

The Catalunya Conundrum, Part 1: How Could Things Come to Such a Pass?

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Catalan democratic institutions (both Parliament and Government) have called for a popular vote on whether Catalonia, an autonomous region in the northeast of Spain of almost eight million inhabitants, should declare itself an independent country. The vote is scheduled for the 1st October, but it as of yet the total opposition of the Spanish Government, which considers it illegal and seems determined to stop it by all means, makes things complicated.

The Spanish Constitutional Court has not yet reached a final decision on the issue, although there are little doubts about the illegality of the referendum, as previous decisions have already excluded any kind of popular vote on secession issues in Spain as a whole (and moreover in any particular autonomous region). That is why, as [José Luis Martí has already explained in the Verfassungsblog](#), the decision of the Catalan Parliament was in clear breach with Spanish law. But even if almost every legal scholar agrees on that, the Catalan file cannot be closed so easily. First of all, legality can be challenged when it lacks enough popular adhesion or is not broadly accepted as legitimate and rightful. In fact, this Constitutional crisis precisely shows a challenge of that kind. Also, because many of the actions taken by the Spanish Government seem hard to reconcile with freedom of speech.

In a three-piece series of blog posts, I will focus on three issues: the different attempts made in recent years by Catalan secessionists parties trying to find a lawful way to ask the population about the independence of Catalonia and Spanish legal system's responses blocking them; how this gridlock has led to a constitutional crisis in Spain and what could be possible solutions; and finally why concerns about the Spanish authorities' reaction may be well founded, thus creating a potential conflict at the European level.

Is there a way within the Spanish Constitution of 1978 to ask Catalan citizens whether or not they want to be part of Spain?

The History of Catalonia is full of major and minor clashes against the Castilian powers that emerged as the dominant part of the dynastic union that was at the origins of current Spain. Major ones happened in 1640, 1714 or 1934. In all of them, there was a clear assertion of a will of independence on the Catalan side (obviously, expressed in very different ways each time), and in every one of them the conflict resulted in a military defeat. Also, Spanish Civil War (1936-1939) fostered some assertion of political independence in Catalonia, a territory which was from the beginning against General Franco's putsch, but the final victory of the pro-coup camp ended these aspirations. When democracy returned after the death of General Franco in 1975, autonomy claims quickly emerged again. As Fran Caamaño, Spanish Public Law scholar and former Spanish Justice Minister, puts it out, democracy in Spain inevitably leads to autonomy claims in some part of the country, and those times were not an exception. As a matter of fact, the 1978 Spanish Constitution is not only a bargain between Francoist officials and the democratic opposition pushed by foreign powers (the USA, as well as some European countries) but also an agreement reached with nationalist parties in the Basque Country and Catalonia who did not fight against the process in exchange of a generous political autonomy (later generalised to all regions of Spain).

The modern Spain that emerged from 1978 Spanish Constitution is a decentralised State built on an ultra-centralised regime. Decentralisation for every region in Spain has been not only a surprise but also a big success in general terms. Nevertheless, Basque and Catalan nationalist parties feared, as the XX century faded, that some of these achievements were at risk due to new political majorities and the evolution of the Spanish Constitutional Court's jurisdiction. Both regions entered political processes to legally shield increased autonomy powers, but those attempts were deemed unconstitutional by the Spanish Constitutional Court (for the Basque

“Plan Ibarretxe”, see [STC 103/2008](#), the first decision in which the Spanish Constitutional Court clearly held that no referendum vote is possible without the authorization of the Spanish Government and also that no referendum vote is possible, at least under the current legal system in Spain, that could lead to the questioning of the unity of Spain). As bitter as this legal pill could have been to swallow, the Basque nationalist majority took a step back, helped by the traditional special financial status offered to the Basque Country, that has been extended and secured several times in recent years.

The Catalan Statute of 2006

Paradoxically, the Catalan case was considered less controversial at that time. Instead of passing a legislative act to call a referendum, the Catalan institutions tried to expand and secure their autonomy through a reform of the Catalan Statute of Autonomy, thus using the legal tools provided by the Spanish Constitutional framework. The political agreement on this reform was really difficult to reach, but finally a deal was closed within the Catalan Parliament between the governing centre-left coalition (PSC, ERC, ICV) and the Catalan conservative nationalist party that headed the opposition. This reform required the approval of the Spanish Parliament, though. The Spanish conservative party PP, with not so many voters in Catalonia but a large base in other parts of Spain, was commanding the opposition there and opposed fiercely the new Statute. Finally, largely the same majority that had passed the bill at the Catalan Parliament approved the new Statute at the Spanish Parliament, albeit with major changes in order to try to make it more acceptable for voters from other Spanish regions. After that, the people of Catalonia agreed with the text by voting in favour of the reform in a referendum (with an [overwhelming 3/4 majority](#)). The Spanish conservative party PP, though, excluded from the agreement, challenged the constitutionality of the Statute.

Amid much political turmoil, the Spanish Constitutional Court, in its [unanimous decision 31/2010](#) (even if some concurrent votes dissented on the rationale), upheld most of the Statute. At least, that was how the Constitutional Court decision was presented, and politically praised, in almost every part of Spain... with the notorious exception of Catalonia.

From the very beginning, Catalan political actors considered, accurately, that this decision in fact had ruined the whole project's ambitious intention of providing autonomy for the Catalan democratic institutions within the Spanish Constitution. Even though the Constitutional Court had declared unconstitutional only a dozen of articles, many others were reinterpreted “according to the Constitution” in a way that resulted in giving the text a very different meaning. And, most important, the Constitutional Court stated likewise that parts not affected by its 31/2010 ruling were also to be “interpreted” in the future by themselves, if called upon, thus eliminating the perspective to constitutionalize Catalan autonomy and protect it from future legal recentralization by new majorities. Legal reforms in the following years had nothing but confirmed these fears. To add insult to injury, some of the articles eliminated from the Catalan Statute had been introduced in other texts adopted by other Autonomous Communities after 2006, without having been challenged before the Constitutional Court, and therefore they were (and they are still today) in force while their Catalan equivalents are not.

The quest for a new financial agreement (2012)

The Decision 31/2010 of the Spanish Constitutional Court came belatedly and in very bad timing. The economic crisis that began in 2007-2008 was already hitting hard the Spanish economy in 2010. After a first period of denial, citizens were beginning to realize that the days of wine and roses in Spain were over, at least for some years. Tough times were expected to come and political unrest grew across the country.

In that context, the decision of the Constitutional Court was a political bomb exploding in the face of the Catalan center-left government coalition which, after a snap election, lost to the Catalan nationalist conservative party. This new Catalan government tried to strike a new and fair financial balance with the Spanish government, following the example of the Basque Country, as an alternative way of gaining and protecting some of the political autonomy lost because of the Constitutional Court decision. The economic situation not only in Spain but also in Europe left scarce room for economic manoeuvring, and these attempts failed.

A perfect secessionist storm was gaining momentum. Former secessionists were joined by parts of the federalist

left disappointed by the ruling of the Constitutional Court that limited maybe forever the possibility of an ambitious federal system within the boundaries of the Spanish Constitution, and also by part of the traditional nationalist right that considered no real economic autonomy was possible without an ambitious reform of the financial status of Catalonia. In that context, a consultative referendum on the independence of Catalonia appeared for the first time as a political objective shared by a vast majority of the Catalan Parliament.

The Catalan Parliament asks the Spanish Parliament to call for a referendum (2014)

The Spanish Constitution of 1978 regulates different types of referendums – to approve or to reform some Statutes of Autonomy, or to amend the Constitution. There is also another possibility, regulated in article 92 of the Spanish Constitution (CE): the consultative referendum, which may be submitted to “all citizens” about political decisions of special importance.

It is important to remember, at this point, that article 149.1.32^a CE clearly states that State holds exclusive adjudication competence for the “authorisation for popular consultations through the holding of referendums”. Accordingly, art. 92.2 CE, for the consultative referendum, explains that it “shall be called by the King at the proposal of the President of the Government, following authorisation by the Congress of Deputies”. After a petition of the Catalan Parliament passed by a large majority, the Congress of Deputies finally decided in 2014, after months of popular and massive social movements in Catalonia, that such a referendum was not possible under the Spanish Constitutional regime.

As the Spanish Prime Minister stated, it was not only a question of will (even though he made clear that he did not want, in any case, to accept such a referendum), but that he was also legally unable to. An overwhelming majority in the Spanish Congress of Deputies, including both the right and the left, agreed with this (299 votes to 47). The legal and constitutional foundation for this was a reading of article 92 CE according to which not only a State authorisation was required but also a vote by “all citizens” (art. 92.1 CE), in conjunction with the idea of national sovereignty (art. 1.2 CE) and the “indissoluble unity of the Spanish nation” (art. 2 CE). The Basque „Plan Ibarretxe“ Decision by the Constitutional Court was also invoked as a precedent. This reading of the constitution was found convincing in both large parts of the media and among legal scholars, with the notable exception of Rubio Llorente, probably the most important Spanish Constitutional Law scholar of the last decades, [in major newspaper El País as early as in 2012](#).

In support of Rubio Llorente’s position, it has to be said that this very rigid reading of the Spanish Constitution clashes with the fact that art. 92.3 CE delegates to further legislative development the detailed regulation of the different forms of referendum. This development could have been accepted as a way to regulate the issue introducing the possibility of a State authorisation for referendums proposed by any Autonomous Community. The constitutional mandate that those referendums should call “all citizens” to vote could have been easily interpreted as “all concerned citizens” or “all citizens from the territorial entity in which the referendum is taking place”. In fact, and surprisingly, Spanish legislation regulating the activity of local entities allows cities and towns to ask for this kind of authorisation by the State in order to make referendums in some cases, and no one has ever considered this regulation to be in breach with arts. 92.1, 1.2 or 2 CE.

In any case, these positions failed to persuade the Spanish legal community, which adhered, following the example of the Constitutional Court, to a very restrictive interpretation of the possibilities offered by the Spanish Constitution. This rigid way to analyse our Constitution created not only a problem of internal coherence (local entities have a higher degree of autonomy in this realm than Autonomous Communities), but also aggravated the political problem and Constitutional crisis in Catalonia, with Catalan institutions looking for other constitutional ways to do the vote.

A Catalan “popular consultation” as another possible constitutional way to vote (2014)

After a sharp debate within the Catalan institutions a last attempt to come to a vote within the boundaries of the

Spanish Constitution was made, trying to find constitutional ground on the idea that art. 149.1.32^a CE, when saying that the State has to authorise “popular consultations through the holding of referendums“, was thereby accepting other kinds of popular consultations. This claim had already been accepted at that time even by the Spanish Constitutional Court. Using that possibility, the Catalan Parliament adopted a legislative act on popular consultations and the Catalan government decided to call for a vote on 9 November 2014.

Once again, the Spanish Government blocked this consultation. The Spanish Constitutional Court in a number of rulings (SSTC [31/2015](#), [32/2015](#), [138/2015](#)...) stated the impossibility under the Spanish Constitution to hold such consultations in a way too close and too similar to a general vote (because in that case it has to be considered as a “referendum” and not as a “popular consultation”) and, also, invoking previous decision STC 103/2008, because of the absolute impossibility of asking about anything that may affect the unity of Spain.

Again, the rigidity of the ruling is shocking, as it leaves no viable way to ask the population even with consultative tools and participative procedures. But, once again, it has to be noted that a vast majority of Spanish scholars seemed to support this way to read our Constitution. The few voices that openly disagree were usually from Catalonia, with very few (and remarkable) exceptions. It is also interesting that the Catalan government formally accepted the decisions of the Constitutional Court and declined to go on with the official consultation, but started openly collaborating with civic entities pushing for independence. Finally, the 9 November 2014, almost 2.5 million Catalans (near half of the citizens with a right to vote) cast a ballot with no legal validity but an intense political significance. Almost 2 millions of those votes were in favour of the independence of Catalonia.

Snap elections as a means for Catalans to openly express their opinion on independence (2015)

With every other legal option shut down by the Spanish Constitutional Court, the Catalan Government decided to ask Catalan citizens to go to the polls, and thus to express themselves about the independence of Catalonia, in a snap election. This way to proceed was clearly within the Spanish legal framework, but from a legal point of view the election was a normal one rather than an independence vote. Nevertheless, moderate Catalan parties favouring independence grouped in an explicit secessionist coalition, Junts pel Sí, and promised to declare independence if they reached a majority. Other secessionist groups like CUP (radical left) went to polls alone, and so did the different parties that rejected the secession: the Spanish right party PP, the Spanish left party PSC-PSOE, the Catalan anti-secession party Ciudadanos; but also other parties that explicitly said that they favoured the referendum but had no official position on the issue (most important Podemos). The result of the elections was an absolute majority of seats for the explicitly secessionist parties that fell short of reaching an absolute majority of votes (48%), with parties against secession reaching 40% of the votes. With no clear democratic mandate for declaring secession, the secessionist majority decided against it. Which put the political problem, posed by the impossibility of asking the citizens directly on the issue, back on the table.

However, the legal and constitutional problem, as we have seen, had been already solved. All attempted ways to allow the Catalan citizens to vote had been blocked because of constitutional reasons. Certainly, the series of decisions of the Spanish Constitutional Court can be criticised as overly rigid and has proven unable to fix political issues that any constitutional system needs to fix in order to survive. Nevertheless, it could be hardly said they are not clear enough. Spanish Constitutional Court, in line with all major Spanish parties and most legal scholars, has explicitly stated, time and again, over and over, that it is not possible within the Spanish constitutional system to ask the citizens of a part of the country about their wish of being part of Spain or not. It is not possible to do it with a referendum nor by some other type of popular consultation; it is unconstitutional for the Congress to give authorisation for doing it, and it would be even more illegal to do it without a negotiation with the State and its previous approval.

Which takes us to the current constitutional crisis Spain finds itself in right now. This I will take on in part 2 of the series.

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