CATALONIA, IN SEARCH OF POLITICAL GUARANTEES
The Referendum of October 1, 2017

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The opinions expressed in this LISD Commentary are those of the author.

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The idea of the modern nation – and here I wish to emphasize the adjective “modern” because the sentiment of belonging to a national community possibly precedes the contemporary world, as is evident to anyone that has read the funeral prayer of Pericles in Thucydides, that has thought about how the Jewish people understood the concept of Israel in the Bible, or that remembers Machiavelli’s appeals to Caesar Borgia to unify Italy – was born with the French Revolution. And it was understood as a community of citizens, equal before the law, sheltered under the umbrella of a rational bureaucracy, and governed by institutions with the capacity to avoid that any faction of the population or part of the territory could capture the government permanently and to its advantage.

Nevertheless, the exact articulation of the modern nation took many forms, ranging from the French or French-Jacobin model – characterized by absolute uniformity – to the Swiss solution – a nation where municipalities may vote directly on whether or not to grant citizenship to a foreigner.

In Switzerland, the construction of the (modern) nation was easy. The relatively bloodless civil war of 1848 – resulting in a few dozens of dead men and scorned by Bismarck as a “hare’s hunting party” – ended with the recognition of a strong autonomy for the cantons of the Swiss Confederation as well as the principles of religious peace and linguistic equality. In France, the process of national formation was much more costly. As beautifully described by Eugen Weber in his book Peasants into Frenchmen: The Modernization of Rural France, 1870-1914, linguistic unity did not arrive until at least the First World War. Yet, by then, the idea of a single French nation had become, for better or worse, fully undisputed.

In Spain, by contrast, the national revolution stalled, giving way to a nationally fragmented political community. Throughout the nineteenth century, from the Cortes of Cadiz, an assembly gathered in 1812 to write the first Spanish liberal constitution and now mythicized by the most jingoistic Spanish patriots, up until the loss of Cuba in 1898, Catalans and Spaniards sought for different ways to make their national personalities and their national interests

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1. This article is adapted from a discourse delivered before the Institut d’Estudis Catalans on September 11, 2017. I thank John Palmer for assisting me with its translation to English.
compatible with each other. They failed. Today, more than two hundred years after the French Revolution and its reception in the Iberian Peninsula, Spain has not managed to reach the Hegelian end of history: a seamless national community, articulated under a state accepted as legitimate by all its citizens.

Had the Castilian national project for Spain succeeded, Catalonia would have ended up being Spanish the way other national minorities did in France – with its ancient language treated as a “patois” and cornered in a few rural valleys and with its old institutions and symbols folklorized as romantic but useless memories. Had the alternative Catalan political project triumphed, Catalonia would have become Spanish the Swiss way. In the latter case, that might have happened in two different ways. Catalonia may have become happily integrated in a multiregional administration, with Catalan as an official language used in regional institutions and with Catalan private law fully recognized – the dream of the Catalan bourgeoisie, made explicit by the Mañé i Flauger, the editor of the influential newspaper Diari de Barcelona. Alternatively, it could have formed part of a very decentralized federal structure, based on strong local governments – the political utopia of the republican left led by Pi i Margall and of Catalan anarchist craftsmen, who invented incomprehensible political concepts to avoid the term “nation,” which repelled them because it was used by their Carlist cousins in the Catalan mountain and by the Spanish ultramontane right.

The model of a unitary nation-state championed by Castilian and Andalusian elites did not prosper mostly because the liberal revolution failed in Spain. While Paris offered to treat the French living in the Midi as equals (under a single law) in exchange for giving up their memories and language, Madrid relied on the sheer force of arms, which is never enough to endow a single people with a single national feeling, to forge a unitary Spanish nation. As a result, Catalonia ended up not being or, if you will, not feeling comfortably Spanish.

For its part, Catalonia could not impose the Swiss solution either. Turin and Milan unified Italy because Rome, governed by the Vatican, never offered an "imperial" project for the Italian peninsula. By contrast, Barcelona, as the capital of a demographically small country, did not have the capacity to displace the reactionary, anti-liberal Spanish elites out from the helms of the state. As a result, it could not create a plurinational and democratic state or, simply, a state where it could co-operate with other peninsular elites from a position of equality.

Some have wanted to see in the assassination of General Prim, the Catalan leader behind the democratic constitution of 1869, and in the failure of the First Republic of 1873-74, the end of a project of comprehensive intervention by Catalan elites (alone or in collaboration with the Spanish liberals) to reform Spain. The idea is attractive but difficult to prove with certainty. What we know, however, is that, by the turn of the twentieth century, most Catalan parties and, more generally, the so-called generation of 1901, had already completely given up on remaking the Spanish state – at least as "Spanish patriots", that is, as individual combining a strong regional feeling with the willingness to speak of the "Spanish nation" fully as their own. Instead, and faced with a linguistically, culturally, and spiritually unified Spanish ma-
jority, Catalans decided to shift all their energies simply to resist the pressure of that majority and to protect their cultural and national personality.

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The inability of both Castilians and Catalans to assert themselves before or above the other side resulted in the emergence of several unhappy nations in the Iberian Peninsula. There were several nations because we can recognize several national personalities and divergent political projects within Spain today. They are unhappy because, instead of maintaining a minimally fraternal relationship, they ended up coexisting under an unequal relationship between a majority comfortable with the idea of a unitary Spain and a minority – Catalonia – struggling to survive as a cultural and political nation.

As Hegel reminds us in his *Phenomenology of the Spirit* (chapter 4, part A), a relationship between unequals or, perhaps more precisely, a relationship of domination, is always an unhappy one for both parties concerned.

That relationship is an unhappy one for both the dominant and the subordinate party for several reasons. The latter must always fold to the demands of the former. It must act knowing that its subordinator ignores or uses it instrumentally. It must, if it wants to survive, maneuver strategically: keeping silent when protesting would aggravate its condition; taking advantage, on the other hand, of the crises, insufficiencies and divisions of the majority, whenever those take place, to improve its conditions; knowing that all such behavior will make it suspicious of disloyalty to the other party; and intuiting that its tactics will be scorned as "duplicitous" or mercenary because its behavior changes with wind.

That relationship of domination also brings unhappiness to the dominant party because the latter never achieves the authentic recognition, gratuitously and freely granted, of its subordinate. Indeed, the subordinate’s refusal to acknowledge its value and virtues makes it react with contempt and, in some cases, with ignorance toward the subordinate party, to hide the frustration of not being loved for what the dominant party really is or believes itself to be (rather than for the force it uses).

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3.1

In short, in this relationship, neither side is genuinely free. The two parties are, in different ways, chained or subjected to one another.

The only way, then, to transcend that conflict and to free both parties from a condition that imprisons everyone is to create a political structure in which each can recognize and accept the other on an equal footing. That structure implies, first of all, respecting the will and autonomy of the other party. It implies abandoning the use of violence, by sword or coercion. It
presupposes, finally, establishing a political-legal relationship that guarantees, based on the principles of equality and reciprocity, the freedom and dignity of both parties.

3.2

The democratic transition and the constitutional pact of 1978 opened a window of opportunity to amend the relationship of inequality that had crystallized in the process of building Spain as a modern state during the previous two hundred years – by recognizing the plurinational reality of the Iberian Peninsula.

That window of opportunity, however, ended up in failure. Perhaps, as many claim, it did because the constitution was written in a political context marked by the presence of the old Francoist guard and the watchful eye of the army. Perhaps it did because the fathers of the constitution, who had been educated in a naïve, idealistic law tradition, more German than Anglo-Saxon, were content to constitutionalize a blurred and ethereal federalism. In any case, that opportunity failed because it did not guarantee a position of equality for the peninsular nations.

Denying the idea that several national communities could coexist as equals within the Spanish State, the authors of the Constitution articulated the so-called "State of autonomies" employing absolutely vague doctrinal foundations. On the one hand, they recognized the existence of “nationalities” – even though they did not specify what that term meant or to what extent it differed from the term “regions” that was also used next to it. On the other hand, they reserved for Spain the title of "nation."

The specific distribution of powers between the central state and future autonomies followed the same pattern of inconcreteness and ambiguity. Nominally, the Constitution allowed the legislator to confer broad and even exclusive powers over a considerable range of policy domains to regional governments. Yet, once again, it gave the central government the right to interfere in any matters theoretically devolved to a regional government through the enactment of so-called “leyes de bases” that could define the architecture of any policy.

Aping the German Constitution and its Kelsenian imprint, the fathers of the constitution deposited the task of resolving all these contradictions, that is, the final power to interpret the exact meaning of the words of the Constitution, in the hands of a paramount political arbitrator, the Constitutional Court. The problem, however, was that the composition of that body remained in the hands of the Spanish majority. Accordingly, once the instability of the democratic transition disappeared, that is, once the Spanish left stopped needing the support of Catalonia to check the Spanish right, what was supposed to be a neutral arbiter became the instrument, elegant only in the form it employed, to reproduce the relations of subordination that the Constitution should have overcome.

It is true that, to enact or modify a Statute of Autonomy (i.e. the law that regulates the institutions and power of an autonomous region), the Constitution requires the joint agreement of the central state and the corresponding regional institutions. Once a qualified majority of the
regional parliament has approved or modified a Statute of Autonomy, the Spanish parliament must approve it too. In addition, the inhabitants of the autonomous community must ratify it through a referendum. That system, which some constitutional scholars have described as a procedure devised to shield Catalan autonomy from Spanish interferences, is, however, defective. The Spanish Cortes made use of their power to amend the Statute to the point of forcing the Catalan population to choose between an amended legal text that was far removed from the ideal preferences of the consulted citizens and the unsatisfactory status quo that had pushed the Catalan parliament to write the new autonomy law to start with.

More importantly, all this procedure of double approval imploded once the Constitutional Court, overriding the double consent given by the Spanish and the Catalan legislative powers, bestowed upon itself the role of final arbiter of the constitutionality of the Spanish “State of Autonomies” with its July 2010 ruling on Catalonia’s 2006 Statute of Autonomy. Through this institution, the majority made explicit its status as both party and judge in the political game of the Peninsula. The relationship of inequality became once again evident, with all its crudeness, and Catalonia entered into a state of rebellion.

To sum up, the Catalan protest is not simply based on tax or fiscal grievances. It does not arise from any complaints about the lack of public services or infrastructures. It does not derive from a situation of linguistic discrimination. All of these problems do exist and, as such, the Catalan people and its institutions have legitimately denounced and tried to correct them. At the end of the day, the current protest is, instead, deeply rooted in the generalized desire to create a relationship based on dignity, equality, and freedom for all.

The fundamental lesson of the democratic period established in 1978 and, above all, the negotiation of the 2006 Statute, crowned by the ruling of the Constitutional Court, is that the Spanish constitutional structure does not guarantee any meaningful sovereign space for Catalans. Catalonia was and is a permanent national minority, with its laws and institutions always susceptible of being corrected and laminated by the vote of the majority.

Looking at this problem through the Jacobin lens of a citizen without attributes (since it is the law that gives attributes, if any, to the citizen), Spain is a democracy without problems. Nonetheless, that point of view is an entelechy. Both the history of Spain and the way in which different Spanish citizens think of themselves and their identity make clear that Spain is defined by the presence of considerable internal national differentiation. As it turns out, this differentiation is neither recognized nor protected under the current political and constitutional framework and practices.

Does this mean there is no constitutional architecture that could restore and maintain a relationship of equality between Catalonia and Spain without them being independent of one another? Supporters of a federal solution believe such an architecture exists.
In order to investigate this possibility, we must begin by making a clarifying point. The terms federalism, federation, and federal pact are polysemic. Mexico, Austria, and Switzerland call themselves federal states, but their constitutional differences at the operational level are extraordinary. Hence, merely calling for the introduction of a federal state would not solve anything. To work out properly, a federal constitution must have the right structure to guarantee the execution of the federal pact in the terms agreed by all its members.

I now turn to consider that point. That implies answering two questions: Is there any federation that includes constitutional mechanisms to prevent the exploitation of one of its members by the remaining members of that federation? And, additionally, is that type of federation possible in Spain (possible in the sense of avoiding a situation of inequality in the relationship between federated units)?

Traditionally, most federalist theorists, concerned about the relationship between the federal government and federated units as the potential source of political tensions in a federation, have reiterated that the only federal system that can function properly is one that establishes a balanced distribution of powers between the federal government and the federal states. In other words, a system where the federal government is not strong enough to exploit the federal states, but where the former has the capacity and strength to keep the federation together. This theory of optimal federalism or, using more colorful terms, the theory of “goldilocks” federalism (in honor of the girl that drank neither the bowl of hot soup nor the cold one), is, in principle, a plausible one.

The truth is, however, that the legitimacy and strength of the federal government – to assert its position and to keep the federation together – ultimately depends on the degree of support it receives from some or all of the federated units. For that reason, the success or failure of a federation in guaranteeing the rights of the federated units does not lie in the place pointed out by the goldilocks theory of federalism but rather derives from the nature and national identity of the federated units.

At the risk of simplifying a necessarily complex reality, I will now describe the four types that may characterize the arrangement of national identities in federal systems. For each case, I will then proceed to examine to what extent and how they facilitate or disrupt the federal objective of preserving the unity of the federation and the equality of the federated units. Consider, first, the case where all federated units share the same national identity and the existing political divisions or cleavages do not match the territorial limits of the subnational units (or if they do, they are not very intense). This is the case of the United States at almost every point in its history: a single national identity, with political conflicts structured around social categories such as class, race, religion, etc., and with those different political and social groups distributed relatively equally across the territory. In that case, the possibility that some of the states of the union may be systematically marginalized by the rest is low. The political coalitions necessary to win elections, to pass legislation in Congress, and to govern will be organized according to the existing class or religion cleavages. Given the approximately uniform distribution of these divisions across the territory, almost all states (or a part of each state) will participate in federal decisions at all times. Strictly interregional or inter-state coa-
litions that can be formed will almost always be temporary. That will minimize the danger of exploitation or discrimination against one part of the federation by the rest. And, as a result, the guarantees of the federal states, agreed in the Constitution, will be respected.

Consider, in the second place, the case of a federal country with strong territorial identities (that is, a federation where each state has its own national identity) and where the federal states are aligned in two blocks that have similar demographics and political and economic resources. Belgium, where Walloons and Flemings have a similar weight, fits this description. In that case, the maintenance of the federal pact derives or will derive directly from the balance of power of the two parties.

For a similar reason, the federal pact is also guaranteed in multinational countries where there are several federal units with particular national identities and where none of those units (or blocks of units with the same identity) represents a majority of the federation. The European Union may be close to this situation. In this case, all regions or blocks of existing regions can form alternative coalitions with each other, allowing all to have a similar opportunity to participate in the administration of the federation and therefore blocking any attempt at discrimination or permanent exclusion. As an example, let us consider the case of a country with three regions of similar weight (and different identities), A, B and C. To approve a majority law, there are four possible coalitions: AB, AC, BC and ABC. If A aligns with B to exploit to C, C can always propose a better deal to A by charging all its costs to B. Of course, B can respond by proposing an even better proposal to C at the expense of A. Again, however, A will try to break that alliance by suggesting to B or C terms that will be advantageous to one of the two. In short, in this game of cyclical majorities, the possibility of maintaining a stable pact between two regions is impossible and, as a result, the systematic discrimination or subordination of a region is not feasible.

All these dynamics do not take place, however, in those cases where there is a multinational federation and where one of the units (or block of units with a shared identity) has a (demographic) majority over the other units. In that case, the probability of a situation of discrimination or exploitation of the minority, fiscal, linguistic or cultural, is considerable. And, as a result, the probability of a secessionist reaction and the breakdown of the federation, is also considerable. This would be the case in Spain even if it established a federal system without further ado.

In order to remedy the imbalance in power relations described in the latter case, and especially in those cases where the minority has strong preferences over certain political or social issues, some scholars of federalism have often proposed a so-called asymmetric federal structure aimed at compensating for the demographic or material inequality between federated units. Such a solution consists in granting extraordinary powers to territorial minorities (or in creating special jurisdictions for them). In itself, that solution represents an improvement over the "uniform" or symmetrical federal model. Nevertheless, it shares the same fundamental problem with other types of federations (and, indeed, with all states). It still needs to establish a mechanism to guarantee the fair implementation of the agreements included in the initial constitutional pact, that is, to guarantee the interpretation of the words written in the Constitu-
tion in the sense understood by the parties that signed and accepted it. In other words, the system of asymmetric federalism (as well as one of symmetric federalism) can only work if the arbiter who adjudicates over conflicts between the federal government and federated units, and among the latter units, does so without discriminating against anyone. In other words, a robust or stable federation can only be obtained if the federal arbitrator is not a party and judge of a decision or judgment and is not, therefore, captured or hijacked by a subset of the federation.

Is that possible? Yes, indeed, it is. It suffices that the affected parties (the federated units) become equal partners in the composition of the arbiter (the corresponding Constitutional or Supreme Court). That is to say, they should form part of the federal arbiter on equal terms or, in other words, they should have veto power and may block decisions detrimental to their interests - as long as they do so with the good faith that the commitment to comply with the initial constitutional pact requires.

In the specific case of Spain and the Catalan question, this means making it possible for Catalonia (a national minority) to participate on equal terms (with the majority) in the decisions made at the central level, that is, that Catalonia may exercise the right of veto over State policies. In sum, participation as a co-equal in federal or central institutions is the appropriate solution to avoid that, in a multinational country divided between a national majority and a national minority, the former could subordinate the latter or seriously damage its interests.

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In the sense explored in the previous paragraphs, the right of self-determination (i.e. holding a referendum on self-determination) is equivalent or, as it were, a byproduct of that structure of guarantess because it creates a tool that, in exceptional circumstances, enables the national minority with the capacity to block or escape from a situation of systematic abuse. The right to self-determination, such as the right to marital separation, is a mechanism to be used in cases where, in the face of a repeatedly unfair treatment and in the face of a systematic lack of protection, the weak part of the relationship can free itself from the oppressive actions performed by the rest of the federation. (Here the expectation is that, in anticipation of the possible exercise of the right to self-determination, the majority will refrain from injuring the minority and, therefore, that such a right will never be exercised.)

In the specific case of Spain, that is, in a situation where the Constitution does not include an effective system of guarantees (for territorial self-determination), the exercise of the right to self-determination appears as the only effective barrier available to members of a minority vis-a-vis the systematic imposition of general laws by the national majority.

Of course, the right of self-determination cannot be used frivolously, that is, as a weapon that one brandishes and threatens to throw at any time. To invoke and exercise it, there must have been a reasonable period of negotiation between the national majority and the national minority. It is necessary to demonstrate that the majority has not corrected (or attempted to correct) the ongoing unjust situation and that, throughout this process, it has shown no signs
of acting in good faith. Finally, the national minority needs to show a persistent will (as opposed to some fleeting desire) to exercise the right of self-determination.

All these conditions are in place in Catalonia and in Spain today. In the first place, Catalonia has tried, since the adoption of the Constitution of 1978, to persuade the majority that, given the enormously flexible text of the Constitution and in light of the political expectations created at the time of the transition to democracy, it is possible to construct a structure of generous self-government without violating the principles and architecture of the Spanish fundamental law. This attempt at persuasion resulted in the negotiation and approval of the new Statute of Autonomy of 2006. However, as I have already indicated, the Constitutional Court (controlled by the national majority) annulled key clauses of a Statute that had already been substantially modified by the Cortes. An often-made objection against the right of self-determination – that Catalans should accept the decision issued by the Constitutional Court because a majority of them voted for the Constitution back in 1978 – is unconvincing. Regardless of the (less than ideal) political conditions under which the Constitution was negotiated and approved, the very conflictual application of the territorial clauses of the constitution shows that the two parts in contention held very different interpretations and expectations about the future development of the Spanish constitutional framework to start with. Moreover, the Catalan minority did not foresee that the Spanish State would introduce multiple obstacles and limits to the deployment of Catalan self-government. That fact justifies in itself the demand for a referendum as well as the growing support for independence we have witnessed among Catalan public opinion.

In the second place, Catalan institutions have tried, in good faith, to redirect the situation created (or perhaps simply revealed by the decision of the Constitutional Court in 2010) through negotiations – done, early on, on specific issues, and later focused on channeling the growing demands of Catalan citizens in favor of a referendum of self-determination. It is true that the Spanish Constitution does not literally recognize the right to self-determination. However, that does not prevent it from being exercised. As the Supreme Court of Canada stated in its opinion on holding a referendum in Quebec, “the Constitution is not only a written text,” but “encompasses a whole system of principles governing the exercise of constitutional power … federalism, democracy, constitutionalism and the primacy of law, as well as respect for minorities” that should ultimately govern the actions of the states of Canada and their relations with the federation. In light of these principles, the Supreme Court understood that, although there was no “direct” right of Quebec to secession, it was legitimate and constitutional to consult the citizens of that province if such a consultation was followed by a will to negotiate on the terms of the separation. That same generous interpretation can prevail perfectly well for the Spanish Constitution. The latter includes several clauses that enable both the central government or, by delegation, the Catalan government to hold a referendum to determine the support of Catalans toward independence. Negotiations on the terms of separation would then follow such a referendum.

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A correct interpretation of the Constitution can never be literal. In the Nuremberg trials carried out by the allied powers after World War II, German judges and officers who were being prosecuted for crimes against, among other minorities, the Jewish or Roma population, defended themselves by appealing to a literal interpretation of the German legal system, alleging that they had simply obeyed the orders of their superiors according to the existing constitutional legality. Indeed, once he won the elections in Germany and after being appointed Chancellor, Hitler proceeded to declare the state of emergency in accordance with the prerogatives established by Article 48 of the German Constitution. Two months later, the German parliament amended that text, following the procedures indicated in the same constitutional text, in order to concentrate all political power in the hands of the executive. Formally, the Weimar Constitution was never repealed. However, from a substantive point of view, that is, when considered in the light of the fundamental principles (democracy, federalism, etc.) that inspired it, the Weimar constitution ought to be considered annulled from the moment the Reichstag approved the authorization law of 1933 transferring all the legislative power to the executive power. In other words, the case of Nazi Germany shows that, in sustaining democracy, we must always integrate any constitutional text into a broader conceptual framework – the one defined by the fundamental principles that inspire the constitution. Otherwise, we risk emptying any constitutional text from its legitimacy and, as a matter of fact, its legal validity.

Let us now return to the Catalan question. If, despite a systematic deterioration of the nature and structure of self-government (with respect to the terms imagined at the time of participating in the drafting of the Constitution), despite the presence of multiple mechanisms available to consult Catalans on their political preferences with regards to the terms of their relationship with Spain, and despite the existence of a large majority (eighty percent) of the Catalans in favor of holding a referendum, the majority are systematically opposed to convening it, doing nothing is not a plausible (in the sense of rightful) course of action. It implies legitimizing an unjust situation. It entails perpetuating the condition of inequality that I have described in the second section of this article – a state of affairs that damages in equal proportion (albeit through different mechanisms) both sides of the relationship. Therefore, following the mandate of the Parliament elected in September 2015, holding a referendum on self-determination to decide, in a peaceful manner and in line with the principle of equality embedded in the idea of democracy, the future of Catalonia, is legitimate. Let me here stress again that the decision to call and organize a referendum is completely different from that of declaring independence. It simply opens, in my opinion, the way to negotiate, the day after the consultation, a political solution to the differences in opinion between Spain and Catalonia.

Let me conclude by returning to the initial paragraphs of this essay. The final goal of the referendum held on October 1, 2017 was to correct an abusive situation. Its purpose was to restore the dignity of all parties to the conflict, both majority and minority. The referendum was, in short, an opportunity to create a relationship of equality that does not yet exist and, therefore, to free both Spain and Catalonia from all the distortions and servitudes imposed by an unjust relationship.