



INFORMATION NOTE No. 93/2015

THE TC UNANIMOUSLY DECLARES AS UNCONSTITUTIONAL THE CATALONIAN PARLIAMENT DECLARATION STARTING UP THE SO-CALLED “SEVERANCE PROCESS” FROM SPAIN

The Plenary Meeting of the Spanish Constitutional Court (TC) has unanimously upheld the appeal filed by the Government and has declared as unconstitutional and, consequently, null and void, Resolution 1/XI, used by the Catalanian Parliament last 9 November to declare “*commencement of a political process in Catalonia further to the electoral results of 27 September 2015*”. The Court has stated that both the Resolution and its Annex infringe Articles 1.1, 1.2, 2, 9. and 168 of the Spanish Constitution (CE), as well as Articles 1 and 2.4 of the Catalanian Statute of Autonomy (EAC). The reporting judge has been Andrés Ollero.

Before analysing the merits of the appeal, the Plenary Meeting explained that it has granted the matter “*priority in terms of resolution*” because this is necessary due to its “*constitutional relevance*”.

It has also indicated that the channel chosen by the Government to file the challenge is adequate, as the Resolution is a parliamentary act “*with potential legal (not just political) effects per se*”. In fact, affirms the judgment, the pronouncements contained in the Resolution suggest a recognition, particularly in favour of the Parliament and Government of Catalonia, “*of sovereignty powers that exceed those derived from the autonomy recognised by the Constitution to the various nationalities included in Spain as a nation*”.

The judgment recalled that “*the prevalence of the Constitution as a supreme rule*” in Spanish law is based on the fact that the Constitution itself “*is fruit of the determination of the sovereign nation, through a single subject- the Spanish people- where such sovereignty resides and, consequently, from which ensue the powers of a State (Art. 1.2 CE)*”. Furthermore, the sovereignty of the nation, residing in the Spanish people, “*necessarily entails its unity (Art. 2 CE)*”, and this unity of the sovereign subject constitutes the grounds on which “*the nation itself is constituted, at the same time, as a social and democratic State of Law (Art. 1.1 CE)*”. Art. 1.2 CE “*thus, is the basis of our entire legal order*”.

The Plenary Meeting also recalled that Art. 1 of the Statute of Autonomy provides that Catalonia “*as a nationality, exerts its self-governance as an Autonomous Community in accordance with the Constitution and this Statute*”. Consequently, the Constitution is “*an unconditional rule that conditions any other laws*”; it is “*a superior rule to which all citizens and public powers are subject (Art. 9.1 CE)*”. However, this subjection to the Constitution is just another form of submission to the people’s wish, expressed as a “*constituent power*”; as a result, concludes the judgment, in a constitutional State “*the principle of democracy may not be separated from the Constitution’s unconditional primacy*”.

The challenged Resolution, it affirms, “*causes a conflict between the alleged scope of the “democratic mandate” received by the Catalanian Parliament*” (in the

elections of last 27 September) or the “*legitimate and democratic*” nature of the Parliament and the “*legality and legitimacy of the State institutions, to particularly include this Constitutional Court*”. Said “*democratic mandate*”, affirms the judgment, “*could be used to announce that all Catalanian Parliament decisions “not be subject” to those adopted by the institutions of the State as a whole*” and “*the start of an “unsubordinated” (i.e. unilateral) constituent process (...)*”. In short, Resolution 1/XI intends to avail itself of “*the principle of democratic legitimacy of the Catalanian Parliament, the formulation and consequences of which totally contradict those of the 1978 Constitution and the Statute of Autonomy*”. “*This not only infringes the principles of the State of Law, based on the fully application of the Rule of Law, but also the very democratic legitimacy of the Catalanian Parliament, which the Constitution recognises and protects*”.

In Spain’s social and democratic State of Law, continues the Court, “*democratic legitimacy and constitutional legality cannot be brought into conflict to the detriment of the latter*”, as the “*legitimacy of an action or policy of a public power basically involves its conformity with the Constitution and the law*”.

The Plenary Meeting adds that two essential features of the Spanish constitutional State are linked to the democratic principle: political pluralism and territorial pluralism. With respect to the first, the judgment recalls that the Constitution “*proclaims a minimum content and establishes inescapable rules of the game for all citizens and public powers*”; this minimum constitutional framework of reference is precisely what “*keeps the political community together within the parameters of political pluralism*”.

As regards territorial pluralism, Art. 2 CE, the “*core*” of the Constitution, proclaims “*the right of autonomy of all nationalities and regions*”. In other words, “*the Constitution guarantees the ability of Autonomous Communities to adopt their own politics within a constitutional and statutory framework*”, “*as the basic rule requires a reconciliation between the principles of unity and of autonomy held by all nationalities and regions*”.

For the foregoing reasons, the Plenary Meeting has ruled that “*the law, along with the Constitution at the top, should in no event act as a limit for democracy, but should guarantee the same*”.

Consequently, the challenged Resolution “*overlooks and infringes the constitutional rules vesting national sovereignty in the Spanish people which, accordingly, affirm the unity of Spain as a nation, as the holder of such sovereignty (Arts. 1.2 and 2 CE)*”. This constitutional breach, affirms the judgment, “*is not the outcome, as is usually the case in constitutional infringements, of a misunderstanding as to what it foresees or allows in each case*” but, instead, constitutes “*an express rejection of the binding nature of the Constitution, which is being expressly challenged by a power that is claiming to be the holder of sovereignty, expressing a constituent side that has been used to manifestly reject the current constitutional order*”. “*A power is being affirmed and alleged as the basis of a new political order, consequently released from any legal ties*”.

Finally, the Court reiterates that the Constitution does not act as a “*lex perpetua*” and that a thorough review is possible. Consequently, although public debate enjoys total freedom, the formal channels for constitutional reform should abide by the procedures foreseen in the Constitution itself. “*Otherwise, the public powers would be released from their obligation to comply with the law, irreparably damaging the freedom of citizens*”.

The Catalanian Parliament, affirms the judgment, has decided to pass the challenged Resolution, *“whose content directly affects (...) matters reserved in institutional terms to the constitutional reform procedure foreseen in Article 168 CE” which, consequently*, is also infringed.

The autonomous Parliament may propose or apply for a constitutional reform, the Court has reiterated, but it cannot *“be erected as a source of legal and political legitimacy, taking on the right to breach the constitutional order on which its own authority is based”*. By acting in this way, the Catalanian Parliament *“would bury its own constitutional and statutory foundations (Arts. 1 and 2.4 EAC), by severing all ties to the Constitution and other laws, infringing the grounds of the State of Law and the rule declaring that everyone is subject to the Constitution (Arts. 1.1 and 9.1 CE)”*.

As already stated by the Court, *“a proposal of ideas that try to amend the very foundation of the constitutional order is legally possible”*, as long as it follows the reform procedures foreseen in the Constitution. *“If, on the other hand, the aim is to unilaterally alter this content, deliberately overlooking the procedures expressly foreseen for this purpose in the Constitution, the only viable path is abandoned: that of the law”*.

Madrid, 2 December 2015.