ANOTHER EXAMPLE OF THE EXCEPTIONAL NATURE OF THE REFERENDUM IN CATALONIA

(A comment about the Spanish Constitutional Court's Judgment of 10 May 2017 on the Catalan Law on Referendum Consultations)

Eduard Roig Molés
Professor of Constitutional Law
Universitat de Barcelona

On 10 May, the Spanish Constitutional Court declared void the regulations on the regional referendums to be held with prior authorization from the national authorities contained in the Law of the Catalan Parliament 4/2010, of 17 March. It is the last step taken by the constitutional judges as regards referendums and regional competences over these.

Two years ago, Judgment of the Constitutional Court 31/2015 clearly laid down the requisite of national authorization, pursuant to article 149.1.32 of the Spanish Constitution, for any call made by public authorities to the citizenship aiming to ask their opinion through voting. This is a fundamental reason for declaring unconstitutional the regulations laid down by the Law of the Catalan Parliament of 2014. This Judgment, as well as other previous ones (Judgment 31/2010, particularly its legal ground No. 69, and Judgment 103/2008), had already given organic laws (even organic laws as laid down by article 92.3 of the Constitution) a reserved status for the establishment of referendum modalities different from those determined in the Constitution. Additionally, the Judgments had laid down that referendum consultations as established by article 92 of the Constitution do not implicitly cover regional referendum consultations to be directly developed by the regional legislation.

The Judgment issued on 10 May confirms these previous Judgments turning their obiter dictum nature into the Court's ratio decidendi. And it does so through the unanimity that characterizes all Judgments in this field. To summarize, the Court understands that, if the right to participation in political issues has to be regulated by an organic law, it is the state who will have to establish and regulate the referendum modality (legal ground No. 5.b). However, the Court immediately limits this principle of statutory law to the establishment of such modality, thus allowing other legal instruments to regulate and develop what has been laid down by the organic law (legal ground No. 5.c). This would mean admitting the constitutional nature of the regulation of municipal popular consultations. But in the case of regional referendums the Court observes that regions can only intervene as regards "incidental aspects" (legal ground No. 6.a) and again, without a doubt, that the "referendum consultation cannot be understood, as far as competences are concerned, as an 'institution' of self-government of the autonomous community as laid down by article 148.1.1 of the Constitution" (legal ground No. 6.b).

Further substantiation of this requirement would have been appropriate as the Judgment does not go beyond its (arguable) literal nature and the allusion to the previous Judgments. Again, the introduction of accidental elements (and thus not necessarily reasoned) in previous judgments and their evolution into binding precedent (at least its authority is indisputable) in subsequent judgments (as ratio decidendi) is reprehensible.

Requiring greater reasoning also derives from the (exceptional) expansive character of the principle of statutory law in this case, as well as from the recognition included in the contested law of the constitutional limit to the authorization from the state according to article 149.1.32 of the Constitution – which adopts itself a position of sufficient safeguard of the supraregional interests at stake. Likewise, considering the doctrine of the Catalan Council for Statutory Guarantees in this sense would justify a judicial dialogue that the Constitutional Court does not seem to be willing to recognize. Apart from this, it is worth highlighting that the Judgment points out that "in federal states the federated entities are generally entitled to establish and regulate their own referendum modalities" (legal ground No. 4). This brief reference to European comparative law shows that countries with similar constitutional systems as regards referendums have chosen the opposite solution. Nevertheless, the Spanish Court does not seem to find it necessary to analyze the specific characteristics of our constitutional system that justify its resolution.

The only justification refers to the parallelism made by the Catalan Government with the regulation of the popular legislative initiative, which is included in the Constitution only for the national sphere and developed by each regional legislation. The Court gives full rein to its precautions against the referendum: it is "the exceptional nature of the referendum" that "prevents the legislator (each of the legislators of our compound state) from freely articulating different modalities and establishes that only the organic law as regulated in article 92.3 of the Constitution shall lay down new consultation modalities (legal ground No. 6.c). Nevertheless, there is no specific justification of this exceptional nature or of the inclusion of regional referendums in article 92.

Finally, the Judgment raises again the old question about the opportunity of the Constitutional Court Judgments. The case has been resolved seven years after the appeal was lodged – there is no doubt that it has taken too much time but, in any case, the Judgment might have been too premature or even ill-timed.

In a nutshell, any institutional consultation to the population as a whole in which citizens are asked to vote is a referendum and, consequently, requires authorization from the state (1). And any referendum is subject to express regulation in the Constitution or the corresponding organic law (including the basic regulation at least as far as regional referendums are concerned) (2). These two aspects have been clearly laid down by the different constitutional Judgments. Many other questions are left unresolved as there are by now no challenged laws

Institut de Dret Públic

Adolf Florensa, 8, 1r pis Tel. (+34) 93 403 45 35
08028 Barcelona Fax. (+34) 93 403 45 36
www.idpbarcelona.net idp@ub.edu

to be addressed by the Court. These are the questions that remain open to the political game: the scope of the regional competences that are the necessary object of a possible regional referendum, and the possibility to organize referendums on matters requiring a constitutional reform or, in other words, matters that violate the Constitution.

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