

LEGALITY AND THE REFERENDUM ON INDEPENDENCE IN CATALONIA

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The President of the Generalitat de Catalunya has reiterated in recent weeks two statements of great importance. The first is the commitment to consult Catalanian voters during the next term about the possibility of Catalonia becoming a sovereign state, if the elections to be held on November 25th indicate a clear majority in favour of the proposal. The second statement is that the vote will be conducted within the framework of the law to the extent that it is possible.

The Spanish government's reaction has been forceful. Thus, the state government has indicated that the Spanish Constitution does not permit the possibility of such a popular consultation regarding the possible separation of Catalonia from the rest of the state. The response adds that if the Catalan government takes actions to call for the vote for the referendum, they will be paralyzed through administrative and judicial processes.

For the Spanish Government, the legal basis for its position is founded on the fact that the Constitution of 1978 does not provide expressly for a referendum of the characteristics noted above, in line with the provisions of Articles 1 and 2 of the Constitution. These articles only establish the sovereignty of the Spanish people and the indissoluble unity of the Spanish nation, respectively. The state government also finds support for their position in the Judgment of the Constitutional Court (JCC) 103/2008, which seems to exclude the possibility of any popular inquiry regarding the identity and unity of a sovereign entity except a constitutional reform referendum involving all of the Spanish citizens.

Certainly the Constitution does not provide for the possibility of calling a referendum at this time by which the citizens of Catalonia could legally decide on the independence of the territory. Nonetheless, the fact remains that, based on the democratic principle of Article 1 of the Constitution and, in the absence of limits on constitutional reform, there are ways that can be found in the Constitution and current legislation which allow for Catalan citizens to express their views in an advisory referendum about the start of the constitutional reform process leading to the independence of Catalonia. This explicit link between the referendum on the collective future of Catalonia and the reform of the Constitution should overcome any obstacles to an inquiry posed by JCC 103/2008. It should be remarked here that this decision of the Constitutional Court was issued in relation to the proposed referendum on the Ibarretxe Plan, which specifically did not link the decision on the future of the Basque country to constitutional reform.

What are the mechanisms under the Constitution and current legislation that can legally allow the will of the people of Catalonia regarding the creation of their own sovereign state to be known? Essentially, there are two: the referendum provided for in Article 92 of the Constitution and the referendum established by the Catalan Act 4/2010 on popular consultations. Both are purely advisory, so that their outcome can not have

directly effective legal consequences, although following democratic logic, the verdict of the inquiry could hardly not be politically binding. In the first case, the power to call a referendum resides with the central government. In the second, it corresponds to the Government of Catalonia, with prior authorization from the central government. It should be recalled that, as stipulated by the JCC 103/2008, a referendum involves the participation of the entire electorate of the entire Spanish territory, or part thereof, conducted with the guarantees of electoral procedure established by State organic law.

Article 92 of the Constitution stipulates that political decisions of special importance may be submitted to an advisory referendum called by the King at the proposal of the Prime Minister and with the authorization of the Congress of Deputies. Recognized constitutionalists, such as F. Carreras and F. Rubio Llorente consider that, before formally opening the necessary constitutional reform process to recognize the right of Catalonia to separate from Spain, it is necessary to verify that there is such a desire for independence in this territory, and that the way to determine this is through the application of the abovementioned Article 92. Certainly this precept and the Organic Act that develops it (Law 2/1980 of the different types of referendum) do not expressly provide for this type of referendum. For this reason, as noted by the professor Rubio Llorente, it would be necessary to reform that organic legislation in the Spanish Parliament, through a legislative initiative that could be driven by the Catalan Parliament under article 87.2 of the Constitution. This modification should incorporate the new form of referendum and the regulation of some essential issues such as: the requirement of clarity in the question and its link to the constitutional reform process, the percentage of voter turnout for approval of the proposal, and the consequences of a favourable result. Regarding this last point, the referendum should be considered consultative legally, but the organic law could provide for meetings between the Governments concerned in order to evaluate the results of the referendum and account for their positions before their respective Parliaments.

Meanwhile the Catalan law 4/2010, adopted in the framework of Article 122 of the Statute of 2006 and with respect to the above-mentioned organic law, allows for an advisory referendum whereby Catalan citizens can vote on political issues of particular importance in the scope of the powers of the Generalitat. This last point should be interpreted so that the subject of consultations may include, in addition to questions about competencies, questions concerning the powers of the Generalitat recognized by the Constitution and the Statute, among which is the exercise of constitutional reform initiative, as evidenced by Articles 166 and 87 of the Constitution. It is, therefore, legal within the Catalan legislation to call a referendum on the collective future of Catalonia whenever the questions are linked to a process of constitutional reform. The referendum regulated by the Catalan law 4/2010 has consultative status, must be approved by Parliament, is to be called by the Government of the Generalitat with the prior approval of the central government under the provisions of Article 149.1.32 of the Constitution and obligates the Catalan Government to appear in Parliament and report their position on the outcome. In any case, it would be necessary to reform the Catalan law to foresee a referendum for the specific purpose mentioned above and its core elements such as the requirement of clarity in the question, the percentage of voter participation and the percentage of votes in favour of the proposal. Finally, it should be noted that, although the law 4/2010 was challenged by the President of the Government before the

Constitutional Court, the Court lifted its suspension by Auto 87/2011. In short, the law 4/2010 remains fully in force while the Constitutional Court does not say otherwise by ruling on an appeal or by accepting a request to reconsider lifting the suspension.

A third way to hold the consultation regarding Catalan sovereignty has also been considered. This would be the option of holding a popular consultation without it being considered an official referendum regulated by Act of Parliament of Catalonia. As such, it does not meet the requirements of a referendum, which means that voters and the guarantees for the electoral procedure are different from those established by organic state law, and therefore, the referendum would not require state approval to be called. During the last legislature, the Catalan Parliament discussed a bill, without actually approving it, for this type of consultation, which included a specific provision of guarantees and voters and did not include state authorization for the consultation. It cannot be ruled out that a legislative initiative of the same or similar characteristics could be approved by the Catalan Parliament in the next legislature. This is not the context to examine the constitutional framework for such popular consultations. Evidently, in any case its value as an expression of the democratic will of the people would be less than that of a referendum. For this reason this type of popular consultation should only be utilized if it is not possible to hold a referendum because the central Government's refuses to convene or authorize an official referendum. Of course in this situation, it is likely that the Spanish Government would have already challenged the Catalan law on referenda before the Constitutional Court and the Court would have dictated the subsequent suspension of its application. In this case, the Generalitat would be unable to act within the framework of the law.

As explained above, it is clear that the call for a referendum on the collective future of Catalonia linked to the beginning of a constitutional amendment is possible within the constitutional framework and the law. The Spanish government can certainly block this initiative politically in Parliament, prevent it administratively, denying the authorization requested by the Generalitat, and challenge it by Article 161.2 of the Constitution before the Constitutional Court if it believes that the Catalan institutions are operating outside of the law. The Generalitat, meanwhile, could go to the administrative court to challenge the refusal to authorize the referendum. Therefore, it is clear that if a strong parliamentary majority arises in favour of a consultation on the sovereignty of Catalonia in the election on 25 November, the Spanish government and the Generalitat must negotiate the terms of the referendum under the law and carry out the relevant regulatory changes. Precedents in Canada-Quebec and the United Kingdom-Scotland, even those involving constitutional contexts other than that of the Spanish situation, must be a source of inspiration to find a solution for the Catalan referendum, as the democratic principle must ultimately be the essential foundation of the decisions to be taken.