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RESEARCH ARTICLE

Legal Unity as Political Unity?

Carl Schmitt and Hugo Krabbe on the Catalonian Constitutional Crisis

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This article offers an analysis of how theories on constitutional revision can help understand crises that threaten legal unity. The Catalonian crisis represents the case study, and is discussed from the perspective of constitutional theory. The article starts out from a conceptualisation of 'legal unity' as the organisational as well as political claim of constitutions to provide unity within a certain legal order, which in the end comes close to the idea of a unified national state. The article refers to the constitutional theories of Carl Schmitt and, the lesser-known Hugo Krabbe, to help increase the understanding of constitutional change and, to connect these insights to the Catalonian case. Schmitt's claim is that constitutional law is indeterminate and thus in need of the sovereign's decision. In this analysis, it is made clear that Schmitt's argumentative scheme in which a distinction is made between friends and enemies in political conflict is unhelpful in addressing the Spanish crisis. Indeed, Schmitt moves beyond descriptive and explanatory goals to defend a normative rejection of liberal political decision-making. By contrast, Krabbe argues for the determinacy of constitutional law. According to Krabbe, constitutional law is finally embedded in 'legal consciousness', inherent to all human beings, and which can be determined by majority rule. Even if this answer may not be entirely convincing, it is maintained that this theoretical perspective could nevertheless benefit cases such as the Catalonian constitutional crisis, if as a consequence claims of both the Catalan as well as the Spanish sides based on the idea of ultimate sovereignty over a demarcated territory were dropped.

Keywords: legal unity; political unity; constitutional amendment; revision; change; independence; Catalonia; Spain; popular sovereignty; political decision; legal consciousness; Carl Schmitt; Hugo Krabbe

I. Introduction. The Spanish Legal Unity at Crisis

Since September 2017 Spain has been in a state of constitutional crisis. On 6 September 2017, the Catalonian Parliament approved the act, which would create an independent republic if a majority was reached in the referendum vote.[1] The approved act required no minimum turnout. After the Catalan government held their own referendum on independence on 1 October, the Spanish Prime Minister, Mariano Rajoy, called the regional election illegal. The Spanish government sent masked riot police to raid polling sites and confiscate ballot boxes. On 27 October 2017, the secessionists declared independence in a secret ballot. Prime Minister Rajoy invoked article 155 of the Spanish Constitution to dissolve the Catalan parliament after it voted to declare Catalonia an independent republic.[2] Once approved by the Senate, this provision gives Spain the authority to conduct direct rule over Catalonia. The Prime Minister also removed the regional President, Carles Puigdemont, and the Catalan government. The Spanish Attorney General pressed for charges of sedition, rebellion and embezzlement against Puigdemont and some members of his cabinet. Subsequently, they decided to flee to Brussels (Belgium). Rajoy ordered a new election of the Catalonian Parliament on 21 December 2017. In this election, the pro-independence parties collectively won close to 48 per cent of

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[1] Law of 6 September 2017 on the Referendum on Self-determination <http://exteriors.gencat.cat/web/.content/00_ACTUALITAT/notes_context/Law-19_2017-on-the-Referendum-on-Self-determination.pdf> accessed 15 June 2018.

[2] Shehab Khan, 'Catalonia: Spanish Prime Minister Mariano Rajoy Approves Measures to Strip Region's Autonomous Powers' *The Independent* (21 October 2017).

the votes with a nearly 80 per cent turnout.[3] This result allowed them to keep the absolute majority in the Catalan Parliament and claim 70 out of 135 parliamentary seats. Rajoy's *Partido Popular* won only one-fourth of the seats. Commentators called the Catalan secession attempt Spain's worst political crisis since democracy was established following dictator Francisco Franco's death in 1975.[4] The Catalonian constitutional crisis developed in a spectacular way, with the flight of members of the Catalonian government, under leadership of Carles Puigdemont, into exile in Brussels.[5] Eventually, following a visit to Finland, Puigdemont was arrested in Germany after he crossed the Danish-German border.[6]

The Catalonian constitutional crisis is not just a threat to the political unity of the Spanish national state, it also affects the European Union and some of its Member States, as the flight of Puigdemont with six of his cabinet members to Belgium and his arrest in Germany made clear.[7] Not only were Belgium and Germany put into a difficult diplomatic position,[8] but also it affected the European Commission, which was forced to either accept or reject the Catalan claim of independence. The Commission decided to reject this claim.[9] In this article the Catalonian constitutional crisis is theoretically analysed as a threat to the legal unity of Spain. There will be a special focus on examining the relationship between constitutional change and legal unity.

The Catalonian constitutional crisis is a recent example of an attempt of constitutional change and the need for an adequate theory of constitutional revision in light of legal unity.[10] Constitutional revision can be viewed on different levels, starting with the amendment procedures, which are provided for in formal constitutions. The exceptional fact of constitutional revision is that it is in fact, as Peter Suber called it, a 'paradox of self-amendment'.[11] From a hierarchical point of view, the formal constitution is the highest norm; therefore, it must contain a revision provision, and the constitution-making power itself formulates these amendment rules. In contrast to Acts of Parliament, many formal, written constitutions therefore contain an amendment or revision procedure.[12] A problem arises when there is, for instance in the Catalonian constitutional crisis, a wish to change the constitution without using the amendment procedure. That problem will be theoretically analysed in this article in light of the legal unity of Spain.

An important limitation of this article is that the Catalonian constitutional crisis will be discussed from the point of view of a Dutch scholar who has no direct access to Spanish sources, and has to rely on Dutch, English and German sources. Certain misrepresentations of what is at stake in the Catalonian constitutional crisis therefore cannot completely be avoided. On the other hand, this 'external' perspective on the Catalonian constitutional crisis could deliver a more distanced description and analysis of the current crisis. Another limitation lies in the focus on a constitutional theoretical analysis of the Catalonian constitutional crisis, which touches upon questions of political philosophy. This article, consequently, does not contain an analysis from the perspective of international law and, from that perspective, the question of Catalonia's

[3] Ricard Gonzalez, 'Catalonia's Crisis Is Just Getting Started' *Foreign Policy* (27 December 2017).

[4] Sean Murray, 'Explainer: What Now for Catalonia After the Separatists Secured Election Victory?' *The Journal* (22 December 2017) <http://www.thejournal.ie/catalonia-election-victory-3766708-Dec2017/> accessed 4 April 2018.

[5] This article refers to the 'Catalonian constitutional crisis', and not of the 'Spanish constitutional crisis'. This is because speaking of 'Catalonian' clearly refers to the current crisis, and not some of the historical crises on the Iberian Peninsula. This choice of words is explicitly not meant as a choice for one side in the crisis ('Catalonian' could be interpreted as an expression of the Madrilenian side of the discussion). No side is chosen. The article is restricted to a description and analysis of a constitutional crisis from a constitutional and theoretical point of view.

[6] Philip Olterman, 'German Prosecutors Ask Court to Extradite Carles Puigdemont to Spain' *The Guardian* (3 April 2018) <https://www.theguardian.com/world/2018/apr/03/german-prosecutors-ask-court-to-permit-carles-puigdemont-extradition-to-spain> accessed 4 April 2018.

[7] Claudi Pérez & Reyes Rincón, 'Supreme Court Rejects European Arrest Warrant Request for Puigdemont' *El País* (23 January 2018) <https://elpais.com/elpais/2018/01/22/inenglish/1516611004_920738.html> accessed 4 April 2018.

[8] Ulrich Preuß provides an excellent analysis of the legal difficulties of executing the arrest warrant of Puigdemont and some of his cabinet members. See Ulrich K. Preuß, 'Kataloniens Kampf geht nicht um Freiheit, sondern um Identität' *Verfassungsblog* (3 April 2018) <https://verfassungsblog.de/spanische-tragoedie/> accessed 8 May 2018.

[9] Maïa de La Baume and David M. Herszenhorn, 'Brussels Defends Use of 'Proportionate Force' in Catalonia' *Politico* (4 October 2017) <https://www.politico.eu/article/brussels-defends-use-of-proportionate-force-in-catalonia> accessed 4 April 2018.

[10] Some excellent work on the theory of constitutional revision has been recently done by Richard Albert. Richard Albert, Xenophon Contiades and Alkmene Fotiadou, *The Foundations and Traditions of Constitutional Amendment* (Hart Publishing 2017) and in the Netherlands by Reyer Passchier. R. Passchier, *Informal Constitutional Change. Constitutional Change Without Formal Constitutional Amendment in Comparative Perspective* (E.M. Meijers Instituut 2017).

[11] Peter Suber, *The Paradox of Self-Amendment. A Study of Logic, Law, Omnipotence, and Change* (Lang 1990).

[12] In some constitutional systems it is more appropriate to speak of 'revision' – in France 'révision' (Titre XVI: De la révision); in Dutch 'herziening' (Hoofdstuk 8: Herziening van de Grondwet);– and in other constitutions of 'amendment'. I will use 'revision' and 'amendment' in this article more or less as synonyms, mostly using 'amendment' when focusing on the procedure and 'revision' for the overall process.

self-determination.[13] Therefore, this article contains no opinion as to whether the secession of Catalonia would be legitimate or illegitimate under international law.[14] Rather, this article helps to understand and value the arguments that were upheld by both the former Catalonian government, under leadership of Puigdemont, and the Madrilenian government.

First, some light will be shed on the historical-political background of the Catalonian constitutional crisis to understand what is at stake. In the next part the concept of legal unity is addressed. After that, the Catalonian constitutional crisis is analysed with the constitutional theory of the German constitutional scholar Carl Schmitt. This paper argues that the Catalonian constitutional crisis fits the scheme of Schmitt's theory. This theory can provide an explanation of the constitutional crisis, but also sets out that in some respects the theory is flawed. To prove this point, the third part of this paper discusses the position of Hugo Krabbe, a Dutch constitutional scholar and contemporary of Schmitt. Krabbe's position can be viewed as a well-considered opposition of Schmitt's constitutional theory. Krabbe's theory helps to understand what is at stake in the Catalonian constitutional crisis on a theoretical level. The arguments that can be derived from Krabbe's work are in many respects similar to H.L.A. Hart's criticism on the tradition of the command theory. In contrast to Krabbe, Hart does not offer a fully elaborated theory on constitutional revision. Because this article's focus on how constitutional amendment procedures relate to legal unity, Krabbe's theory is, in this respect, more relevant than Hart's.

A. The Spanish Constitution: the Spanish Nation and the Autonomous Communities

To understand what is at stake for both the secessionists and the central Spanish government in the current Catalonian constitutional crisis it is important to understand its historical background. From a mere geographical standpoint, one would assume that because Spain shares the Iberian Peninsula only with Portugal this would be one of the first areas in Europe where a unified state would emerge. This was not the case. Only at the start of the 18th century, with the ascension of the Bourbons to the Spanish throne, endeavours were undertaken to centralise the country.[15] In 1716, with the decree on a new system of government, Catalonia was punished because of betting on the wrong horse in the War of the Spanish Succession (1701–1714); Catalonia chose the side of the Archduke Charles of Austria, but it was Philip of Anjou, grandson of Louis XIV, who ascended the Spanish throne. Spain was centralised after the French model of centralisation.[16] However, this centralisation did not put an end to the regional sentiments.

According to the Spanish Constitution of 1931, a Statute of Autonomy could be attributed to an Autonomous Region.[17] Catalonia was granted its Statute of Autonomy in 1932, however, in 1938 General Franco revoked the Statute of Autonomy. The current Spanish Constitution, on the contrary, revived the old decentralised tradition. The provisions on the Autonomous Communities can be found in Part VIII, Chapter III, entitled: Autonomous Communities, articles 143–158, of the Spanish Constitution. The status of Autonomous Community can be obtained in either a slow or fast way.[18] Because of Catalonia's Statute of Autonomy by referendum of 1932, the status of Autonomous Community was acknowledged to Catalonia being – besides the Basque country and Galicia – a 'historic nation'.[19] By a statute dated 18 December 1979 Catalonia received the status of Autonomous Community.

The first sentence of Article 2 of the Spanish Constitution states that the constitution 'is based on the indissoluble unity of the Spanish nation, the common and indivisible country of all Spaniards'. Some parts of the Spanish military feared that uncontrolled centrifugal forces could threaten this 'indissoluble unity'.[20] This was made clear during the siege of the Congress on Monday 23 February 1981. Lieutenant-Colonel Antonio Tejero, who was also involved in a military putsch in 1978, and his followers, and at the same time General Jaime Miláns del Bosch in Valencia, committed a coup d'état.[21] King Juan Carlos chose to maintain democracy, as established in the 1978 Constitution, and ordered the armed forces to end the coup.[22] Two days later the order was restored.

[13] This was the focus of Nicolas Levrat, Sandrina Antunes, Guillaume Tusseau and Paul Williams, 'The Legitimacy of Catalonia's Exercise of its Right to Decide' (27 November 2017) <https://ssrn.com/abstract=3078292> accessed 4 April 2018. This report contains in chapter I (16–29) an overview of the political developments concerning Catalonian's self-government from 1980 onwards.

[14] An interesting parallel with the Catalonian is the wish of secession by Quebec. See Sujit Choudhry and Robert Howse, 'Constitutional Theory and the Quebec Secession Reference' (2000) 13 Canadian Journal of Law & Jurisprudence 143. This parallel is not further examined in this article.

[15] Lucas Prakke, 'The Kingdom of Spain' In: Leonard Besselink et al (eds), *Constitutional Law of the EU Member States* (Kluwer 2014) 1575.

[16] ibid.

[17] ibid.

[18] ibid.1576.

[19] ibid.

[20] ibid. 1577.

[21] ibid. 1548.

[22] Bill Cemlyn-Jones, 'King Orders Army to Crush Coup' *The Guardian* (23 February 1981).

Because of the anti-decentralisation agenda of the military in the young post-Franco Kingdom of Spain, the 29 December 1978 Spanish Constitution, which reinforced decentralisation to suppress the sentiments of parts of the military, was on top of the political agenda. In the period between 1981 and 1983, 13 statutes of autonomy were enacted.[23] Article 152 of the Spanish Constitution contains the regulation of the institutional arrangements of the Autonomous Communities: they all have the same institutional autonomous organisation, containing a legislative assembly, a governing council, a prime minister and a high court of justice. The political balance of powers resembles the national, central government, for example; the members of parliaments of the Autonomous Communities elect one of their members as president of the council.[24] According to the first paragraph of article 152 of the Spanish Constitution, the president is appointed by the king. But in the second sentence it adds to this: 'it recognises and guarantees the right to autonomy of the nationalities and regions of which it is composed, and the solidarity amongst them all'. This second sentence of article 2 of the Spanish Constitution is elaborated on in Part VIII, Chapter III of the Constitution.

Despite the constitutional arrangements regarding the Autonomous Communities, the topic is still very sensitive. An important stage in the development of the Catalonian constitutional crisis was the verdict of the Spanish Constitutional Court in 2010, which was a 2006 complaint brought before the Court by the *Partido Popular*, the political party of Prime Minister Rajoy. The complaint of the *Partido Popular* was directed against the Statute of Autonomy of Catalonia, which was passed by the national parliament and by referendum of the Catalonian people. After a four-year-deliberation on 28 June 2010, the Constitutional Court decided that 14 articles were unconstitutional and another 27 articles were curtailed. One of the most salient parts of the judgement was that the Catalan language no longer had, as was put down in the 2006 Statute of Autonomy of Catalonia, preference over the Spanish language in Catalonia. Mention of 'Catalonia as a nation' and to 'the national reality of Catalonia' were declared unconstitutional as well.[25] The Constitutional Court's verdict was, according to Argelia Jiménez, 'the turning point' among the Catalonian people and among Catalan constitutional scholars,[26] and viewed as the 'peak' of the growing resistance of the Spanish Government to negotiate Catalonian's self-government.[27] The most recent developments of the Catalonian constitutional crisis are discussed in the introduction.

B. The Concept of Legal Unity

As mentioned, Spain's legal unity and its relation to constitutional change is the topic of this article. Three conceptions of legal unity can be discerned. In the first place, a division can be made between two types of legal unity claims. The first claim of legal unity is the distinction between form and content. The distinction between form and content of the law is at the core of the tradition of legal positivism.[28] This division can already clearly be found in John Austin's *The Province of Jurisprudence Determined*.[29] Austin strictly discerned law as it is from law as it ought to be. Lesley Green rephrased Austin's insight regarding the distinction between law's form and content in the tradition of legal positivism as follows: 'Legal positivism is the thesis that the existence and content of law depends on social facts and not on its merits'.[30]

Unity of content centres around the idea that law is united in the sense that there are no contradictions within the law. Legal unity in this sense can either be viewed as logical coherence or coherence of content. Logical coherence was boiled down to the question addressed by Dick W.P. Ruiter 'how to preserve logic?'.[31]

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[23] Prakke (n 15) 1577.

[24] ibid. 1578.

[25] Krishnadev Calamur, 'The Spanish Court Decision That Sparked the Modern Catalan Independence Movement' *The Atlantic* (1 October 2017) <https://www.theatlantic.com/international/archive/2017/10/catalonia-referendum/541611/> accessed 4 April 2018.

[26] Argelia Queralt Jiménez, 'The Catalan Question and the Spanish Constitutional Court' *Verfassungsblog* (14 October 2014) <https://verfassungsblog.de/catalan-question-spanish-constitutional-court> accessed 22 January 2018.

[27] Nicolas Levrat, Sandrina Antunes, Guillaume Tusseau and Paul Williams, *The Legitimacy of Catalonia's Exercise of its Right to Decide* (27 November 2017) 16. <https://ssrn.com/abstract=3078292> accessed at 4 April 2018.

[28] Brian Bix, 'Legal Positivism' In: M.P. Golding & W.A. Edmundson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Publishing 2005) 29–30.

[29] John Austin, *The Province of Jurisprudence Determined* (1st edn 1832, CUP 1995) 157: 'The existence of law is one thing; its merit or demerit is another. Whether it be or not be is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation'.

[30] Lesley Green, 'Legal Positivism' (2010) Stanford Encyclopedia of Philosophy <http://plato.stanford.edu/entries/legal-positivism> accessed 7 January 2018.

[31] Dick W.P. Ruiter, *Legal Institutions* (Kluwer Academic Publishers 2001) 8.

Logic is, in most legal orders, assumed as an essential requirement of the law. The process of law creation however, always produces unforeseeable conflicts between legal rules, and thus, these conflicts, and the rules to resolve conflicts, are inevitable. The typical set of these conflict rules consists of the rules of *lex superior*, *lex specialis* and *lex posterior*.

Coherence of content is exemplified by Ronald Dworkin's *Law as Integrity*. In this project, coherence is not assessed as a logical prerequisite of a legal order, rather, it addresses the relationship between law and morality. The judge, who, according to Dworkin's *Law as Integrity*, is in the process of finding the one right answer, is successful if the found solution is both the best continuation of the existing law, as well the best justification of the legal system as a whole.[32] This moral conception of legal unity is expressed in Dworkin's statement that '[a]ccording to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness and procedural due process, which provide the best constructive interpretation of the community's legal practice'.[33] It will be made clear that Krabbe's conception of legal unity is in many respects similar to Dworkin's.

Dworkin's thick conception of legal unity as law as integrity is problematic. It has been aptly criticised by Joseph Raz. He confronted Dworkin's notion of coherence with, among others, two problems.[34] First, Raz correctly pointed out that within Dworkin's notion of coherence the false assumption is made that conflicting moral principles can be reconciled by invoking a more abstract moral principle.[35] This is only true if there is no moral pluralism, but a singular set of ultimate moral norms. Dworkin's denial of plurality of moral norms is highly problematic.[36] Another problem within Dworkin's notion of coherence is, according to Raz, the vagaries of politics.[37]

A third conception of legal unity is the claim of political unity. Legal unity as political unity fits the picture of the territorial demarcated, national state. The German constitutional law theorist Georg Jellinek developed the classic conceptualisation of the state in his three elements doctrine (Drei-Elemente-Lehre).[38] A 'state', according to this doctrine, consists of a demarcated territorial unity (Staatsgebiet), a people (Staatsvolk) and effective governmental control (Staatsgewalt).[39] Despite the fierce criticism of this conceptualisation by many scholars, and the deviation of this definition in some treaties on statehood,[40] what constitutes a state is still defined in this manner by many constitutional scholars.[41] Legal unity would, in relation to the Catalonian constitutional crisis, and in light of Jellinek's three elements doctrine, concern the threatened unity of the territorial integrity of Spain.

Constitutions have played a key role in providing and expressing the political unity of the legal order. Especially with the rise of written or formal constitutions at the end of the 18th century, constitutions contained provisions on jurisdiction and regulations of public institutions and the organisation and competences of the judiciary. These provisions had the goal to create a clearly organised unity within the legal order by defining and regulating state competencies. Besides these organisational provisions, most written constitutions also provide a set of norms expressing political unity. In the preambles of the American, French

[32] Ronald Dworkin, *Law's Empire* (first published 1986, Hart Publishing 1998) 245: 'Law as integrity, then, requires a judge to test his interpretation of any part of the great network of political structures and decisions of his community by asking whether it could form part of a coherent theory justifying the network as a whole'.

[33] ibid. 225.

[34] Joseph Raz, 'The Relevance of Coherence' In: Joseph Raz, *Ethics in the Public Domain* (Oxford University Press 1995) 277–325.

[35] Raz (n 34) 298.

[36] As will be discussed under paragraph II.C on Schmitt's friend-enemy-distinction, a legal theory that assumes a normality in the sense of a single set of highest moral norms is a problematic assumption. That being said, Dworkin does not commit himself to Schmitt's friend-enemy distinction or Schmitt to law as integrity.

[37] Raz (n 34) 296.

[38] Georg Jellinek, *Allgemeine Staatslehre* (first published 1900, 3rd edn, Häring 1914) 144.

[39] ibid. 144.

[40] For instance article 1 of the Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19; 49 Stat 3097. The Montevideo Convention adds 'capacity to enter into relations with the other states' to Jellinek's three elements. Also these four criteria of the Montevideo Convention are disputed, see for instance the criticism of Thomas D. Grant, 'Defining Statehood: The Montevideo Convention and its Discontents' (1999) 37 Columbia Journal of Transnational Law 403, 434–453. The point is that a fixation on criteria for statehood – whether it are 3 or 4 – is highly problematic.

[41] See George H. Sabine and Walter J. Shepard, 'Translators' Introduction' In: Hugo Krabbe, *The Modern Idea of the State* (Appleton and Company 1922) XXXI: 'The state is thus a unit which necessarily manifests itself in certain powers of government; these powers reside in specific agencies all of which derive their authority from a single central reservoir of power. What is assumed, therefore, is an hierarchical organization of government according to a logical scheme by which all the powers of government can be brought forth from the idea of the state. Hence political theory becomes an attempt to locate the ultimate source of authority and to trace out the channels by which it flows from its source to the final agencies by which it is exercised.'

and German Constitutions, the will of the people, as the constitution-*giving* power, is directly expressed.[42] The people's will is to be united in a political unity, for example in Spain or France in a nation, or in Germany in a state. Therefore, legal unity can also address the expression of the people – or a certain group – to be politically united, and can be discerned from a mere legal organisational unity. As will be made clear under parts II.B and II.C, Schmitt's constitutional theory is a clear example of the conception of legal unity in the sense of political unity.

C. Constitutional Revision

As mentioned in the introduction, the goal of this article is to investigate constitutional change in light of legal unity and, the Catalonian constitutional crisis is taken as a case study of constitutional change in which legal unity is at stake. The Catalonian constitutional crisis shows that the amendment procedure in Part X of the Spanish Constitution only partly answers the question of constitutional change. The Catalonian government wished to change the Spanish Constitution without using the procedure laid down in the written constitution of the Kingdom of Spain. The Spanish Constitution, as such, did not have a provision allowing for the secession of certain territorial unities belonging to the Kingdom of Spain. To achieve its wish, the Catalonian government needed to claim a constitutional amendment procedure, which was not laid down in the written constitution.

Reijer Passchier distinguishes between formal and informal constitutional change.[43] He defines informal constitutional change as a change of the meaning of formal constitutional norms 'without (foregoing) formal constitutional amendment – that is, without explicit changes to the written text'.[44] Passchier's distinction between formal and informal constitutional change is based on the constitutional text.[45] A constitutional change is therefore informal if there is an effective change of the constitution without explicit change to the text. The employed concept of a constitution by Passchier is based on: 'the ideal that constitutional text should be a comprehensive codification of the body of rules that governs the government'.[46] This informal constitutional amendment procedure was the act accepted by the Catalonian Parliament on 6 September 2017, containing the announcement of the independence referendum. This was a one-sided claim by Catalonia to have authority over the decision of its independence, despite the fact as mentioned, that the Spanish Constitution does not contain a provision allowing secession. Such constitutional amendment procedures outside the written constitution can only be successful if they meet acceptance of other constitutional actors within the Spanish constitutional realm.

A distinction must be made between the rules of existing constitutional law, which contain foreseen ways of amending constitutions, and cases that go beyond the regulation of the existing constitutional law. The amendment procedure is a part of a specific constitution, for example Part X of the Spanish Constitution. Many constitutions contain provisions that are excluded from amendment.[47] In addition, one of the fundamental laws in Spain during the Franco Era contained unamendable provisions.[48] The current Spanish Constitution does not contain unamendable provisions, but in Part X distinguishes between two procedures; a light and a strengthened procedure. Article 166 of the Spanish Constitution refers to the normal competences of the initiation legislation. According to the first paragraph of article 87, the government, the Congress, or the Senate can initiate revision of the Constitution. The second paragraph states that the Parliaments of the Autonomous Communities can also initiate a constitutional referendum. Popular initiatives, in the third paragraph of article 87, are excluded from initiating constitutional revision, and are therefore restricted to normal legislation. The strengthened procedure is laid down in article 168 of the Spanish Constitution. This provision distinguishes between a total or partial revision, affecting the Preliminary Title, Chapter Two, Section 1 of Title I, or Title II. Partial revisions that do not affect these parts of the Constitution fall under the lighter revision procedure of article 167. This light procedure was followed at the constitutional revisions in 1992 and in 2011,[49] and demands that in both houses the amendment is approved by a three-fifths majority. After that, the Congress can, according to the second paragraph, pass the amendment

[42] In the Netherlands only the Constitution of the Batavian People (Staatsregeling voor het Bataafsche Volk) of 1798 contained these kind of political provisions. The current constitution does not contain any norms expressing political unity.

[43] Passchier (n 10).

[44] ibid. 11.

[45] ibid. 11 and 205.

[46] ibid. 206.

[47] For example the German Basic Law with the provision falling under the scope of article 79, paragraph 3, Basic Law or the French constitution in article 89, alinea 5, which excludes the republican form of government from revision.

[48] Prakke (n 15) 1537. Containing the principles of the national movement.

[49] ibid.

by a two-thirds majority of its members. Within 15 days, according to third paragraph, one tenth of the members of both houses can demand that the proposed amendment is submitted to a binding referendum. Partial revisions that fall under the scope of the Preliminary Title, Chapter Two, Section 1 of Title I, or Title II are subject of the strengthened procedure that requires in both houses a two-thirds majority of their members to agree with proposed amendment. After passing the first round, the two houses are dissolved and the newly elected houses must vote on both the principle and the text of the proposed amendment by a two-thirds majority. After that, the amendment procedure is subject to a binding referendum.[50]

II. Carl Schmitt's Constitutional Theory

A. The Indeterminacy of Constitutional Law

There are some significant parallels between the Catalonian constitutional crisis and the work of the German constitutional law theorist, Carl Schmitt.[51] In 1928 Schmitt's main work *Constitutional Theory* (*Verfassungslehre*) was published.[52] Instead of describing and analysing the applicable German constitutional law of the Weimar Republic, the main focus of this book was the phenomena of a constitution. A fruitful approach towards Schmitt's legal theory that underlies *Constitutional Theory* is the problem of legal indeterminacy.[53] In Schmitt's first work after his PhD thesis, *Statute and Judgment* (*Gesetz und Urteil*),[54] he claimed a high degree of indeterminacy of statutory law. Only in some cases a provision from a statute determines the outcome of the case (the judgment).[55] Schmitt problematised this high level of statutory indeterminacy; it is in contrast with the need of his contemporaries for foreseeability and predictability of legal judgments. According to Schmitt, his contemporaries were so obsessed with foreseeability and predictability that he describes them as 'poor devils' for whom the railway timetable is the holy book.[56] In Schmitt's view these people cannot live with the uncertainty of outcomes in legal cases. His proposed solution is to introduce, besides statutory law, other determinants for the outcome in legal cases. In *Statute and Judgment* this other determinant is the legal practice itself; the judge is making the right decision if another judge would make the same decision in a similar case.[57] Thereby, it is the legal practice itself that constitutes the norms that determine – besides the statutory provision – the outcome. In other words: a normality is constituted that guides the judge's decision. This notion of 'normality' will be further discussed under part II.C.

The problem of indeterminacy of law remains the red thread in Schmitt's later works on constitutional law. In his later works the focus of the indeterminacy problem is shifted from the judge to the public officials, such as the imperial government or the imperial president, under the constitution of the Weimar Republic.[58] In *Constitutional Theory,* Schmitt clearly states the impossibility of overcoming indeterminacy in constitutional law. He wrote on the Prussian conflict between king and provincial assembly, 1862 to 1866, that the royal government could act freely because this case was not regulated: 'The constitution was said to have a "gap" here, and the king could claim for himself the presupposition of unlimited jurisdiction. Such "gaps" are always possible, and an essential part of a constitutional conflict is that one can successfully present claims based on unforeseen circumstances. The uselessness of all normative types of discourse on the "sovereignty of the constitution" reveals itself here especially clearly'.[59]

Here Schmitt uses 'gap' in a negative sense. In Schmitt's view, the liberal doctrine is unnecessarily problematising what it called 'gaps'. In his view on legal indeterminacy 'gaps' are inevitable and not something to problematise to a great extent as 'liberals', in his view, tend to do.[60] *A fortiori*, Schmitt opposes the idea of attaching 'gaps' in constitutional law with the consequence that it should not be constitutional *legal* problems. Schmitt only embraces the 'gap' semantics in a mere negative sense. The next section demonstrates

[50] ibid.1537–1538.

[51] This article is restricted to the discussion between Carl Schmitt and Hugo Krabbe on constitutional change. This does not mean that other approaches, for instance Giorgio Agamben's interpretation of Schmitt's state of exception, could be of great interest too, Giorgio Agamben, *State of Exception* (Chicago University Press 2005).

[52] Carl Schmitt, *Constitutional Theory* (Jeffrey Seitzer tr, Duke University Press 2008).

[53] This claim is substantiated in the following works: Jeroen Kiewiet, 'Does Carl Schmitt Defend a Critical Legal Indeterminacy Thesis?' In: Ubaldus de Vries & Lyana Francot (eds), *Law's Environment: Critical Legal Perspectives* (Eleven Publishers 2011) 155–174; Jeroen Kiewiet, 'Carl Schmitt en de beslissing in het recht' 2013 (10) Ars Aequi 740; Jeroen Kiewiet, *Carl Schmitts dezisionistischer Rechtsbegriff* (GvO 2014).

[54] Carl Schmitt, *Gesetz und Urteil* (first published 1911, Beck 1969).

[55] ibid. 8.

[56] Carl Schmitt, *Theodor Däublers „Nordlicht"* (first published 1916, Duncker & Humblot 1991) 60.

[57] Schmitt (n 56) 71.

[58] Schmitt, *Der Hüter der Verfassung* (first published 1923, Mohr Siebeck 1931) 192.

[59] Schmitt (n 52) 107.

[60] ibid.

that Schmitt is wrong on this point. On a side note, the 'gap' semantics spans a bridge between Schmitt's constitutional theory and the debate between Ronald Dworkin and H.L.A. Hart on the determinacy of law. Dworkin was accusing Hart of promoting a model of a legal system in which a judge had discretion in 'borderline cases', that is, cases wherein the direct application of a legal rule was problematic. In Dworkin's interpretation 'discretion' stands for a gap in the law. Dworkin's reaction to Hart's model was a model of a legal system without gaps, thus a gapless legal system. In part III.A this side note is further developed.

With 'normative types of discourse', as quoted above with respect to the 'sovereignty of the constitution', Schmitt means every type of legal reasoning that adheres to the basic model of the legal syllogism, containing a major premise of legal rules (also called: legal norms), a minor premise of facts (also called: the relevant facts, the case), and the outcome (conclusion). The model's assumption is that legal rules (legal norms) solely determine the outcome. It was already clear in relation to his early work that Schmitt fundamentally opposes this position. For him, the law – the set of legal norms – is to a very large extent underdetermined, almost completely indeterminate. According to Schmitt, it is useless – in the sense of the 'uselessness of all normative types of discourse' – to deny this fact. Only the 'liberal method' – this is, for Schmitt, roughly the 19th century 'positivist' constitutional law theory, which should not be confused with the general tradition of legal positivism[61] – evades the inevitable question; namely 'the question regarding the subject of the constitution-making power and the *representatives* of the political unity that are empowered to decide and which for this purpose constituted a sovereign third'.[62]

According to Schmitt's constitutional theory the Catalonian independence referendum can be seen as a 'gap' in constitutional law. It is an unregulated case. Especially on the side of the Catalan government, the unforeseeability of the constitutional situation has been stressed; the Spanish Constitution of 1978 does not provide the possibility of regulation of independence of the Autonomous Communities. The Catalan government, for their sake, framed – just as Schmitt describes in the quoted passage – the situation as unforeseen, and *therefore* unregulated.

The *conclusion* of this reasoning is problematic for both Schmitt's theory and the Catalan claim of the legitimacy of the referendum. Schmitt's claim, which must be agreed upon, is that it is impossible to regulate all future events.[63] But his conclusion that a 'gap' is completely unregulated is not sufficiently justified. It is inconceivable that the law has a complete absence of norms and standards. In the Catalonian constitutional crisis this is demonstrated by the position of the central Spanish government. Prime Minister Rajoy referred to the norms of the Constitution and the Autonomous Statute of Catalonia.[64] The claim that the constitutional crisis was unforeseeable does not mean it was completely unregulated. In fact, the position of Prime Minister Rajoy comes very close to an argument of the 'sovereignty of the constitution'. If this argument is successful, and at this moment it seems to be that the central Spanish government perseveres, Schmitt's qualification of the 'uselessness of all normative types of discourse' is not convincing.

B. One Bearer of the Constitution-Making Power

A question that follows from Schmitt's basic assumption of the indeterminacy of constitutional law is: who decides? In *Constitutional Theory* Schmitt adheres to the view, developed in his previous works, that only with the decision of a certain person or instance, the law is given. As mentioned above, case law does not have foreseeability or predictability; it always comes down to the decision of the judge. This is the core thesis of Schmitt's *decisionism*.[65] The question after the subject of the decision-making power is the recurrent issue of Schmitt's constitutional theory. In his work Schmitt often refers to Thomas Hobbes, who famously asked in *De Cive*: '*quis judicabit*'?[66] As in Hobbes's *Leviathan* there can only be *one* sovereign, Schmitt states: 'Inside

[61] It is important to notice that Schmitt's use of the word 'positivism' is not in line with the tradition of legal positivism, as discussed under part I.B. of this article. See John Gardner, 'Legal Positivism: 5 ½ Myths' (2001) 46 American Journal of Jurisprudence 199. On pages 211–214 and 218–222 Gardner clarifies that legal positivism does not prescribe certain interpretation methods, which is Schmitt's claim concerning 'positivism'.

[62] Schmitt (n 52) 107. Italics in the original.

[63] This point is also clearly made by Hart. See H.L.A. Hart, *The Concept of Law* (OUP 1994) 124 ff.

[64] Sam Jones, Stephen Burgen and Emma Graham-Harrison, 'Spain Dissolves Catalan Parliament and Calls Fresh Elections' *The Guardian* (28 October 2017).

[65] The problem of Schmitt's position is that this position can only be maintained if there are no cases in which the outcome does not follow directly from a legal rule. This was masterfully demonstrated by Lawrence Solum. See Lawrence B. Solum, 'On the Indeterminacy Crisis: Critiquing Critical Dogma' (1987) 54 University of Chicago Law Review 462, 471–472.

[66] Schmitt (n 52) 101.

every political unity, there can only be one bearer of the constitution-making power'.[67] Schmitt stresses again that one must be an adherer to the 'liberal method' to deny this fact.

According to Schmitt, the real sovereign is not acting on itself, but the representatives of the political unity are in fact acting as a sovereign third. As Schmitt points out in *Constitutional Theory,* a new epoch started with the American Declaration of Independence of 1776 and the French Revolution of 1789.[68] The crucial point of Schmitt's consideration is the following: 'This case involves people themselves determining the type and form of their own political existence. (…) With complete awareness, a people took its destiny into its hands and reached a free decision on the type and form of its political existence'.[69]

But these are rare occasions in which the people manifest themselves directly and take into their own hands the decision on the type and form of their political existence. In many cases, it is a sovereign third – a *representative* – of the people who expresses the people's decision. On many occasions in *Constitutional Theory* Schmitt refers to Emmanuel-Joseph Sieyès's classical distinction between *pouvoir constitutant* (the constitution-making power) and the *pouvoir constitué* (the constituted powers). For Schmitt, as it was for Sieyès, the people are the *pouvoir constituant* who are in the state of nature. In the words of the German philosopher Matthias Kaufmann, the people can be viewed as 'a pre-legal person, who sometimes is a bit wild and tries to get rid of the harness of the order of the state'.[70] In Schmitt's words, the people is 'a kind of higher person'.[71] Apparently, in both Sieyès's and Schmitt's theory the people as the *pouvoir constituant* are always there, however, they only manifest themselves on some occasions. Schmitt draws attention to four categories of cases in which this manifestation can be observed in modern democracies, ranging from the 'modest' expression of the people by way of the national assembly drafting and passing constitutional legislation, to the direct and open declaration of the people's will by way of general popular vote (plebiscite).[72]

On 10 October 2017, President of Catalonia Puigdemont delivered a speech in the Catalonian Parliament in which he declared that he defended 'the mandate of the people of Catalonia to become an independent republic'.[73] This declaration of Puigdemont exactly resembles Schmitt's theory of a sovereign third, that is, a representative of the people claiming to have a mandate. Immediately a couple of questions arise from Puigdemont's declaration. When was this 'mandate' given to him to represent the entire Catalonian people? According to Spanish constitutional law, the President is elected by the Parliament of Catalonia and appointed by the King of Spain according to the first paragraph of article 152 of the Spanish Constitution. His authority is not based on the people's direct vote for his office. Rather, this article of the Constitution provides that he is, 'the supreme representation of the respective Community as well as the State's ordinary representation in the latter.' The President's role under the Spanish Constitution seems to be a mere representative of the decentral state and represents the central state within the Autonomous Community of Catalonia. He is clearly not a 'people's representative', as for example, the French President or the American President, nor the German Imperial President of the Weimar Constitution of 1919, who, according to Schmitt, could claim to be the keeper of the constitution (*Hüter der Verfassung*).[74]

The declaration of Puigdemont aptly shows the problems of Schmitt's conceptual framework. Besides being an official with certain constitutional tasks, he has – contrary to the Catalonian Parliament – no role in outing the Catalonian people's voice; he is a *state* representative. He just went beyond his constitutional role and claimed the people's mandate. In contrast to constitutional revision, if successful, this would lead to a constitutional revolution, setting aside the existing constitution and its revision procedure.[75] This makes his declaration potentially very dangerous. Anyone can claim to represent 'the people'. Almost all dictators came into power by claiming to represent the 'real' people or the people's 'real' interests.

[67] ibid. 105.

[68] ibid. 126.

[69] ibid. 127.

[70] Matthias Kaufmann, *Recht ohne Regel? Die philosophischen Prinzipien in Carl Schmitt Staats- und Rechtslehre* (Alber 1988) 205. Original quote: 'eine Art *vorjuristische Person*, die bisweilen etwas ungebärdig ist und das Zaumzeug der staatlichen Ordnung abschüttelt.'

[71] Carl Schmitt, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* (Duncker & Humblot 1926). In the original: 'eine Art Überperson'.

[72] Schmitt (n 52) 132–134.

[73] Ray Sanchez and Natalie Gallón, 'Catalonia's President Puts Off Declaration of Split From Spain' *CNN* (10 October 2017) <http://edition.cnn.com/2017/10/10/europe/catalonia-independence-declaration-delayed-spain/index.html> accessed 16 October 2017.

[74] Schmitt (n 58) 132 ff.

[75] Schmitt (n 52) 147 ff.

What makes a certain group of persons a 'people' in the sense of Schmitt's theory? Schmitt's answer to this question is that before the constitutional contract can be agreed on – expressed in the *pouvoir constitué*, such as in a written constitution or acts of parliament – the people need to establish a political unity. To be clear: the 'constitutional contract' is not the establishment of a political unity.[76] A 'people' requires a minimum of homogeneity; a substantive democratic similarity.[77] Already in Schmitt's *Political Theology* this is clearly expressed:

> 'Every general norm demands a normal, everyday frame of life to which it can be factually applied and which is subjected to its regulations. The norm requires a homogeneous medium. This effective normal situation is not a mere "superficial presupposition" that a jurist can ignore; that situation belongs precisely to its immanent validity. There exists no norm that is applicable to chaos. For a legal order to make sense, a normal situation must exist, and he is sovereign who definitely decides whether this normal situation actually exists'.[78]

Thus, the normal order precedes the legal order. This 'normal order' can be established in a revolution. The foundation of the order on ground of normality implies that there are certain informal, not legal, standards that provide guidance. The next section discusses the question of who is 'sovereign who definitely decides' on normality according to Schmitt's constitutional theory.

C. Friends and Enemies of the New Catalonian Constitution

In the Catalonian constitutional crisis one can recognise a key point of Schmitt's controversial book *The Concept of the Political* (*Der Begriff des Politischen*).[79] In this work Schmitt claims that every controversy is – at a certain level of intensity – a political conflict. According to Schmitt, there are no neutral, i.e. non-political, domains of human life in which economic and technical organisation can completely eliminate politics.[80] Politics should not, in the definition of Schmitt, be viewed as a kind of definition or description which runs down to an equalisation of 'politics' with 'state'.[81] Instead, politics is a category with its own criterion. In aesthetics the distinctive criterion is between beautiful and ugly, in ethics between good and evil, and in politics it is the distinction between friend and enemy.[82]

The problem with the friend-enemy distinction starts with its polarised definition; it distinguishes between either friends or enemies. In contrast to 'beautiful' or 'good', an 'enemy' does not refer to an established class of objects or thoughts, which can be explicated by the person who is claiming that something is 'beautiful' or 'good'. This explication can respectively be a certain aesthetical theory or an ethical theory. What constitutes the enemy? The only thing that is clear is that, because of the polarised definition, it must be the opposite of friend.

As mentioned, according to Schmitt, every conflict is potentially political. In *Constitutional Theory* Schmitt expresses this point as follows, '[e]very genuine conflict reveals the simple either/or of the mutually exclusive principles of political form.... In the critical moment, the unresolved conflict and the necessity of a decision manifested itself'.[83] This 'decision' is the decision concerning friends and enemies of the constitution and expresses the 'political consciousness' of the people to discern between friends and enemies of the constitution.[84]

Legal unity is, in Schmitt's view, provided by the sovereign who decides on the normal order. With his decision, 'normality' and, consequently, unity is established; there is a unity of *friends* that can be discerned from 'the others' – the enemies. Unity, therefore, is the foundation of every order. It is no coincidence that Schmitt uses this in reference to Virgil, the Latin proverb '*ab integro nascitur ordo*', as the closing line of

[76] ibid. 113.

[77] ibid. 275.

[78] Carl Schmitt, *Political Theology* (George Schwab tr, The University of Chicago Press 2005) 13.

[79] Schmitt, *Der Begriff des Politischen* (first published 1932, Duncker & Humblot 2002).

[80] ibid. 57.

[81] ibid. 19–22.

[82] ibid. 26.

[83] Schmitt (n 52) 105.

[84] ibid. 275. The full impact of this point was demonstrated by Schmitt in Carl Schmitt, *Staat, Bewegung, Volk* (Hanseatische Verlagsanstalt 1933) 6 ff. The act of parliament regarding empowering the national-socialist government on 24 March 1933 (Ermächtigungsgesetz) was viewed by Schmitt as a new constitution, based on the constitution making power of the German people.

his *The Concept of the Political*;[85] the order is born afresh, which means that the unity is established by the sovereign decision between friends and enemies.

Puigdemont asked for exactly this expression of the 'political consciousness' of the Catalonian people to discern between friends of a new constitution concerning Catalonian independence, and enemies of this new constitution. In all his rhetoric about the 'the mandate of the people of Catalonia to become an independent republic', the presupposed Catalonian people as *pouvoir constituant* can be identified. Obviously, the 'sovereign third' representative of this voice of the people was Puigdemont and other prominent ministers of his cabinet, mobilising and leading the Catalonian people to voice their wish to amend the constitution by voting for a new independent constitution for Catalonia.

Where is this polarisation between friends and enemies of the new constitution leading? Those not embracing the new constitution are enemies of that new constitution, consistent to the false dilemma expressed by George W. Bush: 'Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists'.[86] Transposed to the Catalonian constitutional crisis: 'Every Catalonian has a decision to make. Either you are with us, or you are with the Spanish government'. According to this 'logic', not being in favour of an independent Catalonia is aptly expressed by the Spanish law professor Daniel Sarmiento: 'Thus, I suddenly woke up living in a fascist country, being a fascist myself, a conspirator and an accomplice of the tyrants that oppress the Catalan people'.[87] And what to think of the many inhabitants of the Catalan region who live and work there, but were not raised in that region?[88] They are from one day to the next reduced to second-class citizens of Catalonia. The false dilemma of the friend and enemy distinction is troublesome. When the dilemma is presented as an inevitable either/or, every individual is forced to pick a side.[89]

It would be one-sided to point to Puigdemont as the only one framing the debate in Schmitt's theoretical constitutional terms. Prime Minister Rajoy was also referring, as quoted above, to the 'people's political consciousness', which includes only that of the Spanish and not the Catalonian people. The Spanish Constitution expresses, in its preamble, the wish of the Spanish people who ratified the constitution, that the 'Cortes' – the Spanish Parliament – has passed, the desire of the Spanish Nation to give itself a constitution. The preamble elaborates on the content of, *inter alia*, liberty and security, well-being, fair social and economic order, rule of law, cultures and traditions, and the languages and institutions of the peoples of Spain. There is a clear tension within the Spanish Constitution; the Spanish Constitution is given by one Spanish people, in which national sovereignty according to article 1, paragraph 2, of the Spanish Constitution, is vested, but at the same time there is a plurality of Spanish peoples, having their own languages and institutions.

Rajoy invoked article 155 of the Spanish Constitution, which says in its first paragraph that if an Autonomous Community, like Catalonia:

> 'does not fulfil the obligations imposed upon it by the Constitution or other laws, or acts in a way seriously prejudicing the general interests of Spain, the Government, after lodging a complaint with the President of the Autonomous Community and failing to receive satisfaction therefore, may, following approval granted by an absolute majority of the Senate, take the Control of the bodies of the Autonomous Communities, Government Delegate in the Autonomous Communities, measures necessary in order to compel the latter forcibly to meet said obligations, or in order to protect the above-mentioned general interests'.

The literal text of the constitution was used as a powerful *performative* by Rajoy.

Schmitt's constitutional theory can be assumed to be successful if its goal would be limited to a mere empirical description and explanation of group dynamics. Schmitt's argumentative scheme is the heart of the logic of group inclusion and exclusion, and there is considerable back up from empirical studies proving the adequacy of the distinction between friends and enemies on both the level of small groups as well

[85] Schmitt (n 79) 95. See for an interpretation of this expression Tracy B. Strong in Schmitt (n 87) xxx–xxxi.

[86] 'Bush: 'You Are Either With Us, Or With the Terrorists' – 2001–09–21' *Voice of America* (21 September 2001) <https://www.voanews.com/a/a-13-a-2001-09-21-14-bush-66411197/549664.html> accessed 5 January 2017.

[87] Daniel Sarmiento, 'On Cockroaches and the Rule of Law' *Verfassungsblog* (8 November 2017) <http://verfassungsblog.de/on-cockroaches-and-the-rule-of-law> accessed 5 January 2018.

[88] In 2014 35.7 per cent of the adult population was born outside of Catalonia. '28% of families born outside Catalonia use Catalan language with their children' *Catalan News* (30 July 2015) <http://www.catalannews.com/society-science/item/28-of-families-born-outside-catalonia-use-catalan-language-with-their-children> accessed 4 April 2018.

[89] An example is the 'Black Pete discussion' in the Netherlands. It is either possible to embrace Dutch traditions and support Black Pete or reject Dutch traditions and be against Black Pete. A middle way or compromise in the Black Pete discussion is unthinkable. This discussion has even lead to a proposal of an Act of Parliament initiated by the Second House of Parliament to maintain Black Pete in his current form. See: *Kamerstukken II*, 34078.

as political unities. Also Schmitt's emphasis on the need of a decision is evident; decisions are needed to cut-off discussions, and this cutting-off establishes certainty for the group members. But Schmitt's constitutional theory is not limited to an empirical description and explanation. His constitutional theory has a clear normative goal. In what has been stated above, Schmitt constantly settles the score with, what he calls, 'liberalism' with its 'positivist' attitude. Not only in *Constitutional Theory*, but also in his works ranging from the mentioned *Statute and Judgment* wherein the insufficiencies of liberal 'positivism' were laid down, until Schmitt's enactment of the end of the age of 'juristic positivism' in *On the Three Types of Juristic Thought*,[90] his repugnance of the liberal world view – a world of endless conversation without any decision[91] – is evident. Defining politics as the decision between friend and enemy is not a descriptive definition, but a stipulation based on the rejection of liberalism.

It may come as a surprise that in modern democracies, as in Spain, the public debate is framed into Schmitt's antagonistic political theory on both the Catalan and the Spanish sides. As argued above, this is understandable from the constitutional tradition, dominant in many European countries. In Spain, notably, Schmitt has been a well-known constitutional theorist.[92] It is at least ironic that the debate during the Catalonian constitutional crisis is framed in the terminology of Schmitt, an intellectual that was appraised during the Spanish fascist era.[93] From the Catalonian side, more reluctance to the use of Schmitt's friend-enemy-scheme could be expected; the insufficiency of this argumentative scheme with potential escalation of conflicts into a friend-enemy division of the population is evident. It is time to come up with an alternative constitutional theory. The Dutch constitutional theorist Hugo Krabbe developed a constitutional theory that abandons the central notions of Schmitt's theory of popular or national sovereignty. Discussing Krabbe will show that Schmitt's theory was already assumed to be highly problematic by his contemporaries. The potential of Krabbe's constitutional theory to replace Schmitt's constitutional theory will be investigated in the next paragraph.

III. Against Schmitt. Hugo Krabbe's Constitutional Theory

A. The Determinacy of Constitutional Law

As stated in the previous paragraph, the indeterminacy of constitutional law is central to Schmitt's analysis of constitutional law. Likewise, Krabbe, a very prominent Dutch constitutional theorist of the first half of the 20th century, takes the problem of the determinacy of law at the core of his analysis. Despite Krabbe's importance in the fields of constitutional law and legal theory, Krabbe's work does not receive the attention he deserves. In his own lifetime he received international acknowledgment with his major work *De modern staatsidee* being translated into German (*Die moderne Staatsidee*), English (*The Modern Idea of the State*) and (parts of it into) French (*L'idée moderne de l'état*).[94] In particular, the fact that the translation of Krabbe's masterpiece was undertaken in the United States by the well-known political philosopher Georg H. Sabine and professor of political science George J. Shepard, who wrote 80 pages of translators' introduction, is quite exceptional. The English translation was available in 1922, only three years after the German edition, which served as source text for the translation. The great attention to his work during his lifetime contrasts with the moderate appreciation by his constitutional law colleagues at his time. Despite being the teacher of Roelof Kranenburg, an important constitutional law professor and politician who defended Krabbe's main ideas until the end of his career,[95] Krabbe's work was received with criticism by Dutch constitutional

[90] Carl Schmitt, *On the Three Types of Juristic Thought* (first published 1934, Joseph W. Bendersky tr, Praeger 2004) 90. Tunku Varadarajan, 'Catalonia's 'Kangaroo Referendum' Leaves Spain in Poisonous Gridlock' *Politico* (2 October 2017) <https://www.politico.eu/article/carles-puigdemont-catalonia-referendum-spain-kangaroo-referendum-leaves-spain-in-poisonous-gridlock> accessed 5 January 2017.

[91] Carl Schmitt, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* (Duncker & Humblot 1926).

[92] Since the end of the 1920s Schmitt's work was popular among Spanish constitutional scholars, especially because of Schmitt's appraisal of the Spanish counterrevolutionary Juan Donoso Cortés (1809–1853), a distant descendant from the 'Conquistador' Hernán Cortés. Schmitt started studying Donoso Cortés' work at the start of the 1920s and his study culminated in his 1950-publication *Donoso Cortés in gesamteuropäischer Interpretation* (*Donoso Cortés in Pan-European interpretation*), containing four essays on Cortés. See Carl Schmitt, *Donoso Cortés in gesamteuropäischer Interpretation* (Greven 1950).

[93] Schmitt was a highly esteemed academic in fascist Franco-Spain. His daughter Anima was married to a Spanish law professor in Galicia, and Schmitt – called in Spanish 'Don Carlos' – was appointed in 1963 as honorary member of the *Instituto de Estudios Políticos*, the think-tank of the Falange fascist movement. See Jan-Werner Müller, *Ein gefährlicher Geist. Carl Schmitts Wirkung in Europa* (Wissenschaftliche Buchgesellschaft 2007) 146.

[94] Only recently the project started to translate the major work of the Dutch private law Paul Scholten into English.

[95] Besides Roelof Kranenburg, other constitutional scholars were also inspired by Krabbe. Elzinga mentions E. van Raalte, F.J.A. Huart and I. Samkalden. I would add to this list J.J. Boasson who wrote on theory of the legal consciousness ('leer van het rechtsbewustzijn') the well-wrought book J.J. Boasson, *Het rechtsbewustzijn. Een onderzoek naar het leven der rechtsidee in het individueel bewustzijn* (Martinus Nijhoff 1919).

law scholars. The positive appreciation for his work is still often restricted to the idealism and imaginative power of his work.[96]

In some regards, Krabbe's theory of constitutional law is similar to that of Hans Kelsen. Carl Schmitt pointed out in in a short review of *Political Theology* the parallels of Krabbe's and Kelsen's recent works:

> 'His [Krabbe's] theory of laws rests on the thesis that it not the state but law that this sovereign.[97] Kelsen appears to see in him only a precursor of his own doctrine identifying state and legal order. In fact, Krabbe's theory does share a common ideological root with Kelsen's result, but precisely where Kelsen was original, in his methodology, there is no connection between the exposition of the Dutch legal scholar and the epistemological and methodological distinctions of the German neo-Kantian'.[98]

Recently, Giuliana Stella also drew attention to the work of Krabbe by calling him just like Schmitt a 'precursor of the Pure Theory of Law' in the handbook *Legal Philosophy in the Twentieth Century*.[99] Also Jochen von Bernstorff recently related Krabbe's theory to Kelsen's.[100] Kelsen's project of the Pure Theory of Law (*Reine Rechtslehre*) is well-explained by many scholars,[101] but Krabbe's project, on the contrary, still remains unknown for many.

The idea of psychic monism is at the core of Heymans's theory.[102] The central notion of this theory is consciousness. Heymans differentiated between consciousness and brain processes. There is no direct access to brain processes, but all people have access to our consciousness. Heymans introduced the thought experiment of an ideal observant who would be able to have unlimited access to one's brain.[103] This ideal observant would register that the same consciousness processes of the human test subject have the same regularities over time. These regularities contain probably also the source of the observations of the brain processes in the consciousness of the ideal observant. This probability is the fundamental principle of the Heymans's psychic monism.[104] Every consciousness process corresponds with a simultaneous brain process as physiological counterpart. Therefore, the brain processes are nothing more than the sensory representation of the processes of the consciousness. Consciousness, according to Heymans, can be directed toward different contents.[105] It can have, for example, an esthetical or religious content, but it can also have an ethical content, and its content can also be legal. In that case one speaks of legal consciousness.

Schmitt's remark that 'Kelsen was original' with his epistemological and methodological distinctions of neo-Kantianism, and thereby implying that, Krabbe was not,[106] is not justified because Heymans' modern psychology was the backbone of his legal theory. Krabbe's 'epistemological and methodological distinctions' were based on pure empirical research into the nature of law as a fact of legal consciousness. Kelsen's neo-Kantianism seems, in contrast to Heymans' project, particularly based on a dogmatic distinction between 'is' and 'ought', which was indebted to Kant's distinctions in *Critique of Pure Reason* (*Kritik der reinen Vernunft*).

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[96] D.J. Elzinga, 'Leven en werk van Hugo Krabbe' In: D.J. Elzinga, *De staat van het recht. Opstellen over staatsrecht en politiek* (Tjeenk Willink 1990) 72–73. Elzinga: 'Krabbe's denkbeelden hadden en zekere naïviteit'. 'Het is dit idealistische ontwikkelingsperspectief dat velen destijds in de collegebanken heeft geboeid en waarvan ook nu nog een sprong overspringt als men Krabbe's werk tot zich neemt'.

[97] Quotation in the original. His work on this subject was originally published in 1906; the enlarged edition appeared in 1919 under the title: Hugo Krabbe, *The Modern Idea of the State* (die Moderne Staats-Idee) (George H. Sabine and Walter J. Shepard tr, Springer 1927).

[98] Schmitt, *Political Theology* (first published 1985, George Schwab tr, University of Chicago Press Books 2005) 21–22. Schmitt calls Kelsen, who was born in Prague and raised in Vienna, incorrectly a '*German* neo-Kantian'.

[99] Giuliana Stella, 'Precursors of the Pure Theory of Law: Hugo Krabbe' In: Enrico Pattaro & Corrado Roversi (eds), *Legal Philosophy in the Twentieth Century: The Civil Law World. Volume 12. Tome 1* (Springer 2016) 65–71. Stella refers with 'Pure Theory of Law' to Kelsen's project to establish a legal science as a pure science of norms.

[100] Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen. Believing in Universal Law* (CUP 2010) 65 footnote 104. Also the German political scientist Wilhelm Hennis discussed Krabbe in relation to Schmitt in his PhD thesis of 1951. Wilhem Hennis, *Das Problem der Souveränität. Ein Beitrag zur neueren Literaturgeschichte und gegenwärtigen Problematik der politischen Wissenschaften* (first published in 1951, Mohr Siebeck 2003) 24–27.

[101] E.g. the standard work in Dutch on Kelsen's Pure Theory: J.H.M. Klanderman, *Ratio, wetenschap en recht. Een onderzoek naar de opvatting van 'wetenschap', 'recht' en de 'Grundnorm' in de Reine Rechtslehre van Hans Kelsen* (Tjeenk Willink 1988). In English: Lars Vinx, *Hans Kelsen's Pure Theory of Law. Legality and Legitimacy* (OUP 2009).

[102] 'Het psychisch monisme'(*Koninklijke Bibliotheek Nederland*) <https://www.kb.nl/themas/filosofie/gerard-heymans/het-psychisch-monisme> accessed 9 January 2018.

[103] ibid.

[104] Gerard Heymans, *Inleiding in de metaphysica* (Wereldbibliotheek 1933) 290.

[105] Hugo Krabbe, *The Modern Idea of the State* (Appleton 1922) 46.

[106] Schmitt (n 98) 22.

An important part of Krabbe's theory can be brought down to the challenge, exactly as in Schmitt's theory, of the indeterminacy problems of constitutional law. Schmitt insisted that the indeterminacy of constitutional law is unresolvable. Krabbe's position on the determinacy of law is diametrically opposed to Schmitt's. Instead of claiming a very high degree of indeterminacy, Krabbe's position is that of the complete determinacy of law. Despite some major differences, this proposition on the determinacy of law is argued quite similarly to Dworkin's argumentation in *Law's Empire*. Krabbe's claim of the complete determinacy of law is, similar to Dworkin's, is not argued by way of the proposition ascribed to 'legal formalism' or 'mechanical jurisprudence'. As already pointed out in part I.B, Krabbe and Dworkin share their notion of legal unity, understood as unity of content of the law.

Schmitt not only describes Kelsen as suffering from this defective insight, 'the old liberal negation of the state *vis-à-vis* law and the disregard of the independent problem of the realization of law', but adds to this that the 'conception has received exposition by Hugo Krabbe'.[107] It is true that Krabbe renounces, what he called, a 'legal pope'.[108] We can only obtain 'law plus certainty' according to Krabbe, if we would be submitted to this legal pope.[109] Krabbe proceeded, 'by absence of believers there has been no legal pope available yet'.[110] Absolute certainty of outcomes is not only nearly impossible to accomplish, but also undesirable because people should submit themselves to an ultimate highest force, like the Pope. Such a conception of law is certainly not compatible with Krabbe's conception of the modern idea of the state.

Krabbe's legal theory solved one of the central problems of jurisprudence, that is, the 'gaps' in the law,[111] by using the central idea of Heymans's psychology, the notion of legal consciousness. Krabbe sees a problem – just as Dworkin would, more than 50 years later – in the pedigree thesis, which strictly discerns legal and non-legal. Dworkin's test-case to attack the untenability of the pedigree thesis was based on the argument of hard cases, that law strictly understood as a model of rules could not host legal principles which do not have the 'all or nothing' character of rules, but rather direct towards a certain solution in matters of degrees. The test-case of an adequate theory of law for Krabbe was the acknowledgment of the legal validity of customary law.[112] The problem of customary law is that there is no authoritative actor who created or acknowledged a certain norm, but legal validity is ascribed to a certain existing (customary) practice.[113] Krabbe proved that his theory could withstand this theoretical challenge which was the litmus test for an adequate theory of law. According to Krabbe, all law is based on the legal consciousness; the sense that something is right.[114] It does not matter if it is, what Krabbe called, 'positive law, customary law or the unwritten law in general'.[115] There is only one ultimate source of law, the legal consciousness, on which the validity of all law is based. [116]

According to Krabbe, most, and especially the dominant, constitutional theories failed to explain a simple but central feature of law.[117] This feature is the bindingness of law. The dominant theory of law in Krabbe's time was the command theory, also called imperative or will,[118] theory of law. The basic proposition of this command theory is that law is merely a set of commands. A command is issued by a person who is not bound by the command itself. The recipients of the commands are obliged to adhere to the commands. Every valid command must be followed. This command theory failed in an important aspect. It cannot explain why people normally follow legal rules, therefore failing to explain the normativity of law. It is strange to assume in general that a legal rule is followed only because of the potential sanction that is issued when breaking the law.[119]

[107] ibid.

[108] Hugo Krabbe, *Het rechtsgezag* (Martinus Nijhoff 1917) 31. Original quote: 'Recht plus vastheid zou alleen te verkrijgen zijn wanneer wij stonden onder een rechtspaus. […] Bij gebrek aan geloovigen is zulk een rechtspaus nog niet aanwezig.'

[109] ibid. 31.

[110] ibid. The author's translation.

[111] This terminology was used by Schmitt in his attack on the 'dominant' doctrine within constitutional law in part II.A of this article.

[112] Dölle, *Over ongeschreven staatsrecht* (Noordhoff 1988) 33–39.

[113] Ruiter, *Institutional Legal Facts* (Springer 1993) 36, footnote 69.

[114] Krabbe (n 105) 47.

[115] ibid.

[116] ibid.

[117] It can be discussed if bindingness is a necessary condition of law in cases of, for instance, soft law. At least bindingness appears as a central element of most of the law.

[118] For instance in Hans Kelsen, *Die Hauptprobleme der Staatsrechtslehre* (Mohr 1911) 97 ff.

[119] For some types of rules the command theory may offer an adequate explanation of the reasons why rules are followed. The typical examples are of rules which prescribe certain behaviour or demand to refrain from certain behaviour, and breaking the rule is threatened with a sanction.

Krabbe's solution of the indeterminacy problem by reference to the psychological fact of legal consciousness was criticised by many scholars.[120] The core of the criticism revolves around the problem of the foundation of the validity of law on psychology. Krabbe parcels out the legal philosophical question of the validity of law to psychology. But this parcelling-out ignores the fact that amongst academic psychologists there is a heated discussion about the basic assumptions in psychology.[121] If Krabbe does not succeed with the empirical proof of the legal consciousness, his theory seems to be nothing less than a modern variant of a natural law theory, which also assigned the validity of all law to an ultimate force, like a divine force or reason. Consequently, Krabbe's goal to ground the validity of law on a solid scientific foundation would in that case not be reached.

Krabbe convincingly refuted Schmitt's legal theoretical proposition of the necessity of a person or instance that effectively takes a sovereign decision in case of an unforeseen legal 'gap'. Schmitt's legal theory ultimately relies on the assumption of the necessity of a sovereign who decides, which is nothing other than a slight modification of the theories in the tradition of the command theory of law.[122] Being indebted to the same flawed legal theory as the command theorists, Schmitt's legal theory is subject to the same criticism to, in essence, the failure to explain the normativity of law. Krabbe's stance can also, in a certain respect, be interpreted as a normative one. It is the abhorrence of a concept of law that relies on submitting the people under the sovereign's will. This might also be the case with Hart, but he at least does not use it as an argument against the tradition of the command theory. As stated, Krabbe deems legal unity, resulting from an ultimate sovereign who, with his decisions, takes away all legal uncertainty and, thereby creates political unity, both impossible and undesirable.

B. Constitutional Amendment

So far the discussion of Krabbe's theory has mainly focused on his critique of other theories, which, in essence, claim that the bindingness of law follows from the submission of the people under a higher power. In Krabbe's theory there is, in contrast to Schmitt's, no need for a criterion of 'the political'. A distinction between political unities, which are characterised by their decisions between friends and enemies, is at odds with the idea that legal consciousness is a universal feature inherent to all human beings. This universal nature of legal consciousness does not necessarily mean that it is developed among everybody to the same degree.

Krabbe dealt with the topic of constitutional revision in many of his works. Provokingly, in 1906 Krabbe wrote that the Dutch written constitution (Grondwet) 'of all acts is the least complied with'.[123] Krabbe's position on constitutional change raised the question on how legal consciousness can be accurately determined in a society at a particular point. This is without doubt a problematic part of his theory. His perhaps unsatisfactory answer to the question of how an utterance of legal consciousness can be determined, is by the majority rule. In Krabbe's theory it is conceivable that people consult their legal consciousness, but come up with different positions of what is lawful or not. We all start our lives with just a feeling or instinct of right and we develop this into a more developed sense of right.[124] Not everyone's legal consciousness is developed at the same level, as some people's legal consciousness stays on the level of only a feeling or instinct of right. But unity of legal norms is in itself, according to Krabbe, the highest command of legal consciousness.[125] This unity of legal norms can only be determined quantitatively.[126] This quantitative way of establishing a legal norm may sound arbitrary, and it may disregard the rights and interests of minorities. It depends on the honesty of those who pursue what the legal consciousness demands. The only protection of the rights and interests of minorities follows from the fact that it cannot be in accordance with legal consciousness to harm them.

In part I.C of this article it was noted that the Spanish Constitution distinguishes between a light and a strengthened constitutional amendment procedure. Krabbe is strongly opposed to a strengthened constitutional amendment procedure. The development of the legal consciousness should, according to him, find its

[120] C.M. Zoethout, 'H. Krabbe (1857–1936)' In: J.M. Smits, C.J.H. Jansen and L.C. Winkel (eds), *16 Juristen en hun filosofische inspiratie* (Ars Aequi 2004) 16–27, 24–25.

[121] Dölle (n 116) 35–36.

[122] The main theorists in this tradition are Thomas Hobbes, Jeremy Bentham and John Austin.

[123] H. Krabbe, 'De heerschappij der Grondwet' (1906) 4 *De Gids* 371, 371. In the Dutch original: dat de grondwet 'van al onze wetten het minst wordt nageleefd'.

[124] Krabbe (n 105) 46.

[125] ibid. 47.

[126] ibid. 47.

expression in the constitution, without a 'right of veto of a small minority'.[127] Krabbe's position is that the historical utterances of legal consciousness are not important. Only the current legal consciousness can bind the people, not that of previous generations.[128] In the case of the Catalonian constitutional crisis, the change of the Spanish Constitution should not depend on a strengthened constitutional amendment procedure. According to Krabbe's theory, the wish of the majority of the people would be decisive. It can be difficult to establish what the majority is, and the Catalonian constitutional crisis illustrates this point. Should only the inhabitants of Catalonia be asked for their opinion, or also the Spanish people in its entirety? Further questions arise concerning the requirements of a minimum turnout at a referendum, and how a majority at a referendum should be compared with a majority in Parliament or with a decision of the Constitutional Court. The rule of the majority is not easily established.

IV. Conclusion

The historical outline of recent Spanish history, dating from Franco's death on 20 November 1975 until now, showed how troublesome the political constellation in Spain is. There is still a strong tension between centralist aspirations of the Madrid government on one hand and, on the other hand, wishes for more decentralisation in regions like the Autonomous Community of Catalonia. Legal unity, understood as the political unity of Spain, is at stake. This is not only an issue regarding Spanish national unity. The European Union is confronted with questions on how to deal with Catalonia's wish of secession, and also the possible claims of Scotland or Northern Ireland to secede from the United Kingdom in light of Brexit. However, the legitimacy of secession under international law fell outside of this article's scope. The focus of this article was limited to the constitutional theoretical analysis of constitutional change in light of legal unity, comparing the constitutional theories of Carl Schmitt and Hugo Krabbe on this point.

A first step was the conceptual analysis of the idea of legal unity. A distinction between form and content of the law helped to clarify different claims that are made with reference to legal unity. In the Catalonian constitutional crisis, a third conceptualisation of legal unity, the political claim of the highest authority to rule over a certain territorially demarcated area with a certain people, is made on both the Catalonian and Madrilenian side. After the discussion of the political-historical context of the Catalonian constitutional crisis, Spanish constitutional law regarding constitutional revision was briefly discussed. The Catalonian government's claim of secession could not be supported by the Spanish Constitution because of the lack of such provision. The Catalonian government could only achieve its goal by informally changing the Spanish Constitution. In the case of informal constitutional change, it depends on the actual support of the change as to whether the change is successful or not. At this point it does not look like the Catalonian government successfully claimed Catalonia's right of secession.

This article applied two constitutional-theoretical approaches to the Catalonian constitutional crisis. As mentioned, legal unity in the Catalonian crisis must be understood as political unity. The constitutional theory of Carl Schmitt fits this type of legal unity claim. The political unity, according to Schmitt, is based on the distinction between friends and enemies. Both the Catalonian standpoint, and the Madrilenian stance, express the mutually exclusive positions of friends and enemies of the Catalonian and the Spanish Constitutions. A choice by the members of society between one of these two positions is inevitable. Such antagonistic politics have predictable results. Catalans accuse Rajoy's government of nationalist centralism that goes back to the fascist Franco-era. Many Spanish people, at their turn, view the Catalan secessionist movement as a nationalist movement, which is strengthened by the fact that they seek the vicinity of other nationalist secessionist movements.[129] A reasonable compromise between the interests of Catalonia and the central Spanish government seems to be difficult to reach because of the escalation of the conflict on both sides.

Schmitt's constitutional theory was compared with the opposed position of Hugo Krabbe. The constitutional theories of Carl Schmitt and Hugo Krabbe are, at their core, stances towards the determinacy of

[127] Krabbe (n 123) 400. In the Dutch original: 'vetorecht der kleine minderheid'.

[128] This position is also ascribed to Thomas Jefferson who claimed that the dead may not govern future generations. Maarten Colette quoted Edmund Burke with regard to the rigidity of formal constitutional change: 'A state without the means of some change is without the means of its conservation. Without such means it might even risk the loss of that part of the constitution which it wished the most religiously to preserve'. See Maarten Colette, 'What Would Jean-Jacques Rousseau Think of Catalonia?' *Vereniging voor Wijsbegeerte van het Recht* (20 November 2017) <http://www.verenigingrechtsfilosofie.nl/column-what-would-jean-jacques-rousseau-think-of-catalonia-door-maarten-colette> accessed 2 January 2018.

[129] Especially of the Belgian Nieuw-Vlaamse Alliantie of Bart De Wever. 'Puigdemont bedankt "vrienden van de N-VA" op bijeenkomst burgemeesters in Brussel' *Het Laatste Nieuws* (7 November 2017) <https://www.vlaamsnieuws.be/2017/11/puigdemont-bedankt-vrienden-van-de-n-va.html> accessed 4 April 2018.

constitutional law. Schmitt offered an adapted version of a command theory. His claim of indeterminacy of constitutional law and the need of the sovereign's decision was opposed by Krabbe who claimed the determinacy of constitutional law. The law's validity is based on the psychological fact of legal consciousness, which provides its determinacy. Their positions on legal determinacy directly influence their views on constitutional change. For Schmitt, the legal order is preceded by a decision on normality, which is based on the political division between friends and enemies. This political decision is the essence of the constitution making power (*pouvoir constituant*); it contains the decision on the type and form of the constitution of the legal order. The legal order is a political order, established by the distinction between friends and enemies. According to Krabbe, a distinction between political unities of law is meaningless. There is only one legal consciousness, inherent to all human beings, that provides the unity of content of law. Against Krabbe, it may be argued that the foundation of legal validity is parcelled out to psychology and in political practice the establishment of the majority is complicated and sometimes problematic. Krabbe's theory is in a certain respect utopian. But reconsidering Krabbe's theory that is centred on the idea of unity of content of the law, allows for a forceful rejection of Schmitt's theory of political unity. At least the Catalonian constitutional crisis would benefit from dropping both the Catalonian and Spanish claims of their own political unity.

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