The Catalunya Conundrum, Part 3: Protecting the Constitution by Violating the Constitution

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27.09.2017 doi: 10.17176/20170927-103005

Article 155 CE, if activated, would have offered to the Spanish government a legal tool to take control of Catalan institutions on the terms decided by the Senate after a public debate. Article 116 CE, if activated after a debate in Congress in a situation of violence that could create a risk for public services or a sufficiently serious threat to public order, is to be used in order to limit fundamental rights, invoking a state of emergency.

Lacking legitimacy in Catalonia because of the absence of solutions to Catalan democratic claims within the Spanish legal framework, the position of Spanish institutions is badly weakened. Therefore, they do not to want to take the risk of creating even more political unrest in Catalonia with public and explicit debates on the suspension of autonomy or on the necessity of limiting fundamental rights. Instead, Spanish government is pushing other institutions, such as the Constitutional Court, prosecutors, police and judges, as well as their own executive powers, beyond their ordinary limits.

There is already an increasing list of abnormal situations that are creating deep concern among some Spanish legal scholars and civil servants and getting more and more attention among European media and European Union institutions. The logic followed in all these cases is the same: The Spanish government wants something to be done that could have been easily obtained throughout arts. 155 CE or 116 CE but do not want to pay the political costs of doing it openly and with public debate and democratic control. Therefore, Spanish authorities go ahead using alternative ways to achieve their goals, at the cost of distorting some procedures or institutions or posing fundamental rights at risk. Here is a provisional quick list of some of the most blatant examples:

- The position of the Spanish Constitutional Court has been reshaped with the only intention of avoiding the political costs for government of invoking art. 155 CE. A new bill passed in 2015 granted special executive powers to the Constitutional Court that should be used in order to have more means to secure full allegiance to its decisions. Those special powers allow a provisional suspension of non law-abiding public authorities and other ways to put pressure on them. For the Spanish government, it is a very suitable solution: instead of art. 155 CE, it can just ask the Constitutional Court to act against the concerned authorities. However, for the Constitutional Court, the exercise of these powers could compromise its position. As not only the Venice Commission of the European Council but also a minority of Spanish constitutional judges in their dissents have pointed out, to have and to use these powers risks to reshape the institution, changing its nature from a neutral referee to an agent of execution used at the pleasure of the Spanish Government. For the moment, these exceptional powers have been already used in order to suspend the electoral authorities appointed by the Catalan authorities, in an unanimously voted ruling (although with the caveats and deep concern expressed by three constitutional judges).
- Freedom of speech and assembly and other fundamental rights are under big pressure right now in Spain. Prosecutors (which in Spain are under hierarchical control by the General Prose-

cutor, who is directly appointed by the Government) and administrative bodies controlled by the State are taking to court or directly prohibiting political meetings, the printing and posting of political publicity and even political debates related not only to the illegal referendum but to more general subjects that could be linked to it. Lately, a dozen of web pages from private secessionist associations have been directly shut down by administrative decision. Most judges, under big political, social and journalistic pressure, are accepting to suspend such meetings and also seem to support the view that considers illegal the display of any printed materials related to the referendum..They are even giving their authorization to prosecute private citizens creating "mirror webpages" from the ones created by the Catalan government to give information on the vote. Publicly owned companies, like the Spanish postal service, are controlling the mail in order to prevent the delivery of any information or publicity related to the referendum. All those cases have, obviously, in common the dangerous restriction of basic fundamental rights, altering the traditional case-law of the Spanish Constitutional Court, which have always accepted that Spain is not a "militant democracy", having proclaimed it time and again, even in its former decisions against the Catalan referendum. The very essential idea that public discussion of those issues should be preserved in any case has come under heavy pressure in Spain.

- The Spanish government has been using financial tools and regulations on budgetary stability derived from European directives to gain political control over any decision of Catalan authorities that requires public funding. These legal tools, which have the capacity of effectively limiting autonomy to a great extent, had been accepted by the Spanish Constitutional Court, but only as a way to assure budgetary stability. Misuse of those powers is in clear breach with the Spanish legality, and a gross example of the classical figure of "détournement de pouvoir". It also shows in a disturbing manner how readily the Spanish government is willing to abuse its powers and how fragile the real substance of autonomy in Spain may be.
- A similar distortion has been created with Catalan security forces and police bodies, which State authorities, using the Public Prosecutor Office, have tried to bring under State control ignoring Spanish legality and the normal distribution of jurisdiction between the different police bodies.
- Last but not least, it has to be said that State prosecutors are dangerously expanding the scope of some criminal offenses, prosecuting private citizens because of crimes that are supposed to be committed only by civil servants or public authorities, relaxing the specificity of the legality principle and even claiming that some crimes such as rebellion or similar offenses could be punished even without a violent uprising (against the general practice in Europe, but also in contradiction with the reform of the Spanish Criminal Code made in Spain five years ago with the explicit intention of excluding the possibility of prosecution for those claims without the existence of an effective violent revolt). For the moment, this is just the position of the General Prosecutor. It remains to be seen if any courts will uphold it, and there are good reasons to hope they will not. Nevertheless, the mere fact of seeing the Spanish government and prosecutors pushing in that direction is worrying enough.

In each of the cases listed, State officials claim that an exceptional expansion of the boundaries of administrative or judicial capacities is fully warranted because of the seriousness of the situation in Catalonia. A growing number of legal scholars claim that in order to produce such results the only admissible constitutional way should be to activate art. 155 CE. Legal attrition to fundamental rights and to the criminal legality principle are also seen with big concern, at least in some circles. Furthermore, there are some

political groups denouncing this situation, mostly from the radical left (Podemos) and parties from the Basque Country, the Balearic Islands, Galicia or the region of Valencia. For the time being, though, public opinion in Spain tends to approve this reaction. Spanish media outlets, for example, have shown a steady solid support to the Spanish government, with only marginal exceptions, in sharp contrast with the conflicted vision offered by the European press.

This depiction of general conformity with the Government's reaction hardly applies to Catalonia, though. The social and political divide between Catalonia and rest of Spain has been made even bigger because of recent events. We cannot know if the use of that kind of tools may be increased or decreased in next weeks. We do not know the plans of the Spanish government about the use of art. 155 CE. However, we do know for sure that the use of coercive power is not going to solve the Catalan problem, which is a political one. Sooner or later, the Spanish legal system, i.e. the Spanish Constitution, will have to offer a legal path to allow the normal expression of the democratic wishes of the Catalan people. If not, the situation simply cannot be solved, and it will create more social conflicts, maybe even deeper ones. Spain should have no interest in inflicting such damage on itself. Neither the European Union, for obvious reasons.

Therefore, the solution to the current Spanish Constitutional Crisis would require, in any case, a significant softening of the rigid understanding of the unity principle of the Spanish Constitution. That is the key point. How to do it, by the way, is not so essential. In fact, it is possible to achieve that goal with a mere change in the common interpretation of the Constitution reflected in the Constitutional Court case law, only by accepting the possibility of an agreement on a referendum, for instance implemented with specific legislation as it was suggested years ago by Rubio Llorente. Obviously, it is also possible to amend the Spanish Constitution to make things even easier and clearer. It might be enough to accept a de facto politically valid referendum. But advancing in that direction is essential in order to solve the current constitutional crisis in Spain. If not, pursuing only the sort of remedies that we have seen for the moment coming from the Spanish government, this Constitutional Crisis will continue, the conflict of legitimacies will keep going and widen, and at the end the already existing breach between Catalonia and the rest of Spain might turn into something really horrible.

Part 1: How could things come to such a pass?
Part 2: A full-blown constitutional crisis for Spain

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SUGGESTED CITATION
Palop, Andrés Boix: The Catalunya Conundrum, Part 3: Protecting the Constitution by Violating the Constitution, Verfassungsblog, 27.09.2017, doi: 10.17176/20170927-103005.

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