

The Catalan Self-Determination Referendum Act: A New Legal Order in Europe

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So 17 Sep 2017

José Luis Martí So 17 Sep 2017

Following [my blog post from July 18](#), I would like to bring the readers of Verfassungsblog up to speed on the 'secessionist process' in Catalonia. For this purpose, let me briefly recall that the Catalan Referendum Draft Bill, which was presented to the public on July 3, sets the date of the referendum to October 1, 2017 and requires the Parliament to declare the independence of Catalonia within 48 hours in case of its affirmative result.

The Heated Parliamentary Debate and the Passage of the Self-Determination Referendum Act

Later than I actually predicted, in the night of September 6, the Parliament of Catalonia, with its secessionist majority, finally passed the Self-Determination Referendum Act 19/2017. And it made no changes to the text of the draft bill I analysed in my previous post. The parliamentary debate – despite being drastically shortened as the bill was only set on the agenda on the morning of the day itself – was very tense and bitter, even nasty at some point, and, of course, highly divided. Out of the 135 seats, the Act was approved with 72 votes in favour (all coming from the secessionist parties PDeCAT, ERC and CUP) and 11 abstentions (from the members of CSQP, the leftist party that controls the city government of Barcelona). The other 52 votes were not casted, since all members of the opposition parties (the Socialist Catalan Party, the Popular Party, and Ciutadans de Catalunya) abandoned the chamber before the vote took place as a sign of protest and rejection.

The members of the opposition parties claimed not only the unconstitutionality of the bill, but also the violation of their personal parliamentary prerogatives. The secessionist majority rejected to follow the compulsory procedure of ex-ante consultative judicial review of unconstitutionality before the Catalan Court of Statutory Guarantees. And the group of independent lawyers assisting the MPs with legal procedures in the Parliamentary Legal Counsel warned that several decisions made by the Parliament's Bureau, as well as the passage of the bill itself, might violate the Spanish Constitution, the Catalan Estatut (the equivalent to a Catalan regional Constitution), and the procedural rules of the Parliament. For that reason, and for the first time in the history of modern Catalan democracy, they refused to assist the MPs in the legislative procedure, as they did not want to be complicit in an open act of disobedience. However, according to the response of the secessionist majority, exceptional times called for exceptional means and, therefore, the parliamentary rules of procedure designed to operate in normal times were to be overcome.

Yes, the violation of procedural rules – especially when compromising minority rights -, the unconstitutionality of the Act itself and the boldness of the secessionist who are fully aware of both, are serious issues. But the crucial point, in my opinion, that renders all of this just a bunch of minor details, is a different one: the Act is a direct constitutional and institutional break-up – what I call a constitutional *coup d'état* – and it virtually creates a new legal order in Europe.

The Passage of the Legal Transition and Foundational Act

Before analysing this from the point of view of constitutional and legal theory, let me add another relevant fact: one day later, another bill was passed at a very late hour, namely the Catalan Legal Transition and Foundational Act 20/2017. Again, the draft was not scheduled in the agenda until the morning of September 7. Again, the parliamentary debate was therefore shortened albeit being very tense and bitter. And again, the bill was passed with 71 votes in favour and 10 abstentions, while the opposition abandoned the chamber and claimed the violation of their rights.

The Act 20/2017 has been widely qualified as a Transitional Constitution for Catalonia. Its purpose is to introduce

provisional rules to govern the transition process towards the Catalan Republic in case of an affirmative outcome of the referendum. These rules include, *inter alia*, the continued yet temporary validity of parts of the Spanish legal system in an independent Catalonia, the governance of the future constitution-making process, and central aspects of the would-be future Catalan Constitution, such as the designation of the Catalan people, their fundamental rights and duties, the territorial structure of the Catalan republic and the distribution of powers.

Yes, one might wonder how something can be so fundamental and, at the same time, transitional and preliminary. But this is not the point here. What is again crucial is that the Act 20/2017 constitutes a proto-constitution for an independent Catalonia. It thereby constitutes a direct attack to the Spanish Constitution and an institutional break-up. And this is, as I will argue later, the case even though the entry into force of the Act is conditional upon a positive result of the referendum and the Parliament's declaration of independence.

First Reactions

The Constitutional Court has temporarily suspended these two Acts, together with a couple of subsequently approved decrees of the Catalan Government. Although the final judgment is expected to declare their unconstitutionality, the Catalan Government and the other secessionist forces already declared the enforcement of these acts. An open act of institutional disobedience.

On the National Day of Catalonia on September 11 (called the *Diada*), between 500,000 and 1 million people peacefully marched through the city centre of Barcelona advocating the secession and celebrating the referendum. They supported the acts of disobedience already performed and those announced for the future by the Catalan Government and Parliament, as well as by many Catalan mayors. And, thus, this part of the Catalan society openly showed their support of the disobedience by the government and the institutional and constitutional break-up. These protesters can be said to represent the 1.8 or 1.9 million of Catalans who are presumably in favour of secession. But they only constitute less than 40% of the electorate; many among the other 60% of voters in Catalonia follow these events with great concern.

In the last few days, we have seen several actions from both the Catalan secessionist side as well as from the official Spanish side. While many of these latter actions are reasonable in the logic of protecting the Spanish Constitution from the real challenge of the described institutional break-up, there is an increasing perception, even among those who oppose the secession and the referendum, that some authorities are probably going too far. The Spanish Prosecution's Office initiated to suspend all official advertisements or any other institutional actions supporting the referendum; some Catalan newspapers have been inspected, and a few events – debates and peaceful gatherings – have been banned. Many consider these restrictions as serious threats or violations of the freedom of expression.

A Constitutional Coup d'État

Now, as I previously said, the Acts 19/2017 and 20/2017 both constitute a direct institutional break-up. I qualify it a constitutional *coup d'état*, in its technical sense. I do not agree with those scholars who see violent or undemocratic means as a condition for a *coup d'état*. In my opinion, the term merely refers to a significant forceful break-up with the institutional regime, regardless of being physically violent or legitimate or not.

As these two Acts provide for the constitutional, even if only transitional, rules for a Catalan Republic, they intend to create a new legal order in Europe from scratch. This new legal order implies, in turn, the partial collapse of the Spanish constitutional legality. By disobeying all the established procedures of a constitutional reform, it constitutes a constitutional revolution. It redefines the territory of Spain, the Spanish citizenship, the existence of Spanish institutions in Catalonia, and it violates Spanish sovereignty. Thus, it clearly attacks and compromises the Spanish constitutional identity.

The legitimacy of this new legal order is seen in the will of a new sovereign people, the people of Catalonia. And the Catalan Parliament, as the legitimate representative of that new sovereign, is seen to be entitled to pass this new transitional constitution, thus acting *de facto* as a transitional constitutional assembly. So, in my view, these Acts already effectively presuppose the political independence of Catalonia, i.e. the existence of Catalan sovereignty as different to, and not merely part of, the Spanish sovereignty.

Is This a New Genuine Legal Order in Europe?

We might ask, though, whether this new European legal order is a genuine one. This depends, by and large, on whether it meets the general conditions for the existence of a legal order, as specified by legal theory or jurisprudence. For this purpose, let me refer to Herbert Hart's rule of recognition: Accordingly, a new legal order is a genuine one insofar as the officials in the given state widely and undisputedly recognise it as such. So in this case, it depends on whether most officials in Catalonia – government members, MPs, high level public servants, judges, commands of the police and other forces, etc. – recognise the laws of that order, and particularly the two Acts under scrutiny, to be legally valid and enforceable, and act in accordance. The Spanish Constitution, however, offers another, historical 'rule of recognition': thereafter the only legal order valid on Spanish territory is the one founded by the Spanish constitution. If the Spanish rule of recognition prevails, the two Acts must be declared unconstitutional and totally void; and therefore, they should not be obeyed. But if Hart's rule of recognition prevails, the two Acts will constitute a transitional constitution for Catalonia, the Spanish constitution will no longer be applicable in Catalonia as such, and whatever the Spanish Constitutional Court has to say about this will be regarded irrelevant. As Hart himself clearly pointed out, in situations in which two potential rules of recognition compete with each other, legal theorists cannot affirm the existence of any of them. So, the question is: what are the officials in Catalonia actually doing?

It is probably a bit too early to make solid predictions in this regard. But what we have seen this week is that the relevant actors – the Catalan government, the Catalan police, the judiciary and other state institutions in Catalonia – comply with the requirements of the Spanish legal system, and the orders of the Prosecution's Office, in different ways. And so far, Hart's rule of recognition does not seem to apply, and accordingly the new Catalan legal order seems to loose the battle.

The Legitimacy of the Constitutional Coup d'État

Our most important concern, however, should not be the one of legal validity, but of legitimacy. Even the secessionists themselves recognise the unconstitutionality of the two Acts. But they claim to be creating a new legal order from scratch. So is it legitimate for the secessionist majority in the Catalan Parliament to pass these two Acts and produce such an institutional break-up that implies a constitutional revolution or *coup d'état*?

Many scholars argue that a coup d'état against a democratic system can never be legitimate, as long as it doesn't use those legal means provided for by the system itself (see for instance a very persuasive defence of such view in the recent Philip Pettit's *On the People's Terms*, CUP, 2012). Since Spain has a democratic legitimate system, this view automatically rules out any possibility that this constitutional revolution is legitimate. Generally I sympathize with this view. But let us assume that, under some conditions, a constitutional revolution might be legitimate, even against a democratic, legitimate system. Had the secessionists a popular support of, say, 90% of the electorate in Catalonia, and had the aspirations of such 90% of the people been systematically obliterated in different constitutional mechanisms and procedures with the result of impeding their call for a referendum, I would consider the constitutional coup d'état against the Spanish constitutional system to be democratically legitimate.

But is the actual attack to the Spanish constitution legitimate? I do not think so. First, because the secessionist majority in Parliament does not represent the majority of citizens in Catalonia, since they only acquired 48% of the votes. Second, because the support of the secessionist parties in the last election is not to be equalised with the support of a unilateral, illegal referendum. According to the polls currently available, only 40% of the Catalan voters actually support such an illegal referendum. Third, because the actual consequences of the two Acts (institutional break-up with the Spanish constitution, creation of new legal order, implication of Catalan sovereignty) are too far-reaching considering that the referendum has not even taken place yet, and therefore we do not even know whether the majority of Catalans would even like to secede. And, finally, given that we are not talking about passing an everyday piece of legislation, for which a simple majority would be enough, but of a constitutional revolution against a democratic, legitimate regime, which will produce substantial harm to the rest of Spaniards and the Catalan opponents, a bare majority of 51% would be clearly insufficient. I am not saying that the secession referendum itself should require a larger threshold of positive votes of, say, 60% – although I think it should. But what is under discussion here is not the secession yet, but the procedure to call for a referendum. And I think that the social majority that is required to legitimise a process of constitutional revolution or coup d'état needs to be much, much

larger. And since such a supermajority in favour of revolution does not exist in Catalonia, all those who want to have a secession referendum, including myself, must adhere to the legitimate legal means provided for by the Spanish constitution.

A new legal order might emerge in Europe in the next few weeks. And if it does, it will constitute a unique case of revolution or institutional break-up in the history of constitutional law. For that reason, it deserves all the attention from all over the world, and particularly from the other members of the European Union.

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