

The Judgment of the Spanish Constitutional Court on the Resolution 1/XI of the Parliament of Catalonia

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The Judgment of the Spanish Constitutional Court annulling Resolution 1/XI of the Parliament of Catalonia on the start of the political process in Catalonia as a consequence of the electoral results of 27 September 2015 has not surprised anyone. In fact, the diction itself of the Resolution did not even allow for a content interpretation.

The first aspect worth mentioning is that this Judgment is one of the most speedily issued judgments in plenary session throughout the history of the Court. The Court even justifies this “priority given to the resolution of this matter” by alleging its constitutional significance. This promptness should be questioned since other significant cases have been waiting for years. However, the response given by the Court was not difficult, for the admissibility question of the challenge launched by the Spanish Government had already been dealt with in the Judgment of the Spanish Constitutional Court 42/2014 and the content of the Resolution is clearly unconstitutional. Even the Parliament of Catalonia requested that the challenge not be admitted since the Resolution was a political declaration, although it does not try to defend the constitutionality of the content anywhere in the text.

The only substantial question from a constitutional perspective was, as has been said, if the challenge launched by the Spanish Government had to be admitted if the object of this challenge was a political declaration. This matter was resolved by the Constitutional Court in its Judgment 42/2014, where it laid down that “legal acts are not only those that are binding”. In my opinion, this legal reasoning was arguable in that case but it is not so in the present situation. Indeed, the Resolution of the Parliament of Catalonia object of the Judgment of 2014 seemed to make a difference between the political declaration and its subsequent legal canalization. It pointed out that Catalonia is a “sovereign political and legal subject” while later appealing to the legal framework in order to exercise the right to decide. This differentiation does not exist in the current case inasmuch as the Parliament of Catalonia solemnly declares the start of a constituent process, the consideration of the Parliament as an expression of the constituent power and the no submission to the decisions taken by Spanish institutions. As a consequence, the doctrine laid down in the Judgment 42/2014 is paradoxically more applicable to these declarations than to those included in the Resolution object of the mentioned Judgment.

With regards to the content of the Resolution, the following must be stated.

Firstly, the reasoning of the Court is inspired by a Kelsenian conception of the constitutional order. The principle of unity laid down in the legal order does not allow the existence of several sovereign subjects but only one: the Spanish people as the only constituent power. Consequently, the Parliament of Catalonia, as a constituted power, cannot rise up to this and become unilaterally a constituent power.

Based on this, the second idea to point out is that there is no democracy without constitutionalism. The Judgment reminds us that it is not possible to set democratic legitimacy against constitutional legality to the detriment of the latter. The democratic principle cannot be alleged outside of the constitutional framework, for legitimacy has its roots in the Constitution. The unconditional supremacy of the Constitution is the unique expression of the constituent power, within which, never outside, the democratic principle needs to be interpreted. The content, clearly alleging rupture, of the challenged Resolution eases the reasoning of the Court, which in other circumstances would have admitted nuances.

Thirdly, the allusions to the constitutional canalization of the right to decide have disappeared. It is now a different stage and the Court adapts itself to it. The Resolution does not consider anymore the possibility for the Catalan political community to decide on its political future; instead the majority of the Parliament of Catalonia has solemnly declared the start of a constituent process. Facing this situation the only solution is to overrule the Resolution.

After all this been said, constitutional reform is contemplated as a hypothetical constitutional channel for the secessionist aspirations since there exist no material limits to the reform, but only procedural. However, as we are not talking about the right to decide but about a “declaration on the start of the process towards independence”, constitutional reform would not have as its aim the canalization of the aspirations made clear in the challenged Resolution. Instead the resort to constitutional reform would aim to discredit the Parliament of Catalonia inasmuch as it contemplates a unilateral rupture of the constitutional order in place of following the procedures set up by the Constitution or even making sure that they are politically sealed. According to the Court, the problem is not the ambition to achieve an independent Catalan state but the exclusion of the constitutional mechanisms available.

To sum up, the choice of this unilateral approach that seeks rupture has permitted the Court to reject the behavior of the Parliament of Catalonia from the point of view of constitutional legality, as well as from the perspective of democratic legitimacy. The Court is in a comfortable position as the guarantor of the unity of the legal system, from which it faces a constituted power self-proclaimed “custodian of the sovereignty and expression of the constituent power”.