

Catalonia And Spain'S Constitutional Crisis: Time For A Federal Solution?

Abstract

This contribution describes how a Catalan bid for more autonomy and for national recognition miscarried in 2010 after long negotiations. In this process, the major part of Catalan nationalism turned towards independence. We follow the different steps that led to the show-down in October 2017, with the failed declaration of independence and the temporary suspension of Catalan autonomy. New elections in Catalonia and in Spain have been of no use to get out of the quandary. While federal solutions if combined with a constitutional recognition of Spain's plurinational character might be highly advisable to accommodate minority nations like Catalonia and to combine democracy and constitutionalism, fragmented party systems and minority governments on both sides make the necessary constitutional amendments even more improbable than ever.

Introduction

At the time of writing (November 2019), Catalonia may be compared to a bus. The vehicle moves round and round at changing, sometimes vertiginous speed, in a constitutional roundabout which it cannot leave (Nagel 2018). It arrived at this roundabout via the road of autonomy, but it now insistently indicates toward the exit marked sovereignty, by a referendum that might lead to independence. At the moment of writing, in the driver's seat, we find Quim Torra, the head of the Catalan government; former drivers have been removed by Spanish "police" (the Spanish state institutions) or have fled the vehicle to avoid high sanctions (some former and possible alternative drivers have received prison sentences after asking the people in the bus which way to go).

Torra's driving style is contested by the frontbenchers of the bus, even those that in the end want to take the same direction. But in the bus, about half of the passengers are against taking this exit. The bus has already got some heavy bumps when it tried to take this narrow way in October 2017 (referendum, declaration of independence, suspension and reestablishment of autonomy). On this occasion, the Spanish institutions and the parties from the right and (most) from the left, had worked together to block this road at all cost, and as the vehicle drove nearer, former bystanders (the EU, foreign governments) rallied to help Spain to reinforce the road block. The bus struck the road block with force, but, also to the relief of many of its passengers, it did not pass and was driven back into the roundabout, some of the passengers getting clubbed by police. Since then, debate among passengers remains as whether to insist on driving against the road block while denouncing its illegitimate construction and hoping that steady insistence may take the bus through one day, notwithstanding the threat of further punishment. Others prefer to pursue the same route, albeit at a later date, after filling up with more fuel or convincing more passengers to push, while also hoping that the road block may decay and its supporters disintegrate. At the time of writing, however, the forces standing behind the reservation, in contact with half of the passengers, remain united. An increasing number of them even argue for advancing the road block into the roundabout itself and drive the bus back to the road of autonomy, or take the bus entirely out of traffic, temporarily, or forever. Some, also try to redirect the bus towards one of the other exits. One is clearly marked as leading to increased autonomy, but this one has already proved unsafe for traffic in the past (the failed statute of 2006). Signposts for the one leading to federalism are barely readable. It seems that more vehicles are required to choose this one to make this exit roadworthy. This exit immediately splits into different lanes (marked asymmetric, symmetric, federation, confederation...) and some of them are even more blocked than the independence road.

This image, it seems to me, represents well what is happening. One might however also ask questions on whether the bus may circulate at all and if so, whether it is a bus (a nation) and therefore different to other vehicles (the regions) or not, and whether traffic rules should apply to all the same way, or whether different types of vehicles should be regulated – and driven – differently, too.

Let us however now analyze 1) how the bus got to the roundabout, 2) how its first try to exit toward increased autonomy failed, 3) how the vehicle subsequently tried to change direction, heading towards referendum and independence, 4) how it bumped against the road block and was – as a result – driven back to the roundabout, 5) how it currently goes round and round and round, and 6) why other exits (other than just driving the road of autonomy backwards) are so difficult to take.

1. How did the bus get to the roundabout? The Spanish Constitution and Catalan Autonomy (Nagel, 2015: 388-390)

Spain is decentralized but no federation (Requejo 2017). The Spanish Constitution of 1978, not a pact of territories, nevertheless established a "state of the autonomies": There is only one constitutional Nation, and there is only one State: Spain. Initially, "national" autonomies like Catalonia received a higher level of self government. However, with the years,

these differences were much reduced (Máiz/Losada 2011). Waves of asymmetric decentralization were followed by “re-symmetrizing” governments enjoying absolute majorities, or by pacts of the two major state wide parties. On one hand, autonomy was handed down to all regions (*café para todos*, coffee for all). On the other hand, the state used transversal competences established in the Constitution, organic laws, and its financial power to homogenize the process.

2. How the bus tried to exit via the ‘enlarged autonomy’ route and how this failed (Nagel, 2015: 390-392)

In 2003, a three party coalition led by the socialists were elected to take over the Catalan government after 23 years of autonomist Jordi Pujol and his *Convergència* party. Surprisingly, the Spanish socialists (PSOE) also won the Spanish elections of 2004. A “federalist spring” seemed possible (Nagel 2005). Spanish socialist leader Rodríguez Zapatero had promised that a majority of his party, given the chance, would accept a Catalan proposal for a new, enlarged statute of autonomy, if only this proposal would be backed by a clear majority in the Catalan parliament. Indeed, on September 30, 2005, nearly 90% of the members of the Catalan parliament agreed on a draft for a new statute of autonomy. The Catalan text defined Catalonia as a Nation, improved its financing, and previewed bilateral relations with Madrid in some issues. The way towards asymmetrical federalism seemed open. But a statute is a central state law, and the Madrid parliament had to decide on the final text.

The main opposition party, the conservative Popular Party (PP) led by Mariano Rajoy, was able to mobilize a considerable part of the Spanish public against the text. The final version approved by Spanish parliament no longer amounted to change the system of the state of autonomies, and it no longer recognized Catalonia as a Nation. The financial regime remained unchanged; but the state promised to invest in Catalonia according to Catalonia's share of the GDP of Spain, to make good for long years of under-investment. Further, in terms of its spending capacity per capita, the Catalan government would no longer be left with less money than the net receivers. This final text was passed with the votes of the socialists and the Catalan parties, with the exception of the Republican left. The Catalan population, which went to the polls to ratify this new statute in an official and binding referendum, was no longer enthusiastic about it. Not even 50% of the voters cast their ballot. However, the new statute was confirmed with a 74% majority. A democratic decision in agreement with the procedure previewed by the Spanish Constitution had been taken. However, the conservative opposition, the socialist ombudsman, and some autonomous governments went to the Constitutional Court requiring it to declare the most relevant parts of the statute unconstitutional. The Court, a highly politicized institution, needed four years of deliberation. During these years, information leaked to the media added even more articles of the statute to the list of those that would be scrutinized and ultimately rejected. In the Catalan public, the fears that the statute reforms, begun with enthusiasm, could have been in vain, and that all these years of party negotiations for enhancing autonomy and –some– national recognition were lost years. The opinion that on grounds of fairness, respect and democracy, a statute ratified by popular vote should not be curtailed afterwards by a Court became widespread. Particularly, as judges of the Constitutional Court are nominated without any relevant influence of the minority nations (or the Autonomous Communities).

In June 2010, the Court finally published its verdict. All those parts of the statute that even survived the “significant dilution” of the text in Madrid that increased national recognition, established bilateral relations or, like in the case of a regional juridical power, seemed to grant some measure of statehood and thereby arguably prepared for the conversion of Spain into a federation (a state of states), were either directly cancelled or reinterpreted. This sentence also can be understood as “closing” the Spanish constitution which now was no longer “open” to more favorable interpretations that minority nationalists might ask for. Passing over the will of the Catalan majority confirms the view that Catalans are not recognized demos in their own right but just Spaniards who happen to live in the region and whose political rights are always dependent on the goodwill of an overall Spanish majority that even may take back what it once had graciously granted.

3. How the bus tried to change direction: The independentist turn

In the main nationalist parties, *Convergència* and *Esquerra*, young radicals started to challenge the established leaders, and their new terminology of a “right to decide” became popular. In addition, political initiative, passed from parties to the civil society. In September 2009, in the small town of Arenys de Munt, independentists organized a local “referendum” asking whether Catalonia should decide on independence. Between September 2009 and April 2011, in about half of all Catalan municipalities, local platforms managed to consult the people, and about 800,000 residents participated (Muñoz/Guinjoan 2013).

On July 10, 2010, the first, already immense march protesting against the Court ruling was led by then Catalan socialist Prime Minister Montilla. But its motto now was: “We are one Nation. We decide”. While the parties still discussed the pros and cons of a fiscal pact, on the Catalan national holiday (September 11, 2012), more than a million citizens took to the streets claiming “Catalonia, a new state in Europe”. The mobilizing association, *Assemblea Nacional Catalana* (ANC), had only been founded some months before. From this year onwards, ANC, after 2013 together with the historic cultural association *Òmnium Cultural* (OC), mobilized more than a million citizens on each national holiday. Catalonia has about 7.5 Million of inhabitants. Prime Minister Artur Mas (elected in 2010), and who had enjoyed the support of the regional Conservatives in the Catalan parliament before, changed course and in what appears as a flight to the front, called for new Catalan elections in November 2012, starring as the candidate who, if elected, would provide a referendum on independence.

Mas failed to achieve an absolute majority. But 87 out of 135 seats were won by parties standing in favour of a referendum, and more than 70 by parties defending independence (*Convergència*, *Esquerra* and extreme left CUP). The record high turnout of about 70% contradicted all those that counted non-voters bluntly as people uninterested in or even opposed to Catalan nationalism (Medina/Liñeira/Freixanet 2013).

Unity among these voters was made easier by the Conservative Spanish government, which reacted to the Catalan election with a law directed at “nationalizing” (*españolizar*, the Minister of Education, Wert, *dixit*, see *El Mundo* 3.12.2012; *El País* 4.12.2012; *La Vanguardia* 5. and 6.12.2012) Catalan school children. Other re-centralizing laws and norms were to follow. Since 2012, Catalan and Spanish governments have steered opposite courses. The Catalan governments, bolstered by the parliament and under the continued pressure of civil society, have asked by any ways possible for a referendum or at least a consultation on the issue of independence, on grounds of democracy. The Spanish governments, Conservative or Socialist, with the help of the respective opposition in parliament in Madrid, and counting on the media and the support of the Spanish population outside Catalonia as well as the European Commission, have consistently denied any such vote, on grounds of the Spanish constitution not allowing this, while using the police and the Courts to prevent any such consultation to be carried out unilaterally. Since 2013, many decisions and even declarations without juridical consequences of the Catalan parliament or even of its governing board (*mesa*) have been brought by the Madrid governments of both political colors to the Constitutional Court, and by this act, suspended and afterwards annulled.

In December 2013, four parties (*Convergència*, *Esquerra*, CUP; and ICV, that is, the Greens) agreed to ask for a referendum. In April 2014, the Spanish parliament, when confronted with the proposition to proceed according to the way Westminster handled the Scottish case, but the combined votes of both the PP and PSOE rejected the use of the constitutional possibility. There would be no delegation of competence for a one-off, non-binding referendum. The Catalan government, therefore, prepared a Catalan law on public consultations, according to the competence the Catalan *Generalitat* had received by one of the articles of the new statute which had survived the scrutiny of the Constitutional Court. This was also rejected. But the polling stations were opened on November 9th. Over 2 million residents participated, 80.9% answered yes on both questions (statehood and independence), 10.2% said yes to statehood, but not independence, 4.49% voted nay on both. In Madrid, Prime Minister Rajoy was heavily criticized for having tolerated this “participatory process”. He was not to do so again.

In Catalonia, independentist forces temporarily abandoned the idea of a consultation by referendum. The alternative way to receive legitimacy for a proclamation or declaration of independence was a parliamentary election, if possible, one fought on the issue. In Catalonia, however, there would only be a campaign for independence, but none against: Election or referendum, anti-independentists are not willing to put themselves on the same footing as independentists, who according to them have no legitimacy at all for independence, as Catalonia's constitutional future can only be decided by the sovereign Spanish people that decide on the Constitution (and given that Catalonia counts only some 16% of the Spanish population, not even a 100% majority in Catalonia could change the rules of the game against Spanish opposition).

4. How the bus collided with the road block and was driven back to the roundabout (Nagel 2018)

In March 2015, *Convergència*, *Esquerra*, *ANC*, *OC* and the association of municipalities for independence designed the road-map that would lead the Catalan bus to independence. In September, they agreed on a common list which under the name of *Junts pel Sí* (*JxSI*; together for yes) united candidates from these and other organizations and parties. In the case of winning a majority of seats, they would pass laws establishing state structures, afterwards declare independence and finally ratify it in a referendum. This process would however be interrupted if Madrid negotiated an official referendum.

The Catalan election of 2015 registered the highest turnout so far (77.4%) seen in this type of elections. *JxSI* and *CUP* (another pro-independence party) won 48% of the votes; "unionist" lists (socialists, conservatives, and national-liberal *Ciudadanos*) slightly over 39%; the rest mostly went to a left and sovereigntist, but in its majority non-independentist list (*Catalunya si que es pot*). With 72 seats, independentists held an absolute majority, but were often unable to agree. While the Spanish party system crackled (Spanish elections of 2015 and 2016) and Conservative minority governments ruled Spain, the Catalan parliament passed laws on state structures that were routinely suspended by the Spanish Constitutional Court. Finally, new Prime Minister *Puigdemont*, accepted by *CUP* only on grounds of his undoubted independentism and non-involvement in the former corrupt practices of his party (refounded as *PDECat* in 2016), finally rallied the independentist forces again under the banner of "o referèndum o referèndum" (either referendum or referendum) in summer 2016. It was of course well known that all major Spanish parties with the exception of *Podemos* refused even to negotiate any form of consultation if independence was on the ballot. But the cry for a referendum, negotiated if could be, but unilateral if not, had the additional potential to mobilize elements of the Catalan society more interested in participatory democracy than in independence itself. Polls continuously demonstrate that an overwhelming majority in Catalonia supports a referendum, a right to decide, while the alternative of independence is only supported by tiny majorities, if majorities at all. A successful referendum, also seemed to provide more legitimacy than any electoral victory, with a probably higher chance of international recognition.

Spain tried to prevent a referendum by different kind of means. The prosecution of independentists (for example the organizers of the 2014 consultation) intensified, the Constitutional Court made use of the increased competences it had received by the new law on the Court, and the Spanish ministry of Interior staged "Operation Catalonia" by police to collect compromising materials against leading Catalan politicians.

The Catalan government, supported by the majority of the Parliament, prepared a unilateral referendum. By summary proceeding, and creatively interpreting standing orders, on Sept 6, 2017, the parliament passed the self determination act for a binding referendum on independence to be held in October. The law was based on the right of self-determination of peoples and considered the opinion of the International Court of Justice on the issue of the unilateral declaration of independence of Kosovo. The law was suspended and annulled by the Spanish Constitutional Court afterwards. But, independentist politicians regarded it as binding; the link the law established between winning the referendum and declaring independence proved problematic afterwards, as it left no space for merely using the referendum result as an instrument of

pressure to negotiate with Madrid. Two days later, the Parliament passed “the legal transition and foundation of the republic act” establishing the legal framework for the interim between independence and the future Catalan constitution. Spanish and European laws would remain in force for the time of transition; Catalan citizenship would include most immigrants and respect double citizenship for those citizens that wished to maintain their Spanish passports; both languages would continue to be co-official.

Spanish Prime Minister Rajoy and several ministers swore the referendum would never take place, threatening to suspend autonomy using article 155 of the constitution and sometimes even to use the Spanish army according to Art 8. Thousands of police officers were transferred to Catalonia. Justice and police agents searched and where possible destroyed ballot papers and polling cards, they effectively stopped communications to polling officers. Servers were locked, websites closed, buildings searched, arrests carried out. The Constitutional Court threatened the persons nominated by the Catalan parliament to control the referendum with daily fees of 12,000€ per person if daring to act. These and many other measures have had and may still have juridical consequences for many Catalans involved in the preparation of the referendum. On occasion of a peaceful mass demonstration in front of the Catalan Ministry of Economy against a search for polling materials, Spanish justice agents claimed to have been hindered to leave the building after having carried out their task, and the leaders of the civil society associations ANC and OC were sent to prison (where they still are as they have been convicted for sedition to long prison sentences in 2019). In the end, however, the Spanish forces of public order could not prevent the referendum from taking place. While voting on 1.10.17, police officers stormed poll stations taking away ballot boxes and charged against voters that tried to protect them. In spite of these actions, 2.262.424 citizens cast their ballots (42.5% of the census). 90.09% voted for independence. While on October 3, in Catalonia, a widely followed general strike against the police measures took place, the Spanish king defended the forces of public order in a ceremonious public speech. A seemingly small change in a decree concerning company law empowered the directing boards of such companies to change their seats quickly. Many managers took the hint and during October, some 3000 companies declared to move their headquarters out of Catalonia. On October 8, for the first time, hundreds of thousands of anti-independentists marched through Barcelona, headed by socialist politician Josep Borrell.

On the other side, after the success of celebrating a referendum against all odds, no immediate declaration of independence followed. Independentists did not even try to take the reigns of the country in their own hands. Their majority was only a small one, they lacked immediate money to pay salaries, and they had no international support. But considering the laws they themselves had passed, winning the referendum automatically should mean declaring independence. Their supporters, who had filled the streets day after day during September and had suffered police charges, pressed the politicians to proceed. Rivalry between independentist parties also played a role. In the end, last minute attempts to negotiate had failed because of mutual distrust, a sort of declaration of independence took place in parliament, without all the pomp that such events usually require. The declaration was not even published in the law gazette. On the same day (October 27), and with the votes of the Conservatives, the national-liberal Ciudadanos, and the Socialists, the Spanish Senate^[1], following the requirement of the conservative minority government, used art 155 of the Spanish constitution to suspend Catalan autonomy. Among other measures, the whole Catalan government and parliament were dissolved, and new elections called. The proportionality of this act has been questioned, but has been confirmed by the Spanish Constitutional Court.

5. How the bus is going round and round

The parties that had voted to apply art 155 had hoped in vain that the prescribed elections on December 21, 2017, would render a non-independentist majority. Many important independentist candidates could only take part in the campaign from exile, via skype, or practically could not at all, as they were in jail. But all independentist parties accepted to take part in the election, with their own party lists. Establishing a new record in turn-out, the electoral results restored the independentist majority of seats, but, as before, without an absolute majority of votes. The parties defending art 155, with Ciudadanos now

taking the lead, received fewer votes. Catalunya en Comú, in favor of the referendum, but (mostly) against independence and clearly against art 155, got most of the rest of the votes. Ciudadanos, however, emerged as the largest single party. Under art 155 and with continuous juridical quarrelling on the rights of elected parliamentarians that were in exile or jail, the election of a new head of government proved difficult and only succeeded on May 14, 2018, when Quim Torra was elected with a one-vote relative majority. Afterwards, the same battles continued about the nomination of ministers. Finally, the application of art. 155 was suspended. Spanish prosecutors tried and continue to try to get exiled Catalan politicians extradited from Belgium, Germany, the UK, and Switzerland, but so far have failed. When socialist leader Sánchez succeeded in ousting Conservative Rajoy from the Spanish government with the help of a parliamentary majority which included Catalan independentists, a window for negotiations seemed to open, but Sánchez, suffering accusations of being a “prisoner” of Catalan secessionists has not taken any significant step yet. In retaliation, he did not get independentist support for his budget. Calling new Spanish election was no help. In Catalonia, during the last elections (November 2019), independentists reached the highest number of seats ever won in this type of election (23 out of 48), with a higher turnout. In Spain, the extreme right and Spanish nationalist Vox party, more than doubled its seats, campaigning for recentralization. On October 14, 2019, 9 independentists received long prison sentences (up to 13 years), as the Supreme Court considered them guilty of the crime of sedition, sometimes including misuse of public money and other crimes. Among the convicted were the former vice president and five more former ministers, the former speaker of the Parliament, and two leaders of civil society associations. Many other trials are going on and are to be expected. Protesters considered the sentences to be revenge, not justice. More than half a million Catalans took to the streets. In addition to these peaceful marches, for the first time in the history of the movement for independence, street riots occurred, including police charges and wide spread use of anti-riot equipment. Hundreds of people were injured and detained.

6. Why can the bus not take other exits (enhanced autonomy, new financial system, federalization of Spain), or just drive back?

Spanish and international academics often are most willing to tell the bus where it has to go, eventually, even sometimes criticising the Spanish traffic rulers on the justice of their decisions. However, if –as it seems– the constitution cannot be touched nor interpreted, as the Spanish side (from government to opposition only possibly excluding Podemos) insists that the only new exit viable is enlarging autonomy. Enlarged autonomy would surely count on even more support in Catalonia than independence. But statute reform has been tried already, and its failure has precisely led to the current situation. The Judgment 31/2010 of the Constitutional Court, completing the pruning of the 2006 statute, has made it even more difficult. The compulsory interpretations of the Court have closed many doors the constitution itself initially seemed to leave open. The historic flexibility of the Constitution in regards of autonomous competences seems partially over now.

After the pruning, the then Catalan government had tried to mollify the protests asking for a new financial regime (2010-12), but has been rejected by the Spanish government of the time. If the change is meant to be significant (for example, increasing the tax autonomy of Catalonia or any other Autonomous Community to the one enjoyed by Navarre or the Basque provinces) this would mean a reform of the constitution. And one should remember that it is almost impossible to amend the Constitution, now –with a more fragmented party system– more than ever.

This also affects any proposition to effectively federalize the country. For any federal pact, symmetrical or asymmetrical, partners willing to pact are required. There are very few federalists in Spain, particularly outside Catalonia. Podemos might be a case. The socialists have several times included federalism in their manifestos (during the November 2019 election, only as an afterthought), but when in power, have never tried to reform the constitution accordingly. One might even find secession easier than federalization, as for the first, at least in theory, a unilateral decision might be sufficient (provided this

side has the power, which Catalonia, at least now, has not).

From the standpoint of accommodating minority nations, there is much to be said in favor and against federalism, as has been done by other authors in the Shades of Federalism project. In the Spanish case, a symmetrical federation German style might only lead to repeat the minority position in the first chamber in the second one. Such types of federalism may be perfectly in agreement with Spanish nation-building. Confederal ideas would mean a clearer abandoning of the one state paradigm. They are not to be found in Spain, with the partial exception of the Basque Country.

Asymmetric federal arrangements are often recommended by political philosophers, and there is much to be said in favor of them, as they may allow for equalizing life chances of members of different nations by treating these nations differently, and establish devices of minority protection against majority dominance (veto rights, different sets of competences and representations, etc.). However, they are rarely implemented in a significant way, as few national majorities would renounce their numerical power to establish what in their understanding always is seen as a privilege. Consider Spain's recent history where power symmetry between regions and minority nations is often more important for the majority than enjoying a competence (the famous examples of Prime Ministers of autonomous Communities willing to hand back education competences to Madrid with the only condition that they be taken away from Catalonia).

The difficulty to change the Constitution however applies, too, for those who prefer a total backlash, that is, recentralising the state by abolishing the state of autonomies. There is now an increasing number of Spaniards preferring a state without autonomies or would prefer them to have significantly less autonomy in matters of education, culture, health, police, or media. However, recentralisation may be easier when it takes place in a piecemeal way, using for example the instrument of organic laws to establish limits and deadlines or use the power of the purse, as nearly no competence is exclusive, and nearly all money goes, in the first place, to the central state exchequer.

It is therefore not improbable that the Catalan bus continues to drive around. In the current situation (January 2020), dialogue, if it happens, may not be possible for the actors if it is supposed to solve the important constitutional questions of self determination (and its limits), including referenda, even if unbinding and negotiated, national recognition; probably not even an amnesty.

There is a high chance that the Catalan bus is bound for driving many rounds yet.

[1] Art 155 has often been compared to art 37 of the German federal Constitution. However, in Germany, the power to suspend the self government of a Land would be in the hand of the Bundesrat, where only Länder governments are represented. In Spain, it is the Senate who holds this power, a usually quite unimportant chamber, functioning according to party interests. Some 80% of the senators are not representing any region, but the same electoral districts that also send the members to the lower chamber.

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Further Reading

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