

CATALONIA BACKGROUND INFORMATION [SERIES E / 2014 / 7.2 / EN]

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THE RIGHT TO DECIDE IN CATALONIA AND SPAIN – ITS PLACE IN THE CONSTITUTION AND LEGAL BASIS

In 2010 the Constitutional Court of Spain closed the door on the majority demand for an increase in political autonomy in Catalonia (a proposal previously approved by a majority of Catalans in the referendum regarding a reformation of Catalonia's Statute of Autonomy). The Court's ruling on this issue led directly to Catalan citizens making a new demand, that of the "right to decide".

The "right to decide" in the current context is taken to mean the right of Catalan citizens to collectively express their opinion regarding a possible independence of Catalonia. It is simply a formulation of the constitutional rights which already exist in any democratic state seen in a new context. Without presupposing that the objective of establishing the right to decide is the eventual formation of an independent State, this right contains the power of Catalans to collectively express their position regarding the territorial future of Catalonia as a political community. It does not bestow them with the power to carry out unilateral changes or a constitutional breakup, but it does give them the right for their freely-expressed majority viewpoint to be taken into account by the State if it turns out to be different from that of the current constitutionally established territorial make-up. It signifies, thus, the right to start out a change in constitutional order and, in the specific case we see in Catalonia, a change in the territorial Constitution.

The complex nature of this right, in which structural elements of the freedom of expression (article 20, SC – Spanish Constitution) and the rights of political participation (art. 23, SC) are interwoven, creates three kinds of obligations for public powers as the passive subjects of this right:

- 1) **Firstly**, the obligation to not carry out actions which limit the process of communication of ideas, an obligation which derives from the aspect of freedom or autonomy of the people's will included in this right.
- 2) **Secondly**, as a consequence of the proposing content of the opinion to be transmitted, the State has the obligation to provide citizens with the necessary legal tools (for example, the calling of a consultative referendum, or not preventing one from being called, or offering citizens other instruments to express themselves politically) to bestow unity and political meaning to their collective will. This derives from the aspect regarding participation in public affairs of the right to decide.

- 3) **And, thirdly**, the obligation to take into account the majority opinion if it differs from the established territorial order with the objective of, in that case, modifying said order. This obligation derives from the objective aspect of the right to decide - that is, the preservation and guarantee of discrepancy and free public debate in a constitutional democratic state. As the Constitutional Court has established, freedom of expression is not merely the demonstration of a basic individual freedom but also makes up a defining element of our political system in which there can be agreements and disagreements not just within this system but also regarding the system itself (CCS - Constitutional Court Sentence 235/2007).

Therefore, this demand, expressed in such a way, is similar to that found in the basis of processes such as those which have taken place in Quebec regarding Canada (1980 and 1995 referendums, and Supreme Court of Canada's ruling in 1998) or the upcoming referendum (18 September 2014) in Scotland regarding the United Kingdom, given that the political and legal basis for these processes is also interwoven with the principle of democracy, which is the legitimizing legal basis of the right to decide.

The right to decide is not directly recognized in the Spanish Constitution but this is not because this Constitution is any different from others (none of the Constitutions of Western Democracies directly recognizes this right or the right to proclaim independence), but simply because it is just that, a Constitution. The function of any Constitution is to constitute a state; that is, an organized body of decision and action. In this sense, all states – be they autonomous, federal or regional – are unitary by definition. A state cannot exist without being unitary and its Constitution will tend to preserve this status. Having said that, even though article 2 of the Spanish Constitution recognizes the principle of the indissoluble unity of Spain, this does not make Spain any more unitary or resistant to change and separations within its territory than the Canada or the UK. This is because the co-existence of the principle of unity of the State (whether it be laid down explicitly or tacitly) with the principle of democracy in Western Constitutions is what allows for independence processes to go ahead despite the preservation of the unity of the state at a constitutional level.

To be specific, **the principle of democracy in the Spanish Constitution is a structural principle of the political system and legislation as recognized in article 1 (SC)** and this leads it to act as an orientating principle when creating, interpreting and applying the other points of the Constitution and general judicial legislation. The orientation it offers depends on the content and reach we give to the term “democracy”. In this sense, there is general agreement that current Western Constitutions do not only include a procedural concept of democracy, in accordance with which it is legitimate for the will of the majority to prevail over that of the minority if established procedures are followed, but, in addition to this concept, limits are introduced as to exactly what a majority opinion can impose on a minority of citizens in disagreement. For this reason, substantive elements are incorporated beside the procedural ones: democracy also means respect for minorities and their constitutional rights. The existence and exercising of these

constitutional rights in a democratic state cannot depend on majorities; rather, these rights constitute a permanent protection of the minorities. In this way democratic opportunities are available to those groups which, for example, cannot become majority ones for demographic reasons. Of all the constitutional rights which would fulfil this function, the Spanish Constitution recognizes at least two – as mentioned above: freedom of expression (art. 20 SC), and the right of citizens to participate in public affairs, either directly or through their representatives (art 23.1 SC); a right institutionally developed in article 92 which regulates public referendum or consultation processes.

Furthermore, we must also add that, **as stated by the Constitutional Court, the Spanish Constitution does not establish a “militant democracy”**. In fact, the constitutional Text contains no material limits to its reform (arts. 166 to 169 SC) and, at the same time, recognizes a group of freedoms which strengthen the defence of free ideology (for example, freedom of ideology and expression; arts 16 and 20 SC). In effect this means the Spanish democracy is not one of those which do not tolerate options contrary to the values and principles enshrined in their Constitution. In fact, the Spanish democracy, in accordance with its constitutional makeup does not make it unconstitutional to defend aims and ideologies in opposition to democracy itself; it is not a democracy which generates a “natural and fundamental meta-right” of self-defence of the State which, in turn, becomes a reference parameter for validating and interpreting collective and individual rights, and which is imposed over them in a hierarchy. In fact, the opposite is the case. Remote from the concept of “militant democracy”, **the Spanish Constitution establishes a plural and pluralist democracy with no guardianship and, therefore, does not exclude from legality those subjects or groups who hold a concept of Law and social organization different from or contradictory to the Constitution itself (CCS 48/2003, 5/2004, 235/2007, 12/2008, 42/2014).**

Consequently, **why would it be unconstitutional to collectively express an opinion contrary to maintaining the unity of the Spanish State if the Constitution does not impose adherence for the principle of unity?** How can a public consultation of Catalan citizens regarding their future as a political community violate the principle of democracy or fundamental rights if the ability to express oneself via a public vote is protected by democratic principles and is an exercise of basic rights already recognized in the Constitution itself? Unless the Spanish Constitution is taken to be the Constitution of a militant democracy – an extremely difficult point of view to sustain given the constitutional text itself and corresponding legal precedents – then it cannot be argued that the objective of consulting the Catalans on territorial independence is unconstitutional. No legal elements support this: even the fact that article 2 of the Spanish Constitution recognizes the indissoluble unity of the Spanish nation does not make it constitutionally impossible for a part of the territory to secede nor does it make it impossible to defend and make known the people’s will to secede. Nor can the exercising of constitutional rights by minorities depend on the will of majorities in a democracy. Nor is there a basic State “meta-right” over and above the recognized constitutional rights of citizens. Nor must the

exercising of their freedom by citizens be constrained beyond the basic formal legal and constitutional obligations and conditions.

This has been understood by the Constitutional Court of Spain too in CCS – Constitutional Court Sentence 42/2014. In their ruling regarding an appeal presented by the Spanish government against the Catalan Parliament’s resolution 5/X (2013), approving the Declaration of Sovereignty and the right to decide of Catalan citizens, the Court recognized the existence of the right to decide and it considers it to be a political aspiration which can be defended within the framework of the Constitution and which can be attained through a process following the principles of democratic legitimacy, plurality and legality. The Court ruling states that, in such a process, there is room for a proposal which aims to modify the established constitutional order such as the independence of Catalonia, as long as the activities to “prepare and defend” this political aspiration are carried out without violating democratic principles, fundamental rights, or other constitutional obligations. According to the Court, in this way an obligation of constitutional loyalty between the autonomous power representing the decision of citizens and the public power representing the general State would be created. Thus if the legislating assembly of an autonomous community formulates the opening of a process of these characteristics, the Spanish Parliament would have to consider the proposal; that is, an obligation for reciprocal dialogue between both parts would be created. However, the Government of the Spanish State, and the political parties and media most contrary to the holding of a referendum or public consultation have silenced this jurisprudential recognition of the right to decide.

To sum up, **the right to decide of Catalonia’s citizens is enshrined in the Spanish Constitution, and supported by the Constitutional Court – and, derived from this, the State has the obligation to neither obstruct nor carry out any actions which would limit the process of formulating an independence proposal**, and to make available to citizens the necessary legal tools to provide unity and political meaning to the will of the people as expressed in this sense.

Therefore, **the reiterated refusal of the Spanish State to hold a consultation in Catalonia regarding Catalonia’s future as a political community is not backed up by any coherent constitutional arguments**. This refusal is exclusively a political one as opposed to a legal one, and shows the scant constitutional and democratic culture of Spain.

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