

CATALONIA BACKGROUND INFORMATION [SERIES E / 2013 / 2.1 / EN]

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THE LEGAL BASIS FOR A REFERENDUM OR OTHER PUBLIC CONSULTATION ON THE POLITICAL FUTURE OF CATALONIA

Summary

- There are a number of existing legal bases which would allow for a referendum, or some other form of public consultation, to be held on the political future of Catalonia.
- Some of these would require the intervention of the Spanish Government:
 - it could use its existing powers in order to regulate and hold a referendum;
 - it could transfer these powers to the Catalan Government;
 - or it could amend the Spanish Constitution so as to include specific provisions which would permit a referendum in Catalonia.
- Alternatively, the Catalan Parliament could pass a new law on public consultations which did not come within the Spanish legal definition of a “referendum”: this would allow the Catalan Government to hold a public consultation without the intervention of the Spanish authorities.
- In all of these cases, however, the Catalan Government needs to make every possible effort to discuss and negotiate with the Spanish Government. It should aim to reach agreements both on the holding of a referendum or other form of public consultation, and on the recognition and implementation of the results.
- It would be best to choose one of the legal bases for a referendum or other public consultation which is least open to a challenge before the Spanish Constitutional Court. It is important to try to ensure that the Spanish authorities have no grounds for bringing such a challenge, because if they do, this could greatly delay the process.
- Negotiations would also help to make it clear that any decision by the Spanish Government not to authorize a Catalan referendum is based on political considerations, and not upon the legal considerations which it currently cites. This fact is of crucial importance in demonstrating, both at home and abroad, that the legal bases which would permit a referendum have been blocked, thus justifying alternative democratic processes such as other forms of public consultation or a “single issue” regional election.

Specific comments

1. THE FIVE POSSIBLE LEGAL BASES

There are at least five legal bases which could be used in order to allow the citizens of Catalonia to vote on the political future of their nation. All conform fully with the existing law and with the principles of Democracy and the Rule of Law.

- a) A “referendum-like consultation of the people” as set out in Catalan Law 4/2010.
- b) A Referendum authorized and regulated by the Spanish Government. This could be done either through Article 92.1 of the Spanish Constitution and the existing Law on Referendums (“Organic” Law 2/1980); or through the adoption of new legislation.
- c) The Spanish Government’s powers to hold referendums could be transferred to the Catalan Government, in accordance with Article 150.2 of the Spanish Constitution.
- d) The Spanish Constitution could be amended so that it specifically permits a referendum of the type proposed in Catalonia.
- e) The Parliament of Catalonia could use its powers under Article 122 of the Spanish Law on devolution to Catalonia (the Catalan “Statute of Autonomy”) to pass a new law on public consultations which do not fall under the current legal definition of a “referendum”..

2. THE MAIN CHARACTERISTICS OF EACH LEGAL BASIS

a) A “referendum-like consultation of the people” as set out in Catalan Law 4/2010

Catalan Law 4/2010 allows the Catalan Government to hold “consultations of the people”. The Spanish Government challenged this law before the Constitutional Court and it was suspended pending the sentence of the Court; but the suspension has now been lifted, so for the moment at least, the Catalan Law has full legal effect.

With this law, the Catalan Government intended to create a means of consulting the citizens of Catalonia on particularly important political issues. From a practical point of view, this law would probably allow a referendum-like “consultation” to be held relatively quickly, because the Spanish Government would not have to participate in the process, although it *would* have to authorize the vote.

Nonetheless, when considering the advantages and disadvantages of using this legal basis, it is important not to underestimate the possibility that the Spanish Government, which has already challenged the constitutionality of this law, might not authorize a referendum-like “consultation” based upon it. Such a refusal would almost certainly be founded on an argument that the Government of Catalonia has no powers to hold this sort of public consultation: and although there are many legal arguments to counter this claim, all the difficulties which would arise from such a legal challenge should be taken into account when deciding whether to use Law 4/2010.

b) A Referendum authorized and regulated by the Spanish Government, either through Article 92.1 of the Spanish Constitution and the existing Law on Referendums (“Organic” Law 2/1980); or through the adoption of new legislation

Following the usual principles used for interpreting the Spanish Constitution, Article 92.1 of the Constitution could easily be interpreted in a way which would allow a referendum to be held in Catalonia.

No changes in the law would be necessary in order to hold a referendum based on Article 92.1. Under the procedure set out in the Spanish Law on referendums (“Organic” Law 2/1980 “LORMR”, which supplements Article 92.1 of the Constitution), the Catalan Government would simply have to make a formal request to the Spanish Government, which would in turn present the Spanish Parliament with precise information about the proposed referendum, and ask the Parliament to approve the proposal.

Although it is not necessary in legal terms, the Spanish Law on referendums could also be amended, or a new law could be created. Such a new law could expressly recognize referendums which are held in a single “Autonomous Community” such as Catalonia; or it could establish general rules in this area, rather than rules which would apply only to the Catalan referendum.

c) The Spanish Government’s powers to hold referendums could be transferred to the Catalan Government, in accordance with Article 150.2 of the Spanish Constitution

The Catalan Government would be able to hold a referendum if the Spanish Government transferred its powers on referendums. Again, the Spanish Constitution could easily be interpreted as permitting such a transfer. The Catalan Government would have to make a formal request, and the Spanish Government would have to ask the Spanish Parliament to adopt an “Organic Law” (a law with special constitutional status). Such a transfer could affect all of the powers relating to the Catalan referendum, or only some of them, depending on the degree of control which the Spanish Government wished to maintain.

This legal basis for a referendum has the advantage of being relatively quick, easy clear and open.

If the Catalan Government is interested in using this as one of the possible legal bases for the Catalan referendum, it should bear in mind that it would need to make a request for a transfer of powers *before* it could make any request that the Spanish Government organize a referendum directly. Clearly, if the Spanish Government did not agree to transfer powers, it might nevertheless agree to organize the referendum itself; but if the Spanish Government did not agree to organize the referendum itself, then it would be unlikely to allow the Catalan Government to do so.

d) The Spanish Constitution could be amended so that it specifically permits a referendum of the type proposed in Catalonia.

The Spanish Constitution could be amended so as to include a clear reference to referendums within “Autonomous Communities” such as Catalonia. However, such a reform would have to be followed by the creation of new legislation in order to establish the procedures to be used: something which would make the whole procedure last even longer.

A legal basis for the referendum based on Constitutional Reform has the advantage of not being limited by the terms of the current Constitution. In this sense, it would be clear that any objections raised by the Spanish Government would be based entirely on political considerations, and not on legal ones.

Under the procedures established in the Spanish Constitution, the Catalan Parliament could start the process of Constitutional reform by presenting a proposal to the Spanish Government or Parliament.

Constitutional reform could be used as a “back up” if other legal bases for a Catalan referendum do not produce results. It could be pursued simultaneously with other legal bases. And it could even be the first choice of legal basis for the referendum, as it would give a clear indication of whether or not the Spanish Government is willing to find a way to allow Catalan citizens to decide on their collective political future.

e) The Parliament of Catalonia could use its powers under Article 122 of the Spanish Law on devolution to Catalonia (the Catalan “Statute of Autonomy”) to pass a new law on public consultations which do not fall under the current legal definition of a “referendum”.

The Catalan Parliament is currently working on a proposed law which would allow the Catalan Government to hold public consultations which would not fall under the Spanish legal definition of a “referendum”. A legal basis such as this would have the advantage of being relatively quick; and the decisions on the terms of the “public consultation” could be taken by the Catalan Government without the need for the Spanish Government or Parliament to initiate or authorize the procedure. The only thing required of the Spanish authorities is that they do not challenge the “public consultation” or the law itself in the Constitutional Court.

In order for the results of the “public consultation” to be as legally binding and politically persuasive as the results of an official referendum, the new Catalan Law will need to ensure that a “public consultation” is regulated in a similar way to referendums in respect of participation, transparency and policing. But the “public consultation” must not become a referendum in disguise.

3. CONCLUSIONS

Each of the five legal bases described above would allow for a referendum or other form of public consultation to be held, so that the citizens of Catalonia could decide on their collective political future. Full legal legitimacy would be assured.

A common element in all these legal bases is that the Catalan Government must make every possible effort to discuss and negotiate with the Spanish Government, with the aim of reaching agreements both on the holding of a referendum or other form of public consultation, and on the recognition and implementation of the results. The Catalan Government must do this in the most transparent and formal way possible, in order that there should be no doubt about its willingness to negotiate; nor should there be any doubt about the Spanish Government’s reasons, should it reject the Catalan proposals.

In choosing a legal basis for the referendum or other public consultation, the Catalan Government must give priority to those bases which are least likely to give rise to problems of alleged incompatibility with the Spanish Constitution. The aim should be as far as possible to ensure that the Spanish Government could find no grounds to challenge the referendum or public consultation in the Constitutional Court: something which could severely delay the vote in Catalonia. It would also mean that any objections raised by the Spanish Government would clearly be seen to be of a political nature, and not (as is currently alleged) simply a legal question. That is, it would highlight any lack of political will to permit the vote.

The confirmation that the Spanish Government’s rejection of a Catalan referendum or other public consultation is based on political rather than legal motives is of crucial importance in demonstrating, both at home and abroad, that the legal bases which would permit a referendum have been blocked, thus justifying alternative democratic processes, such as other forms of public consultation or a “single issue” regional election, the results of which might then lead to a declaration of independence by the Catalan Parliament.

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