The Catalunya Conundrum, Part 2: A Full-Blown Constitutional Crisis for Spain

verfassungsblog.de/the-catalunya-conundrum-part-2-a-full-blown-constitutional-crisis-for-spain/

Andrés Boix Palop Mi 27 Sep 2017

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In Part 1, I have explained the rigidity of the constitutional doctrine of our Constitutional Court on the matter of regional independence movements. There are some evident conclusions that swiftly appear – most of all that the only legal way for a hypothetical majority of Catalan citizens to express their wish to secede or at least to consult with the population on the issue, would presuppose a constitutional reform. This is a tremendously complicated matter in itself, though.

Constitution reform in Spain is not particularly rigid when it comes to amending certain parts of the text (as previous reforms on economic issues at EU request, for instance art. 135 CE in 2011, have shown). But the Spanish Constitution was designed to make amendments almost impossible when sensible issues such as fundamental rights are concerned (which is a common feature in modern constitutionalism), but also more exotic ones like the Crown which is thereby shielded from “democratic assaults”. This refers also to the parts of the text regarding the “indissoluble unity of the Spanish nation”. Catalan institutions, if they propose a constitutional amendment that would allow them to hold a referendum on that issue, would need a 2/3 majority in both chambers of the Spanish Parliament, a referendum approving the changes, new general elections, and another 2/3 majority in the new Parliament (art. 168 CE). Considering the fact that the wish for more autonomy or even the acceptance of a secession may gain a majority in some regions of Spain but are broadly rejected in other parts of the country, it is almost impossible for Catalan institutions to work for that coalition.

It is fair to remember, in addition, that the Spanish electoral system favours some regions (for instance, the central regions of Castille) giving them more members of parliament in relation to their population than the members of parliament adjudicated to regions such as Catalonia or the Basque Country. This imbalance is even bigger in the Senate, to the point that in order to achieve a 2/3 majority at that Chamber with their more “natural” political allies on the issue, pro-referendum parties may need a majority of 75-80% of the total vote.

Constitutional reform rules in Spain, as a practical result, offer a viable way to Catalan institutions only if they achieve a broad consensus that has to include today’s fierce opponents to any further decentralisation, including right wing popular parties such as the PP, with a big share of vote in those areas of the country. Those parties have been fighting any attempt to protect or to increase current capacities of Autonomous Communities, let alone hold a referendum. Therefore we can safely say that the only theoretically possible way, constitution reform, is practically impossible at this moment.

Of course, they can always decide to drop their aspirations, and indeed that is what they ought to do according to the Spanish constitutional consensus. But a political conflict like this just does not fade away only because there is not a legal way to express it. In those cases, when there is no way to do it within the legal framework, the rigidity of the system risks to create strong incentives to explore possibilities outside the legal and constitutional scope. And that is exactly what we are seeing now in Catalonia, where the unilateral referendum called by the Parliament and the Government have been prepared in explicit and open breach with the Spanish legality. Catalan secessionists are not even trying to dispute that. They simply invoke other legitimacies, like some principles of Public International Law or the principle of democracy.

I do not intend to analyse these claims (Catalan institutions have presented really interesting papers on the issue, made by some European colleagues, that confront the mostly accepted vision that self-determination does not apply in the Catalan case). But, from a constitutional perspective, I consider it necessary to remember the inherent

problem of legitimacy that appears in a case like this: It is an illegal referendum because it has not been negotiated with the State authorities, even though it could have never been negotiated because it is illegal. Circular reasoning like that is evidently incoherent.

Not offering any possible legal path to implement democratic demands shared by many weakens any democratic regime. That may be the reason why every time when a consolidated Western democracy had to face a situation like this, a referendum was made possible in the end – in some cases, without an explicit agreement (Quebec); in more recent ones, by working together with the State (Scotland). In neither cases the outcome was a weaker or more divided Canada or United Kingdom – quite the contrary.

The lack of a constitutional conflict resolution is also a problem for the State. An executive power with a big loss of legitimacy may lack the required authority to freely choose the proper legal ways to react. In fact, the response of State and central government in Spain provides a striking example of that contingency.

A State with no problems of legitimacy in Catalonia, for example, could have preferred not to react (or not to overreact) to the illegal referendum, hoping that political pressure and emphasis on the fact that the referendum is illegal will be enough to keep a majority of the citizens away from the polls. Obviously, current Spanish State institutions show no confidence that this is what will happen in Catalonia. The reason is clear: Spanish officials fear that mere political pressure would not be enough to guarantee the political failure of the referendum and therefore do not want to take the risk of simply letting people go to vote.

But this same problem of legitimacy also affects, once the government decides use legal and constitutional tools, how to react. Spanish Constitution has an article, like most federal Constitutions, allowing the State to retake control of the institutions of any Autonomous community in exceptional cases, for instance if regional authorities are not law-abiding. Under this article 155 CE, the Spanish Government could have retaken complete control of the situation in Catalonia using perfectly constitutional remedies. For the moment, they have decided not to use that tool, because activating it requires an open debate at the Spanish Senate. Publicity, and having to confront political opposition at the parliamentary arena, is something any government or any State with legitimacy problems will try to avoid. Instead of using the legal tools provided by the Constitution they should use, Spanish institutions are distorting ordinary tools to have at hand exceptional means and ways to react. That poses another, and rather dangerous, challenge to the Spanish system of Rule of Law (*Rechtsstaat*), which I will explore in part 3.

SUGGESTED CITATION Boix Palop, Andrés: *The Catalunya Conundrum, Part 2: A Full-Blown Constitutional Crisis for Spain, VerfBlog,* 2017/9/27, http://verfassungsblog.de/the-catalunya-conundrum-part-2-a-full-blown-constitutional-crisis-for-spain/, DOI: https://dx.doi.org/10.17176/20170927-075116.