SPANISH CONSTITUTIONAL COURT
Cabinet of the President
Press Office

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THE TC UNANIMOUSLY DECLARES UNCONSTITUTIONAL SOME PROVISIONS OF THE CATALONIAN CONSULTATION ACT AND ANNULS THE DECREE OF THE 9-N CALL

The Plenary Meeting of the Spanish Constitutional Court, unanimously, has declared unconstitutional two articles of the Catalonian Consultation Act 10/2014, of 26 September, on popular non-referendum consultations and other forms of citizen participation. In particular, the judgment annuls the provisions regulating the call by the Government of Catalonia of general consultations, on the grounds that it is in fact being used to regulate referendums, which is an exclusive competence of the State. Likewise, and also endorsed by all the Judges of the Plenary Meeting, the Court has issued a second judgment which declares unconstitutional, and therefore void, Government of Catalonia President's Decree 129/2014, of 27 September, which calls a popular, non-referendum consultation on the political future of Catalonia. Judges Pedro González-Trevijano and Juan Antonio Xiol respectively have been Reporting Judges for the Judgments.

Before examining the merits of the appeal lodged by the State Attorney against the Catalonian Consultation Act, the first judgment explains that a referendum is one of the means available for the direct participation of citizens in public matters, guaranteed by the Spanish Constitution, and, as such, expresses the fundamental right enshrined in Art. 23.1 of the Spanish Constitution (CE). Furthermore, the Constitution provides other means of citizen participation which do not arise from the fundamental right expressed in Art 23.1 CE, constituting what is known as a "*participative democracy"*. An example of the latter is the so-called non-referendum consultation.

The Judgment also describes the fundamental features of a referendum. Firstly, "*through a referendum, public powers call the citizens to exercise their fundamental right to participate in public matters"*. A referendum is, therefore, as indicated, an expression of the fundamental right of Art. 23.1 CE. Furthermore, "*the addressee"* of a referendum consultation "*is the group of citizens holding a right of active suffrage in a specific territorial area or, in other words, the electoral body".* The judgment points out that the electoral body should not be mistaken for "*the sovereignty holder"*, i.e. the Spanish population. Unlike the case of referendums, non-referendum consultations "*intend to obtain the opinion of any group"*, whether social, economic, cultural or other. Ultimately, the participation is carried out "*individually"*, not "*as a citizen"*.

The second distinctive feature of a referendum is that "*the opinion of the electoral body is expressed through the vote issued in the course of an electoral process".* The purpose is for "*the result of the consultation being legally allocated to the general will of the political community"* and thus "*it may be considered a genuine manifestation of the fundamental right of political participation recognized by Art. 23.1 CE".* Therefore, a referendum must be carried out "*with all the guarantees inherent to an electoral process".*

Regarding competences, the judgment recalls that the Constitution endows the State with "*exclusive competence"* to authorize the calling of popular consultations through a referendum (Art. 149.1.32 CE), which is also applicable to "*its establishment and regulation".*

Meanwhile, the Statute of Autonomy ascribes to the Government of Catalonia "*exclusive"* competences regarding "*polls, public hearings, participation forums and any other instrument of popular consultation, except those included in Art. 149.1.32 of the Spanish Constitution"*. According to the Court, any consultation, even non-referendum consultations, "*on fundamental matters resolved in the constituent process and removed from the scope of the powers established"* falls outside an autonomous community's competence. "*Respect for the Constitution demands that any intended review of the constituted order, to particularly include any plans affecting the identity foundations of the sole holder of sovereignty, is performed openly and in a straightforward manner through the means foreseen in the Constitution for that purpose. There is no room – the Court remarks – for any other courses of action to be taken by Autonomous Communities or by any State body because, above all, the constituent's decision always expresses the will of the Spanish people, which is the exclusive holder of national sovereignty, at the heart of the Constitution and the source of all political power".* Therefore, "*the citizens' view on such matters must follow the constitutional reform procedures".*

Considering all of the above, the Plenary Meeting analyses the merits of the appeal and concludes that, from the two types of consultation regulated by the challenged act (general or sectorial) only a general consultation would be unconstitutional because it is a referendum disguised as a popular non-referendum consultation.

In a general consultation "*persons over sixteen years of age enjoying political status as Catalonians and nationals of European Union Member States or of other countries, who have resided in Catalonia for a certain period of time and are registered in the Population Registry of Catalonia"* can submit their vote.

General consultations, therefore, constitute a calling to "*a sui generis electoral body"* which "*undoubtedly comprises or includes the statutory and legal electorate of Catalonia".* The Plenary Meeting considers that "*the circumstance that the consultation may be extended to persons under eighteen years of age and to nationals of European Union Member States or of third countries does not prevent the outcome being attributable to the views of the entire Autonomous Community and considered as a valid expression of their general will".* Ultimately, the electoral body to which the Consultation Act refers, "*although oversized, includes all of the citizens of the Autonomous Community of Catalonia or of the local territorial entity, and its suffrages do not merely exteriorize the expression of particular or sectorial collective wills but their general will"* as citizens.

On the other hand, sectorial consultations may be addressed "*by virtue of their specific purpose (…) to a specific group of people".* That is, they constitute "*a calling to a more restricted legal subject than the electoral body of the territorial group in question".*

The rules on consultations included in the challenged Act also reveal that it is "*a procedure of electoral nature in as much as it channels the exercise to active suffrage of the persons called, with the casting of their vote".* On the other hand, sectorial consultations which are regulated in the same Act "*presuppose the calling of a legal subject which is more restricted than the electoral body (…) and therefore those participation channels may be regulated by the legislator of the Autonomous Community of Catalonia"* in compliance with the competence granted by Art. 122 of the Statute of Autonomy.

Therefore, the judgment declares unconstitutional and void the two first sentences of Art. 3.3 ("*Popular non-referendum consultations may be general or sectorial. General consultations are open to people eligible for participation under the terms of Art. 5")* and sections 4 to 9 of Art. 16 of the Catalonian Parliament Act on popular non-referendum consultations and other forms of citizen participation.

The declaration of unconstitutionality of these provisions has determined the decision of the second judgment, which resolves the appeal from the State Attorney against the 9-N calling decree, which has also been declared unconstitutional and void. The Plenary Meeting affirms that the decree signed by the President of the Government of Catalonia, delivered in accordance with the challenged Act, "*is calling a referendum consultation"* and therefore "*incurs the same constitutional infractions incurred by this rule".*

Madrid, 25 February 2015