PREPRINT: Enrique Guillén López, "Constitutional Reform and Federalism in Spain. A Modest Proposal", en *Claims for Secession and Federalism. A Comparative Study with a Special Focus on Spain*. López-Basaguren, Alberto, Escajedo San Epifanio, Leire (Eds.), Springer, 2019. ISBN 978-3-319-59707-2.

CONSTITUTIONAL REFORM AND THE FEDERAL STATE. A MODEST PROPOSAL

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RESUMEN

En esta contribución se mantiene que hay una relación clara e importante entre el procedimiento de reforma de la Constitución y la estructura territorial del Estado, tal y como ha sido advertida por autores como Ackerman. Se analiza la evolución del modelo territorial español, que se ha convertido indudablemente en un Estado federal que, sin embargo, mantiene en su Constitución unas reglas de reforma que no tienen suficientemente en cuenta la voluntad de las Comunidades Autónomas. De acuerdo con esta lógica se propone una reforma del procedimiento de reforma de la Constitución que permita encontrar una solución que puedan compartir, tanto los partidarios de la reforma constitucional como los partidarios del referéndum.

ABSTRACT

This paper considers that there is a clear and important relationship between the procedure for amending the Constitution and the territorial structure of the state, as has been noted by authors such Ackerman. However the evolution of Spanish territorial system, which has undoubtedly become a federal state, the rules of constitutional reform not sufficiently take into account the will of the Autonomous Communities. According to this logic a reform of the procedure of amending the Constitution to allow a solution that

can share both supporters of constitutional reform as supporters of the referendum is proposed.

PALABRAS CLAVE
Reforma constitucional, Estado federal, referéndum.

KEY WORDS
Constitutional amendments, Federal state, referéndum

Bruce Ackerman is the author of one of the finest and most realist works on the American constitutional model. His understanding of it, from its foundation to its most recent transformations (Ackerman, 1993, 1998) has allowed him to outline a comprehensive, very high-profile and important theory[1]. It is a theory, not a description, of which the cornerstone is the principle of democracy. One his most recent works is entitled *The Living Constitution* (2007), and in it he compiled his understanding of judicial and political processes; a twofold understanding in that it distinguishes between normal politics and Constitutional Moments. This distinction is an attempt to grasp the reality of the American constitutional model that, as is well known, is not only limited to the Constitution and its Amendments, but also covers what he refers to as the landmark statutes and judgments of the Supreme Court, some of which, I might add, clearly identify the constitutional model (in that they establish its basic elements), while others also form the authentic standard of constitutionality to which the production of regulations are subject in normal terms.

[1] Habermas, for example, introduces and discusses his theory in regards to the controversy over the legitimacy of constitutional justice. Cfr. Habermas (1996). Waldron (1999), Sager (2004) and Bellamy (2007) among others also directly dispute its construction.

In particular, Ackerman's theory cannot be understood without considering the situation that the American political model is in as a result of the enormous difficulties in implementing constitutional amendments. This is what creates, in turn, a series of challenges that are no less conceptually dense, such as the ultimate legitimacy of constitutional justice[2] where the parameter of formal judgement is not updated with sufficient frequency, such that each Constitution is not a generalised expression of the expectations of the living generations.

With regard to the content of these reflections, I believe it is hugely important to bring to light how, for this author, the underlying problem that makes American constitutional reform impracticable is to do with the transformation of the political substance of the model for the territorial distribution of power that the US has been undergoing from its foundation to the present day. He points out that the procedure of 1787 is based on the consent of the States, since the assent of ¾ is needed, which exactly corresponded with the logic of the recently established federal model[3]. Nevertheless, he continues, the blocking ability of the territorial

[2] This is what, since Bickel, has been known as the counter-majority aspect of constitutional justice. Cfr. See Ahumada (2005)

[3] "We have become a nation-centered People stuck with a state-centered system of formal amendment" (2007, 1743). So "The great challenge for constitutional law is to develop historically sensitive categories for understanding these developments" (Ibid.) See also: "I don't suggest that Americans think of themselves as citizens of a unitary nation-state on the model of, say, nineteenth-century France. We remain Pennsylvanians or Oregonians as well as Americans, but the textual promise of the Fourteenth Amendment has finally become a living reality: we are Americans first. And as the priority of national citizenship has become a fixture of the living Constitution, the inadequacy of other state-centered forms inscribed in the text, and unchanged since the Founding, has become a very serious problem" (2007, 1749-1750).

governments is contrary to the undisputable fact (in the generalised sense a product of decades of political, regulatory and jurisprudential activity) according to which the notion of federal citizenship has changed – not exclusively, of course, but predominantly. In short, Ackerman maintains that it is in large part the mistake of sticking to the reform procedure of a fearful, it could be said, Federal State (fearful that the States that paved the way to federation might question its very existence). This now presents an obstacle to the possibility of any reform, in spite of the fact that not even the slightest amount of mistrust that there was at its origin remains.

It is precisely this thought that I believe ties it to Spain's current situation. In our case, we are also facing a development in a clearly opposite direction to that of the US and, in my opinion, we can also see how radically unsuitable constitutional reform procedures are for the current political identity of the model. It is not appropriate to add anything here to what I believe is undisputed territory: Spain went from being a completely centralised state in 1978 to starting a process of decentralisation, which has turned it into a federal state (*sui generis*, but federal. Aja, 2007). With the Spanish Constitution as an enabling law, the thrust of regulation and, in large part, of case law (I limit myself here to the undisputable landmark judgments of the Constitutional Court to affirm the autonomy of the territories) have led the Autonomous Communities to become clearly identified political subjects who act within the framework of a competence distribution system that was showing ever greatly instability as a result of —not entirely but essentially— something to which judicial-political systems are not immune to either: the passing of time.

Over time, Spain has gone from being a Unitary State to a Federal State. Time also makes it necessary for the framework to be updated, and for the

common collaboration project that any regulatory Constitution entails to be renewed. This need is, incidentally, the only certainty that the author upholds in this paper.

As a result of the undisputable crisis in the territorial model since Judgment 31/2010 (Montilla, 2015) two fundamental options arise[4]. The first, upheld by the Catalan separatist circles and which has become ingrained firstly[5] in the public imagination, and subsequently in the political and judicial debate[6], is the successful concept of the "right to decide", which establishes the possibility of a referendum on self-determination (Ridao, 2014), essentially based on the British and Canadian experiences[7].

The second consists of rejecting the possibility of such a referendum and setting out a constitutional reform that would allow our fundamental law to fully recognise the fundamental constituents our federal system (identity issues, an institutional organisation in keeping with the type of federalism it creates, clarification of the competence distribution system, establishing mechanisms for sufficient spending power, essentially[8]).

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[4] In reality, the third, which is the one espoused by the National Government during this legislature, is to keep the edifice unscathed. This is the equivalent of the Titanic strategy: musicians playing their sombre melodies as the majestic ship sinks.

[5] Tornos (2014) and Montilla (2015), among others, acknowledge this gimmick. It certainly is dishonest, as Caamaño (2014) recalls..., but I believe for now at least, it is the same as arguing about the reason why those who hold the winning cards do.

[6] See Constitutional Court Judgments 42/2014 and 259/2015.

[7] Both beautifully studied by López Basaguren (2014) and Castellà (2014)

[8] See The proposal of the Spanish Socialist Workers' Party (PSOE). Available at http://web.psoe.es/source-media/000000562000/000000562235.pdf. Cfr. Also Cámara (2016) and Solozábal (2014)

Certainly, the latter is the option that, in terms of pure constitutional theory, seems the tidiest and the one that has the fewest flaws from a technical and judicial point of view. However, never have the words of Judge Holmes been more appropriate, when he affirmed that law is not about logic but experience (Holmes, 1995, 115). Of course, as I have mentioned, no less than the law which is at the top of Kelsen's magnificent pyramid and which is the product of the political community's capacity for self-determination could be the starting point from which to reform the entire judicial system[9]. However, it so happens[10] that the transformation of the Constitution via the Constitution demands the acceptance of the legitimacy of the latter and, of course, it means recognising those empowered by the reform procedure as subjects of the decision-making process. This is where the logic becomes impractical: in the current state of affairs, in Catalonia, a constitutional reform that depended on an electorate that only took into account the national variable would be doomed to failure. (Or the mere potential for failure would make it fail, especially where it is close to an option with a greater chance for success: referendum). Constitutional reform, as it appears in Title X of the Spanish Constitution, is an account of this failure. This is because, as per Ackerman's work which acts as a prism for these considerations, the reform of our Constitution is not being thought of in a Federal State Perspective but rather in a Unitary State Perspective[11], which means that there will always

[9] This idea was rightly, of course, echoed during the first doctrinal discussion over the Second Generation Statutes. (Balaguer, 2015, 366)

[10] And not just this: the pyramid's replacement with the circle as the best descriptive device for the contemporary legal system had already been observed by Nieto (1983) very early.

[11] We could even say that he was thinking about the specific model of a unitary state of parties, as is derived from the fact that Article 166 of the Spanish Constitution states that popular initiative is excluded from among those authorised to propose it. See Presno's (2014) reform proposal

be those who see the laying of these foundations as the final attempt for a Pyrrhic victory – their swan song.

The alternative put forward is therefore a referendum. This is done in recognition of the "right to decide"[12], but not exclusively so. De Carreras (2014), for example, distinguished between both extremes, by denying the existence of the right to decide as was suggested in some sectors, although he did accept[13] the possibility of a consultative referendum as provided for under Article 92, following the appropriate reform of the regulating Organic Law. A legal analysis of the situation requires us to consider various issues. The first is that the "right to decide" in general, with no strings attached and without limits, does not exist in a Constitutional State. There are two well-understood concepts in law with which this clearly relates. The first would be the People's right to self-determination, though I am not going to go any more detail than I have above on the inappropriateness of applying this principle —which was created to support the liberation of nations oppressed by the colonial powers— to the current situation of an Autonomous Community in Spain[14]. The second, however, has not been cast aside. It is used as one of the flagships of the new social construction of reality (Luckmann and Berger, 1966), for reasons partly attributed to the system's failure to control new social demands[15]. It is a concept in open recovery, with positive connotations for the capacity of shifting and overcoming realities. It looks to the future and refers to the capacity to shape a new reality based on

[12] For instance, Ridao (2014).

[13] This is also the opinion of Rubio (2012)and Tornos (2014), among others.

[14] In fact, it is a concept that the right to decide relegates to the sidelines.

[15] Regarding this in general, see Guillén (2015)

the establishment of a new political subject being brought to light: that of Constituent Power. It is the return of a renewed classic (as is also the decision – let us not forget Schmitt). The expression "Constituent Power"[16], as a power that can be exempted from all previous legal restriction (through the constituent process that is carried by the correlative process of "disconnection") and attributed to a new sovereign subject —in this case, the Catalan Nation— is present in Catalan Parliament Resolution 1/XI of 9 November 2015. Naturally, the Constitutional Court, in Constitutional Court Judgment 259/2015, does what is appropriate in reality: a consistent reminder of what Constitutional State has meant since WW2, based on the denial of sovereignty on the fringes of the law (Kriele, 1980) and, therefore, on the rejection of the idea that all processes of constitutional change may hinge on "Constituent Powers", i.e. solely on the self-appointed legitimacy of players who they themselves set out the procedure to follow[17]. I believe this affirmation to be flawless. The right to decide is not the right of a single territory to make a general decision, on any issue and in accordance with any procedure. On the other hand, if the "right to decide" is considered as a right to be heard, such that the decision is made in a wide communicative context[18] —a "we decide"— the issue starts to take on a different nuance which, still from a solely legal perspective, may lead it to be considered differently. I have already briefly suggested that I believe there is no clear legal obstruction preventing a referendum from being held, a "consultative" one in any case, in which the citizens of an Autonomous Community are

[16] See the recent and very interesting Azpitartes's approach. (Azpitarte, 2015)

[17] Ground 5 in particular.

[18] Here we should refer to the most Habermasian ideas possible. This understanding of the right to decide coincides with the Constitutional Court's favourable interpretation of it in Judgment 42/2014.

consulted regarding their willingness to belong to a State. Another matter are the aspects mentioned above regarding the question at issue, the method of obtaining the necessary majorities, the constituency to be used as a reference, and other considerations which I am not going to address here, and which are normally considered using Canada's Clarity Act as a model[19]. However, regarding the Canadian and British models as possible inspiration, I would like to bring one consideration to light. For some doctrines, a consultative referendum on whether an Autonomous Community should belong to Spain, addressed exclusively to the registered voters in that territory, would be directly prohibited by Article 2 of the Constitution, in that this Article acknowledges the indissoluble unity of the Spanish Nation. Nevertheless, in my opinion, it should be pointed out that this interpretation makes Article 2 a clause of intangibility, and the doctrine concerning this particular matter is unanimous (De Otto, 1987; Balaguer, 1992). It is possible, therefore, to reform the Constitution in its entirety, including this Article, and the reform does not necessarily have to be prior to any future referendum. The Constitutions close off some decision, but not discussion. They could not do so even if they wanted to. This is why the image repainted by Elster (1979) for constitutional purposes is so brilliant and so accurate at the same time: Ulysses is tied to the mast, but he does not stop hearing the Sirens' song. He is tied up, but they do not give him ear plugs. The problem is, I find the response that it is not possible to consider in any way the Canadian or British experiences because our constitutional model is not comparable deeply unsatisfying and hardly consistent. Certainly, in these times, with multi-level constitutionalism which is aspiring to be global constitutionalism, with an extremely deep-rooted interdependence between legal disputes through the

[19] See, for example, De Carreras (2014). Chacón and Ruiz Robledo (1998), for instance, have paid in Spain a lot of attention to this decision from the outset

dialogue with the Courts placed as the guardians of the various legal systems, I do not think that these issues can, or should, be resolved on an exclusively national level. The two key elements of constitutionalism are, from the perspective of Article 16 of the Declaration of the Rights of Man and of the Citizen, the division of powers (and here we could include both territorial and functional division) and rights. It is true that the integration of rights has shown signs of greater impetus[20], but we must not forget other classic principles that we learned during our first foray into constitutional doctrine: the interdependence between the dogmatic and organic parts of Constitutions. In short, what I mean by this is that, ultimately, determining the relevant territorial structures and specifying their field of competence are also issues that essentially affect the fundamental right to political participation. Regarding these arguments, I do not see sufficient basis for the affirmations of those who say we cannot use the foreign precedents of two model countries that, we should always remember, have never succumbed to the enemies of the Liberal State.

Therefore, a consultative referendum is, in my view, possible. It clearly entails risks, but also some not so sombre possibilities, not least of which is that the huge majority of Catalans who wish to vote and who have embraced the idea that this expression of their will is a right[21] feel acknowledged by this rule. They once again recognise in the Constitution a guarantee of a worthy position and not the systematic brake that they have been seeing for years. Nonetheless, given that the risks of calling a referendum (which, in

[20] Pinon (2015) expressly shows this.

[21] In this regard, we should recall Peter Häberle's doctrine of the open society of constitutional interpreters, applicable in this case in that majority opinion that is consistent and maintained over time must be relevant to the content of a right, over which those who are entitled to the right have control (Häberle, 2008).

addition, could give rise to further emulations in other parts of the country) are deemed sufficiently high so that acceptance by part of the country's political spectrum has been ruled out, a compromise needs to be found.

In my view, the compromise solution can be interpreted as contrary to Ackerman. Let us amend the constitutional reform procedure to make it compliant with the true Federal State that we are and let us definitively involve the Autonomous Communities in approving it. I would like to raise some issues related to this idea for discussion. In my opinion, it could be positive, in terms of stimulating relationships between the Autonomous Communities (which is always more positive than bilateralism), for the initiative for reform to be limited to requiring that, in order to implement any reform of the territorial model, a proposal would need to be presented by at least three Communities. In this case all parliamentary procedures would need to be adapted so as to fully guarantee defence of the proposals on the part of the territories. In addition, in this proposal, together with the public representatives (reducing the majorities that currently make the use of Article 168 impracticable), and before the direct intervention of the entire People in a referendum, it would necessary for at least 15 Parliamentary Assemblies of the Autonomous Communities (plus the two Autonomous Cities) to support the bill. Thus, any constitutional reform undertaken would have to seek to avoid being blocked by 5 territories. If 5 territories do not back the proposed reform, the reform would legally fail because it will be impossible for it to be successful in terms of its effectiveness[22]. Citizens shall naturally be the final bearers of the decision. A Constitution thus approved would be the expression of a true federal pact articulating everyone's right

[22] The relationship between regulation and fact, and between validity and effectiveness in constitutional reform in general is extraordinarily well encapsulated in Zagrebelsky (2003, 18, 19)

to decide, in territorial models that have to make plurality a source of richness and not of fragmentation. It is not possible to live harmoniously in Spain without the democracy being federal and, therefore, there must be two subjects of decision: citizens and territories. This position is for constitutional reform and it is for the right to decide, but it redefines the debate in terms which, I believe, adherents to both concepts can agree upon. In other words, and more clearly: Catalonia could not decide by itself[23], and nothing could be decided, without the territorial claims for which Catalonia currently acts as the standard bearer. Furthermore, the remaining Autonomous Communities would have an equally consequential role which would lead to equality in diversity within the new territorial construct.

Finally, I do not believe that a system of reform like the one proposed would give rise to more obstruction than the "lock" of Article 168. Nevertheless, as Zagrebelsky (2003, 23) accurately points out: "In any event, no procedure for constitutional reform, however hard it tries, can satisfy by itself the true condition that guarantees success in the extremely delicate situations that surround constitutional reform. This condition is the existence of an aspiration to continue living side by side, which is stronger than the individual interests that divide the disputing powers"[24]. This aspiration

[23] With this system, an Autonomous Community could always count on support if it understands that its positions are not going to be specifically addressed by the Constitution, since there is not a single Community that does not share an analogous set of concerns with the others. I think this consideration would probably only need appropriate correction to apply to the cases of the Canary Islands and the Autonomous Cities of Ceuta and Melilla

[24] G. ZAGREBELSKY, Foreword to T. GROPPI, *La reforma constitucional en los estados federales,* Fundap. México, 2003, p. 23.

appeals to what we know as federal culture[25], but that would be another story...

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[25] In this regard I agree with the theory of Montilla (2016).

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