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Constitutional Moments and the Paradox of Constitutionalism in Multinational Democracies
(Spain, 2006-2013)

The Paradox of Constitutionalism

Most formulations of the paradox of constitutionalism are based on the observation that at times there can be a collision between constituent power and constitutional form, or a clash between politics and law, or between democracy and constitutionalism. Such a collision can lead to a clash of legitimacies between an established constitutional form and the constituent power represented by the democratic will of a people in a well-defined territory. Moreover, modern constitutions often aim not only to establish a form of governmental authority, but also to “reconstitute the people in a particular way. The notion of a *constitutional* identity of a people, and particularly its relation to the *constituent* power possessed by the people, is perplexing” (Walker and Loughlin 2007: 1). There is the suggestion, in the first place, that to the degree that there are “natural” units of “peoples,” constitutional texts can reshape and mold these “natural” boundaries between “peoples.” Political identities can thus be “constitutionalized,” given that there is some space for malleability and fluidity, but, conversely, constitutional form itself is not unchallengeable (Walker and Loughlin 2007: 2).

Therefore, “if the *influence* of constitutional form lies in its ability to refine the meaning and import of collective political identity, its *authority* must nevertheless in some measure depend upon its continuing capacity faithfully to reflect that collective political identity. The formal constitution that establishes unconditional authority, therefore must always remain provisional. The legal norm remains subject to the political exception, which is an expression of the constituent power of a people to make, and therefore also to break, the constituted authority of the state” (Walker and Loughlin 2007: 2).

Modern constitutions come into existence as a result of a singular founding act, usually a Constitutional Convention or Constituent Assembly. The act serves to define the institutional parameters of a new polity and the rules for coexistence. But who is the “people” that authorized this founding moment, acting under what authority? “Does that founding authority extend through time to bind subsequent generations? Does the authorizing agent manifest itself only for the purpose of a foundational act and, its business concluded, extinguish itself? Or does that agent maintain a continuing presence within the polity, such that it may reassert itself to modify, or radically alter, the terms of the original foundation?” (Walker and Loughlin 2007: 3).

At first glance, one possible interpretation is that the constituent power of the people would seem to be circumscribed by the constituted power of the governmental form. But established constitutional forms may also be challenged and questioned. “It is in coming to terms with these realities of power in modern societies that constituent power insinuates itself into the discourse of constitutionalism, whether in the form of oppositional politics in their various guises and the (counter)constitutional visions they implicitly or explicitly espouse or, more generally, by ensuring that the intrinsic tension between the abstract rationalities of constitutional design and the quotidian rationalities of governing remains exposed” (Walker and Loughlin 2007: 4).

The Paradox of Constitutionalism and Multinational Democracies

In contemporary multinational democracies such as Spain, Canada, Belgium, Italy, and the United Kingdom, the political aspirations of sub-state national societies for accommodation by the state, for a special status autonomy, for asymmetric federalism, or for a more satisfactory representational scheme in the administrative organs of the central state have been formulated as demands for constitutional reform in the last 30 or 40 years (Tierney 2004: 17). Such demands, in the context of the social and political peculiarities of multinational democracies, add an additional level of intricacy to the contemporary debates concerning the relationship between constituent power and constitutional form. Contemporary multinational democracies, thus, is the universe of cases covered by the scope conditions of this paper.

The dominant constitutional and political view in sub-state national societies such as Scotland, Quebec, the Basque Country, Catalonia, Northern Ireland, South Tyrol, etc. challenges contemporary assumptions about the nation-state, namely, the 'monistic demos' thesis. The traditional assumptions of contemporary republican theory are disputed in these sub-state national societies: the notion of a "monistic conception of the nation as the embodiment of a unified demos" is rejected. In contemporary multinational democracies, there is a distinctive historiographical account of the state's origins: there is a "conceptualization of this founding moment as a union of pre-existing peoples subsequent to which sub-state national societies within the state continued to develop as discrete *demos*" (Tierney 2007: 232).

Thus, sub-state nationalists present "particular challenges to constitutional form which do not generally arise in uninational states" (Tierney 2007: 236). One of these challenges is directed toward a narrow form of legal formalism that pervades much of contemporary constitutional scholarship: mainstream theorists are asked to re-imagine the very concept of the plurinational constitutional state. "In methodological terms, this challenge critiques the artificial distinction between the legal and the political: constitutional formalism, it is argued, is itself conditioned by, and dependent upon, politically-informed assumptions about reality which may themselves be false. As Resina reminds us, "constitutionalism, no less than nationalism, is a functional myth" (Tierney 2007: 237). Thus, there is a need for a more historically or sociologically contextualized account of constitution-making. It follows that "if the plurinational constitution is to be legitimate in the eyes of all of the state's constituent *demos*, elite state actors must be prepared to embrace the idea of the constitution as a living, reflexive instrument. This requires lawyers to broaden their methods and engage with historical and sociological arguments as useful tools in the task of constitutional interpretation" (Tierney 2007: 237).

In sum, the minority nation-majority nation dynamics one observes in multinational democracies add an additional level of complexity to the contemporary debates concerning the relationship between constituent power and constitutional form.

These debates about the relationship between constituent power and constitutional form matter especially in multinational polities because the challenge posed by sub-state national societies to the central state has been formulated in three varieties of sub-state nationalism: independentist, autonomist, and pro-federation nationalism (Lluch 2010, 2012; Lluch forthcoming). Sub-state national movements tend to bifurcate or, at times, trifurcate, into two or three basic political orientations: independence¹, autonomy², and, oftentimes, pro-federation.³ While independentist nationalism remains a vital force in societies such as Quebec, the Basque Country, and Scotland, at the same time nationalist movements have been increasingly oriented towards seeking an autonomous special status or towards gaining greater power as a constituent unit of a fully formed federation. Non-secessionist alternatives have gained increased prominence. In fact, even when it appears a strategy of secessionism is being advanced, “the constitutional outcome it in fact seeks is often a heavily compromised version of statehood which bears little resemblance to the traditional Westphalian model” (Tierney 2004: 93).

The trend towards accommodation within the state has led to the rethinking and reformulation of increasingly complex constitutional models of accommodation within existing

¹Independence is the realization of full political sovereignty for a nation. For stateless nations, it is the attainment of separate statehood, independent from the majority nation with which they have coexisted within the same state for some time. Also, proposals for Sovereignty-Association and Associated Statehood are variants of the independence option.

²Autonomy proposals are political arrangements that generally renounce independence -- at least for the medium- to short-term -- but which seek to promote the self- government of a territorial unit populated by a polity with national characteristics (Henders, 2010; Lluch, 2011). Contemporary instances of actually-existing autonomy relationships include: Åland Islands/Finland, Puerto Rico/USA, etc. Most cases of actually-existing autonomy arrangements can be clearly distinguished from classic *federations*. Generally speaking, moreover, “autonomy is always a fragmented order, whereas a constituent...[unit of a federation] is always part of a whole...The ties in a...[federation] are always stronger than those in an autonomy” (Suksi, 1998: 25). Autonomist parties seek a special status and special powers within a defined geographical territory, but one that does not constitute a constituent unit of a classic federation.

³Pro-federation nationalists seek to have their nation remain (or become) a constituent unit of classic *federations*, which constitute a particular species within the genus of “federal political systems,” wherein neither the federal nor the constituent units’ governments (cantons, provinces, länder, etc.) are constitutionally subordinate to the other, i.e., each has sovereign powers derived directly from the constitution rather than any other level of government, each is given the power to relate directly with its citizens in the exercise of its legislative, executive and taxing competences, and each is elected directly by its citizens (Lluch 2011).

states. The search for these sophisticated institutional designs of mutual accommodation may as a matter of fact pose a more radical challenge to the state and its constitutional self-understanding than secession itself. “Such demands, if taken seriously by the state, can call into question many of the constitution’s most profound self-understandings including even the conception of unitary citizenship which has been an article of faith for state-building processes” (Tierney 2004: 96). Autonomist and pro-federation substate nationalisms may question central tenets of the constitutional ideology of the central state, and may lead to the development of a “metaconstitutional” discourse -- using Neil Walker’s term – that challenges the state’s traditional constitutional discourse. All of this leads to a rethinking of the possibilities for evolution and development of new models of constitutional accommodation in multinational polities. To encourage such accommodation, it would be best to minimize the tension between constituent power and constitutional form, especially in constitutional disputes between the central state and the governments of sub-state national societies.

Integrating Constitutionalism and Comparative Politics

Constitutionalism has traditionally been the primary mechanism for facilitating the mutual accommodation of sub-state and state national societies in plurinational states. However, as recently noted, in multinational democracies (which are a subset of the genus of “divided societies”), if we are to address the complexities of constitutional mutual accommodation, “*comparative constitutional law* must expand its intellectual agenda to encompass issues that have hitherto been the exclusive domain of *comparative politics* in order to be of relevance...” (Choudhry 2008: 13 emphasis added). In addressing the politics of accommodation and constitutionalism in multinational democracies, therefore, “there is a need to bridge comparative politics and comparative constitutional law through a genuinely interdisciplinary conversation” (Choudhry 2008). Studying constitutionalism and politics in such settings calls for methodological syncretism.

As Sujit Choudhry notes, a “legal approach to the accommodation of minority nationalism has both its strengths and weaknesses” (Choudhry 2008: 172). He further states that “we face genuine difficulty in constituting and regulating moments of constitutive

constitutional politics, because at those moments, the very concept of political community those rules reflect is placed in contention by the minority nation” (Choudhry 2008: 172). Therefore, Choudhry concludes, it is at this point that “we come up against the limitations inherent in constitutionalism itself, at least with regard to its ability to accommodate minority nationalism.”

Constitutionalism, therefore, is not the only dimension of the politics of accommodation in multinational democracies. I postulate that the notion of constitutional accommodation in plurinational polities (Taylor 1994) needs to be unpacked and disaggregated and all of its multiple dimensions need to be analyzed, integrating comparative politics and comparative constitutional law into the analysis.

Constitutional and political accommodation of national diversity in multinational polities is complex because the politics of these societies can involve collisions between constituent power and constitutional form, and such collisions can lead to a clash of legitimacies between an established constitutional form and the constituent power represented by the democratic will of a people in a well-defined territory.

In this paper I seek to go beyond the interesting observation by constitutional theorists (see Walker, Tierney, and Choudhry, cited above) that the paradox of constitutionalism is one of the great paradoxes of contemporary constitution-making and to show how politics and law actually interact in a number of concrete situations in multinational polities. I will show that the clash between constituent power and constitutional form can have an important effect on politics, and thus that constitutionalism can have an effect on the development and evolution of sub-state nationalism, and conversely, sub-state nationalism can mobilize itself with the aim of impacting constitutionalism. There is a mutual interaction between law and politics, and the best method we can use to account for this interaction is to integrate comparative politics and comparative constitutional law.

Spain during 2006-2013 has become a laboratory for observing this interaction between politics and law, and a virtual natural experiment to understand how the clash of legitimacies between constituent power and constitutional form can have a substantial impact

on nationalist politics, both at the state level and the sub-state level. Spain is also interesting because in the constitutional standoff between Catalonia and the Spanish state in the period 2006-2013, the tension between constituent power and constitutional form is expressed in two varieties: first, in the clash between an organic statute of autonomy and a constitution (the Catalan Statute of Autonomy of 2006 versus the interpretation of the Spanish Constitution expressed in the Spanish Constitutional Court decision of June, 2010). This political drama has been playing itself out during 2006-2013. Second, in the case of constitutive referendums, as the current constitutional standoff between the Catalan government (which proposes to hold a referendum on independence in 2014) and the Spanish government (which insists that this is not constitutionally permissible). The first variety arises out of the conflict between constituent power and constitutional form that is crystallized around a “constitutional moment.” The second arises out of the tension between constituent power and constitutional form that arises in a “constituent moment.” Each of these two varieties of the paradox of constitutionalism has an important effect on sub-state and state nationalisms.

Constitutional Moments and Sub-State and State Nationalisms

There are two senses in which *constitutionalism* is a critical dimension of the politics of mutual accommodation in multinational polities. First, constitutions tend to constitute the very *demos* that governs itself under and through the constitutional regime. Constitutions can constitute a *demos* by projecting a given vision of political community with the aim of altering the very self-understanding of citizens, often encapsulated in “constitutional moments.” Second, constitutions “enable decision making by creating the institutions of government [such as the kind of federal system it creates], by allocating powers to them, by setting out rules of procedure to enable these institutions to make decisions, and by defining how these institutions interact” (Choudhry 2008: 5). Sovereign states are themselves engaged in a process of majority nation-building aimed at producing a common national identity across the entire territory of the state. “Constitutional moments” are critical periods given that “constitutions have played a central role in this process [of majority nation-building], both in the regulative sense of creating institutions with state-wide authority to permit the creation

and enforcement of these policies, and in the constitutive sense of projecting an image of political community meant to be internalized by citizens” (Choudhry 2008: 30).

A “constitutional moment” is a higher order constitutional event, which impacts the relationship between the central state -- largely controlled by the majority nation -- and the minority nation embedded within the same state.⁴ It is of a higher order than ordinary legislative activity (Lluch 2010). Such “constitutional moments” are relatively rare, and they represent a critical event that crystallizes the nature of the relationship between the central state and the embedded minority nations. These critical constitutional transformative events include: the adoption of a new constitution, the adoption or proposal of significant constitutional amendments, the adoption or proposal of a new organic statute for the government of the embedded minority nation, the proposal and organization of a referendum on sovereignty for a sub-state territorial unit, etc. (Lluch 2010; Lluch forthcoming). The very process of debating and negotiating a constitutional moment is critical because such moments “help to create the political community on whose existence the constitutional order which results from that process depends” (Choudhry 2008: 6).

Note that these critical constitutional transformative events may be either positive or negative in their final outcome. That is, the event could have led to the actual enactment of a constitutional amendment, organic statute, etc., or the event could have been the proposal of such an amendment, etc., even if it was later rejected. What matters is that the event set in motion the public policy discussion and critical reevaluation of the relationship between majority and minority nations, both coexisting in a dialogical relationship within the same state.

Some constitutional moments are often interpreted by the minority nationalists as an instance of majority nation nationalism, and, thus, these constitutional events impact the intersubjective relations of reciprocity between minority nationalists and majority nation nationalism. Importantly, such constitutional moments often dramatize and encapsulate the

⁴ Bruce Ackerman, *We the People* (Cambridge: Harvard University Press, 1991).

tension between constituent power and constitutional form, or the tension between democracy and law, in multi-*demoi* polities. They may also lead to a clash of legitimacies between an established constitutional form and the constituent power represented by the democratic will of the people in a well-defined territorial sub-state unit.

As my previous research has shown, during 1976-2010, both the Catalan and Quebecois national movements experienced the foundation and growth of new political orientations within the institutional component of their national movements, espoused by nationalist political parties (Lluch 2010). *Esquerra Republicana de Catalunya's* (ERC) transformation into a secessionist party during the late 1980's represented the establishment for the first time in the Catalan parliamentary sphere of a genuinely secessionist formation, where none had existed before. The *Action démocratique du Québec's* (ADQ) founding in 1994, out of discontented elements that came out of the federalist party in Quebec, resulted in the creation of an autonomist formation that was more decentralizing in its program and nationalist animus than the federalist party out of which it emerged. These developments in two different national movements that successfully established new political orientations that represented the radicalization of nationalists' preferences show that constitutional moments can have important political effects.

Intersubjective relations of reciprocity between sub-state nationalists and majority nation nationalism are essential for understanding the "trigger" event that serves as the immediate catalyst that inaugurated the process that led to the founding and growth of independentism in the parliamentary sphere in Catalonia in the 1980s (Lluch 2010). The central state constitutional moment of 1975-1982 was interpreted by the minority nationalists in Catalonia as an instance of non-accommodation and non-reciprocity (Lluch 2010). Similarly, during 1982-1992, three remarkable central state constitutional transformative events occurred during this period in Canada: the final "patriation" of the Canadian Constitution and the adoption of the Canadian Charter of Rights and Freedoms in 1982, the negotiation and ultimate failure of the Meech Lake constitutional Accord during 1987 to 1990, and the proposal and ultimate failure of the Charlottetown Accord in 1992 (Lluch 2010; Lluch forthcoming). These

had an important effect on politics in Quebec, leading to the creation of an autonomist formation that was more decentralizing in its program and nationalist animus than the federalist party out of which it emerged (Lluch 2010).

Sub-state nationalists inhabit an imagined community that is a “moral polity” where reciprocities are expected and notions of collective dignity, the common weal, and mutual accommodation are essential. The perception by these sub-state nationalists that their expectations of reciprocity have been violated is a factor that contributes to the increasing radicalization of sub-state nationalists’ political preferences (Lluch 2012; Lluch 2013).

The previous research I report above concern constitutional moments and political developments that took place in the 1980’s and 1990’s. Recent developments in Spain, especially during 2006-2013, have given us another opportunity to further understand how the clash of legitimacies between constituent power and constitutional form can have a substantial impact on nationalist politics, both at the state level and the sub-state level. I will first examine how the tension between constituent power and constitutional form is expressed in the clash between an organic statute of autonomy and a constitution (the Catalan Statute of Autonomy of 2006 versus the interpretation of the Spanish Constitution expressed in the Spanish Constitutional Court decision of June, 2010). Second, I will refer to the current constitutional standoff between the Catalan government and the Spanish government on the issue of holding a referendum in 2014.

The Paradox of Constitutionalism and the Constitutional Moment in Spain (2006-2013)

The Catalan Statute of Autonomy of 2006 and the Spanish Constitution of 1978

The Spanish territorial model established in the 1978 constitution, the State of Autonomies, has been unsatisfactory for a number of years in the eyes of the main political parties in Catalonia. In Catalonia, the major parties are: *Esquerra Republicana de Catalunya* (ERC), the federation of *Convergència i Unió* (CiU) -- consisting of *Convergència Democràtica de Catalunya* (CDC) and *Unió Democràtica de Catalunya* (UDC) -- the *Partit dels Socialistes de*

Catalunya (PSC), and *Iniciativa per Catalunya-Verds* (IC-V).⁵ “The autonomy achieved at the foundational moment of the Spanish constitutional state was closer to the administrative decentralization than to a model of national minorities accommodation...National pluralism was not implemented by the State central authorities” (Lopez Bofill in Lluch forthcoming). Moreover, autonomy did not ensure the protection of the Catalan language and culture, given the overwhelming presence of Spanish in the public sphere. In the financial and fiscal sphere, the system established has been perceived as inadequate. There has been a “persistent transfer of resources to the Spanish central government as a ‘solidarity’ contribution with the outcome of a fiscal imbalance with the center of almost 17 billion euro, or 9.8% of the Catalan GDP. As an average, during more than 30 years of autonomy, for every euro that Catalans paid in taxes only 57 cents were spent in the region” (Lopez Bofill in Lluch forthcoming 2014).

During a number of years, the major Catalan parties had been putting forward proposals for reform their statute of autonomy. By September 2005, the parties were able to come to an agreement and in September 2005, a major proposal for the reform of the Catalan Statute of Autonomy was passed by the Catalan Parliament. A total of 120 out of 135 members of Parliament voted for the September 2005 Catalan Statute of Autonomy (“CSA”), including the representatives of practically all the Catalan parties, except the *Partido Popular* (Popular Party-PP). The new CSA was a complex document of 110 pages in length and containing a Preamble, a Preliminary Title, and the following eight titles, in its final version (2006):

[Title I. Rights, obligations and governing principles \(articles 15-54\)](#)

[Title II. Institutions \(articles 55-94\)](#)

[Title III. Judicial power in Catalonia \(articles 95-109\)](#)

[Title IV. Powers \(articles 110-173\)](#)

[Title V. Institutional relations of the Generalitat \(articles 174-200\)](#)

⁵ These are the Republican Left of Catalonia, Democratic Convergence of Catalonia, Democratic Union of Catalonia, Socialists’ Party of Catalonia, and Initiative for Catalonia-Greens.

[□ Title VI. Funding of the Generalitat \(articles 201-221\)](#)

[□ Title VII. Reform of the Estatut \(articles 222-223\)](#)

The new CSA proposal sought 1) the recognition of Catalonia as a “nation” and to increase the symbolic, linguistic and identity elements of Catalonia within the Spanish State; 2) the protection of the Catalan self-government powers *vis-à-vis* the central government’s constitutional powers; and 3) the improvement of the finance system in order to limit the “solidarity” contribution.

In the quasi-federal system that is the State of Autonomies, the amendment of an Autonomous Community’s statute of autonomy must be enacted by the Spanish Parliament (*Cortes Generales*) under the shape of a Spanish State law (*Ley Orgánica*). The new CSA of 2005 was amended extensively by both Houses of Parliament (the Congress of Deputies, whose Members must approve the Autonomy Statute’s amendment by overall majority, and the Senate). According to one study, 64.7% of the articles in the proposal that came out of the Catalan Parliament in September 2005 were amended by the Spanish Congress of Deputies (ERC 2006).

The approval by the Spanish Parliament was possible since the Spanish Prime Minister, the socialist José Luis Rodríguez Zapatero, arrived at an agreement with the Catalan leader of the opposition, Artur Mas (who would become Catalan Prime Minister from 2010 until the present) about the definition of the nation, the Catalan language regulation, the allocation of powers and financing. This agreement, however, represented the step back from the principles that had inspired the new CSA of September 2005 (the national recognition, the protection against the central state’s infringement against Catalan self-government’s exclusive competences, the measures adopted in order to strengthen the Catalan language’s social use, and the effort to limit “solidarity” revenue transfers from Catalonia to the central state). The so-called Mas-Zapatero agreement on the amendment of the Catalan Statute of Autonomy engaged the socialist parliamentary groups in Congress and Senate, which at that time were the majority of both Houses. Other minority political groups represented in the Spanish Parliament gave support to the Catalan Statute’s amendment as well (the left-wing political

groups and those that represented national minorities such as the Basque and the Galician, besides the support of the Catalan nationalist group of CiU in the Congress and the Senate). But the main opposition party in the Spanish Parliament, the conservative People's Party (*Partido Popular*, PP) strongly contested the new CSA's amendment process. The People's Party fostered a fierce campaign against the Statute's approval in the course of the winter and the spring 2006, which sometimes included vitriolic language, and a campaign to boycott Catalan products, such as the Cava (Lopez Bofill in Lluch forthcoming 2014).

The final form of the new CSA of 2006 was enacted by the Spanish Parliament and ratified by the Catalan people in a referendum that was held on July 18, 2006 in Catalonia, at which 73.9% of the votes were in favor, 20.8% against, and 5.3% blank votes, with 48.85% participation (Argelaguet in Lluch forthcoming.)

The new CSA of 2006 was therefore the quintessential example of the invocation of **constituent power** to express the democratic will of a people in a territory with a sub-state national society. The text was approved by 120 out of 135 members of the Catalan Parliament in 2005, was then subsequently approved by the Spanish Parliament in 2006, and by the Catalan people in a referendum (2006).

The People's Party voted against the Statute's amendment project in the Spanish Parliament and, after its enactment by the Spanish Parliament and the ratification by the Catalan people, the PP parliamentary groups in Congress and Senate challenged the constitutionality of the new Catalan Statute before the Spanish Constitutional Court in Madrid.

After 4 years of deliberation, the Spanish Constitutional Court (SSC) finally issued the decision on the Statute of Catalonia in June 2010.⁶ The decision has 881 pages, of which 250 contain its legal rationale. The Court nullified 14 key provisions of this Statute and interpreted another 27 key provisions in accordance with the 1978 Spanish Constitution. The decision undermined the aims and the basic structure of the CSA of 2006. The SSC decision of June 2010, and its interpretation of the **constitutional form** embodied in the Spanish Constitution of

⁶ Spanish Constitutional Court Decision 31/2010 of June 28, 2010.

1978, dramatized the clash between constituent power and constitutional form in contemporary Spanish constitutionalism.

According to the interpretation given by Prof. Hector Lopez Bofill, a constitutionalist at Universitat Pompeu Fabra, the recognition of Catalonia as a “nation” was curtailed since the judgment repeatedly stressed that the term “nation” used in the Statute’s preamble had no legal standing. The Court insisted that according to the Spanish constitutional framework there is only one nation, Spain, which is the unique holder of sovereign power through the will of the Spanish people represented in the Spanish Parliament. The term “nation” mentioned in the Catalan Statute’s preamble was therefore rejected by the Spanish Constitutional Court to the extent it contained any attribute of sovereign power. Nevertheless, it was considered compatible with constitutional provisions insofar it referred to what the Spanish Constitution defines as a “nationality”: a community that can exercise a right to autonomy following the procedures set by the Spanish Constitution. The interpretation held by the Court of the term “nation” as a “nationality” was extended to any aspect of the Statute in which the national character of Catalonia was mentioned such as the reference to the “national situation” or the regulation of the “national symbols.” The effort towards a political recognition of Catalonia within a plurinational conception of Spain was therefore rejected by the Spanish Constitutional Court ruling (Lopez Bofill in Lluch forthcoming 2014) (Spanish Constitutional Court Decision 31/2010 of June 28, 2010).

With regard to “historical rights” referred to in article 5 of the Catalan Statute, the Court’s decision deliberately excluded this provision from the recognition that the Spanish Constitution makes of historical rights in Navarra and the three Basque provinces, on which the independent financing system of these territories is based. Avoiding any possible correspondence between the Catalan “historical rights” and the constitutionally enshrined historical rights of the above-mentioned territories, the Court rebuffed the Catalan Statute’s aims not just in the field concerning the recognition of identity elements within the Spanish State but also in the improvement of the Catalan’s financing system (Lopez Bofill in Lluch forthcoming 2014) (Spanish Constitutional Court Decision 31/2010 of June 28, 2010).

Concerning linguistic rights, the ruling abolished the preferential status for Catalan in the Catalan public administration and media. Even though the decision maintained the regulation of Catalan language in the area of education and its vehicular character, the Court subjected the Statute's provisions to the recognition of the Castillian language as vehicular in education at the same level of Catalan. The Constitutional Court's decision on the Statute regarding language policy was the beginning of a sequence of judgments issued by Spanish ordinary courts that have threatened the policy established from 1983 by the Catalan government of making Catalan the main language of communication and learning in Catalonia's public schools. This policy was considered a key tool in order to preserve the Catalan language after 40 years of prohibition during General Franco's dictatorship. However, according to the Constitutional Court ruling, Spanish should increase its presence as a language of learning, menacing the social use of Catalan among students and thus in the future (Lopez Bofill in Lluch forthcoming 2014) (Spanish Constitutional Court Decision 31/2010 of June 28, 2010).

As far as the allocation of powers, the Constitutional Court's ruling on the Catalan Statute closed the door to the Statute's intention of modulating the competences framework between the State and the Autonomous Community of Catalonia. The ruling deactivated practically all the new aspects that the Statute had sought to introduce, by explicitly specifying an inferior position of the Statutes of Autonomy within the block of constitutionality and promoting the role of the Constitutional Court in the interpretation of the system of the allocation of powers. Therefore, it rejected all of the Statute's attempts to broaden the material content of the autonomous community's exclusive powers and to ensure that, as far as possible, the central government would not use its own powers to intervene in these areas. The ruling stated that the Constitutional Court enhanced its interpretative monopoly on the general categories regarding the functional definition of competences, watering down the range of exclusivity applied to the competences recognized under the new CSA of 2006 (Lopez Bofill in Lluch forthcoming 2014) (Spanish Constitutional Court Decision 31/2010 of June 28, 2010).

Regarding institutions, the ruling questioned the articles related to the Judicial Power altogether and declared them unconstitutional.

Finally, the financing system was also heavily modified by the Spanish Constitutional Court's decision since it reduced the legal effect of the Statute's provisions in this area. The Statute's norms are not enforceable against the Spanish Parliament, which is sovereign to regulate the contribution of every Autonomous Community to the "solidarity" fund, and the financial transfers. In practice, the Constitutional Court's decision on the financing system was contrary to one of the central purposes of the new CSA of 2006: to do a structural reform of Catalonia's financing system and to avoid the burden of fiscal transfers and the enormous fiscal imbalance with the center that has a deleterious effect on the sub-state territory's economy (Lopez Bofill in Lluç forthcoming 2014) (Spanish Constitutional Court Decision 31/2010 of June 28, 2010).

The Political Effect of the Paradox of Constitutionalism in Spain, 2006-2013

The Spanish Constitutional Court ruling on Catalonia's Statute was contested by a huge demonstration that filled Barcelona's center on July 10, 2010 with an estimated attendance of more than one million people. Even though the call for independence began to be present in the demonstration, the march's slogan, "We decide. We are a nation" still sought to defend the will of the Catalan people expressed in the new CSA of 2006. Even Catalonia's Prime Minister at that time, a member of the PSC opposed to Catalan independence, José Montilla, expressed his "disappointment and indignation" with the Spanish Constitutional Court's ruling and supported the march summoning the Catalan people to demonstrate in order to defend the full implementation of the Statute (Lopez Bofill in Lluç forthcoming 2014).

The constitutional moment of 2006-2010 was interpreted by many in Catalonia as an instance of majority nation nationalism, and, thus, it impacted the intersubjective relations of reciprocity between minority nationalists and majority nation nationalism. Importantly, it embodied the tension between constituent power and constitutional form. Many scholars and political analysts would concur that the constitutional moment of 2006-2010 has served as the "trigger" event that is the immediate catalyst for the dramatic growth of independentism in the parliamentary sphere in Catalonia between 2010-2013.

In late November 2010, elections were held in the Parliament of Catalonia, and there emerged a new political plurality. CiU, the moderate Catalan nationalist coalition, won 62 seats out of 135. However, it had to govern in minority, hoping to receive some support from other parties. The political commitment of the new president, Artur Mas, was to get a new fiscal pact and try to cope successfully with the economic crisis that was having two important effects: it was eroding the living conditions of many families and it was jeopardizing the finances of the Government that allowed implementing welfare policies (Argelaguet in Lluç forthcoming 2014).

On September 11, 2012, during the Catalonia's National Day celebrations, hundreds of thousands of people took to the streets of Barcelona calling for Catalonia's independence from Spain. After this massive demonstration, Artur Mas, the Catalan's Prime Minister, dissolved the regional Parliament and called for elections. The Prime Minister's coalition, *Convergència i Unió* (CiU) included for the very first time in 2012 the demand for statehood in its electoral manifesto (Lopez Bofill in Lluç forthcoming 2014).

On November 25th, 2012, in the elections to the Parliament of Catalonia,⁷ CiU received 30.7% of the votes and 50 seats (out of 135); ERC, 13.7% and 21 seats; PSC, 14.4% and 20 seats; PP, 13.0% and 19 seats; ICV-EUiA, 9.9% and 13 seats; C's, 7.6% and 9 seats; and, finally, CUP, 3.5% and 3 seats.⁸ These results show that in Catalonia there is a clear majority of the parties that are defending the so-called 'right to decide' (CiU, ERC, ICV and CUP), that is, they believe that the people of Catalonia have the right to choose its political future (including

⁷ Source: Departament de Governació, Government of Catalonia.

⁸ CiU, *Convergència i Unió* [Convergence and Union], is a moderate center to right catalan nationalist coalition. ERC, *Esquerra Republicana de Catalunya* [Republican Left of Catalonia], is an pro-independence and leftist party. PSC, *Partit dels Socialistes de Catalunya* [Party of the Socialists of Catalonia] is a Catalan socialist party with narrow links with PSOE (PSOE). PPC, *Partit Popular Català* [Catalan Popular Party] is the regional branch of the Popular Party (PP). ICV-EUiA, *Iniciativa per Catalunya Verds – Esquerra Unida i Alternativa* [Initiative for Catalonia Greens – Alternative and United Left] is a coalition between a postcommunist and green party with a coalition of leftist groups led by the Party of the Communists of Catalonia (PCC). C's, *Ciudadanos – Partido de la Ciudadanía* [Citizens – Citizenship's Party], is a Spanish nationalist and populist party. CUP, *Candidatura d'Unitat Popular* [Popular Unity Candidature] is an extreme left and pro-independence party. SI, *Solidaritat per la Independència* [Solidarity for Independence] is a pro-independence party.

independence) and, moreover, they are committed to holding a referendum in which the Catalans will be able to express their preferences (Argelaguet in Lluch forthcoming 2014).

One of the first decisions of the new Parliament was to approve, on January 22nd of 2013, the Resolution 5/X, whose title was “the Declaration of sovereignty and right to decide of the people of Catalonia.”⁹ Its centerpiece states that “The people of Catalonia has, for reasons of democratic legitimacy, the nature of a sovereign political and legal subject.” This resolution - adopted by 85 votes in favor (CiU, ERC, ICV-EUiA and a member of CUP), 41 against (PSC PPC and C's) and 2 abstentions (CUP)¹⁰- came into collision with the Spanish Constitution, which establishes that the Spanish people are sovereign (Argelaguet in Lluch forthcoming 2014).

The new Parliament of Catalonia of 2012 is reflecting the growth of the secessionist option occurred in the Catalan society in recent years, especially since the Constitutional Court ruling of June, 2010.

Data from *Centre d'Estudis d'Opinió* (CEO) of the Catalan government show the dramatic growth of catalanist sentiment and independentism. Its director, Prof. Jordi Argelaguet, has provided us with up- to-date data, which I reference here. The CEO is a well-respected instrumentality in charge of measuring public opinion. While non-partisan, it is a branch of the Catalan government, and thus is clearly not a neutral party. It is the counterpart of the *Centro de Investigaciones Sociológicas* (CIS) in Madrid.

⁹ This complete declaration is available at <http://www.parlament.cat/web/documentacio/altres-versions/resolucions-versions>

¹⁰ Five members of the Parliament belonging to PSC did not participate in the vote because they did not want to vote against the “right to decide” like it was suggested by their party. Two deputies belonging to CUP abstained because they rejected the references to EU and some other aspects of this Declaration.

Table 1. Constitutional preferences of the relationships between Catalonia and Spain according to *Centre d'Estudis d'Opinió* surveys (2006-2013).

	Region	Autonomous Community	An State within a Federal Spain	An Independent State	DK/NA	N	Source
2006 (1)	8.1	38.2	33.4	13.9	6.3	2.000	REO, 346
2006	6.8	40.0	32.8	15.9	4.5	2.000	REO, 367
2007	5.1	37.8	33.8	17.3	6.0	2.000	REO, 404
2008	7.1	38.3	31.8	17.4	5.4	2.000	REO, 466
2009	5.9	37.0	29.9	21.6	5.6	2.000	REO, 544
2010	5.9	34.7	30.9	25.2	3.4	2.500	REO, 612
2011	5.7	30.3	30.4	28.2	5.4	2.500	REO, 651
2012	4.0	19.1	25.5	44.3	7.1	2.500	REO, 705
2013	4.4	20.7	22.4	46.4	6.1	2.000	REO, 712

(1) This is the first survey of the CEO's Barometer Series, in March 2006. The other surveys are the last wave of the Barometer in each year. In 2013, it is the first wave of the Barometer.

Source: (Argelaguet in Lluç forthcoming 2014).

Table 1 shows the dramatic upswing in the citizenry's political orientation. Pro-independence alternative has grown from 13.9% to 46.4% in 2013. Correspondingly, the pro-autonomism orientation (which represents the status quo- the State of Autonomies) has suffered a drop from 38.2% in 2006 to 20.7% in 2013. The pro-federalism orientation has also suffered a dramatic descent from 33.4% to 22.4%.

I conclude that this data indicates that the pro-independence orientation is at its best moment in history, and its upward turning point can be located in 2011, which is right after the constitutional moment of 2006-2010. This provides support for my thesis that the latter was the "trigger" event and the immediate catalyst for the dramatic growth of independentism in Catalonia between 2010-2013.

TABLE 2. Subjective National Identity in Catalonia (1979-2013)

	Only Catalan	Cat > Spa	Cat= Spa	Spa > Cat	Only Spanish	DK/NA	(N)	Source and study number
1979	14.9	11.7	35.4	6.7	31.3		1.079	DATA
1982	9.3	11.7	41.2	8.7	23.1		1.176	DATA
1984	7.1	22.4	46.2	8.8	12.5	3.0	4.872	CIS, 1413
1988	11.1	28.2	40.4	8.4	9.1	2.7	2.896	CIS, 1750
1992	15.6	23.4	35.7	8.3	14.9	2.0	2.489	CIS, 1998
1995	13.4	23.1	41.0	7.0	13.8	1.7	1.593	CIS, 2199
1999	14.0	21.8	43.1	6.1	11.5	3.3	1.368	CIS, 2374

2001	15.4	25.8	35.9	6.2	14.7	2.0	2.778	CIS, 2410
2003	13.9	24.7	43.2	6.7	9.8	1.8	3.571	CIS, 2543
2006	13.8	24.7	41.6	7.6	8.8	4.5	1.965	CIS, 2660
2006	14.2	27.7	42.5	5.2	6.6	3.9	2.000	REO, 346
2006	14.5	27.2	44.3	4.7	6.1	3.2	2.000	REO, 367
2007	17.1	29.4	41.2	5.1	3.9	3.4	2.000	REO, 404
2008	16.4	25.7	45.3	5.4	4.7	2.5	2.000	REO, 466
2009	19.1	25.6	42.7	4.5	5.7	2.4	2.000	REO, 544
2010	20.3	25.5	42.5	3.9	5.5	2.3	2.500	REO, 612
2011	20.5	29.5	39.3	3.3	5.0	2.4	2.500	REO, 651
2012	29.6	28.7	35.0	2.5	2.0	2.3	2.500	REO, 705
2013	29.1	27.9	35.1	2.7	2.9	3.2	2.000	REO, 712

Sources: DATA. Quoted by Shabad and Gunther (1982); CIS, Centro de Investigaciones Sociológicas, available at www.cis.es; CEO, Centre d'Estudis d'Opinió, available at www.ceo.gencat.cat
Note: DATA and CIS surveys are based on personal interview; CEO, CATI.

Source: (Argelaguet in Lluç forthcoming 2014).

Table 2 shows subjective national identity in Catalonia, based on the “Linz-Moreno” question, which allows us to examine an indicator on the identification of individuals with two political communities that claim to be nations, as in this case, Spain and Catalonia. There have been some changes: between 2006 and 2013, the Catalan identity has grown while the Spanish one has declined significantly.

	2001	2011 (June)	2011 (Oct.)	2012 (Jan.)	2012 (June)	2012 (Nov.)	2013 (Feb.)
Yes, in favor	35.9	42.9	45.4	44.6	51.1	57.0	54.7
No, against	48.1	28.2	24.7	24.7	21.1	20.5	20.7
Non voting	---	23.3	23.8	24.2	21.1	14.3	17.0
Other answers	---	0.5	0.6	1.0	1.0	0.6	1.4
DK	13.3	4.4	4.6	4.6	4.7	6.2	5.2
NA	2.8	0.8	1.0	0.9	1.1	1.5	1.0
(N)	2.777	2.500	2.500	2.500	2.500	2.500	2.000
Source	CIS	CEO	CEO	CEO	CEO	CEO	CEO
Study number	2410	652	661	677	694	705	712

Notes: *Centro de Investigaciones Sociológicas* (CIS) survey is an interview face to face. *Centre d'Estudis d'Opinió* (CEO) survey is a CATI one.

Source: (Argelaguet in Lluç forthcoming 2014).

Table 3 shows the growth in the pro-independence orientation in Catalan politics. As I have noted previously, in 1989 for the first time in contemporary Catalan history, a fully pro-

independence political party (*Esquerra Republicana de Catalunya*) made its appearance in the parliamentary sphere. This political orientation has been gaining support in the electorate: in the 1990s it was about one-third, and in 2013, it has been measured at 54.7%.

Conclusion

The shift during 2010-13 in Catalan public opinion about constitutional preferences is remarkable, and I argue that the constitutional moment of 2006-2010 was the “trigger” event and the immediate catalyst for this dramatic growth. The paradox of constitutionalism in Spain during 2006-2010 has had a concrete political effect: it shows how politics and law actually interact, and how it can serve as a catalyst for the growth of the pro-secessionism orientation in sub-state nationalism in multinational polities.

These events also confirm one of the theoretical points made in my previous work: sub-state nationalists inhabit an imagined community that is a “moral polity” where reciprocities are expected and notions of collective dignity, the common weal, and mutual accommodation are essential. The perception by these sub-state nationalists that their expectations of reciprocity have been violated is a factor that contributes to the increasing radicalization of sub-state nationalists’ political preferences (Lluch 2012; Lluch 2014).

However, it needs to be recognized after the “trigger” event of the constitutional moment of 2006-10, other factors came into play, which had an additional effect on the growth of sub-state secessionism in Spain. Some of these factors “concern strictly political issues such as election results and formation of new governments or they are related to public policy (bills, public investment in the area)...or economic factors (the economic crisis and its impact on the finances of the Government of Catalonia, with all its consequences); or, even, they affect some symbolic elements (expressions of opposition to the action of the Head of the State, for example). Also, this process is completed with the structuring of a wide social movement in favor of independence, which showed a high capacity for action in the public sphere and to exert pressure on political parties” (Argelaguet in Lluch forthcoming 2014).

From 2012 to the present, there is constitutional standoff between the Catalan government (which proposes to hold a constitutive referendum on independence in 2014) and the Spanish government (which insists that this is not constitutionally permissible). Chapter 3, Section 148 (17) of the Spanish Constitution states that “authorization of popular consultations through the holding of referendums” is one of the prerogatives of the central state. A new constitutional moment is configuring itself during 2013-2014, and this new instance of the paradox of constitutionalism is sure to have a palpable effect on sub-state nationalist politics.

Unlike the Scottish case, where an agreement between the Scottish Prime Minister, Alex Salmond, and the British Prime Minister, David Cameron, was signed on 15 October 2012 in order to provide the legal framework for the holding of Scotland’s independence referendum, the Spanish government led by Mariano Rajoy (PP) has taken a stand against the Catalan proposal to hold a referendum on independence. The Spanish government strong opposition is supported by the interpretation of the Spanish Constitutional Court defending the most restrictive point of view on the issue of the right to self-determination of other nations currently existing within the Spanish state (Lopez Bofill in Lluç forthcoming 2014). What is the normative status of constitutional referenda within multinational polities, which may call into question fundamental constitutional presuppositions of existing states? Is there a right to holding constitutional referenda in multinational polities? How do we determine what is the demos entitled to participate in such a referendum? (Tierney 2012) These are some of the questions that will be on the constitutional and political agenda in Spain during 2013-2014.