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Regional elections in Catalonia - questions and answers

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1. Although the Spanish Constitution speaks of Autonomous Communities and makes the difference between regions and nationalities of Spain (article 2), we shall use here the term "regional" in the unifying sense of the word, as in the Congress of Local and Regional Authorities of the Council of Europe, whose Chamber of Regions brings together amongst others the representatives of the Spanish regions, including those of the Catalan parliament. (<http://www.congressdatabase.coe.int/WebForms/Public/Country.aspx?id=6>).

2. <http://www.bcn.cat/estadistica/castella/dades/telec/ref/ref78/r22.htm>.

3. Approved by the « State organic law » 6/2006, this text is available in several languages on <https://www.parlament.cat/web/documentacio/estatut/text-aprovat/index.html>.

4. Whose official results (that can be found on <https://www.parlament.cat/document/composicio/150360.pdf>) led to the formation of Catalan governments formed by nationalists only (1980-2003, and 2010-2017), or in coalition with some left-wing parties.

5. Eleven in the Basque Country, ten in Andalusia, Galicia and Madrid, and nine in all the other (twelve) Autonomous Communities which (together with Madrid) vote on the same day, likewise the autonomous towns of Ceuta and Melilla.

6. In fact, the parties of the Catalan parliamentary majority which supported this process did not reach 50% of the vote in the last regional elections, but 47.8%. However, an electoral system that favours the least populous provinces of the region (which are traditionally more nationalist) gave them 53.3% of the seats: see <https://www.parlament.cat/document/composicio/150360.pdf>.

Without any doubt the Catalan regional elections on 21st December 2017 are the focus of particular interest, not only in Spain but also abroad, because of the exceptional circumstances that surround them. As a result, it seems pertinent to clarify certain issues that this election raises in some fundamental areas concerning (1) their scope and meaning, (2) the exceptional circumstances in which they have been convened, and (3) the political forces standing for election.

1. THE SCOPE OF THE ELECTIONS: WHAT IS AT STAKE ON 21ST DECEMBER? REGIONAL ELECTIONS, RULE OF LAW AND CONSTITUTIONAL REFORM.

The question would appear irrelevant, but unfortunately this is not the case. And this is precisely where a good part of the problem lies, since in certain areas of public opinion there seems to be some confusion about this.

On 21st December regional elections will take place in Catalonia[1]. This will be exactly the twelfth election since an overwhelming majority of the Spanish citizens (including of course the Catalans) approved the 1978 Constitution. A Constitution which in fact had more votes (in absolute terms and in percentage) in Catalonia than in Madrid[2].

Consequently, on 21st December the Catalan citizens (who are Spanish citizens living in Catalonia: article 7.1 of the Statute on the Autonomy of Catalonia of 2006, hereinafter SAC[3]) will elect the members of their regional Parliament, which will exercise its power "according to the measures included in the SAC and the Constitution" (article 2.4 SAC). This is the aim of regional elections, in Spain elsewhere. It has been so in the previous 11 Catalan elections[4], in some other 150 regional elections that have taken place in all the other Spanish Autonomous Communities since

1980[5]... and in all the equivalent elections which are constantly held in the rest of Europe. Whatever the political or constitutional context in Catalonia, Corsica, Venetia or Bavaria, in Scotland, Flanders or Carinthia, the main issue at stake in regional elections is the choice of the members of their respective regional Parliaments and, in line with the results, the configuration of the regional governments. Governments which, in all events, and undoubtedly, have to submit to the constitutional order in force.

Consequently, it makes no sense to ask whether the Spanish government will "acknowledge" the results of these elections: naturally it will do so, as it has always done. Out of democratic belief, and out of respect for the idea of the rule of law in force in Spain and in Europe. Now, why do some, and particularly those who support the rejected Catalan government, express doubts about this acknowledgement?

The answer is obvious: out of interest. Because the Catalan government – at present deposed – and the majority of those who support it (a majority that was "manufactured" via the electoral system[6]), consciously engaged on the path of unilaterally breaking away from the legal system in force in Spain and Catalonia. Although some tried to hide this from the citizens, obviously this path could only lead to a political, constitutional and systemic crisis like the current one. But today as yesterday, in Spain or elsewhere, such a behaviour is

unacceptable, as it has been recognized by all of the authorities in Europe and across the world. Hence the interest in generating confusion by mixing concepts that are clearly differentiated the world over.

This (manufactured) majority specifically expressed its will to “to start a constituent process” that aimed to “create an independent Catalan State in the shape of a republic”, adding that during this process “it would not submit to the decisions taken by the institutions of the Spanish State, particularly those of the Constitutional Tribunal”[7]. In doing so, this majority illustrated its decision to infringe the Constitution approved by the Spanish Parliament and citizens, as well as the Statute of Autonomy approved by the Parliament and citizens of Catalonia.

Therefore, the regional parliamentary majority seized the competence to ignore and subvert the laws in force in both Spain and Catalonia. A decision fully incompatible with the fundamental European principle of the rule of law. A decision which, according to the constitutional theory, could only be politically legitimate by reforming through democratic procedures the rules in force: those of the Constitution and the Statute of Autonomy.

The Spanish Constitution (hereafter designated by the acronym SC), unlike other equally democratic Constitutions, like those of France, Italy or Germany can be entirely reformed, ruling out none of its parts. But, as in nearly all democratic Constitutions, such a reform is quite difficult, mainly requiring qualified majorities which formally strengthen its substantial supremacy. This procedure of constitutional reform can be initiated in Spain by several subjects, including the parliaments or governments of the autonomous regions (articles 16 and 87.2 SC). But of course, neither the Catalan government nor the parliament ever tried to do so.

Likewise, the Statute of Catalonia can also be reformed by a (two-thirds) qualified majority... which the advocates of this process did not have either. As a result, the majority was not enough for reforming the regional Statute, and might have tried –but did not want – to reform the Constitution. Therefore it quite

simply decided to assert that it was not subject to the law in force. Hence freed of the constraints of any law, *legibus solutus*, the Catalan government – supported by its “manufactured” majority – rushed into a systematic breach of all of the decisions delivered by the courts, be it the Constitutional Court or the ordinary courts of law[8].

Consequently, those who throw doubts on the meaning of these elections and the recognition of their results are relying on a double lie. Firstly, by giving the regional elections a value which, quite clearly, they do not have, and by trying to transform them into a vote on the validity of the Constitution and the Statute of Autonomy. Secondly, by changing the rules of the game, which they themselves claim to be playing, via the conversion of a minority popular vote into a take-it-or-leave-it majority. In brief: a minority of voters allowed the parliamentary majority (“manufactured” by the electoral system), not only to govern (what it could legally do) but also to assert that there were no limits, and that it could therefore freely infringe the Constitution, the Statute and any remaining laws.

It was precisely what this majority did by approving a parliamentary resolution on 27th October to declare the “Catalan Republic, as an independent and sovereign State”, while asserting “the wish to launch negotiations with the Spanish State, without any prior conditions ... necessarily on equal terms,” and by exhorting the “international community” to recognise this reality[9].

2. THE EXCEPTIONAL CIRCUMSTANCES OF THE CALLING FOR REGIONAL ELECTIONS ON 21ST DECEMBER 2017

Of course, no democratic, even slightly earnest State would tolerate such successive attacks on the law by a regional Parliament, which, with its narrow (and artificial) majority, declared its sovereignty, thereby rejecting the validity of the law in force (including the law it had itself previously adopted). This exceptional situation logically led to exceptional consequences that affected the convening of regional elections via two different kinds of action: (a) some which were

7. Resolution I/XI, adopted on 27th September 2015, points 1 and 6; available in several languages on: <https://www.parlament.cat/web/documentacio/altres-versions/resolucions-versions/index.html>.

8. As declared by the Constitutional Court in its judgement (114/2017, 17th October) regarding the Catalan law on the referendum “a power that purposely ignores the Law denies itself as an authority worthy of respect” (see <http://hj.tribunalconstitucional.es/docs/BOE/BOE-A-2017-12206.pdf>, article 5.d; a press release in English and French is available on <https://www.tribunalconstitucional.es/en/prensa/Paginas/default.aspx>; and <https://www.tribunalconstitucional.es/fr/prensa/Paginas/default.aspx>.)

9. See Parliament’s sessions log book (<https://www.parlament.cat/document/dspcp/238145.pdf>), pages 28-29. The resolution was adopted by the ‘manufactured’ parliamentary majority, whilst all of the other groups (majority in numbers of votes) were against it. In fact the MPs of the People’s Party, the Socialist Party and the Liberals did not attend the vote arguing that it went against the Law and that it had been prohibited by the Constitutional Court. The radical left, which rallied to Podemos voted against.

strictly political; (b) others, which were strictly judicial (although with obvious political repercussions).

a) In the political sphere, the Spanish government decided to trigger the federal coercion procedure provided by article 155 of the Constitution. A procedure according to which, "if an autonomous community does not fulfil the obligations that the Constitution or other laws set it", allows the government – with the approval of the Senate – to "adopt the necessary action to force the respect of these obligations". Article 155 SC is directly inspired by article 37 of the Fundamental Law of Bonn and is similar to other legal measures that exist in various federal decentralised States, providing for cases of conflict between the central power and territorial entities[10]. Widely supported across the country (except for in Catalonia) by public opinion, which demanded a response to the challenge made by the Catalan institutions[11], the government submitted a proposal to the Senate, which was supported by an extremely wide majority composed of the People's Party (PP), the Socialists (PSOE), the Liberals (Ciudadanos) and other nationalist and regionalist parties (Canaries, Navarre and Asturias). In all, there were 214 votes in support, 47 against and 1 abstention: i.e. support of more than 80% of the House.

With this support, the government decided to replace the leaders of the situation described above: the regional government was dismissed, and its powers were provisionally transferred to the State government (direct rule); whilst the Catalan Parliament was dissolved, leading to the convening of elections on 21st December 2017. It was deemed that the acceptance of this invitation and the participation in these elections, submitted to the electoral law in force in Catalonia and Spain[12], implied *de facto* the recognition of this legality by those who had proclaimed (quite unsuccessfully, by the way) an independent republic. From then on, the (new) autonomous Catalan parliament should, whatever its composition, take office again in the present legal and constitutional framework.

(b) Almost at the same time, but in very different ways (as it has to be in a State where the courts are "independent... and only subject to the rule of law,"

article 117.1 SC), several judicial procedures led to convergent outcomes. Some of these procedures were launched *ex officio*, some others following complaints; some before the illegal referendum on 1st October; and others after the declaration of independence. Clearly, none of these procedures aimed to judge the legitimacy of the independentist thought. All, focused rather more on real actions in which the laws in force had been breached.

In some cases the procedures came in response to actions which seemed to clearly exceed the remit of the regional authorities, thus leading them to use every possible means (human, material and organisational) for illegal ends. This possibility led to various potential crimes (from sedition to the embezzlement of public funds) involving the abuse of power on the part of those who are obliged to act in line with the law.

In addition to this, other procedures resulted from various circumstances, linked in particular to the preparation of the referendum on 1st October 2017. A referendum which had been suspended by the Constitutional Court on 7th September 2017, although this suspension was not accepted by the Catalan authorities, who rejected any submission to the said Court.

To ensure the respect of the Constitutional Court suspension of the referendum, a judge in Barcelona ordered a series of legal measures[13]. On 20th September (that is, before October 1st), a crowd surrounded the public building where, on order of the court, a police search was taking place. Encouraged by the passiveness of the Catalan police force (subordinate to the regional government), this crowd prevented the said police officers from leaving the building (besieged for 19 hours, until the next morning). The legal official who accompanied the officers had to flee by jumping onto the roof of a neighbouring building, a theatre, and escaped by mingling with the crowd which was leaving the said building. Moreover, several police vehicles were sent in, and were attacked and burnt – the arms they were carrying were stolen. According to the legal report, the crowd's action was spurred on by the two main leaders of the organisations which had called for

10. On the provision and the use of this mechanism in comparative law (including the occasional use of force), we can consult – in Spanish – the study by G. Gomez Orfanel, which assesses the cases of the USA, Argentina (art. 75.31 Const.), Brazil (art. 34), Italy (art. 126), Austria (art. 100), and Germany (art. 48 of the Weimar Const. and art. 37 of the present Const.): <https://revistasonline.inap.es/index.php?journal=CDP&page=article&op=view&path%5B%5D=766&path%5B%5D=821>. We might add to this, in a very different constitutional context, the direct rule set by Tony Blair (who suspended the Regional Assembly of Northern Ireland between 2002 and 2006: <https://www.theguardian.com/world/2002/oct/14/qanda.northernireland>), and which has now arisen again with significant differences (<http://www.bbc.com/news/uk-40462749>).

11. See the polls published before the Spanish government even answered by different media as La Sexta (TV channel close to the left) http://www.lasexta.com/noticias/nacional/el-633-de-espanoles-crece-que-rajo-debe-aplicar-el-155-para-que-el-estado-tome-el-control-de-cataluna_2017102159eb20f30cf28f8922eaa7b7.html), or El Mundo (second biggest, Liberal Spanish newspaper): <http://www.elmundo.es/opinion/2017/09/11/59b58fa322601df1338b4664.html>.

12. Curiously enough, even if all of the Spanish Autonomous Communities have the competence to adopt their own electoral rules, Catalonia is the only one not to have been able to do this, so that their regional elections are almost completely ruled by the Spanish Election law.

13. https://elpais.com/ccaa/2017/09/20/catalunya/1505885372_273143.html.

this demonstration, closely associated to the Catalan government and the parliamentary majority. In fact, they were present and stood on the police vehicles, which led to their arrest and provisional detention[14].

Other procedures were launched in other Courts (the High Court of Justice of Catalonia, the National Court and the Supreme Spanish Court, when members of Parliament were involved). The Judicial Chamber of the Supreme Court appointed an investigating judge who, after various vicissitudes decided, first, to bring all of these procedures before the High Court; and, second, to keep in prison the said leaders, with those others whom the judge deemed directly responsible for a coordinated strategy between the government, parliamentary and social leaders to "mobilise human and financial resources" which called for acts of violence referred to in the legal report[15].

Therefore, the next Catalan election will take place in exceptional circumstances, in two discrete ways, whose effects may overlap even though they are different by their nature and their effects: firstly, the Spanish government acted politically by triggering the federal coercion process provided by article 155 of the Constitution to depose the Catalan government, dissolve the regional Parliament and convene new elections. Second, the courts acted legally by temporarily depriving certain political leaders of their freedom; however, they can still run for election as long as they are not convicted ... likewise the former Catalan President whose flight abroad prevented the judge from examining the case.

3. THE POLITICAL FORCES RUNNING

So far the polls do not forecast any major changes in the balance of power between the two main blocks: the balance registered in the 2015 election (nearly 48% of the vote for the independence parties and slightly over 50% for those against independence[16]) seems to be maintained overall.

However, the balance between the parties running have been significantly changed. Especially in the camp of the independentists where, in 2015, a

major coalition (Junts pel Si, Together for the Yes) won a relatively comfortable majority. This coalition brought together the nationalist political parties that traditionally have run and have been in office in Catalonia since 1980, *Convergència i Unió* (deprived of its more moderate members, which split but did not achieve representation) and *Esquerra Republicana de Catalunya* (ERC). Alongside these two parties, the independentist parliamentary majority was completed by a clearly "anti-system" party: the *Candidature for People's Unity, CUP*[17].

At present, however, this grand independentist coalition has divided in two, which might reduce the "majority bonus" caused by the electoral system in force. On the one hand there is ERC, which is aspiring to become the leading Catalan political force for the first time since 1980, as the polls have been forecasting for many months. On the other, the former President, now on the run, C. Puigdemont, who from Brussels is coordinating a coalition composed –amongst others – of former members of the previous *Convergència i Unió*. A new coalition named *Junts per Catalunya* (Together for Catalonia), which is trying –quite successfully- to fight for the first place with the ERC – something which seemed impossible just a few weeks ago. The CUP, rather down in the polls, is still the poor (but decisive) part in this trio.

Amongst the parties against independence and still according to the polls, the *Citizens Party* (*Ciudadanos-Partido de la Ciudadanía*) seems to be strengthening its majority position as it has continued to rise after the 2015 elections and to the detriment of the *Partido Popular* (PP), which very well may continue its decline[18]. Whilst the *Socialist Party*, reinforced by some moderate nationalist leaders who have joined its ranks, seems to have stopped its decline over a ten year period that had brought it down from the 31% mark (2003) to 12% (2015) of the vote.

The scenario is completed by a left-wing coalition (in 2015: *Cataluña sí que puede, CSQEP*; now, *Catalunya en Comú, CeC*) which rallies former communist militants as well as social activists and the Catalan branch of *Podemos*. *CeC* is against the unilateralism

14. The full text of the legal resolution: https://www.economiadigital.es/uploads/s1/52/85/35/2/sanchez_cuixart.pdf.

15. <https://ep00.epimg.net/de-scargables/2017/12/04/6b55476a43f9dc390d0d85e052dc7054.pdf>. As we know, in addition to the two instigators of the violent demonstration of 20th September there remains in prison the deposed Vice-President of the Catalan government and the director of the regional police, who did not intervene in spite of the demands made of him to facilitate the evacuation of the besieged agents. And as it is also known the President of the Catalan Government, also dismissed, escaped legal proceedings as he fled abroad and remains in Belgium together with other members of his government who, had they stayed in Spain, would surely be already free, just as their former cabinet colleagues are.

16. The three main national parties (C's, PSOE and PP) won more than 39%; the far-left coalition (not explicitly pro-independence), totalled 9%; and a moderate nationalist candidature did not win any seats in spite of its 2.5%.

17. See footnote no.3.

18. We should note that *Ciudadanos* (C's), a party which is now part of the liberal group in the European Parliament (ALDE) was created in Catalonia with a message focused on criticism of Catalan nationalism and the concessions that the national parties (mainly the PP and the PSOE) made to the nationalists over the forty years of Spanish democratic life since 1977.

of the independentist process (and voted against it in parliament), at the same time it defends (but not unanimously) Catalonia's right to self-rule and it is a severe critic of article 155 of the Constitution by the Spanish State. It seems that this position might weaken in the election.

The Catalanian citizens (Spanish citizens living in Catalonia) will be voting on 21st December. Almost everything seems to announce that the formation of a majority government will be very difficult. And, after all the events over the last two years, this experiment will not happen again. Indeed, responses have not at all been those forecast by the independentists (European and international recognition, acceptance and passiveness of the Spanish institutions). Moreover,

the impact (political, social, legal and economic[19]) has been alarming. And it seems inadmissible that unilateral decisions taken disregarding the established legal proceedings may cause the collapse of the current European integration process which has been ongoing now for decades.

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19. We just need to point out here that nearly 3000 businesses (amongst the biggest in Catalonia, include the two main banks) have moved their HQs – and often their tax base – since October to escape the legal and political instability caused by the independence process.

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