



CONSTITUTIONAL COURT OF SPAIN
Cabinet of the President
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THE TC DECLARES THE REFERENDUM ACT UNCONSTITUTIONAL AND NULL AND VOID, ADVISING THAT “A PUBLIC POWER THAT EXPRESSLY REFUSES TO FOLLOW THE LAW IS IN TURN DEPRIVING ITSELF OF ANY BINDING AUTHORITY”

The Plenary Meeting of the Constitutional Court (TC) has unanimously declared the unconstitutionality and nullity of Catalanian Act 19/2017, of 6 September, in its entirety, referred to as the “*self-determination referendum*” and provisionally suspended last 7 September. The Court, upholding the appeal lodged by the State Attorney’s Office, has affirmed that the rule invades state competences in referendum consultation matters and infringes the supremacy of the Constitution, national sovereignty and the unbreakable unity of the Spanish nation, amongst other constitutional principles. It has also stated that during the parliamentary processing of the Act, the Catalanian Parliament incurred “*very serious infringements of the legislative procedure*”, thereby affecting the freedom of Parliament, the rights of minorities and the fundamental rights of all citizens to participate in public matters through their representatives. The judgment, in which Andrés Ollero acted as Reporting Judge, affirms that “*a public power that expressly refuses to follow the law is in turn depriving itself of any binding authority*”.

The judgment analyses the unconstitutionality vices reported by the State Attorney’s Office, from three different perspectives: competences, materiality and parliamentary procedures. Before the expiry date, neither the Catalanian Parliament nor the Regional Government [Generalitat] had submitted any pleadings.

Before analysing the Act, the Court made some considerations on the alleged right of self-determination claimed to underlie the challenged rule, arising from the content of certain international treaties subscribed by Spain. The right of self-determination, interpreted as a “*right to promote and consummate a unilateral secession from the State of Spain*” is not acknowledged in the Constitution; furthermore, according to the judgment, it is not incorporated into Spanish law through international treaties. The Court recalled that “*the right of free self-determination*” of the people, proclaimed in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (both subscribed by Spain) has been restricted in “*several unequivocal resolutions of the United Nations*” to cases where “*the people are being subjugated, dominated and exploited by a foreign country*”. Beyond these cases, “*any attempt to break up national unity, in whole or in part, or the territorial integrity of a country, is incompatible with the purposes and principles of the United Nations Charter*”.

Unconstitutionality in terms of competences. The judgment explains that “*a referendum as an institution constitutes channels for direct citizen participation in public affairs*”, over which the State is exclusively competent, “*irrespective of the form or territorial scope over which it is projected*”. Not all matters, it adds, may be submitted to autonomous popular consultation (whether or not through a referendum), as is the case of “*fundamental issues that were resolved in the constituent process and which are therefore beyond the scope of decision-making by constituted powers*”. Consequently, “*a redefinition of the identity and unity of the holder of sovereignty is an issue that should be channelled through the reform procedure foreseen in Art. 168 Spanish Constitution (CE), through a constitutional review referendum*”.

The foregoing reasoning led the Court to affirm that Act 19/2017 “has been passed with no competences whatsoever backing it up” and is unconstitutional “in its entirety given that, overall, it establishes rules on the regulation and calling of a specific referendum that is beyond the statutory competences held by the Autonomous Community”.

Material unconstitutionality. The Court considered that the Act as a whole “is evidently unconstitutional”, as it is explicitly contrary to “essential principles of Spain’s constitutional order: national sovereignty, held by the Spanish people, the very unity of the Nation as a social and democratic State subject to the rule of law, and the supremacy of the Constitution, to which all public powers are subject and consequently, also, the Catalanian Parliament (Arts. 1.2, 1.1 and 9.1 CE)”. It constitutes a constitutional infraction, points out the judgment, which is not “fruit of a mistaken understanding of what it imposes or allows in each case”, but “a manifest denial of the current constitutional order”.

The challenged Act contradicts the supremacy of the Constitution as it claims to be “legally prevalent over any rules that may conflict with it”. However, “no constituted power may place itself above this fundamental rule”. The supremacy that Act 19/2017 is upholding is derived from its consideration of the Catalanian people as a “sovereign political subject”, a statement that openly contradicts Art. 1.2 CE. Neither the Catalanian people “hold sovereign power, which is exclusively held by the Spanish nation as a State”, nor, for the same reason, may it be identified as a “legal subject competing with the holder of national sovereignty”.

With respect to a binding self-determination referendum, as regards the challenged Act, the Court affirms that “the issue affecting us all, i.e. whether or not a common State should remain, constituting Spain, could only, ultimately, be reconsidered and likewise decided by everyone; otherwise, this would break up citizenship unity, and would rupture, in legal/constitutional terms, the common Nation”.

The judgment reiterates that the Constitution foresees the possibility of a “total review”, but that this may only take place “further to the reform procedures” contemplated therein. “This fundamental rule is fully open to formal review, which may be requested or proposed, amongst other State bodies, by the Assemblies of Autonomous Communities”. “Otherwise”, adds the judgment, “to release a public power from all submission to the law would irreparably damage citizen freedom”. This last point, it concludes “is what the Catalanian Parliament has caused by passing the challenged Act”.

The Catalanian Parliament, “totally overlooking” constitutional loyalty and the principle of democracy, “has placed itself completely outside the law, unacceptably using non-legal resources, openly ceasing in the exercise of its constitutional and statutory functions, and putting all Catalanian citizens at a high risk, as regards the validity and effectiveness of all guarantees and rights to which they are entitled under the Constitution and the Statute of Autonomy”. Consequently, it has left these citizens “at the mercy of a public power that propounds to ignore any limit whatsoever”.

Unconstitutionality derived from parliamentary proceedings. The judgment describes in detail what happened during the meeting of the Catalanian Parliament held on 6 September, and reaches the conclusion that, during this meeting, the legislative procedure foreseen in the Catalanian Parliament Regulations (RPC) was “absolutely or radically” breached.

The proposal giving rise to act 19/2017 “was processed and passed without following any of the legislative procedures foreseen and regulated in the RPC”. The parliamentary majority, endorsed by the Panel and Presidency of the Chamber, availed itself of what is foreseen in Art. 81.3 RPC to “improvise and articulate- ad hoc- an unprecedented device during which any possible intervention and the rights of all other groups and deputies were left at its entire discretion”. Pursuant to the regulatory provision, allowing the agenda to be changed, the majority “innovated the RPC itself and arbitrated for the case at hand (...) an unheard-of “procedure” that it conceived and imposed

at its convenience". In other words, "the rule of law was conditioned and consequently degraded, ultra vires, to the decision of the majority".

As regards the Panel's decision to not request an opinion from the Council of Statutory Guarantees, the Court pointed out that a request for this report *"cannot be ruled out by the Chamber without harming the integrity of the legislative procedure itself and, in turn, the rights of all representatives to uphold this specific right, conferred to them by law and incorporated into their legal/constitutional status"*. The Plenary Meeting, however, cancelled out this right, with no further ado, *"exclusively as decided"* by the majority, despite the protests of the minority and being expressly admonished by the Council itself.

As a result, it affirmed that *"during the parliamentary process to pass what ended up being Act 19/2017, there was a very serious breach of the legislative procedure, clearly affecting the formation of the Chamber's wish, minority rights and the rights of all citizens to participate in public matters through their representatives"*.

The Court reiterated to the authorities and public offices of the Generalitat of their duty, already expressed in its resolution of 7 September, to *"prevent or stop any initiative that could entail overlooking or evading the ruling of this judgment"*, which is *"fully effective erga omnes (Arts. 164.1 and 38.1 CE)"*.

Madrid, 17 October 2017