Despite the State Attorney making a precautionary request for express prohibition on calling the parliamentary bodies to debate or vote on initiatives to develop Resolution 263/XI, the Constitutional Court did not respond to this request in the ruling for acceptance or in the judgment, avoiding the conflict referred to in the arguments of the Parliament's Secretary General. This situation also highlights the Constitutional Court's considerable freedom as regards its orders of execution, not even referring to one of the requests included in the document which instituted the proceedings.

It is true that the Constitutional Court has not exercised its full powers (fines and suspensions of officials) on the authorities affected, although it has on the public debate (as what it imposes is a prohibition on the holding of certain debates). It should also be remembered that the passing of the case details to the Public Prosecutor makes it hard for this institution not to bring the corresponding criminal proceedings and represents a considerable amount of pressure on the authorities affected, which as a result limits the parliamentary debate even further. In predictable fashion, the Court assumes this role in a case that is particularly clear-cut as regards the existence of non-compliance (although the effect on the parliamentary debate was already adopted in other rulings, particularly those involving suspensions), but once this path has been taken, the door is open for it to be applied to cases that are less straightforward.

b) Resolution 306/XI, of 6 October 2016, on the general political orientation of the Government of Catalonia

The next proceeding in which the Constitutional Court applied these powers raised further doubts as regards its executive nature. While the content of Resolution 306/XI is yet another clear manifestation of unconstitutionality,[53] the degree to which it is non-compliant with the Court's previous decisions is less clear, as its origin and content are different from those of the resolution addressed in Constitutional Court Judgment 259/2015.[54] In this case the Court widens its considerations to include the whole Catalan sovereignty process, thus extending the duties of compliance to any actions that pursue the sovereignty process's aim (defined as 'the constituent process in Catalonia, aiming for the creation of an independent Catalan state…', legal grounds no. 7). This is something that could in some cases result in major problems of definition, potentially leading to new proceedings for unconstitutionality, more serious than a mere order of execution. However, above all it puts the authorities charged with ensuring future compliance with decisions in a hard position, having to conduct trials of quite some difficulty on whether or not there is non-compliance. This in turn will have important knock-on effects on their functions and general obligations to ensure parliamentary activity and on the eventuality of criminal proceedings.

The Resolution and the subsequent order of execution in the Constitutional Court continues the pattern already seen of confrontation followed by immediate reaction and a hardening of tone from the Court:[55] confirmation of the global consideration of Catalan sovereignty process actions in terms of their unconstitutionality and prohibition,[56] repetition of the duty to guarantee constitutionality that is incumbent on the parliamentary authorities and is unaffected by their autonomy or by the duties that stem from their regulations, and, lastly, the annulment decisions, personalised warnings on the duty of compliance, and potential criminal responsibility and transfer to the Public Prosecutor for whatever criminal proceedings may arise.[57]

These decisions have a notable dissuasive effect, as do the resulting restrictions on the parliamentary debate and on the rights of the affected authorities. They also represent further development in the leading role taken by the Constitutional Court in the conflict with the Catalan sovereignty process, with the Court no longer being an impartial way to get rulings on disputes, but instead an institution responsible for ensuring compliance with its own decisions. As such it has a strong interest and is clearly at odds with those it considers to be not complying.[58]

53 The points challenged in the Resolution referred to the 'binding referendum on independence', even 'in the absence of political agreement with the Spanish Government', to the adoption of a jointly presented text on the legal system that would regulate 'the succession of the legal code, nationality, basic rights (…) judicial power during the transitory period between the proclamation of the Catalan Republic and the adoption of the Constitution', among other statements that clash directly with the constitutional framework.

54 While the first Resolution made reference essentially to the institutional process for the declaration of independence, the new Resolution focused primarily on the referendum.

55 Using expressions such as 'absolute contradiction', 'confirmation of anti-judicial intent', 'evading the obligation of compliance', 'failing to heed the repeated warnings from this Court' and 'directly contravening the repeated statements of this Court'.

56 'The resolution (…) carries the same purpose as resolutions I/XI, 5/XI and 263/XI: the start of a constituent process aimed at the creation of an independent Catalan state in the form of a republic, the stages of which are described in the fifth section of Resolution 263/XI' (legal grounds no. 7), and the Court adds that, in relation to the referendum, its anti-constitutional nature was established and confirmed in its Judgments 31/2015, 32/2015 and 138/2015, so the order of execution also refers to these judgments, as is confirmed in legal grounds no. 11.

57 This now extends to the members of the Board of the Parliament of Catalonia who voted in favour of the initiative that led to the resolution.

58 In this regard, much importance can be attached to the questions raised regarding the Court's judgments on the reform of the Organic Law on the Constitutional Court, referring precisely to the change in the Court's position (something highlighted by the Venice Commission) and the rights of the people at whom the order of execution measures were directed, an aspect that was latent in the discussion on the potentially punitive nature of the orders. On this matter see the references earlier in this work, in footnote no. 40.

And, as regards the execution and exercising of its powers in this area, this is the point to which the Constitutional Court's jurisprudence has arrived so far, without any call for use of the provisions made in the reform of the Organic Law on the Constitutional Court for fines, suspensions of officials or substitute enforcement. This situation could change if the Catalan Government institutions decide to move on from their parliamentary actions without binding effects (but with legal effects, according to the Constitutional Court's interpretation) to actions with consequences affecting citizens – an area where there has not yet been any disobedience to the suspension and annulment rulings handed down by the Court, as detailed in the next section.

1.4.4 Preparations of administrative actions linked to the Catalan sovereignty process

Besides the parliamentary actions highlighted, the Catalan sovereignty process has also developed through the adoption of varying legislation essentially aimed at preparing administrative actions to provide resources in sectors of supposed importance, based around the concept of so-called 'state structures'. This has not been so much legislation changing the regulation of citizens' rights and obligations as it has regulatory preparations to enable or give mandates for future material actions by the executive.[59] Naturally this has reduced the immediate effects and, as a result, the effects of the judgments made to annul them.

Essentially there were three laws, two of which have been brought before the Constitutional Court for judgment and the third of which has been challenged and is awaiting a ruling: Law 16/2014, of 4 December, on foreign actions and relations with the European Union;[60] Law 3/2015, of 11 March, on fiscal, financial and administrative measures;[61] and Law 4/2017, of 28 March, on Catalan Government budgets for 2017.[62] In the same category are Decree 16/2015, of 24 February, creating the Commission for National Transition;[63] as well as Decrees 2/2016, of 13 January; and 45/2016, of 19 January, regarding the creation and naming and functions of the Ministry of Transparency and Foreign and Institutional Relations and Affairs, which have been challenged in the Constitutional Court and are awaiting judgment.[64]

59 In fact, it has been argued that in many of these cases this legislation was not actually that, but rather they were essentially parliamentary resolutions purely for political effect, regardless of their legal text format. This was the argument made by the Government of Catalonia in Constitutional Court Judgment 128/2016 (background fact no. 5, section d), considered and refused by the Court in legal grounds no. 4.

60 This relates to Constitutional Court Judgment 228/2016, of 22 December. This was a proceeding that contained some points linked to the discussion surrounding the Catalan sovereignty process, but which essentially addressed the Autonomous Communities' capacities abroad. Relating to the focus of this study, it is worth highlighting the challenge of the use of the expression 'public diplomacy' and the Court's reasoning (legal grounds no. 11) behind its declaration of unconstitutionality, a decision contested by some dissenting opinions. Neither the Law nor the Judgment refers to the Catalan sovereignty process, but based on the mere mention of the activity 'public diplomacy', extra protection against the possible assumption of 'the capacity to establish diplomatic relations, which is the preserve of the State' is linked to a line of jurisprudence close to preventive unconstitutionality or developed 'by suspicion' in connection with the Catalan sovereignty process, something looked at shortly.

61 Constitutional Court Judgment 128/2016, of 7 July, ruling on an appeal on the grounds of the unconstitutionality of various precepts of this Law, contains a number of pronouncements linked to the Catalan sovereignty process (essentially legal grounds no. 4). These relate to additional provisions 22 to 26 on approval of a master plan for a Catalonia tax agency, creation of an inventory of the assets of Catalonia's public administrations, a catalogue of strategic infrastructure, a draft bill for the creation of a Catalan Agency of Social Protection and a plan on the energy and telecommunications sectors and on information systems and rail transport. According to the appeal, all of these would be alike in their orientation towards the creation of 'state structures' in the framework of a 'national transition process' aimed at achieving independence for Catalonia, meaning that here too there is the element of prevention or suspicion.

62 The unconstitutionality appeal was made against additional provision 40 and against the budget items referring to electoral processes and citizen participation, once again in consideration of their potential use for the holding of a referendum on independence. The appeal was declared admissible by the Constitutional Court (Government of Catalonia's Official journal, 12 April 2017), leading to the automatic suspension of the precepts and various personalised warnings that will be referred to shortly.

63 Declaration of unconstitutionality by the Constitutional Court in its Judgment of 10 May 2017, based on the tasks assigned to the Commission and which represented actions transforming the institutional position of the Autonomous Community of Catalonia, something that can only be achieved through constitutional reform (legal grounds no. 5). The same Judgment was also handed down on the Catalan Government's plans regarding state structures and strategic infrastructure, which were declared unconstitutional due to the extension of the limits to its competences, linking as it does explicitly to the Catalan sovereignty process and the achieving of its purposes, something only possible via constitutional reform (legal grounds no. 7).

64 Declaration of admissibility by the ruling of 16 February, with the corresponding suspension and partial removal of the suspension by Constitutional Court Order of 21 June 2016. The conflict centres on the name 'foreign affairs' and represents yet another case in which the question of unconstitutionality is raised on the basis of future actions that could be carried out or the potential implications of a name. A brief commentary on this is in Roig, E. 'Inconstitucionalidad por el nombre e inconstitucionalidad por sospecha', [blog post, online] Instituto de Derecho Público [accessed June 2017].

All these actions and their corresponding judgments raise the matter of the administrative materialisation of the Catalan sovereignty process and the provision of human and material resources by the Government of Catalonia for the development of the process and for the future exercising of competences that currently correspond to the State. The Constitutional Court considered the said actions unconstitutional for (a) specifically pursuing unconstitutional objectives by supposing a unilateral alteration of Spanish sovereignty, meaning that they run counter to the distribution of powers[65] or (b) representing actions that are illegitimate by virtue of their competences, by their interference with state competences, a feature that is key to the rest of the actions considered unconstitutional.[66] Nevertheless, the Court accepted the measures that can be seen as being within the limits of the Catalan Government's scope of competence.[67]

The Constitutional Court makes clear its refusal that declarations of unconstitutionality can be based on a potential purpose of the measure, on suspicion, or as prevention against future unconstitutional uses, things that the Court's jurisprudence has traditionally ruled out.[68] However, the broad notion of interference with state competences – which extends as far as the generation of an appearance or perception of legitimacy for unconstitutional situations – is sometimes difficult to distinguish from the mere suspicion of future unconstitutional actions.[69] As such, a great deal of subjectivity is involved in the way it is perceived, and this is of relevance when noting that no actions have (yet) been adopted that run counter to state competences or the constitutional framework.

The Constitutional Court's basic focus on avoiding future actions to develop the Catalan sovereignty process – considered unconstitutional as a whole as per the analysis provided – can also be seen in its frequent recourse to personalised communications and warnings of the duty to comply and prevent non-compliance with the resulting responsibilities, which can be found in the rulings for admissibility of the proceedings or the suspension rulings, and which have affected people at the top of the Catalan Government, and have been notably far reaching.[70]

65 This was essentially the case in the Constitutional Court Judgment of 10 May 2017 on the Commission for National Transition and on the Catalan Government's plans for state structures and strategic infrastructure. There is a similar reasoning as per use of the expression 'public diplomacy' in the Law on Foreign Actions (Constitutional Court Judgment 228/2016).

66 This was also so with Constitutional Court Judgment 128/2016 with regards to the additional provisions from Law 3/2015, on fiscal, financial and administrative measures relating to the master plan for a tax agency (unconstitutional in that it aims to provide the Catalan Government's tax agency with the means to assume and manage competencies that do not pertain to it: legal grounds no. 6) the catalogue of strategic infrastructure (unconstitutional for interference with state competences on public safety: legal grounds no. 8) and the master plan on the energy, telecommunications and rail transport sectors (unconstitutional for impinging on state competences and not respecting the Court's provisions: legal grounds no. 10), all of which were analysed on the basis of their contents and their provisions.

67 This was the case for most of the precepts considered in Constitutional Court Judgment 228/2016, on the Law on Foreign Actions and the additional provisions of Law 3/2015 on the Catalan Agency of Social Protection and the master plan for social protection and on the inventory of the assets of Catalonia's public administrations (Constitutional Court Judgment 128/2016).

68 In particular, in Constitutional Court Judgment 128/2016, in its legal grounds no. 5, featuring the decision to address 'only the statement and the content of the additional provisions that cannot be passed, for the purpose of their judicial interpretation and review, due to their reference to manifestations, declarations or reports (…) whose form is removed from that of the parliamentary procedure in which this legislation was approved…'. Further on, in the same legal grounds no. 5, the Court issues a reminder of the inadmissibility of challenges that are 'preventive or anticipatory of potential future unconstitutional actions'.

69 The question over appearance or perception as a legal effect has developed particularly in relation to parliamentary resolutions, as already seen (especially in Constitutional Court Orders 141/2016, 170/2016 and 24/2017), but also in relation to provisions on executive actions, for example with reference to the master plan for a tax agency, 'this action brings into question the correct distribution of public powers between the State and the autonomous communities…' (legal grounds no. 5, section c), or with reference to legal certainty in relation to the catalogue of infrastructure (legal grounds no. 8, section c).

70 A particularly clear example of this is the declaration of admissibility for the appeal against Law 4/2017, on budgets. The Constitutional Court's ruling of admissibility (Government of Catalonia's Official Journal, 12 April 2017) led to the automatic suspension of the law's precepts and the Court's adoption of the decision to personally notify the President, ministers and Secretary General of the Catalan Government, the Secretary General of the Vice Presidency and of Economy and Finance, as well as the general managers of procurement and budgets. The Court issued a reminder of the duty to 'impede or prevent any initiative that entails ignoring or evading the suspension ruling'. In particular, the Court reminds them to abstain from initiating, processing or issuing any report and from creating any agreements relating to the budget items challenged or any other (including the Contingency Fund) adopted in accordance with additional provision 49, aimed at financing any costs arising from the preparation, management and holding of the referendum process or referendum referred to in the challenged additional provision; in particular the tendering, execution or overseeing of administrative contracts tendered by the Catalan Government for participation in the preparation of the referendum; also to abstain from initiating, processing or issuing any report and from creating any agreements for the extension, modification or transfer of the budget items

In this manner the Constitutional Court manages to achieve its goal of reining in the development (at least in a public and explicit way) of administrative resources intended for deployment and use as soon as a new state is created, replacing the current state structures. And thus its preventive function extends its reach to the Catalan Government administration's organisational and planning actions, curbing the development of the Catalan sovereignty process in yet another area.

1.5 Evading the Constitutional Court's control: de facto proceedings and changes in approach

Over recent months, faced with the situation described above, Catalan Government institutions have adopted courses of action that are essentially aimed at avoiding the interventions of the Constitutional Court or, at least, at delaying them for the time being and thus enabling as a minimum the initial development of initiatives that are incompatible with the constitutional framework. In doing so the intention has been to enable at least the adoption of the corresponding decisions (avoiding the suspension or annulment of their initial acts or their processing) and to reduce the time between the eventual suspension of the act (once it is adopted) and its effects, or even to delay the moment of clear non-compliance with one of the Constitutional Court's rulings as per its own terms.

In this regard, the calling of the consultation of 9 November 2014 provides a precedent, in that the passing of its Decree was facilitated by the very elimination of its prior processing and of parliamentary discussion of the question, date and other relevant details relating to the consultation.

The first new action along these lines appears to be the decision taken by the Board of the Parliament of Catalonia on 1 March 2016 to process Catalonia's social protection laws, legal system and tax administration through a joint presentation procedure. This was a way to avoid the presentation and processing of a draft law or bill, actions that could have been the object of an order of execution in relation to Constitutional Court Judgment 259/2015, based on the fact that they were explicitly contemplated in the suspended resolution (which was later annulled).[71] In contrast, the processing by way of joint presentation enabled the development of the parliamentary studies without the need to initially define a text, thus making it a procedure that was harder to shackle.

However, the decision was still subject to the Constitutional Court, but in this case via an appeal for the protection of constitutional rights, leading to Judgment 224/2016, of 19 December, which annulled it for breaching the rights of the members of parliament who made the appeal.[72] This highlighted both a new means of intervention for the Court and, in particular, problems of legitimacy arising from the effects this type of action has on the rights and principles of public and democratic debate.[73]

Also affected by these problems, albeit in a way that is much more directly linked to the Catalan sovereignty process, are The Catalan Government's projects 'for the preparation of state structures' and 'strategic infrastructure', plans that were published on the Catalan Government's website and were mentioned by the Catalan President during a public appearance on 17 February 2015. The Constitutional Court considered that these were expressions defining an unsigned agreement made by the Catalan Government and therefore

challenged or any other budget items or the Contingency Fund; and, in general, to abstain from any other budgetary measure agreed in pursuit of the alleged purpose, as covered by the precept of the challenged Law, including the modifications of budgetary structures foreseen in the second additional provision of the challenged Law that lend themselves to this purpose…'.

71 The fifth section of Resolution 1/XI asserts that 'The Parliament of Catalonia considers appropriate to begin within thirty days the passing of legislation on the constituent process, the Catalan social security system and the Catalan Tax Agency.'

72 This Judgment was one with arguments not directly connected to the sovereignty debate, as the focus of its analysis was the joint presentation procedure and its inapplicability in this case according to the parliamentary regulations, a use of parliamentary regulations as a parameter of constitutionality that introduces some problems regarding the extension of constitutional jurisdiction, as up until this point the Court's efforts had been limited to suppositions of the breaching of constitutional precepts.

73 Less relevant in this regard was the conflict regarding the declaration of admissibility on the resolution proposal that led to Resolution 1/XI without the Board of Spokespersons having been formed. The appeals for the protection of constitutional rights that were presented led to a favourable judgment from the Constitutional Court (once again strictly in the terms of parliamentary law and without reference to the Catalan sovereignty process) with exclusively declaratory effects (Constitutional Court Judgment of 7 June 2016). In fact, in the context of this proceeding, the Constitutional Court refused to issue a precautionary suspension on the processing of the Resolution, considering that the issue in hand was to check its constitutionality, not to protect basic rights that could be protected instead by an appeal for the protection of constitutional rights (Constitutional Court Order 189/2015, of 5 November). In relation to this see Vintró Castells, J., 'Decisiones parlamentarias y Tribunal Constitucional', [article, online] Agenda Pública [accessed June 2017].

declared the challenge on them admissible, despite them not being formal agreements and having a non-definite character.[74] From this point on, the Court has applied the jurisprudence stemming from Law 3/2015, such that it considers to be unconstitutional any provisions on objects outside of their competence that provoke, as a result, interference with the system of competences and their exercise by the party rightfully entitled to do so. Accordingly the Court then annulled both plans.

Lastly, it is worth noting two further actions that are clearly aimed at avoiding intervention from the Constitutional Court and which bring up a new set of problems.

- To start with there is the provision in the Law on Budgets on credits allocated generically for the holding of electoral processes,[75] which could be allocated to the holding of a consultation explicitly prohibited by the Constitutional Court. This again throws up questions based on the use of open expressions and the relevance or possibility of considering the suspicion of a future unconstitutional use to be cause for unconstitutionality, something the Court has never openly accepted.[76]

- And then there is the debate on the creation and passing of the so-called 'Law of Transition' or 'Law of Disconnection', defined doubly by its creation and discussion outside the parliamentary framework (a) and its eventual passing through a fast-track single vote procedure (b) after a reform of the parliamentary regulations to enable use of this procedure. The first of these matters certainly raises the possibility of criticism of the Catalan Government and the participant parliamentary groups for their political use of the power to create legislation, but it does not alter the rights of other parliamentarians or the publication of the processing of the legislation, which will in the future be required. As such, its legitimacy does not appear to be questionable, and its effects are limited to delaying but not avoiding the duty on the part of the President of the Board of the Parliament of Catalonia to avoid it being processed, and its certain challenge and suspension if passed. The second matter – also worthy of criticism from the point of view of the parliamentary debate's need for public exposure and plurality – is that the reform brings in laws that are basically the same as the regulations existing in other autonomous community parliaments and those of the Spanish Parliament. However, parliamentary debates raise doubts about whether proper criteria are used regarding the processing of the draft legislation and its simplicity or nature, or whether use of the procedure might be generalised without any limitations.[77] In any case, use of the fast-track single vote procedure cannot prevent whatever intervention from the Constitutional Court might be deemed necessary, it simply means that the object of this intervention will be legislation that has already been passed. In this respect it worsens the resultant confrontation and the tension regarding the predictable suspension and annulment.

1.6 The effects of the Constitutional Court's intervention and the resulting transformations in the Catalan sovereignty process

The Constitutional Court has become more or less the only state authority to intervene in the Catalan sovereignty process. This option of having the constitutional jurisdiction take the lead has achieved three clear goals: first, it has (so far) prevented direct confrontation with the executive branch of the government and, essentially, recourse to article 155 of the Spanish Constitution; second, it has reduced the pressure on the Spanish Government and Parliament, facilitating a state response focused on the breaching of the judicial-constitutional framework, without entering into a more complex political discussion, open to nuances and varying positions in the heart of the Congress's political groups, which above all would entail

74 Constitutional Court Judgment of 10 May 2017, (legal grounds no. 7).

75 This provision relates to three budget items named 'electoral processes and popular consultations' and 'citizen participation processes', which were challenged and suspended 'in relation to these items referring to costs linked to the holding of a referendum' (Constitutional Court Ruling of 4 April 2017).

76 See footnote no. 68.

77 Article 135 of the Regulation, in the version published in the Official Gazette of the Parliament of Catalonia no. 431 of 7 June 2017. In relation to this, Vintró Castells, J., 'El Parlamento exprés: antecedentes y contexto', [article, online] Agenda Pública [accessed June 2017].

taking responsible political positions; and third, most essentially it has done enough to prevent the Catalan sovereignty process from developing the key actions that shaped its road maps.[78]

However, as well as achieving these objectives, the Constitutional Court's interventions have had a profound effect on the configuration of the Catalan sovereignty process, which has progressively transformed itself due in great part to the judgments handed down and their consequences. This effect, described in detail in the previous sections, is defined by the following aspects.

1.6.1 The judicialisation of the Catalan sovereignty process

The Catalan sovereignty process began essentially as a political movement, without expressing the judicial form its development and objectives might take. Its objective is by definition outside what is subject to the current constitutional framework. However, the Constitutional Court's intervention has moved the focus of attention to the legality of the process, i.e. seeking its judicial definition. This attention has not been on the weight of its arguments as a whole, instead concentrating on the ways it might be achieved: through a consultation or through actions to prepare for or declare independence. Of course, the Constitutional Court has not been the only factor in this transformation, as the discussion on some of the procedures (essentially the consultation) raises significant differences in the citizen and political support as regards the discussion on independence. However, the central actions of the Court as well as the need to develop a legal defence in the corresponding proceedings have been aspects that have contributed to the same shift.

1.6.2 The illegalisation of the Catalan sovereignty process

Once the legal framework for the Catalan sovereignty process was established, the options for its development were essentially reduced to two: the channelling of a movement putting pressure on state institutions, accepting these institutions' exclusive capacity for making the relevant decisions; or the alternative, to move into illegality, illegal not for the objective but for the use of instruments that run counter to the legal system, given that the Constitutional Court had closed off the route for unilateral development presented as respectful towards the current legal framework. Once again, other factors have played an important part in this area, particularly the onward march of time, which has forced the Catalan sovereignty process to define itself through actions aimed at achieving goals outside the political and institutional debate. However, the steps taken by the Constitutional Court have progressively edged the process into a corner where it has just two choices: to be reduced to a mere 'political aspiration' subject to national majorities, or to oppose the law. The choice of the latter option by the Catalan Government institutions entails major consequences for the process, as shall be looked at next.

1.6.3 The difficulty of achieving the goals set

The decisions taken by the Constitutional Court have to a large extent curbed the achievement of the specific goals marked on the Catalan sovereignty process's various road maps.[79] In addition to the suspensions and prohibitions, there have also been more indeterminate obstacles, such as the warnings issued by the Court and the various criminal proceedings brought for disobedience towards its rulings. Altogether these actions have not only prevented the acts challenged from being adopted or producing effects, they have also been a relevant factor at very least in the decisions not to take further actions with more powerful legal effects,[80] which would have ended up the same way, further aggravating the effects of criminal prosecution that shall be referred to shortly.

The development of the Catalan sovereignty process outside of the law has deprived it, firstly, of one of the main sources of its impetus via autonomous community institutions: the capacity to adopt binding decisions based on the majority decisions of these institutions. Secondly, it has made it harder to use public resources –

78 See in particular the response in Satrústegui Gil-delgado, M., 'Encuesta sobre la cuestión catalana', in Teoría y Realidad Constitucional, no. 37, p. 77ff.

79 Essentially formalised in Resolutions 1/XI, of 9 November 2015, on the start of the Catalan sovereignty process, and 306/XI, of 6 October 2016, on the general political orientation of the Government of Catalonia, objects of Constitutional Court Judgment 259/2015 and Constitutional Court Order 24/2017, respectively.

80 None of the legislative initiatives cited in the resolutions was approved and, in most of the cases, processing of them did not even begin.

both material resources and in particular human resources – to boost the process, without giving rise to new challenges and suspensions.

It is true that the Catalan sovereignty process has managed to develop, basically through parliamentary resolutions, even when these have been the subject of subsequent challenges or have been issued against explicit prohibitions by the Constitutional Court. In this regard, the Constitutional Court's interventions have not managed to prevent the manifestations of the Catalan sovereignty process in which the Court has – debatably – recognised legal effects. The increase in the pressure stemming from pronouncements made with the orders of execution and the subsequent criminal proceedings are, however, not the Constitutional Court's last resorts; now under the Organic Law on the Constitutional Court, it can use fines, the suspensions of officials, or substitute enforcement. But the containment of the Catalan sovereignty process within its framework of parliamentary development, without generating binding effects for citizens, is in itself a relevant objective, one the Court has managed to achieve using its traditional methods, without having to run the risk or accept the consequences of taking harsher measures.

1.6.4 Lack of formalisation and reduction of the public debate

The control enforced by the Constitutional Court has led Catalan Government institutions to turn to special forms of action, aiming to avoid or reduce the impact of the Court's decisions, particularly its suspension rulings. This modification of the standard procedures and contents in the corresponding institutional actions has materialised in various forms, which can be categorised as follows:

- De facto actions, avoiding judicial formalisation: the clearest example being the actions developed in relation to the participative process of 9 November 2014. However, Constitutional Court Judgment 138/2015 had little trouble forming an opinion on these actions, the Court recalling its own jurisprudence on the possibility of challenging de facto proceedings and on all actions being subject to the constitutional framework, regardless of their format. The expressions of a purely political nature without legal effects (so far at least) that have been made in recent months[81] are a separate matter, capable of delaying the Court's interventions, but without any possibility of having legal effectiveness.

- The elimination of the initial and intermediate public stages in the proceedings, thus preventing them from being challenged before the adoption of the corresponding final act, has been another example of this strategy. In fact, the 2014 Law on non-referendum popular consultations already signalled this trend, defining the procedure to call the consultation by way of just one act, the decree by which the President could call the consultation without prior parliamentary discussion. More recently, the secret drafting of the 'Law of Transition', or the reform of parliamentary regulations enabling the passing of legislation through a fast-track single vote procedure are further examples of this pattern.

- The adoption of actions of an open or indefinite character that provide grounds for the adoption of actions in the framework of the Catalan sovereignty process as well as others compatible with the constitutional framework. This essentially applies to legislation providing for the procurement of material resources (in some cases annulled by the Constitutional Court), until what may be referred to as unconstitutionality 'by suspicion' started appearing in the Court's rulings and in proceedings that are still pending.

- Lastly it is also worth highlighting the shift to identify the initial proposal with a wider range of institutions, as a way of making it harder both to challenge the proposal and to attribute responsibility. The attempt to form joint presentations for the creation of legislative bills for a tax agency, social security and the legal system – leading to Constitutional Court Judgment 224/2016 – is the clearest example of this type of action.

However, all of these strategies entail an increasing lack of public exposure and pluralism in the actions they seek to protect, which of course results in negative effects as regards the legitimacy – in more than just a judicial sense – of the acts adopted.

81 For example, the act of commitment to the Catalan sovereignty process signed by leading figures in the Catalan Government on 21 April 2017, or the political announcement calling a referendum for 1 October 2017, made by the President and Vice President of the Government of Catalonia on 9 June 2017.

1.6.5 Open confrontation with the law, the Constitutional Court and the ordinary courts: disobedience

The latest stage in the development of the Catalan sovereignty process is a clear illustration of the confrontation with the constitutional framework defined by the Constitutional Court. But the confrontation is expressed most clearly in Resolution 1/XI and Constitutional Court Judgment 259/2015, as well as the subsequent actions examined by the Court. This route taken, one of open and definite eschewal of constitutional legality, opens the possibility of a de facto, legally unsupported route towards the constitution of a new state or, otherwise, progression with the criminal process initiated on the basis of the actions relating to the consultation of 9 November 2014. From an institutional point of view, questions arise regarding the potential use of the powers provided by the reform of the Organic Law on the Constitutional Court to ensure compliance with the Court's rulings (essentially the suspension of officials and substitute enforcement), or the ever-present possibility of recourse to article 155 of the Spanish Constitution, despite the Spanish Government's choice to avoid this option so far, the use of the Constitutional Court being its preferred solution. However, with the unconstitutionality of the Catalan Government's actions clearly established (judicially, not politically) and its disposition towards open confrontation with the constitutional (again, in a judicial sense) framework, recourse to article 155 of the Spanish Constitution undoubtedly becomes an option that could be taken more easily, with responsibility shared between the Court, the Government and the Senate. The judicialisation of the conflict would also be evident in this patently political move, with the previous intervention by the Court giving a final judicial and depoliticising effect.

2 The Constitutional Court faced with the Catalan sovereignty process

The capacity assumed by the Constitutional Court in relation to the development of the Catalan sovereignty process has had notable effects on its own institutional position, its role wholly transformed by the new functions it has taken on. This transformation has stemmed from evolutions in the actions of Catalan Government institutions and equally from the Court's own acceptance of its new functions, enshrined in the reform to the Organic Law on the Constitutional Court. As such it was very much a conscious decision, one that has been the subject of purposeful discussion in each of the processes that have shaped its path and has brought up controversial questions regarding its very existence, the way it was executed and what exactly was being brought into law. The following sections examine the fundamental aspects of this transformation of the Court's position, functions and instruments (section 2.1) and offer an initial evaluation of the effects of the central role the Court has played in relation to the Catalan sovereignty process (section 2.2).

2.1 The evolution of the Constitutional Court's position, functions and instruments

The Constitutional Court's jurisprudence, as touched upon in the first part of this study, has evolved in a way that can be summarised as moving from its traditional function of defining the constitutional framework to a new function of ensuring respect and compliance, new at least in the intensity with which it is pursued and new in some of the ways it materialises. In these functions there has also been an evolution from a certain degree of self-restraint and referral to the political debate (section 2.1.1) towards an increasing judicial delimitation of the framework and the resulting restrictions on institutional actions (section 2.1.2); also from an emphasis on preventing non-compliance (section 2.1.3) towards the adoption of executive measures to correct them (section 2.1.4).

2.1.1 Definition of the constitutional framework: the Constitutional Court's self-restraint, referral to the political debate and indications for the future

The Constitutional Court's jurisprudence on the Catalan sovereignty process begins in accordance with its traditional role as the institution that interprets the Spanish Constitution and, therefore, the appropriate legal framework. In this regard, Constitutional Court Judgment 42/2014 contained a series of decisions specifying the constitutional framework surrounding concepts relating to sovereignty, constitutional pluralism and the potential for constitutional reform, constructed in relation to the Parliament of Catalonia's Resolution 5/X, of 23 January, which does not directly question the validity of this framework.

In addition, the Court adopted a moderate position as regards its intervention in the core of the matter. The Catalan sovereignty process's origins as a political debate, subject to the constitutional framework, gave the Court its licence to take this course, emphasising the need for dialogue and negotiation between the State and

autonomous community political institutions and underlining the position of the Constitution (and the Court itself) in favour of political pluralism and the resulting integration of the reforming positions.[82]

However, as already noted, this foundational position includes two elements that would be key to the future development of the Court's decisions, elements made clear from the outset as a precautionary guarantee of its own control:

- First there was the admittance of the challenge, rejecting the very reasonable possibility of considering that the resolution did not contain anything worthy of jurisdictional control. This decision would tie the Court into its subsequent role as the institution responsible for global control over the Catalan sovereignty process. It also determined the requirement for the Catalan sovereignty process to be subject to the law, regardless of whatever institutional form of expression it could take.

- And second, the Constitutional Court determined the essential elements in the constitutional framework to which the legitimacy of the Catalan Government's actions would be subject: reserving the final decision to constitutional reform and ensuring this protection through a reform to its organic law. As such, despite accepting the possibility of developing the 'right to decide', the Court does not see it as an actual 'right' but rather a political aspiration, and not a 'decision' as might initially be understood but instead a preparation for a decision by the institutions holding the power of constitutional reform.

And this Judgment also saw the start to a feature that has continued to date in almost all of the rulings made: the unanimity of the judges. This has been highly significant for the Court itself, and having been achieved it would go on to hugely reinforce the effectiveness of the arguments to which it has given grounds.[83]

2.1.2 Definition of the constitutional framework: judicialisation and the restrictions on autonomous community actions

The two elements referred to in the section title were immediately reinforced in the subsequent rulings, which, addressing the possibility of an autonomous community consultation, completed the definition of the framework for exercising the 'right to decide'. The changes to the type of legislation being challenged (changes to legislation made immediately effective) and to the context for the decision-making (the route favouring negotiation suggested in Constitutional Court Judgment 42/2014 having been ruled out) created a position for the Constitutional Court that was much more focused on its role as prescriber of the Constitution and the restrictive consequences for actions that opposed it.

In this regard, the Court strengthens its use of the arguments contained in judgments from before the start of its intervention in the Catalan sovereignty process, in a way making Constitutional Court Judgment 42/2014 something of a parenthesis in the development of the conflict, of lesser relevance to the subsequent rulings. It is well worth emphasising the relevance given to some statements that, when made, were not part of the *ratio decidendi* giving grounds to those original judgments, and which therefore were not the subject of any special discussion in the arguments from each side, and were not included in the grounds used by the Court. However, these statements would subsequently become precedents that were almost indisputable and, somewhat incontrovertibly, would end up marking the direction of new judgments. For the Constitutional Court this is one of its classic forms of argumentation, but it must be noted that it held little conviction or effectiveness in the

82 As highlighted by Arbós Marín, X., 'El Tribunal Constitucional como facilitador', p. 41ff., and criticised by Fossas, E., 'Interpretar la política', p. 295ff. and p. 300, and by Tajadura, J., 'La STC 42/2014…', p. 72ff.

83 This unanimity, which is not exactly typical in the Constitutional Court in recent years, has only been absent in two of the rulings made: Constitutional Court Judgment 228/2016 on the Law on Foreign Actions, a relatively minor matter that was essentially external to the Catalan sovereignty process; and Constitutional Court Judgments 185/2016, of 3 November, and 215/2016, of 15 December, on the reform of the Organic Law on the Constitutional Court that introduced new measures to ensure compliance with, and the execution of, its judgments, a matter that was also formally separate from the Catalan sovereignty process but in this case materially linked and even of central relevance. However, it is worth noting that the dissenting opinions only questioned some of the execution measures, in essence calling for them to be used sparingly and as a protection, and that the second judgment reduced the intensity and size of the split in the Court. In any case, and without having turned to use of the more provocative means, the Constitutional Court's rulings in favour of personalised warnings have also been made unanimously.

political debate to which it applied,[84] an aspect that shall be revisited and which represents, in my opinion, one of the Court's most significant failings in its intervention in the Catalan sovereignty process.

The Constitutional Court continued with its key function of defining the framework, at this point focusing on the definition of what constitutes a referendum, and on it being the preserve of the State and organic law to establish types of referendum and their basic regulation. However, it also used its judgments to signal two elements that introduce an essentially preventive purpose, inclined to prevent future actions:

- Firstly there is the Judgment of 10 May 2017, on the 2010 Law on consultations, which can be seen as closing off the possibility of a consultation not provided for by the organic law but agreed with the State under its authorisation. Although this is an effect that is undoubtedly inherent to the appeal ruling, the argument is justified by the fact that the judgment was handed down without any pressure in terms of its timing, after seven years of waiting, and when the matter was the object of a certain amount of political debate.

- And secondly, much more relevant to the development of the conflict, there is the use of the suspension in the aforementioned judgment as an element of central importance and, above all, as an element open to future definitions different from the content of the initial challenge, a matter that has been brought up repeatedly.

2.1.3 The function of ensuring the established framework through the prevention of new contrary actions

The prevention of unconstitutional actions is quite clearly a function pertaining to the Constitutional Court, and this is immediately evident in both its annulments and its precautionary suspensions. However, in the series of Constitutional Court rulings on the development of the Catalan sovereignty process, this preventive function manifests very particular and distinct characteristics. Very often it is not so much a consequence of the constitutional process ('declaratory') but rather its main purpose, other times it is projected onto future actions (in an essentially 'preventive' manner), it uses personalised communications with a tone of clear censure that draw it towards the coercive instruments of execution, and lastly it takes on new justifications for its application. Each of these areas is briefly examined below:

- Suspension becomes the basic decision in proceedings when there is no discussion on the background or when dealing with one-off legislation or actions. In these cases the nature of the automatic suspension has a double effect worth commenting on: firstly the obvious and well-known weakness of the autonomous community actions, but secondly, the nonexistence of any reasoning behind the decision, making it particularly deficient in the political debate developing at that moment in time. Automatic suspension is thus an instrument that is very effective from a judicial point of view, but at the same time very limited as regards the parallel political debate, without the later judgment (normally a foregone conclusion) doing much to change this. Some specific statements from the Constitutional Court in relation to the Catalan sovereignty process have worsened this situation, greatly reducing the possibilities for dialogue and explanations from the Court.[85]

84 It may be useful to provide some relevant examples: of course, no special argumentation is needed regarding the constitutional demand that the State authorise referendums, based on the provisions in article 149.1.32 of the Spanish Constitution. However, simply stating this and leaving it at that, which is what the Court does in its Judgment 31/2015, is not of great usefulness in political terms, and creates an impression of the Constitution as simply legislation that imposes limits, without explaining the purpose and significance of said limits. The political debate is thus dominated by the idea of the referendum being prohibited in order to prevent the expression of desires for independence, without any discussion of other issues such as the legitimacy of the institutional effects of a partial referendum on a decision that corresponds to a larger institution, the functionality of referendums in the context of discussions that do not have a clear social majority, or the effect of depleting any negotiation room. In addition, an explanation of the significance of article 149.1.32 of the Spanish Constitution would have enabled examinations of whether, under the strict terms used, other functions and purposes were the preserve of organic law as regards provisions for autonomous community referendums (Constitutional Court Judgment of 10 May 2017) or if authorisation being the preserve of the State was sufficient to cover the interests in need of protection. The educational and explanatory function the Court has on other occasions made efforts to fulfil was, in my opinion, excessively absent from at least the initial rulings on the Catalan sovereignty process, rulings that tended too much towards literal or systematic interpretations, judicially sufficient but very weak when stood alone in the public debate, one which is essentially a finalistic debate.

85 This has been the case with the refusal to clarify measures (Constitutional Court Order 292/2014), especially in the context of suspensions with effects that are not limited to specific actions (even though this might entail a possibility of evading or delaying the effects of the ruling), or the refusal to examine the misuse of suspension requests (ibid) or, on a more nuanced level, the unyielding insistence on the nonexistence of an admission process in the unconstitutionality appeal (Constitutional Court Judgment 42/2014, for example).

- The preventive nature of the suspensions is linked in particular to their indeterminate effects, meaning the idea is not so much to suspend specific actions as it is to prevent a certain result being achieved (the true goal of the suspension), whether this is by means of one set of actions or another. This characteristic has become widespread across a large share of the challenges to the Catalan sovereignty process, with the Constitutional Court ending up seeing it as all part of the same course of action, edging towards a unilateral assumption of sovereignty and a declaration of independence. The court has thus turned to preventive suspensions for everything of this ilk, followed by annulments via the corresponding orders of execution.

- Suspensions have been accompanied with increasing frequency by personalised communications to those responsible for compliance with them.[86] This is an element with two implications: firstly there is the stern warning over subsequent adoption of execution (or even criminal) measures, something analysed in the next section; and secondly it serves as an effective instrument to steer the conduct of the people in charge to whom the communications are addressed, an aspect that increases its effectiveness in the prevention of non-compliance.

- Lastly, the Court introduced a special justification for use of its suspensions, besides the traditional justification of considering the effects: this is particularly relevant to the conflict, as it removes the obligation to enter into specific evaluations of the effects of the resolutions challenged,[87] thus closing the net on the actions of the Catalan sovereignty process that come up against the Court.

However, suspensions are not the only preventive measure within the Constitutional Court's jurisprudence on the Catalan sovereignty process. Attention must also be given to the development of preventive or 'by suspicion' unconstitutionality. This refers to cases whereby a measure, although in itself constitutional, is declared unconstitutional to prevent it from giving rise to other future developments or actions that are unconstitutional. The Constitutional Court has repeatedly rejected this construction, demanding that the condition of unconstitutionality relate to the act itself and not its potential consequences. Nevertheless, the Court has at the same time started frequently referring to 'interference' with extraneous competences or the mere perception of ownership of extraneous competences, extending the attribution of unconstitutionality and bringing it very close to preventive or suspected unconstitutionality, given that 'interference' and 'perception' are intrinsically subjective notions.

2.1.4 The guaranteeing of the rulings handed down: compliance and execution

Recent proceedings show an increasing focus on ensuring compliance with previous rulings handed down by the Constitutional Court, a focus that culminated in rulings for orders of execution in 2016 and 2017. The Court thus takes on exclusive responsibility for seeking compliance with its rulings, addressing actions that are not judged for their own direct constitutionality, but for the extent to which they oppose the ruling that is executed.

To date, the Court has fulfilled this role without making use of all the instruments specifically provided by the 2015 reform to the Organic Law on the Constitutional Court, following its controversial introduction and declaration of constitutionality. At the same time, important questions have arisen regarding the scope of application for the orders of execution (a), the position of those who are obliged to comply (b), the proceedings (c), and the possible content of the rulings (d).

a) Scope of application for the orders of execution

An order of execution can be issued in the event of pronouncements that oppose one of the Constitutional Court's rulings or attempt to undermine its (judicial or material) effectiveness. Constitutional Court Orders 141/2016 and 24/2017 show that definition of these scenarios is not easy when they do not arise from explicit

86 Seen for the first time in the communication of the declaration of admissibility and suspension (11 November 2015) of Resolution 1/XI, as described in the background facts (no. 3) in Constitutional Court Judgment 259/2015. Afterwards this provision was used more widely and those affected grew in number to the point highlighted previously regarding the unconstitutionality appeal against Law 4/2017, on Budgets, published in the Government of Catalonia's Official Journal, 12 April 2017.

87 Constitutional Court Orders 156/2013, 182/2015 and 186/2015, which could raise questions about parliamentary resolutions with effects supposedly interfering with state competences. While the Constitutional Court has not assumed this criterion for determining the challengeability of actions (and has formally considered their 'legal effects'), it has ended up doing so for decisions regarding the lifting of suspensions.

references to the acts addressed in the judgment being executed. In these cases the Court establishes the executive character of its rulings (allowing a much faster and stricter control procedure) through reference to the same purpose pursued by the ruling addressed in the judgment presently executed.[88] However, taking this reference to a formal act that was addressed in a previous judgment and transforming it into the new contents and objective can be difficult, especially when there are doubts over what the object of unconstitutionality was in the first ruling (the purpose or content of the corresponding action).

Meanwhile, the suitability of parliamentary resolutions as objects of jurisdictional pronouncements is confirmed, specifying in each case which elements are the cause of the resolution's legal effects.

b) Duties to comply

In particular, these proceedings have raised the issue of the duties to comply and to prevent non-compliance that are incumbent upon civil servants and public authorities. The Constitutional Court has been especially emphatic in its refusal to countenance non-compliance with the duties arising from the authorities' judicial position, particularly in the case of the President of the Parliament of Catalonia, asserting that the obligations stemming from parliamentary regulations cannot provide an exemption from the obligation to comply and to provide guarantees, under any circumstances, as all legislation must be interpreted in such a way as to favour and conform to the effectiveness of the Constitution and, ergo, the Constitutional Court's judgments.[89]

c) The proceedings

The chief characteristic of the orders of execution is the speed with which they can be processed, thus the rulings for the orders discussed were made in little over five months (Constitutional Court Order 141/2016), two months (Constitutional Court Order 170/2016) and four months (Constitutional Court Order 24/2017). In any case, the orders of execution entail the automatic suspensions of the challenged actions,[90] and any request for execution measures consisting of personalised warnings of the potential use of the measures described in article 92 of the Organic Law on the Constitutional Court or of the transfer of proceedings to the Public Prosecutor requires a hearing with the persons affected.

d) The content of the rulings

The Constitutional Court has made it its normal practice to provide full details of the contents of order of execution rulings, beyond their approval or rejection. The pleas included in the document presenting the order of execution are simply proposals91 that the Court can accept or dismiss. The Court can also go beyond these 'proposals', although in this case it would be reasonable to demand that the parties affected be given prior notification so as to be able to provide whatever arguments they deem appropriate.

88 For example the 'constituent process' identified with the attempt to ascribe sovereign attributes to the parliament or people of Catalonia (Constitutional Court Order 141/2016, legal grounds no. 4) based on the areas studied by the Commission and the sequencing of the Parliament's actions (legal grounds no. 6) or of the specific actions planned (Constitutional Court Order 24/2017, legal grounds no. 7). It is doubtful whether the Court would be prepared to extend its application of this construction to areas of less 'exceptional relevance', for example in relation to competences, repeating its jurisprudence in relation to subsidies for specific sectors.

89 This duty is made clear in Constitutional Court Orders 141/2016 and 170/2016, flatly dismissing the possibility of any justifications for non-compliance with the Court's rulings. The strength of this dismissal is probably justified in the cases studied, but there may be more nuanced cases in the event of new impacts on the constitution that have not been considered by the Court, where evaluation of the corresponding authority is required (particularly in relation to parliamentary debate). Separately, mention has already been made of the different position of civil servants, based on the arguments of the Secretary General of the Parliament in Constitutional Court Order 170/2016 (see footnote no. 52).

90 This was not included in the proceedings of Constitutional Court Order 141/2016, but was included in Constitutional Court Orders 170/2016 (background fact no. 6) and 24/2017 (background fact no. 8).

91 This is expressed in Constitutional Court Order 141/2016: '…it is therefore (…) inexcusable for the Court, for which the pleas from each side in relation to this point are taken as proposals (article 92.3 of the Organic Law on the Constitutional Court), to exercise its full authority to determine the scope of approving an order of execution of this nature' (legal grounds no. 7). The Court does not even examine (and naturally does not take up) any of the measures proposed in Constitutional Court Orders 170/2016 and 24/2017, namely the warning of a potential adoption of fines and suspensions of officials provided for in article 94.2 a) and b) of the Organic Law on the Constitutional Court (background fact no. 5 of the Constitutional Court Order 170/2016 and background fact no. 7 of the Constitutional Court Order 24/2017) and the order not to convene the parliamentary bodies in certain cases (background fact no. 14 of Constitutional Court Order 24/2017).

The Constitutional Court has made it its normal practice to give consideration to the following possibilities in order to form its ruling:

- Approval or rejection of the order, depending on whether it is clear there are obstacles and a need to remove them or avoid them in the future. Just the declaration of approval generates effects that increase compliance, even without any annulment of the challenged action, and it enables the issuing of the personalised warning of the duty to comply.[92]

- The action can be annulled by the Court or can remain in place, being interpreted in a certain way, i.e. if it is considered open to interpretation in conformity with the ruling being executed, even though the order is approved (Constitutional Court Order 141/2016).

- In all of the cases so far the Court has included a personalised warning on the duty of compliance (specifying in Constitutional Court Orders 170/2016 and 24/2017 both the obligation not to take certain actions and the obligation to prevent the actions of third parties), a feature of particular relevance as a preliminary step indicating the potential recipient of future execution measures or of demands for criminal responsibility.

- Lastly, the Court has decided to transfer proceedings to the Public Prosecutor in the cases of some of the responsible parties, for the purpose of potential future criminal responsibility.[93]

To date the Court has not taken into consideration the proposals from the State Attorney and the Public Prosecutor to give warnings specifically on the possibility of adopting the measures provided for by article 92 of the Organic Law on the Constitutional Court (fine or suspension of officials), and has not even expressed any opinion on going to this length so as to confirm the full availability of measures the Court has.

2.2 The central role played by the Constitutional Court in relation to the Catalan sovereignty process: an assessment

The central role the Court has played in relation to the Catalan sovereignty process and the transformations analysed in the previous section have affected aspects traditionally of importance as regards how the Court is perceived (section 2.2.1). These negative impacts the Court has endured must be viewed in the light of its contribution in the conflict with the Catalan Government institutions, a contribution that has been consciously advanced above those of other potential lead figures. As such, the Constitutional Court's contribution is analysed (section 2.2.2) basically in relation to these other potential figures, essentially the Spanish Government and Parliament. And lastly, these aspects provided by the Court have entailed an absence of certain other elements, due to the Court's decisions or as an inevitable result of its very nature, something that has also shaped the development of the Catalan sovereignty process (section 2.2.3).

2.2.1 Negative impacts on the Constitutional Court

As analysed in the previous section, the Constitutional Court has adopted changes to its position and approach, changes that may have a negative impact on its traditional role and position as a means for the resolution of conflicts through judicial interpretation (i.e. impartial and grounded in the law) of the Constitution.[94] Furthermore, the Constitutional Court, like any other public institution, essentially has its roots in the trust and respect it receives from the public and other institutions; the effective exercise of its functions is only possible if it has these things, at least in a global sense and in the long term.

92 As was the case with the ruling from Constitutional Court Order 140/2016 on the formation of the study commission on the constituent process. The Court did not annul the creation, as the study commission was capable of operating constitutionally. However, the Court did approve the order of execution and clearly established certain authorities' duty of compliance and the illegitimate nature of certain actions, without issuing a warning about the non-compliance.

93 Constitutional Court Order 170/2016 for the President of the Parliament of Catalonia and Constitutional Court Order 24/2017, again for the same President and for the members of the Board of the Parliament of Catalonia who voted in favour of the non-compliant proceedings.

94 This is argued with particular strength in Urías, J., 'Damaging the legitimacy of the Spanish Constitutional Court', [blog post, online] Verfassungsblog [accessed June 2017], and 'The Spanish Constitutional Court on the Path of Self-Destruction', [blog post, online] Verfassungsblog [accessed June 2017], which advance some of the points made further on in this section.

The Constitutional Court has spent three years addressing challenges to the actions initiated by Catalan Government institutions in the framework of the Catalan sovereignty process. Over the course of these three years its position has deviated from defining a disputed constitutional framework to providing a guarantee and the execution of said framework. Almost all of the rulings it has handed down have been in favour of the state plaintiffs and against the actions of the autonomous community. As the Court itself has expressed, this has essentially been due to the fact that the object of the judgments has mostly been one and the same, the Catalan sovereignty process, manifested in various forms in each case. However, in the eyes of the general public, the Court's semblance of impartiality may be affected by this situation, whether this is justified or not. And this is particularly true with those who, to a greater or lesser degree, agree with Catalan sovereignty arguments.

This risk – which it is hoped can be described objectively and in separation from any evaluation of alternative courses of action – is heightened by a series of aspects that have coincided with the Court's actions:

- The Court has fully taken on the role of guaranteeing and executing its own rulings. This has not stemmed from the reform of the Organic Law on the Constitutional Court (which could have driven the Court) so much as from its own decisions and in virtue of its own perception of its role. And in executing its rulings, the Court no longer looks like an institution that is removed from the conflict; instead it seems to be involved in the conflict, face to face with the parties affected by the execution. What is more, the nature of the orders of execution (speed, more restrictive parameters, contexts of conflict) have the same effect, as signalled by the Venice Commission in its appraisal of the reform of the Organic Law on the Constitutional Court.

- It cannot be ignored that this situation comes on top of a general crisis of confidence in Spanish public institutions, something that is particular to the Constitutional Court due to criticisms of politicisation, and is specific to Catalonia because of the long and problematic handling of its Statute of Autonomy by the Court in recent years, as well as the final judgment and the subsequent reaction.

- The increasing frequency and significance of the suspension and execution rulings – with less reasoning provided than in the unconstitutionality judgments – represents a growing difficulty the Constitutional Court has in giving explanations to the public. In contrast, the Court is also faced with (the majority positions of) political institutions with a constant presence in the public debate, and has not always had a fair amount of fortune with the arguments it has provided for its rulings.

- Also, the need for fast rulings and their integration in the Catalan sovereignty process means the distance in time and the political separation between the Court and the matters it is ruling upon is lost. This is an aspect that can always be traced to the suspensions and executions, and in relation to the Catalan sovereignty process very often stems from the unconstitutionality proceedings.

The significant loss in the public's trust in the Constitutional Court as a result of all this seems hard to ignore, in Catalonia at least, and if it occurs for long enough and to a sufficient degree, it may be very difficult to restore. And trust in the Constitutional Court and trust in the Constitution are very closely linked, if not one and the same.

As well as this fundamental effect that goes beyond the legal sphere (but affects it deeply), two other effects can be added in connection with the Court's functions:

- By taking on preventive and – more significantly – executive functions, the Constitutional Court became for the first time a court of first instance (and often 'only instance') for decisions that have impinged on the rights of the people affected (in particular the authorities responsible for the compliance) and on the significant elements of pluralism and political debate, as the practice developed demonstrates. This transformation, while problematic in itself, is also brought about without any clear framework of guarantees and defence being specified, through hasty and ill-defined proceedings (the suspensions and orders of execution), and by a Constitutional Court that is traditionally not involved in elements such as hearings, evidence or the requirement of direct contact between each side and the judges. The resultant weakening of the Court's position may sometimes be disproportionate, especially if it comes into play with the indirect but hard to avoid effects of subsequent criminal proceedings.

- The conflict has very often been presented as a conflict between law and democracy, or one could say between the rule of law and democratic principles,[95] or between legal reasoning and political discussion. In spite of the efforts the Court could have made and the impossibility of separating the two principles – clear to anyone practising law, a public perception of the law and the Constitution acting as an arbitrary means of curbing the people's will has taken some hold, undermining the position of, and respect for, the Constitution, the Court and its decisions.

2.2.2 The Constitutional Court's contributions to the conflict

The Constitutional Court has of course contributed to the conflict with its conception of the constitutional framework, as detailed previously in this study. But a question that begs answering is, beyond this legal definition, what factors justify the Court's leading role in the conflict, countering or compensating as far as possible for the negative effects suffered?

In this respect, three main elements can be identified that stem from giving the Court the central role it has taken:

- Firstly, its effectiveness in curbing the actions of Catalan sovereignty. So far, the Court's rulings have managed to prevent the Catalan Government from adopting binding decisions, and any remaining non-compliance with its rulings relates essentially to parliamentary actions without any effect beyond the political debate. Whether this success will continue in the future or whether there will be instances of non-compliance with greater consequences – possibly requiring the use of unprecedented instruments by the Court or by other figures – remains to be seen.

- Secondly, the unanimity in the Court's interventions, something that has reinforced unity among the actions of most of the state's political forces. The Court has been particularly careful to gain unanimity in its decisions on this matter, but moreover it has been a shared figure of importance for most of the political parties in the Congress, cutting the probability of discrepancies appearing in relation to the actions taken or led by the Government (and in relation to taking responsibility for actions or failing to do so).

- And thirdly – and essentially, the Court's intervention has prevented the conflict from escalating to a direct clash between state and autonomous community institutions, between executive branches of government. The Court has converted what was famously referred to as a 'head on train collision' into a more prolonged and less virulent process of constant undercutting, thus avoiding the use of instruments that remain unprecedented in Spain's system, such as recourse to article 155 of the Spanish Constitution. As such, for every time the Court's interventions negatively affect its own legitimacy or are seen to be lacking in political effectiveness, there is at least the upside that an open conflict between governments is avoided, a fundamental purpose of constitutional law in relation to territorial conflicts.

2.2.3 The Constitutional Court's failings in the conflict

Alongside the aforementioned contributions, the lead taken almost exclusively by the Constitutional Court has also entailed shortcomings, as already mentioned over the course of this study, deficiencies of which the Court itself is aware, as seen in its initial (though largely unsuccessful) attempt to vacate centre stage. These relate to drawbacks inherent in the nature of any Constitutional Court, but there are also failings that are specific to this Court in particular. None of these failings is necessarily attributable exclusively to the Court (although it could be accused of showing enthusiasm even despite these failings). Instead the finger could be pointed at the other institutions who could have contributed, which are essentially the same institutions that have appointed this specific Constitutional Court for the years 2013 to 2017, charged with resolving the conflicts that have arisen:

- Firstly, the Constitutional Court has focused primarily on debates regarding proceedings, leaving aside any debate on contents. This is probably because its scope for intervention is greater in the former than in the latter (the discussion on the possibility of a consultation allows for more legal solutions than the discussion on sovereignty), but also because this is the basic terrain for judicial debate. However,

95 The Constitutional Court gives a significant amount of attention to this question in Constitutional Court Order 170/2016 (legal grounds no. 6, in what is an order of execution). However, in my opinion it would be of greater use if their efforts were spent on explaining the bases and purposes of the constitutional precepts discussed in the declaratory judgments.

this has meant eschewal of a debate on contents, essentially a political debate, which could have found more grounds for agreement than the discussion on the proceedings for exercising the 'right to decide'.

- A judicial procedure is not a negotiation, and the Constitutional Court can only offer procedures and a framework to encourage negotiation. Leaving aside the matter of whether the framework defined could have better incentivised such negotiation, what is certain is that the institutions responsible for this function (governments and parliaments) failed to deliver, and the conflict, inserted into the judicial arena, took its course as any trial must: with winners and losers.

- The creation of winners and losers, regardless of whatever constitutional correctness it might have, entails a considerable deficiency as regards the integration of the losers in the system. If there are few losers or they renounce their positions, the system is strengthened, but if there are many and they stick to their positions, the system is weakened. The Constitutional Court as an institution and this Constitutional Court in particular (in election, workings and expression) is not sufficiently capable of the integration needed to counteract the resulting feelings of exclusion from the system.

3 Postscript: the conflict's 'collateral victims'

Examination of the Constitutional Court's jurisprudence shows how the series of judgments handed down in relation to the Catalan sovereignty process have an impact on a very wide range of areas. As a result, the constitutional framework for these areas is affected by the rulings, which are essentially aimed at restricting autonomous community and parliamentary actions. A full analysis of these wider impacts is beyond the scope of this article, but it is worthwhile at least outlining the main aspects.

3.1 Parliamentary debate

The rulings studied have a multitude of effects on the parliamentary arena and, as a result, on the potential for public and politically plural debate in our system. At least three elements are reformulated in the light of this new jurisprudence.

- The scope of judicial review over parliamentary activities has expanded hugely due to decisions such as the admission of challenges to resolutions, decisions that are now considered to have legal effects and which can also lead to suspensions and annulments via orders of execution. In this regard, the dividing line between politics and law appears to have moved in favour of the latter, not just in terms of procedural effects but also as regards the real possibilities for expression through parliamentary debate.

- Parliamentary authorities now have much stronger obligations and powers regarding the processing of initiatives (not so much those that might be unconstitutional, but rather those that could run counter to the Constitutional Court's past rulings). The powers of 'technical review' and the (potentially criminal) responsibility of Presidents and members of parliaments are currently much greater than they were before the Constitutional Court rulings studied in this article were made.

- Although it has not been a direct object of attention for the Court, the scope and effects of parliamentary inviolability take on new nuances and controversial questions arise in this context. This has already resulted in the criminal proceedings against the President and members of the Board of the Parliament of Catalonia.[96]

96 Parliamentary inviolability does not make unconstitutional actions constitutional, but it does exempt them from sanction, particularly criminal charges. The Constitutional Court did not analyse the role of parliamentary inviolability as regards the possible existence of non-compliances or the potential use of orders of execution (deliberation could still be given to weighing the object of the protection of parliamentary inviolability – i.e. free parliamentary and political debate – against compliance with the Court's rulings), so the debate on whether parliamentary inviolability provides exemption from criminal responsibility for actions carried out as part of parliamentary work remains open. The premises of the discussion can be seen in Supreme Court Judgment 1117/2006, of 10 November (Atutxa case), which excluded the actions of the President and the parliament from parliamentary inviolability, considering them actions of internal organisation, of a nature more technical than political; also, taking an opposing standpoint, in the arguments of the Parliament of Catalonia's attorney in the aforementioned Constitutional Court Orders 170/2016 and 24/2017, published in the Official Gazette of the Parliament of Catalonia no. 206, of 8 September 2016, and no. 305, of 19 January 2017, which discuss this distinction and chiefly defend the need to apply parliamentary inviolability in these cases as a necessary means to guarantee the interests protected by parliamentary inviolability: freedom of discussion and debate.

The combination of these elements are a considerable restriction on the full freedom that is traditional in parliamentary debates and expression, such that it must be assessed to what point the Court's decisions in this area are transferable, beyond the question of the Catalan sovereignty process deemed of such 'exceptional relevance'.

3.2 Autonomous community competences

The Constitutional Court's rulings have included some aspects that are new to Spain's system of competences, aspects that are essentially restrictive towards the autonomous communities.

- Firstly, there is of course the matter of autonomous community competences for popular consultations, which have been confined to a very marginal role as regards both the type of consultation left outside of state competence on referendums and the possibilities for autonomous community regulation or actions in the framework of the Organic Law on Types of Referendum.

- Secondly, there has been the development of the notion of 'interference with competences', key in the recognition of legal effects in certain acts and frequently used by the Court in the framework of the Catalan sovereignty process.

- Also the limits of autonomous community competences have been subject to monitoring as regards the administrative configuration of their human and material resources and the internal determination of the functions (and even the names) of their governmental bodies.

- And lastly, in relation to autonomous communities' participation in constitutional reform procedures, relating to both recognition of special effectiveness in their initiatives and determination of the limits in potential actions for the preparation and promotion of any reform.

3.3 Direct democracy

Naturally enough, the referendum concept has been a central object of the Court's attention. Arguments over competence aside, this attention has focused on the following elements:

- The development and reinforcement of the condition whereby the establishment and regulation of referendums is the preserve of the organic law, specifically the Organic Law on Types of Referendum, with a strict view of the possibilities directly open according to the Constitution.

- The explicit consideration of referendums as an extraordinary and exceptional event in Spain's system and the consequently broad interpretation of their limits.

- The limitation on (consultative) referendums as regards questions subject to constitutional regulation, in virtue of respect for the constitutional reform procedure provided, part of a construction that despite having been made in relation to autonomous community referendums, appears to apply to state referendums also.

3.4 The Constitution's integrating function (vs. its legislative function)

In its initial Judgment 42/2014, the Constitutional Court hoped to project the Constitution's integrating qualities and, as a result, its own actions. In the words of that Judgment, 'the primacy of the Constitution, however, does not mean that there is a positive duty to adhere thereto. In Spanish constitutional law, there is no room for a "militant democracy" (…) Approaches that intend to change the very grounds of the Spanish constitutional order are acceptable in law'. These assertions enable even those hoping to change the Constitution to feel integrated within their system, and mean that in the dialogue put forward – 'the public powers (…) are the ones entrusted with resolving any matters arising in this field, through dialogue and cooperation' – compromises are sought to allow the maximum number of citizens to be included in the system.

This initial situation ending up – for the time being at least – with continual orders of execution, open confrontation between institutions, and proceedings for disobedience, thus emphasising the prescriptive nature of the same constitutional law (citing Constitutional Court Order 24/2017, legal grounds no. 9, 'the

anti-judicial will to continue with the "constituent process in Catalonia" outside of the constitutional order'), was perhaps inevitable, but in any case it lays bare the failure of the integrating capacity in this process; a failure on the part of the Court and the Constitution itself to reintegrate a large number of the citizens in its constitutional system.

OTHER WORKS CITED

Government of Catalonia (ed.), '*La suspensión de las leyes autonómicas en los procesos constitucionales*', Institut d'Estudis Autonòmics, Barcelona, 2005.

Albertí Rovira, E., 'Encuesta sobre la cuestión catalana', in *Teoría y Realidad Constitucional*, 2016, no. 37, p. 13ff.

Arbós Marín, X., 'El Tribunal Constitucional como facilitador' in *La última jurisprudencia relativa al Parlamento*, Basque Parliament, Vitoria-Gasteiz, 2016, p. 21ff.

Arbós Marín, X., 'La nació: un pas endavant i dos enrere', in *Revista Catalana de Dret Públic*, 'Especial Sentencia 31/2010 del Tribunal Constitucional sobre el Estatuto de Autonomía de Cataluña de 2006', p. 105ff.

Bar Cendón, A., 'El proceso independentista de Cataluña y la doctrina jurisprudencial: una visión sistemática', in *Teoría y Realidad Constitucional*, no. 37, 2016, p. 208ff.

Barceló i Serramalera, M., 'El derecho a decidir como instrumento constitucional para la canalización de problemas territoriales', in *Fundamentos*, no. 9, 2016, p. 361ff.

Barceló i Serramalera, M., 'Reconocimiento y construcción del derecho a decidir en el sistema constitucional español', in Barceló, M., Corretja, M., González Bondia, A., López, J., Vilajosana, J. M., *El derecho a decidir. Teoría y práctica de un nuevo derecho*, Atelier, Barcelona, 2015, p. 91ff.

Blanco Valdés, R., 'Encuesta sobre la cuestión catalana', in *Teoría y Realidad Constitucional*, 2016, no. 37, p. 13ff.

Castellà Andreu, J.M., 'Consultas populares no referendarias en Cataluña', in *Revista Aragonesa de Administración Pública*, no. 14, 2013, p. 121ff.

Castellà Andreu, J.M., 'Tribunal Constitucional y proceso secesionista catalán: Respuestas jurídico-institucionales a un problema político-constitucional', in *Teoría y Realidad Constitucional*, no. 37, 2016, p. 561ff.

Corcuera Atienza, J., 'Soberanía y autonomía. Los límites del "derecho a decidir" (Comentario de la STC 103/2008)', in *Revista Española de Derecho Constitucional* no. 86, 2009, p. 303ff.

Ferraiuolo, G., 'Tribunal Constitucional y cuestión nacional catalana. El papel del juez Constitucional español entre la teoria y la práctica', in Cagiao Conde, J., and Ferraiuolo, G., (coords.), *El encaje constitucional del derecho a decidir*, Libros de la Catarata, Madrid, 2016, p. 110ff.

Ferreres Comella, V., 'Cataluña y el derecho a decidir', in *Teoría y Realidad Constitucional*, no. 37, 2016, p. 461ff.

Fossas Espadaler, E., 'Interpretar la política. Comentario a la STC 42/2014, de 25 de marzo, sobre la Declaración de soberanía y el derecho a decidir del pueblo de Cataluña', in *Revista Española de Derecho Constitucional* no. 101, 2014, p. 273ff.

Fossas Espadaler, E., 'Encuesta sobre la cuestión catalana', in *Teoría y Realidad Constitucional*, 2016, no. 37, p. 13ff.

Galán Galán, A., 'Del derecho a decidir a la independencia: la peculiaridad del proceso secesionista en Cataluña', in *Istituzioni del federalismo*, no. 4, 2014, p. 885ff.

López Basaguren, A., 'Sobre referéndum y comunidades autónomas: La Ley vasca de la "consulta" ante el Tribunal Constitucional', in *Revista d'Estudis Autonòmics i Federals*, no. 9, 2009, p. 202ff.

Montilla Martos, J. A., 'La sentencia del Tribunal Constitucional sobre la Resolución 1/XI del Parlamento de Cataluña', [blog post, online] Instituto de Derecho Público [accessed June 2017].

Montilla Martos, J. A., 'Encuesta sobre la cuestión catalana', in *Teoría y Realidad Constitucional*, 2016, no. 37, p. 13ff.

Nieva Fenoll, J. and Roig Molés, E., 'El Tribunal Constitucional y sus nuevas, e insólitas, facultades de ejecución', in *Diario La Ley* no. 8892, 2017.

Ridao i Martín, J., 'La juridificación del derecho a decidir en España', in *Revista de Derecho Político* no. 91, 2014, p. 91ff.

Ridao i Martín, J., 'La oscilante doctrina del Tribunal Constitucional sobre la definición de las consultas populares por la vía de referéndum. Una revisión crítica a través de cuatro sentencias', in *Estudios de Deusto*, vol. 63, n. 1, 2015.

Ridao i Martín, J., *El dret a decidir. La consulta sobre el futur polític de Catalunya*, Institut d'Estudis Autonòmics, Barcelona, 2014.

Roig Molés, E., 'Siete cuestiones y una conclusión a propósito de la Sentencia del Tribunal Constitucional sobre la ejecución de sus resoluciones', [blog post, online] Instituto de Derecho Público [accessed June 2017].

Roig Molés, E., 'De expectativas, frustraciones y prudencia judicial. Comentario a la Sentencia del Tribunal Constitucional de 25 de febrero de 2015 sobre la Ley de consultas populares no referendarias de Cataluña' [blog post, online] Instituto de Derecho Público [accessed June 2017].

Satrústegui Gil-Delgado, M., 'Encuesta sobre la cuestión catalana', in *Teoría y Realidad Constitucional*, no. 37, p. 13ff.

Tajadura Tejada, J., 'La STC 42/2014, de 25 de marzo, respecto a la resolución del Parlamento de Cataluña 5/X, de 23 de enero de 2013, por la que se aprueba la declaración de soberanía y del derecho a decidir del pueblo de Cataluña: la introducción del "derecho a decidir" en el ordenamiento jurídico español', in *La* última jurisprudencia relativa al Parlamento, Basque Parliament, Vitoria-Gasteiz, 2016, p. 21ff. and p. 56ff.

Urías, J., 'Damaging the legitimacy of the Spanish Constitutional Court', [blog post, online] Verfassungsblog [accessed June 2017].

Urías, J., 'The Spanish Constitutional Court on the Path of Self-Destruction', [blog post, online] Verfassungsblog [accessed June 2017].

Villaverde Menéndez, I., 'Cumplir o ejecutar: la ejecución de sentencias del TC y su reciente reforma', in *Teoría y Realidad Constitucional*, no. 38, 2016, p. 643ff.

Vintró Castells, J., 'El Tribunal Constitucional y el derecho a decidir de Cataluña: una reflexión sobre la STC de 25 de marzo de 2014', [blog post, online] Revista Catalana de Dret Públic [accessed June 2017].

Vintró Castells, J., 'El Tribunal Constitucional y la consulta en Cataluña: certezas, ambigüedades, decepción', [article, online] Agenda Pública [accessed June 2017].

Vintró Castells, J., 'Decisiones parlamentarias y Tribunal Constitucional', [article, online] Agenda Pública [accessed June 2017].

Vintró Castells, J., 'El Parlamento exprés: antecedentes y contexto', [article, online] Agenda Pública [accessed June 2017].

Vírgala Foruría, E., 'Encuesta sobre la cuestión catalana', in *Teoría y Realidad Constitucional*, 2016, no. 37, p. 13ff.