

Federal execution, Article 155 of the Spanish Constitution and the crisis in Catalonia

María Jesús García Morales*

- I. Introduction
 - II. The constitutional instrument: Article 155 SC, an importation of the German *Bundeszwang* with differences
 - A. History of Article 155 SC
 - B. Conditions for the application of Article 155 SC
 - C. Procedure of Article 155 SC
 - D. Content of Article 155 SC
 - E. Control of Article 155 SC
 - III. The first case: the application of Article 155 SC and the crisis in Catalonia
 - A. Background: the crisis in Catalonia and the declaration of independence
 - 1. Catalonia in the State of Autonomies and a brief history of the Catalanian conflict
 - 2. The referendum on self-determination and the unilateral declaration of independence of Catalonia
 - B. Response of the central State: the triggering of Article 155 SC and the measures approved
 - 1. The triggering of Article 155 SC, step by step
 - a. The initiative of the Central Government
 - b. The procedure in the Senate
 - 2. The controversial measures approved under Article 155 SC
 - a. Measures regarding the President and the Catalanian Government
 - b. Measures regarding the Catalanian Parliament
 - c. Measures regarding the Catalanian Administration
 - d. Other measures
 - e. Duration and review of the measures
 - C. Controversies surrounding the application of Article 155 SC: does it violate the Constitution?
 - IV. Conclusion
- References

* Prof. Dr. *María Jesús García Morales*, Professor of Constitutional Law (*Profesora Titular*), Autonomous University of Barcelona (UAB), Faculty of Law, Campus de la UAB, 08193 Bellaterra, Barcelona, Spain, <mariajesus.garcia@uab.es>.

The author would like to thank Prof. Dr. *Armin von Bogdandy* for the invitation to visit the *Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht* where she was able to consult German and comparative sources. She would also like to express thanks to Prof. Dr. *Jochen Abr. Frowein* for his invaluable comments and bibliographical indications, to Prof. Dr. *Iris Canor* for her comments, and to the anonymous reviewer. The period spent at the MPIL was possible thanks to a grant “Programa Salvador de Madariaga” (Ministerio de Educación).

Abstract Article 155 of the Spanish Constitution (SC) imports a rule with a long tradition in German federalism: federal execution (Article 37 GG) which has no precedent in Spain. The dreaded Article 155 of the Constitution was applied for the first time in Spain due to the initiation of a process of secession in Catalonia in autumn 2017. This article analyses the constitutional framework of Article 155, its practical dimension in this first case, and the intense controversy caused by its application (particularly some of the more drastic coercive measures) on which the Constitutional Court will have to rule. This reconstruction of the (political and legal) situation seeks to provide tools to understand why, to what end and how Article 155 was applied. It also looks into the questions this application has raised, where difficulties in overcoming the impasse lie and why solving the serious Catalanian crisis requires more than just legal responses.

Zusammenfassung Art 155 der spanischen Verfassung importiert ein Instrument mit langer Tradition im deutschen Föderalismus: den Bundeszwang gemäß Art 37 GG, der in Spanien jedoch keine Präzedenzfälle gehabt hat. Der gefürchtete Art 155 ist nun anlässlich des Abspaltungsprozesses durch Katalonien im Herbst 2017 in Spanien erstmalig angewendet worden. Dieser Aufsatz analysiert den verfassungsrechtlichen Rahmen des Art 155, die praktische Dimension seiner Anwendung sowie die beachtliche Meinungskontroverse, die dessen Anwendung ausgelöst hat (insbesondere einige der drastischeren Zwangsmaßnahmen) und über die das spanische Verfassungsgericht zu entscheiden haben wird. Die Nachbildung der (politischen und juristischen) Situation soll das nötige Handwerkszeug dafür bereitstellen, um zu verstehen, warum, wofür und wie Art 155 angewendet worden ist. Zudem wird auf die Streitfragen eingegangen, zu denen die erstmalige Anwendung der Vorschrift geführt hat, worin die Schwierigkeiten liegen, um die Pattsituation aufzulösen und warum der Ausweg aus der ersten Katalonienkrise mehr als nur rechtliche Antworten erfordert.

Keywords Federal execution; State of Autonomies; Spanish Constitution; referendum; secession; independence; Catalonia.

Norms Article 155 of the Spanish Constitution; Article 159 of the Senate Regulations; Order PRA/1034/2017 (coercive measures proposed by the Central Government in application of Article 155 SC, for their approval by the Senate, BOE [Spanish Official State Gazette] 27.10.2017: Consolidated text, which includes amendments introduced in the Senate.)

I. Introduction

On 27 October 2017, Article 155 of the 1978 Spanish Constitution (SC) was applied for the first time in the history of the so-called State of Autonomies. The application of Article 155 SC constitutes the most important political decision taken by the Central Government since the Autonomous Communities were created forty years ago. The event leading to its application was the initiation of a process of secession in Catalonia. The application of Article 155 SC lasted for 218 days and measures remained in force until a new Government was formed in Catalonia on 2 June 2018.

Article 155 SC imports the institution of federal execution (*Bundeszwang*) as regulated in the Basic Law of the Federal Republic of Germany (*Grundgesetz* [GG]). This figure does not exist in all federal and politically decentralised States. It is one of the possible instruments provided for by the constitutions of those systems in order to compel territorial units, if necessary, to comply with their obligations set forth in the legal system of the state.

Although Article 155 SC is the equivalent of German federal execution, Spain has no historical experience of federalism or of political decentralisation similar to Germany or other European federal states. What is more, centralism has predominated Spanish constitutional history with the exception of a few brief decentralising experiences. The State of Autonomies was constructed under the auspices of the 1978 Constitution through a process of *devolution* which permitted a transition from a centralist state towards a higher degree of political decentralisation.

This State of Autonomies consists of seventeen Autonomous Communities and two Autonomous Cities with very different identities and histories. In Spain, contrary to other countries, there are Autonomous Communities, such as Catalonia and the Basque Country where a strong feeling of local identity exists. In Catalonia, this has resulted in demands for independence backed by a large sector of the population and by regional governments advocating secession from Spain. The Catalanian crisis currently constitutes the biggest challenge in Spain since the advent of democracy.

The objective of this article is not to construct a dogmatic treatment of Article 155, but to offer an overview of the political and legal situation to provide for the necessary keys to understand context, scope, and consequences of the first application of this constitutional provision.

To that aim, the article analyses the constitutional instrument of Article 155 SC and the way it differs from its German model (II.), the dimension of its practical application as a result of the Catalanian crisis (III.), including the reasons for its application (III.A), the procedure and specific measures adopted (III.B), and the questions that remain unanswered and on which the Constitutional Court will have to rule (III.C). It concludes with an assessment of what the first application of Article 155 SC has meant and outlines the possible future scenarios (IV.)

II. The constitutional instrument: Article 155 SC, an importation of the German *Bundeszwang* with differences

A. History of Article 155 SC

Spain is the only country in Europe that has imported the institution of German federal execution (Article 37 GG) to deal with critical situations resulting from a breach of constitutional and legal obligations by a territorial unit.

Federal execution is not strictly speaking a uniquely German issue. It is a problem which enjoys a long tradition in federal history,¹ although not in Spain where no prece-

¹ See *Kelsen Hans*, Die Bundesexecution, in Giacometti Zaccaria/Schindler Dietrich (eds), *Festgabe für Fritz Fleiner zum 60. Geburtstag 24. Januar 1927* (1927) 127 ff. On federal execution in American, Swiss and German constitutional history, *Frowein Jochen Abr.*, Die selbständige Bundesaufsicht nach dem

dents exist.² Furthermore, Article 155 SC inserts an institution from a federal country into the Constitution, in spite of the fact that no constitutional rule defines Spain as a Federal State. No matter how widely accepted the idea is, that the State of Autonomies functions in practice as a Federal State,³ the Constitution avoids the word federalism. For that reason, the term federal execution is not used in Spain, and the name usually given to this instrument is “Article 155” of the Constitution.⁴

Regarding its wording, Article 155 SC is not an exact replica of German federal execution, in spite of the clear influence of the Basic Law of the Federal Republic of Germany:

- “1. If an Autonomous Community does not fulfil the obligations imposed upon it by the Constitution or other laws, or acts in a way seriously harming the general interests of Spain, the Government, after lodging a complaint with the President of the Autonomous Community and failing to receive satisfaction therefore, may, following approval granted by an absolute majority of the Senate, take the measures necessary in order to compel the latter forcibly to meet said obligations, or in order to protect the above-mentioned general interests.
2. With a view to implementing the measures provided in the foregoing clause, the Government may issue instructions to all the authorities of the Autonomous Communities.”⁵

For its part, Article 37 GG reads as follows:

“[Federal execution]

- (1) If a *Land* fails to comply with its obligations under this Basic Law or other federal laws, the Federal Government, with the consent of the Bundesrat, may take the necessary steps to compel the *Land* to comply with its duties.
- (2) For the purpose of implementing such coercive measures, the Federal Government or its representative shall have the right to issue instructions to all *Länder* and their authorities.”⁶

Grundgesetz (1961) 40 ff. Specifically on federal execution in German constitutional history, *Huber Ernst Rudolf*, *Deutsche Verfassungsgeschichte seit 1789* III³ (1988) 1029 ff und IV (1981) 731 ff.

² The Constitution of the Second Spanish Republic of 1931 did not regulate these situations.

³ *Aja Eliseo*, *Estado autonómico y reforma federal* (2014).

⁴ Other terms which are not as common are state coercion (*coerción estatal*) and state compulsion (*compulsión estatal*).

⁵ The English translation of the Spanish Constitution uses the version published by the Spanish Official State Gazette: Spanish Official State Gazette, available at <<https://www.boe.es/legislacion/codigos/codigo.php?id=158&modo=1¬a=1&tab=2>> (28 March 2018). In Spanish, the text of Article 155 SC states:

- “1. Si una Comunidad Autónoma no cumpliere las obligaciones que la Constitución u otras leyes le impongan, o actuare de forma que atente gravemente al interés general de España, el Gobierno, previo requerimiento al Presidente de la Comunidad Autónoma y, en el caso de no ser atendido, con la aprobación por mayoría absoluta del Senado, podrá adoptar las medidas necesarias para obligar a aquélla al cumplimiento forzoso de dichas obligaciones o para la protección del mencionado interés general.
2. Para la ejecución de las medidas previstas en el apartado anterior, el Gobierno podrá dar instrucciones a todas las autoridades de las Comunidades Autónomas.”

⁶ The version published by the *Bundestag* is used for the English translation of the Basic Law: *Deutscher Bundestag*, Basic Law, available at <<https://www.btg-bestellservice.de/pdf/80201000.pdf>> (28 March 2018). Article 37 GG in German states:

The differences between the two texts centre on three aspects. First, the conditions which serve to trigger federal execution in Spain are much broader, as they do not only include a breach of the Constitution and federal laws, as in Germany, but of *any* law. Furthermore, the Spanish text includes an additional condition, a serious threat to the general interest of Spain. Second, with regard to procedure, the Basic Law of the Federal Republic of Germany does not require the federal Government to lodge a complaint with the Prime Minister of the non-complying *Land* before requesting the approval of the *Bundesrat* for the adoption of measures, nor does it require an absolute majority of the *Bundesrat* to approve the measures of federal execution. And third, with regard to the method of execution, in the Spanish case the Central Government has to give instructions to the Autonomous (regional) authorities directly and there is no room for the possibility that a representative of the federal Government may also do so, as provided for by Article 37 GG.⁷

However, the essential difference between German federal execution and Article 155 SC does not lie in the text: the *Bundesrat*, a key component (in terms of structure and dynamics) of the mechanism of the German *Bundeszwang*, does not have an equivalent in Spain, where, as we shall see, there is no Chamber of territorial representation.

The former President of the Constitutional Court, *Pedro Cruz Villalón*, has stated that Article 155 SC “is without doubt the most important political decision of those provided for in the Constitution”.⁸ It provides for political control that does not replace judicial control regarding the validity of the laws, norms or acts of the Autonomous Communities, but rather it is conceived as a means of guaranteeing the effectiveness of the legal system in critical situations deriving from the conduct of an Autonomous Community.⁹ In spite of the political importance of the decision, the wording of Article 155 SC employs vague and imprecise expressions, thereby leaving open many questions as to its interpretation.

To date, the Spanish Constitutional Court has had few occasions to judge on this rule. If so, its judgments were always related to laws, not to the application of the article itself, since it has never been applied before. The Constitutional Court has declared that Article 155 SC is an exceptional means of coercion designed to deal with extremely

“[*Bundeszwang*]

(1) Wenn ein Land die ihm nach dem Grundgesetze oder einem anderen Bundesgesetze obliegenden Bundespflichten nicht erfüllt, kann die Bundesregierung mit Zustimmung des Bundesrates die notwendigen Maßnahmen treffen, um das Land im Wege des Bundeszwanges zur Erfüllung seiner Pflichten anzuhalten.

(2) Zur Durchführung des Bundeszwanges hat die Bundesregierung oder ihr Beauftragter das Weisungsrecht gegenüber allen Ländern und ihren Behörden.”

⁷ On the differences between Article 155 SC and Article 37 GG, *Álvarez Álvarez Leonardo*, La coerción estatal del art. 155 CE en la estructura del Estado autonómico, *Teoría y Realidad Constitucional* 38 (2016) 277 ff.

⁸ *Cruz Villalón Pedro*, La protección extraordinaria del Estado, in Predieri Alberto/García de Enterría Eduardo (eds), *La Constitución española de 1978: estudio sistemático* (1981) 715.

⁹ *Satrústegui Gil-Delgado Miguel*, Un instrumento para la defensa del Estado: el artículo 155 de la Constitución, in Parejo Alfonso Luciano/Vida Fernández José (eds), *Retos del Estado y la Administración en el siglo XXI: Libro Homenaje a Tomás de la Quadra-Salcedo* (2017) 1872.

serious breaches.¹⁰ It has permitted the legislator to define the conditions for the application of this instrument (specifically in the event of non-compliance with the objectives of budgetary stability and sustainability)¹¹. The court has rejected the idea that Article 155 SC can be used as an instrument of normal supervision to ensure that the Autonomous Communities execute state legislation.¹² Beyond that, it has been doctrine (which is scarce in comparison with other issues) which has interpreted the tenor of this rule.

B. Conditions for the application of Article 155 SC

Article 155 SC provides for an exceptional political control of the actions of the Autonomous Communities. Power to evaluate whether the conditions justifying recourse to Article 155 SC are fulfilled lies with the Central Government. Article 155 SC is directed to the Autonomous Communities and any breach which is detected must be attributed to their institutions (Parliament, Government and President).¹³

The decision on the part of the Central Government to trigger Article 155 SC can only be taken under two conditions: either because of a breach of “the obligations imposed upon it by the Constitution or other laws” by the Autonomous Community or, alternatively (not cumulatively), because of a serious threat to the “general interest of Spain”.

First, there must be a breach on the part of an Autonomous Community of its obligations under the Constitution or other laws, *ie* obligations established in the legal system, not mere political discrepancies or moral duties. The constitutional text does not specify the laws in question, contrary to the German Basic Law that foresees federal execution only in the case of a breach of constitutional obligations or the laws of the Federation. In Spain, the expression “other laws” includes both laws of the central State and laws of the Autonomous Communities themselves.¹⁴

The breach can be either an action or an omission, must be effective, serious and manifest. Given the exceptional nature of Article 155 SC, there must be a judicial ruling on the existence of the breach. The Constitutional Court has declared that Article 155 SC is designed to “deal with extremely serious breaches of the Constitution”.¹⁵

¹⁰ 22 March 1988, STC 49/1988, EU:ES:TC:1988:49, FJ 31.

¹¹ 18 December 2014, STC 215/2014, EU:ES:TC:2014:215, FJ 8; 3 March 2018, STC 41/2016, EU:ES:TC:2016:41, FJ 16.

¹² 5 August 1983, STC 76/1983, EU:ES:TC:1983:76, FJ 12.

¹³ *Gómez Orfanel Germán*, Artículo 155, in Casas Baamonde María Emilia/Rodríguez Piñero Miguel (eds), *Comentarios a la Constitución Española* (2008) 2578.

¹⁴ *Virgala Foruria Eduardo*, La coacción estatal del artículo 155 de la Constitución, *Revista Española de Derecho Constitucional* 73 (2005) 85 ff; *Calafell Ferrá Vicente Juan*, La compulsión o coerción estatal (estudio del artículo 155 de la Constitución española), *Revista de Derecho Político* 48–49 (2000) 107 ff. For a restrictive interpretation of the law limited only to the laws of the so-called constitutionality block (these are laws which in Spain delimit powers between the central government and the autonomous communities), see *Ballart Xavier*, Coerció estatal i autonomies. L'article 155 de la Constitució de 1978 (1987) 125; *Álvarez Álvarez* (Fn 7) 286.

¹⁵ 3 March 2018, STC 41/2016, FJ 16.

It is not sufficient that just any breach has been committed; it must be quantitative and qualitative. The breach requires wilful intent or culpability. The mere objective impossibility of compliance is not sufficient, because in such a case assistance can be requested from the central State. A failure to comply with judicial rulings, reiterated in time, converts a breach into a serious breach, as it demonstrates the will of the Autonomous Region to refuse to abide by those rulings. It can also be a single breach affecting an essential element of territorial organisation.¹⁶

In the Spanish legal system, the only scenario triggering Article 155 SC is a breach on the part of an Autonomous Community of its obligations regarding budgetary stability and financial sustainability.¹⁷ Also in the event of a failure to comply with obligations arising from international treaties or European Law, the doctrine accepts the triggering of Article 155 SC.¹⁸

The second trigger, serious harm to the general interest of Spain is a condition most difficult to interpret, as it is an imprecise legal concept.¹⁹ It was introduced into the Constitution in a drafting-phase that was not public (the so-called *Informe de Ponencia constitucional* or “Report of the Constitutional Committee”) and therefore the reasons behind its introduction are not known.

The inclusion of this condition into the Constitution has been criticised because it opens the door for the Central Government to trigger Article 155 SC independent of legal reasons, thereby providing a basis for suitability control.²⁰ For this reason, this condition is interpreted restrictively and equated with the breach of obligations imposed by the Constitution and the laws, because there cannot be a serious threat to the general interest of Spain which does not also entail a constitutional or legal infraction.²¹ There is no doubt that a breach on the part of an Autonomous Community aimed at disrupting the constitutional framework would indeed constitute a serious threat to the general interest of Spain.²²

C. Procedure of Article 155 SC

The procedure for triggering Article 155 SC consists of two phases: the first, in the sphere of the Central Government; the second, in the Senate.²³

The Central Government must take two decisions: first, it must verify that a breach of constitutional and legal obligations has occurred, or that a serious threat to the gen-

¹⁶ *Virgala Foruria* (Fn 14) 89 f; *Satrústegui Gil-Delgado* (Fn 9) 1872.

¹⁷ Organic Law 2/2012 of 27 April on Budgetary Stability and Sustainability; 18 December 2014, STC 215/2014, FJ 8.

¹⁸ *Virgala Foruria* (Fn 14) 85 ff; *Gómez Orfanel* (Fn 13) 2579.

¹⁹ *Requejo Rodríguez Paloma*, La resurrección del interés general en el Estado autonómico, *Revista de Derecho Político* 87 (2013) 152 f.

²⁰ *Alzaga Villaamil Óscar*, Comentario sistemático a la Constitución española de 1978² (2016) 677; *Cruz Villalón Pedro*, Coerción estatal, in González Encinar José Juan (ed), *Diccionario del sistema político español* (1984) 61.

²¹ *Calafell Ferrá* (Fn 14) 109.

²² *Virgala Foruria* (Fn 14) 92 f.

²³ *Virgala Foruria* (Fn 14) 93 ff; *Satrústegui Gil-Delgado* (Fn 9) 1877 ff.

eral interest of Spain exists. Subsequently, the Central Government must decide to trigger Article 155 SC since it is not obliged to do so. Its decision must be based on an assessment of both the seriousness of the breaches and the political expediency of making use of the instrument.

The lodging of a complaint (the so-called *requerimiento*) is one of the novelties established by Article 155 SC compared with Article 37 GG.²⁴ The complaint must be lodged by the Central Government as a collective body against the President of the non-complying Autonomous Region. This is a mandatory requirement before the Government can propose the pertinent measures to the Senate. The lodging of the complaint is not a declaration of non-compliance. It is an invitation and, at the same time, a warning (not an instruction) whereby the Central Government warns the Autonomous Region of the consequences of its non-compliance. It serves as a preliminary phase, the aim of which is to give the Autonomous Region a last opportunity to rectify and thus avoid federal execution.

The Constitution does not prescribe the form or content of the complaint. The complaint must indicate which breaches of the Constitution and the laws have been committed and/or how the general interest of Spain is threatened.²⁵ Beyond that, what other requirements should the complaint have?

In spite of the fact that the Constitution is silent on this issue, it seems logical, for example, that the complaint of the Central Government specifies the measures it expects to adopt in the event that the Autonomous Community persists in its breach,²⁶ or contains a deadline by which the regional President must respond, the breach must be rectified or, alternatively, the complaint can be considered as having been ignored.²⁷

In case that the Autonomous Region does not react in a satisfactory manner, the Central Government can present the necessary measures to the Senate. Article 155 SC only stipulates that these measures must be approved by the Senate by absolute majority. The Senate Regulations stipulate the procedure to be followed.²⁸

The Government must submit a written statement to the Senate which sets out the content and scope of the measures proposed and proves that the complaint has been lodged and ignored. The statement must be sent to the Senate's General Committee of the Autonomous Communities or the *ad hoc* Committee created explicitly for that purpose.

This Committee will order the President of the Autonomous Region to submit background information, data and arguments and to designate, if he or she considers it appropriate, a person to represent him or her in his or her appearance before the Senate. The most notable aspect of the way this procedure is regulated lies in the fact that the Senate does not merely rubberstamp the measures proposed by the Central Government, but can accept, reject or partially accept the proposals submitted.

²⁴ *Satrústegui Gil-Delgado* (Fn 9) 1877 f.

²⁵ Among others, see *Calafell Ferrá* (Fn 14) 114 ff; *Gómez Orfanel* (Fn 13) 2580; *Virgala Foruria* (Fn 14) 93 f.

²⁶ *Satrústegui Gil-Delgado* (Fn 9) 1879.

²⁷ *Satrústegui Gil-Delgado* (Fn 9) 1879.

²⁸ Article 189 of the Senate Rules and Regulations. In particular, see *Satrústegui Gil-Delgado* (Fn 9) 1880 ff.

The plenary session of the Senate must approve the measures by absolute majority. As indicated above, the requirement of an absolute majority is expressly stated in the Spanish Constitution. This intervention of the Senate in Article 155 SC (except as regards the express requirement for an absolute majority) is identical to the one provided for in Article 37 GG. However, as we have already said, the Spanish Senate is not comparable to the German *Bundesrat*. In spite of the fact that the Spanish Constitution defines the Senate as a Chamber of territorial representation, in practice the Senate does not represent the Autonomous Communities. It is not a Chamber which represents the Governments of the *Länder*, as does the German *Bundesrat*, but a Chamber which represents Spanish society as a whole through the political parties. Once the measures have been approved by the Senate, they must be published in the Official State Gazette and in the Official Gazette of the Autonomous Region.

D. Content of Article 155 SC

Applying Article 155 SC means applying coercive measures. However, the Constitution does not provide details as to what these measures should be. Article 155 SC only indicates that the measures adopted by the Government must be “necessary measures” (“medidas necesarias”) to oblige an Autonomous Community to comply with its constitutional or legal obligations, or to protect the general interest of Spain. Therefore, the Central Government enjoys a wide margin of discretion when it comes to choosing those specific measures.

As the measures are not detailed in the Constitution, they must be adopted on the basis of each specific case. The generic manner with which the Constitution refers to the “necessary measures” constitutes the main problem of this instrument.²⁹ The principle of proportionality is the most important limit for the Central Government.³⁰ For that reason, measures adopted must be designed to achieve the proposed aim, must be necessary in the sense that no alternative, less onerous methods exist, and must be appropriate to the seriousness of the breach and the intended result. This requires, therefore, that the measures be also *ultima ratio*.

Furthermore, the measures in question must also be temporary and must cease as soon as the breach or the serious threat to the abovementioned general interest disappears. There is no room for indefinite measures.³¹ Measures must be specific, *ie* the Senate cannot approve a general clause which gives the Government full powers, but must establish the content and the scope of the measures proposed.³² Moreover, recourse to Article 155 SC is only possible in situations of urgency which cannot be addressed using ordinary mechanisms which require more time.³³

Which specific “necessary measures” the Government can adopt is a controversial issue. Also recourse to Comparative Law throws not much light on the matter, as the

²⁹ Cruz Villalón Pedro, Estados excepcionales y suspensión de garantías (1984) 58 f.

³⁰ Calafell Ferrá (Fn 14) 127 ff; Cruz Villalón (Fn 20) 59 f.

³¹ Cruz Villalón (Fn 20) 60.

³² Cruz Villalón (Fn 20) 59.

³³ González Hernández Esther, El artículo 155 CE y la LO 15/2015, de 17 de octubre de reforma de la LOTC: ¿Ineludible reciprocidad o círculo perverso?, Teoría y Realidad Constitucional 37 (2016) 535.

doctrinal positions in Germany regarding the measures admissible under Article 37 GG also diverge and there is no empirical experience because it has never been applied.³⁴

The measures admissible under Article 155 SC cannot entail the abolition of the Autonomous Region or the suspension of its autonomy.³⁵ The Spanish Constitution does not contain “eternity clauses” (*Ewigkeitsklauseln*) such as, for example, the protection of the existence of the *Länder* in Germany (Article 20 GG). However, Article 2 SC recognises, within the unity of Spain, the right to autonomy of the regions of which it is composed. The suspension of autonomy would be understood as dissolution of the Autonomous Region which is not sanctioned by Article 2 SC. Neither does Article 155 SC support the use of armed force by the Central Government.³⁶

The most common legitimate coercive measures are the issuing of instructions to the regional authorities by the Central Government and the substitution or partial subrogation of those authorities. As far as the issuing of instructions is concerned, in contrast to the German Basic Law, in Spain it is the Central Government which must issue those instructions (it cannot do so via an appointed representative or commissioner).³⁷ For its part, substitution or subrogation consists of the temporary assumption by the organs of the Central Government of certain specified functions of the Autonomous Community in question, whether directly or via appointed delegates or commissioners.³⁸

Beyond these cases, profound discrepancies exist what other measures can be adopted under Article 155 SC. The most controversial measure in Spain is the suspension or dissolution of regional bodies. The non-specific, generalised substitution of the regional bodies (the Government and the Parliament of an Autonomous Community) is not accepted by the majority doctrine in Spain,³⁹ or by the dominant doctrine

³⁴ Among others, for example, *Schäfer Hans*, Bundesaufsicht und Bundeszwang, AÖR 78 (1952/53) 44 ff; *Wolff Heinrich Amadeus*, Art 37 GG, in Hömig Dieter/Wolff Heinrich Amadeus (ed), GG-Handkommentar¹¹ (2016) Rz 6; *Bauer Hartmut*, Art 37, in Dreier Horst (ed), GG-Kommentar II³ (2015) Rz 13; *Erbguth Wilfried/Schubert Mathias*, Art 37 GG, in Sachs Michael (ed), GG-Kommentar⁸ (2018) Rz 10–13; *Sannwald Rüdiger*, Art 37 GG, in Schmidt-Bleibtreu Bruno et al (eds), GG-Kommentar¹³ (2014) Rz 12–16. *Bundeszwang* has not been applied under the Basic Law, but it has been applied in the past. On the use of the equivalent instrument, *Reichsexecution*, during the Weimar Republic see *Thüringen* (1920), *Gotha* (1920), *Sachsen* (1923), and *Preußen* (1932); *Huber*, IV (Fn 1) 741 ff.

³⁵ *Cruz Villalón* (Fn 20) 60.

³⁶ *Cruz Villalón* (Fn 20) 61; *Calafell Ferrá* (Fn 14) 124; *Virgala Foruria* (Fn 14) 104.

³⁷ *Calafell Ferrá* (Fn 14) 133; *Satrústegui Gil-Delgado* (Fn 9) 1889.

³⁸ The equivalent in German legal doctrine would be the instrument of *Sequestration in engerem Sinne* or *treuhänderische Verwaltung*, *García Torres Jesús*, El artículo 155 de la Constitución española y principio constitucional de autonomía, in Instituto de Estudios Fiscales (ed), Organización territorial del Estado (Comunidades Autónomas) (1984) 1283 f; *Virgala Foruria* (Fn 14) 100 f. In this situation the subrogation by the central government of the autonomous community parliament is not allowed, *Calafell Ferrá* (Fn 14) 132.

³⁹ In German legal doctrine, it would be the instrument of *Sequestration*, *Cruz Villalón* (Fn 20) 60. The prevailing legal doctrine in Spain includes, *García Torres* (Fn 38) 1282 f; *Ballart* (Fn 14) 163 ff; *Gil Robles José María*, Artículo 155: el control extraordinario de las Comunidades Autónomas, in Alzaga Óscar (ed), Comentarios a la Constitución Española de 1978 XI (1988) 514; *Requejo Rodríguez* (Fn 19) 167; *Álvarez Álvarez* (Fn 7) 296.

in Germany, from where Article 155 SC is imported.⁴⁰ In contrast to the Austrian Constitution (Article 100 B-VG), the Italian Constitution (Article 126 CI) and the Portuguese Constitution (Article 234 CP), the Spanish Constitution does not expressly provide for the possibility of dissolving the Parliament of an Autonomous Community or suspending a regional Government.

Indeed, such a possibility was excluded in the parliamentary debates which took place during the drafting of the Constitution, as the express inclusion of the suspension of one or more regional bodies or the appointment of a central governor with extraordinary powers was proposed.⁴¹

However, the crux of the matter lies in how to interpret this exclusion. What exactly was rejected? The inclusion of the possibility to dissolve regional bodies in Article 155? Or the express specification, at that point in history, that one of the coercive measures might be the dissolution of the Parliament of an Autonomous Community but without excluding that possibility?⁴² If the latter is the case, it means that the Spanish constituent assembly did not want to expressly regulate the possibility of dissolving bodies, but that Article 155 SC would be flexible and that this measure should not be excluded.⁴³ The suspension of the Government of the Autonomous Community or the dissolution of its Parliament could be considered necessary measures in exceptional situations such as initiation of a process of secession, in which this substitution of the regional bodies would not be sufficient.⁴⁴

E. Control of Article 155 SC

The use of Article 155 SC can be controlled by parliament or the courts. With regard to judicial control, it is important to differentiate between two acts: the challenge to the complaint lodged and the challenge to the measures approved.

The complaint lodged by the Government against the President of the Autonomous Community, inviting the latter to desist from non-compliance, can be appealed against before the Constitutional Court by means of the procedure established to resolve conflicts of jurisdiction (Article 161(1)(c) SC), which is designed to challenge norms and acts not having the force of law and violating the distribution of power. Both the Central Government and the Governments of the Autonomous Communities are eligible to lodge a challenge in the event of a perceived conflict of jurisdiction.

⁴⁰ In particular, the measures deemed illegal are the removal of the government (*Amtsenthörung einer Landesregierung*) and the dissolution of the Landtag (*Auflösung des Landtages*), Bauer (Fn 34) Rz 13; *Erbguth/Schubert* (Fn 34) Rz 13. It is not ruled out in certain cases, *Bothe Michael*, Art 37 GG, in Wassermann Rudolf (ed), Reihe Alternativkommentare. Kommentar zum Grundgesetz für die Bundesrepublik Deutschland (1989) Rz 25; *Sannwald* (Fn 34) Rz 14. Considering German constitutional history, the federal government goes as far as the *Sequestration of a Land* and its government, *Schäfer* (Fn 34) 46.

⁴¹ During the drafting phase: dissenting vote of the *Grupo Popular*, BOCG of 5 January 1978, 701, amendment núm 736 by *Ortí Bordás*. Amendment to the bill: amendment 957 by *Ballarín Marcial*. For more information on the drafting of Article 155 SC, see *Ballart* (Fn 14) 50, 53, 58.

⁴² In favour, *Virgala Foruria* (Fn 14) 104.

⁴³ *Vandelli Luciano*, El ordenamiento español de las Comunidades Autónomas (1982) 331 f; *Tolivar Alas Leopoldo*, El control del Estado sobre las Comunidades Autónomas (1984) 186 f.

⁴⁴ *Virgala Foruria* (Fn 14) 102 ff.

The coercive measures adopted can be challenged before the Constitutional Court by means of a complaint of unconstitutionality (Article 161(1)(a) SC). This procedure is foreseen to appeal against laws and norms having the force of law. The measures adopted under Article 155 SC are approved by means of an agreement of the Senate and formalised as a Government regulation. In light of the special nature of the procedure of Article 155 SC, the act of the Senate that approves these measures can, exceptionally, have the force of law.⁴⁵ The following institutions are eligible to lodge an complaint of unconstitutionality: the President of the Government, the Ombudsman, fifty Deputies (MPs), fifty Senators and the Governments and Parliaments of the Autonomous Communities. The Constitutional Court in Spain never acts *ex officio*.

III. The first case: the application of Article 155 SC and the crisis in Catalonia

Article 155 SC was applied for the first time on 27 October 2017 to deal with the crisis in Catalonia. The use of this instrument had been considered on two previous occasions, first in the Canary Islands and later in the Basque Country, but it was not finally triggered.⁴⁶ For that reason, the crisis in Catalonia is the first case where the Central Government has triggered the dreaded Article 155 SC. Although the event that led to the triggering was the declaration of independence by the Catalanian Parliament, the Catalanian crisis dates back to previous years.

A. Background: the crisis in Catalonia and the declaration of independence

1. *Catalonia in the State of Autonomies and a brief history of the Catalanian conflict*

In order to situate the Catalanian crisis in its context, it might be useful to first provide some general data about what Catalonia represents in the State of Autonomies. Spain covers an area of 505,944 sq km. Catalonia is located in the northeast and occupies 32,090 sq km⁴⁷ (Catalonia is somewhat smaller in surface area than the German Land of *Nordrhein-Westfalen* and comparable in terms of population to *Niedersachsen*). Unlike other “newly created” Autonomous Communities, Catalonia (like Spain) existed before the 1978 Constitution. Spain has a population of 46,445,828 inhabitants, of which 7,408,853 reside in Catalonia (distributed among the four prov-

⁴⁵ In 2016, the Constitutional Court admitted this conception in a decision regarding another exceptional instrument (the state of emergency) which is considered applicable to the case of Article 155 SC. 28 April 2016, STC 83/2016, EU:ES:TC:2016:83, FJ 9, 10. *Satrústegui Gil-Delgado* (Fn 9) 1883; *Álvarez Álvarez* (Fn 7) 300.

⁴⁶ In 1989, the government of the autonomous community of the Canary Islands refused to abolish the tariffs required to join the European Union. It was threatened with Article 155 SC, but the conflict ended before it was applied. In 2005, the government of the Basque Country submitted a draft statute of autonomy that included a provision for the right of the Basque people to decide their future in a referendum on self-determination. Use of Article 155 SC was once again considered, but it was ultimately not implemented, because the text was rejected in the Spanish Parliament and the Basque president did not continue with the plan.

⁴⁷ Surface area 2015: *Instituto Nacional de Estadística (INE)*, España en cifras 2017 (2017), 2, 4, available at <http://www.ine.es/prodyser/espa_cifras/2017/files/assets/common/downloads/publication.pdf> (28 March 2018).

inces which form the Autonomous Community: 5,444,273 in Barcelona, 791,747 in Tarragona, 741,695 in Girona, and 429,138 in Lleida).⁴⁸ Catalonia is one of the most prosperous Autonomous Communities.⁴⁹

Furthermore, in Catalonia (along with the Basque Country) there is a strong sense of distinct identity unlike in the rest of the Autonomous Communities. This has led to a strong demand for autonomy and, occasionally, for independence.

Thus, the demands for self-government did not only emerge with the 1978 Constitution, but has roots going back centuries, with their nearest historical point of reference being the autonomy they achieved during the 2nd Republic.⁵⁰ The struggle against Francoism in Catalonia was linked not only to the recovery of freedoms but also to the demand for political autonomy. Indeed, the State of Autonomies was the solution proposed by the Spanish Constitution of 1978 to the historic problem of how to incorporate Catalonia and the Basque Country into Spain.⁵¹

The Constitution translates this distinct identity into so-called “differential facts” (*hechos diferenciales*). In Catalonia, these “differential facts” consist above all of the existence of its own language (Catalonian, which is co-official alongside Spanish) and its own civil law (the Catalan civil code). Catalonia is subject to the same fiscal system as the other Autonomous Communities, unlike the Basque Country and Navarre, the so-called *territorios forales*, Autonomous Communities with recognised historic rights, which have a different (and extremely favourable) system of fiscal guarantees under the Constitution.⁵² The existence of these two fiscal systems (one for these two territories and another for the remaining Autonomous Communities) is possibly one of the most important, constitutionally guaranteed asymmetries among Autonomous Communities.⁵³

Beyond that, the party system in the State of Autonomies shows peculiar features that should not go unnoticed. There are state-wide parties and nationalist (or pro-independence parties) which only exist in certain Autonomous Communities. In Catalonia and the Basque Country, the centre-right nationalist parties (the now-extinct *Convergència i Unió* [CiU] and the *Partido Nacionalista Vasco* or Basque Nationalist Party [PNV]) have always won in their respective Autonomous Communities except for brief hiatuses. In the case of Catalonia, the Autonomous Community was governed uninterruptedly for twenty-three years by the centre-right nationalist party CiU. After

⁴⁸ *INE* (Fn 47) 8 (figures at 1 January 2016).

⁴⁹ It is among the autonomous communities with the highest GDP per capita. Above the average in the top position is the Community of Madrid with EUR 32,723 per inhabitant, followed by the Basque Country with EUR 31,805, Navarre with EUR 29,807 and then Catalonia with EUR 28,590 (figures from 1 June 2016), *INE* (Fn 47) 29.

⁵⁰ During the Second Spanish Republic, Catalonia was an autonomous region, but in the final years it came into conflict with the constitutional order. The president of the Catalan government proclaimed independence on 6 October 1934. The central government initially suspended the Catalan Statute de facto and then *de iure*. The Constitutional Court declared this suspension unconstitutional, since it was not stipulated in the Constitution of 1931. The Constitution of 1931 did include an instrument like the current Article 155 SC.

⁵¹ Along these lines, see *Solé Tura Jordi*, *Nacionalidades y nacionalismos en España: Autonomías, Federalismo y autodeterminación* (1985).

⁵² Additional Provision One SC.

⁵³ *Aja* (Fn 3) 324.

a hiatus lasting from 2003 to 2010, this party regained power. At that point, it veered towards independence. In 2015, the party broke up, which led to the emergence of new formations and a new map of the party landscape in Catalonia.

It must be borne in mind that in Spain the regional nationalist parties have acted as “hinge” parties at state level: Whenever one of the large state parties failed to obtain an absolute majority, the nationalist parties (Catalonian, Basque and also from the Canary Islands) have given parliamentary support to the social democratic (PSOE) or conservative (PP) party of the day. But these parties have only given parliamentary support; they have never formed part of a coalition government.⁵⁴ There has never (yet) been a coalition government in Madrid.

One factor which must be taken into account in order to understand the party system in the State of Autonomies is that pugnacious democracy (*streitbare Demokratie*) is not accepted in Spain. In spite of the influence of German Constitutional Law, the Spanish Constitutional Court has rejected the concept of pugnacious democracy of the German Federal Constitutional Court.⁵⁵ It is therefore possible that parties which defend independence and the rupture of the framework of constitutional co-existence stand and, subsequently, win elections and govern in an Autonomous Community or wherever they stand.

The episode which led to the triggering of Article 155 SC in autumn 2017 dates back to 2006.⁵⁶ In that year, after more than a quarter of a century during which Catalonia had enjoyed the greatest level of political autonomy in its history, a new Statute of Autonomy (equivalent to the Constitution of a *Land* [*Landesverfassung*]) was approved which sought to achieve for Catalonia a special position in Spain. In a referendum with a high rate of abstention (51.1%), 73.2% of the voters who turned out voted in favour of the new Statute.⁵⁷

This new Statute sought to guarantee specific powers of Catalonia in the face of the expansive use of certain powers by the central State, it reinforced elements of identity (the language and the declaration that Catalonia is a Nation) and it stipulated a new system of financing for Catalonia similar to that of the Basque Country (but with the difference, it must be remembered, that the Basque system is enshrined in the Constitution).

The Constitutional Court ruled in 2010 that more than twelve of the regulations contained in the Catalanian Statute of Autonomy of 2006 were unconstitutional (in particular, those relating to aspects of identity and questions of financing) while many others could only be considered as complying with the Constitution when they were interpreted in such a way as to deactivate the intention of the new Statute. In essence,

⁵⁴ Pallarès Francesc/Astudillo Javier/Verge Tània, Spain: Unresolved integration challenges in a party-led decentralization, in Detterbeck Klaus/Renzsch Wolfgang/Kincaid John (eds), *Political Parties and Civil Society in Federal Countries* (2015) 227 ff.

⁵⁵ Cruz Villalón Pedro, *Das Grundgesetz in der spanischen Verfassungsentwicklung (1978–2008)*, in Hohmann-Dennhardt Christine/Scholz Rupert/Cruz Villalón Pedro, *Las Constituciones alemana y española en su aniversario* (2011) 71.

⁵⁶ Boix Palop Andrés, *El conflicto catalán y la crisis constitucional española: una cronología*, *El Cronista del Estado social y democrático de Derecho* 71–72 (2017) 172 ff.

⁵⁷ <<http://www.bcn.cat/estadistica/angles/dades/elec/ref/ref06/r21.htm>> (28 March 2018).

the Constitutional Court considered that the Catalanian Statute entailed an implicit reform of the Constitution.⁵⁸

The population of Catalonia vehemently rejected the sentence. A few days after it was handed down, a massive demonstration was organised in Barcelona against the ruling which ended with proclamations in favour of independence. In general, the nationalist parties considered that the sentence proved that the State of Autonomies option had failed for Catalonia.⁵⁹

The Catalanian Government's next step was to propose, in 2012, the so-called *pacto fiscal* (fiscal pact), *ie* to negotiate for Catalonia a system of financing like the one enjoyed by the Basque Country. The Central Government rejected this because contrary to the Catalanian case, the system applying to the Basque Country is enshrined in the Constitution.

From then on, there was a strategic shift on the part of the main Catalanian nationalist party towards favouring Catalanian independence and the demand to hold a referendum on self-determination. Thus, historically speaking, the demand for independence was not the first option in Catalonia, but rather a response to the refusal to delegate more self-government to the region.

The Spanish Constitution provides for the possibility of submitting particularly important decisions to a consultative (non-binding) referendum, subject to the prior authorisation of the Congress of Deputies (the lower Chamber of the Spanish Parliament) on proposal of the President of the Central Government (Article 92 SC).

The decision to call a consultative referendum is, therefore, a political decision which corresponds in the first instance to the President of the Government in Madrid. The then President, *Mariano Rajoy* (PP), did not call this referendum.

In addition to political reasons, the interpretation of the Constitutional Court has neither discarded nor does it facilitate a consultative referendum agreed upon with the central State: there is no room for a unilateral secessionist referendum without a prior reform of the Constitution.

The Constitutional Court has declared that an Autonomous Community cannot unilaterally call a referendum on self-determination to decide whether or not it belongs to Spain, invoking the judgement of the Canadian Supreme Court of 20 August 1998 on the case of Quebec, which rejected the unilateral secession on the part of one of its provinces from the viewpoint both of its Constitution and of International Law.⁶⁰ Furthermore, the Constitutional Court has declared that the integrity of the territory cannot be decided by only one part thereof, because sovereignty is vested in the Spanish people as a whole and it is for the Spanish people as a whole (and not to a part) to decide on this matter. Therefore, there can be no unilateral secessionist referendum without a prior constitutional reform.⁶¹

⁵⁸ 28 June 2010, STC 31/2010, EU:ES:TC:2010:31.

⁵⁹ *Aja* (Fn 3) 86 ff; *Satrústegui Gil-Delgado* (Fn 9) 1860.

⁶⁰ *Reference re Secession of Quebec* [1998] 2 SCR 217, 1998 CanLII 793 (Supreme Court of Canada) cited in the key judgement: 25 March 2014, STC 42/2014, EU:ES:TC:2014:42, FJ 3.

⁶¹ 25 March 2014, STC 42/2014, FJ 3. Comments referring to the judgement, *Fossas Espadaler Enric*, Interpretar la política. Comentario a la STC 42/2014, de 25 de marzo, sobre la Declaración de soberanía y el derecho a decidir del pueblo de Cataluña, *Revista Española de Derecho Constitucional* 101 (2014) 273; *Arbós Marín Xavier*, El Tribunal Constitucional como facilitador: el caso de la STC 42/2014, in *Parla-*

According to reports by the Venice Commission, the referendum is not an indispensable element in the European democratic standard.⁶² In the opinion of this body, Constitutions can establish restrictions on referenda without infringing the democratic principle.⁶³ However, the point-blank refusal on the part of the President of the Central Government to negotiate a referendum based on the Constitution, when a majority of Catalan society has demanded one, strengthened the pro-independence movement.⁶⁴

The Central Government took refuge in legality but did not engage in any political activity to win over Catalan society. For their part, the supporters of independence, spurred on by the increase in support, questioned the law as it stands and progressed to a scenario of outright disobedience to the legal system.⁶⁵

In this context, the Catalan Parliament (with a pro-independence majority) and the Catalan Government took actions to ask the people of Catalonia about their political future and to create an independent State.

Given that the Spanish legal system, according to the jurisprudence of the Constitutional Court, does not permit the calling of a referendum on self-determination without a prior constitutional reform, all of these actions were in breach of the constitutional framework and entailed a stubborn and sustained disregard on part of the Catalan authorities for the numerous rulings of the Constitutional Court which have first suspended, and then declared unconstitutional, each of those actions.⁶⁶

2. *The referendum on self-determination and the unilateral declaration of independence of Catalonia*

The final sequence in the process which led to the triggering of Article 155 SC was the holding of the referendum on self-determination on 1 October 2017.⁶⁷

mento vasco (ed), *Instituciones de Derecho Parlamentario*, VIII. La última jurisprudencia relativa al Parlamento (2016) 23; *Farreres Comella Víctor*, *Cataluña y el derecho a decidir*, *Teoría y Realidad Constitucional* 37 (2016) 461 ff; *Barceló Serramalera Mercè*, *El derecho a decidir como instrumento constitucional para la canalización de problemas territoriales*, *Fundamentos* 9 (2017) 365 ff.

⁶² *López Basaguren Alberto*, *Demanda de secesión en Cataluña y sistema democrático. El procés a luz de la experiencia comparada*, *Teoría y Realidad Constitucional* 37 (2016) 171 ff.

⁶³ *López Basaguren* (Fn 62) 173.

⁶⁴ *López Basaguren Alberto*, *Crónica de un gran error político y sus consecuencias o ¿cómo se sale de laberinto?*, *El Cronista del Estado social y democrático de Derecho* 71-72 (2017) 61.

⁶⁵ *López Basaguren* (Fn 64) 58 ff.

⁶⁶ An autonomous community norm or act is automatically suspended if it is challenged by the prime minister (Article 161(2) SC). All pro-secession actions have been challenged by the prime minister. Regarding the constitutional jurisprudence on the Catalan sovereignty process (before October 2017), *Roig Molés Eduard*, *The Catalan Sovereignty Process and the Spanish Constitutional Court. An Analysis of Reciprocal Impacts*, *Revista Catalana de Dret Públic* 54 (2017) 24.

⁶⁷ On the referendum of 1 October 2017 and the Catalan pro-independence process, see *Ragone Sabrina*, *Das Unabhängigkeitsreferendum in Katalonien – Wie ist der Stand aus vergleichender und kontextueller Perspektive?*, *DÖV* 9 (2018) 345; *Nagel Klaus-Jürgen*, „Entweder Referendum oder Referendum“ – oder doch Neuwahlen? *Der katalanische Unabhängigkeitsprozess und sein spanischer Kontext*, in *Europäisches Zentrum für Föderalismus-Forschung* (ed), *Jahrbuch des Föderalismus* 2017 (2017) 399 ff. Previously, on 9 November 2014, the Catalan government, with *Artur Mas* (CiU) as its president, organised a “consultation” (which is different from a referendum) about the political future of Catalonia. The consultation was

On 27 September 2015 elections were called for the Catalan Parliament. Once again, the main issue of the election campaign was independence. The pro-independence bloc considered these elections to be of a plebiscitary nature. The conservative nationalist party CiU, traditionally conciliatory towards the central State (until it adopted a pro-independence stance), which had ruled Catalonia for almost the entire history of the Autonomous Community had broken apart and its leader, *Artur Mas*, headed a new coalition (*JuntsxSí*) consisting mainly of parts of the former CiU and the republican left (*Esquerra Republica de Catalunya* [ERC]), historically in favour of Catalanian independence.

In these elections, out of a total of 4,130,196 registered voters with a turnout of 74.95%, the party with most votes was the pro-independence coalition *JuntsxSí* (1,628,714 votes and 62 seats out of a total of 135). By entering into a pact with an anti-system pro-independence party (CUP) (with 337,794 votes and 10 seats) they obtained an absolute majority in the Catalanian Parliament. By a narrow margin of votes, the parties clearly opposed to independence were in a minority (1,608,840 votes and 52 seats).⁶⁸ A left-wing coalition (*Catalunya Sí que es Pot*) encompassing a range of diverse positions also obtained representation in the Catalanian Parliament (367,613 votes and 11 seats).

The electoral system is the key to understanding parliamentary majorities in Catalonia. The Spanish Constitution establishes a system of proportional representation in the Parliaments of the Autonomous Communities (Article 152(1) SC). The regional legislator enjoys significant room for manoeuvre when it comes to choosing the specific system of proportional representation. The electoral laws of the Autonomous Regions mirror the electoral law of the central State, the *D'Hondt* variant of proportional representation (there is no customised proportional system or *personalisierte Verhältniswahl*).⁶⁹

used as a legal alternative since it was impossible to obtain authorisation from the central government for a referendum on self-determination. The Constitutional Court initially suspended the consultation and then ruled that it was unconstitutional (11 June 2015, STC 138/2015, EU:ES:TC:2015:138; 2 December 2015, STC 259/2015, EU:ES:TC:2015:259), but it was held anyway. Two questions were asked: “Do you want Catalonia to be a state? If so, do you want this state to be independent? More than two million people voted; however, unlike in elections, foreigners residing in Catalonia and minors aged 16 and 17 were allowed to vote (in Spain, full legal age and the minimum voting age is 18). Voter turnout was estimated to be around 37%, and 29.5% of the voters were in favour of Catalonia being a state and independent. Generalitat de Catalunya, Official results from the consultation of 9 November 2014, available at <http://premsa.gencat.cat/pres_fs/vp/AppJava/notapremsavw/277419/ca/resultats-proces-participatiu-9n.do> (28 March 2018). The people primarily responsible for the consultation, including the president of the Catalan government, were found guilty by the Superior Court of Justice of Catalonia of corruption and disobedience to the Constitutional Court.

⁶⁸ The other parties that obtained parliamentary representation: in second place, *Ciudadanos* with 736,364 votes, 17.90% and 25 seats; in third place, the Catalan social democratic party PSC with 523,283 votes, 12.72% and 16 seats; in fourth place, the left-wing coalition *Catalunya Sí que es Pot* with 367,613 votes, 8.94% and 11 seats; in fifth place, the conservative party PP with 349,193 votes, 8.49% and 11 seats; and in sixth place, the radical left-wing party CUP with 337,794 votes and 10 seats. The electoral results can be viewed at: Generalitat de Catalunya, Eleccions al Parlament de Catalunya 2015, available at <http://www.gencat.cat/governacio/resultatsparlament2015/resu/09AU/DAU09999CM_L1.htm> (28 March 2018).

⁶⁹ Organic Law 5/1985 of 19 June on the General Electoral System. From the abundant literature available, see *Oliver Araujo Joan*, Los sistemas electorales autonómicos (2011) 269 f, 276 f; *Gavara de Cara*

Catalonia is the only Autonomous Community which does not have its own electoral law, because there has never been a sufficient political majority to pass one. Therefore, the state law (electoral barrier of 3% and *d'Hondt* variant) applies. In Spain, there are no single-seat constituencies. In Catalonia, there are four electoral constituencies (the four provinces: Barcelona, Tarragona, Girona and Lleida).

In addition to the strong popular support for the pro-independence parties, the *d'Hondt* variant, by giving a certain advantage to the list with the highest number of votes, benefits these parties, which, combined with the distribution of seats in the Catalan Parliament, means that the territories where these political parties obtain most votes (Girona and Lleida, provinces which are more rural and less populated than Barcelona) are over-represented, in such a way that they obtain more MPs with fewer votes.

The distribution of seats in the Catalanian Parliament is regulated by an old norm from the first Catalanian State of Autonomy of 1978. Specifically: of the 135 seats in the Catalan Parliament, 85 seats correspond to Barcelona (2016: 5,446,273 inhabitants), 17 to Girona (2016: 429,138 inhabitants), 15 to Lleida (2016: 429,138 inhabitants) and 18 to Tarragona (2016: 791,747 inhabitants).⁷⁰ In spite of the fact that Barcelona represents more than 72% of the population of Catalonia, this norm means that the other three provinces are over represented in terms of seats in Parliament.

The question is, is this proportional?⁷¹ In spite of the criticisms of the lack of proportionality of the *d'Hondt* formula, the Constitutional Court has accepted the broad freedom of the legislator to choose any of the variants of the proportional system. It has declared that the *d'Hondt* formula does not undermine the principle of proportionality nor is it contrary to the principle of equal suffrage.⁷²

For its part, the controversial norm which regulates the distribution of seats in the Parliament has never been challenged. The parties which benefit from this system have never been interested in changing it, and thus the criterion of territoriality, according to which certain territories should not be forgotten in spite of their low population density, continues to prevail.

Juan Carlos, La homogeneidad de los regímenes electorales autonómicos (2017) 215 ff.

⁷⁰ Transitory provision 4.2 of the Catalan Statute of Autonomy of 1979 that still remains in force.

⁷¹ On the system of proportional representation and the principle of equality of all voters in the cases of unequal electoral circumscriptions, *Frowein Jochen Abr.*, Die Rechtsprechung des Bundesverfassungsgerichts zum Wahlrecht, AöR 99 (1974) 84 f, 95 f. On the intense debate in Germany on the proportionality of small circumscriptions, *Frowein Jochen Abr./Herzog Roman*, Rechtsgutachten zu der Vereinbarkeit der Verhältniswahl in kleinen Wahlkreisen (Dreier-Wahlkreissystem) mit dem Grundgesetz (1968). Within the Council of Europe, on the system of proportional representation and the overrepresentation of sparsely populated regions, *Frowein Jochen Abr./Peukert Wolfgang*, Europäische Menschenrechtskonvention EMRK-Kommentar³ (2009) 684 f. From a political scientist's point of view: *Lublin David*, How Catalonia's election was biased in favor of the separatists, The Washington Post 22 December 2017, available at <https://www.washingtonpost.com/news/monkey-cage/wp/2017/12/22/how-a-bias-in-catalonias-elections-helped-the-separatists-win/?utm_term=.2604c08edb3c> (28 March 2018).

⁷² On this controversial point, the Constitutional Court ruled that the principle of equality does not require that a specific proportional representation system be used, but rather that equality must occur within the electoral system chosen by the legislator, thus preventing discrimination within this system but not in comparison to another system. 21 June 1985, STC 75/1985, EU:ES:TC:1985:75, FJ 4.

After the elections of 27 September 2015, the Catalan Parliament was divided into two blocs: the pro-independence bloc (represented by *JuntsxSí* and CUP), which constituted an absolute majority (72 seats, corresponding to 1,966,508 votes), and the so-called constitutionalist bloc opposed to independence (*Ciudadanos*, PSC, PP: with 52 seats in total corresponding to 1,608,842 votes). Not forming part of either bloc was the left-wing coalition *Catalunya Sí que es Pot* which initially opted for an intermediate position but in the end voted against unilateral secession.

The ex-president of the Catalan Government (*Generalitat*), *Artur Mas*, failed to obtain sufficient support to be sworn in and was succeeded by *Carles Puigdemont*, from the same party, who was elected as the new President of the *Generalitat*. The central activities of the new regional government revolved around preparations for a referendum on self-determination and the creation of the structures of a new Catalan Republic.⁷³ The high (and final) point of that legislature was the presentation of two controversial initiatives in two tense sessions of the Catalan Parliament.

Firstly, on 6 September 2017, the Parliament passed the Catalan law which announced an independence referendum on 1 October 2017 (*Ley catalana del referéndum de autodeterminación*).⁷⁴ The passing of this law represented a clear break of the Constitution and Spanish legality, since the Constitutional Court has ruled on many occasions that a referendum of this kind is not possible within the legal framework of the 1978 Spanish Constitution. The law was passed with the 72 votes in favour of the pro-independence bloc (*JuntsxSí* and CUP) and 11 abstentions (corresponding to the left-wing coalition, *Catalunya Sí que es Pot*). The MPs of the non-separatist bloc (*Ciudadanos*, PSC, and PP with 52 seats) abandoned the chamber before the vote as a sign of protest. The law provided for holding a binding referendum on self-determination in Catalonia on 1 October 2017. The validity of the result would not depend on a minimum threshold of participation. What was especially controversial was the lack of clear legal guarantees for holding the referendum itself.

Secondly, on 7 September 2017, the even more controversial *Ley catalana de transitoriedad jurídica y fundacional de la República*⁷⁵ was passed. The law was voted for by the separatist bloc (*JuntsxSí* and CUP with 72 votes in favour). On this occasion, the left-wing coalition *Catalunya Sí que es Pot* did not abstain but rather voted against the law (11 votes). Once again, the MPs of the non-separatist bloc (*Ciudadanos*, PSC, and PP with 52 seats) abandoned the chamber and did not participate in the voting. This law regulated the consequences of the referendum and the transitional law of the Republic until the Constitution of the new Catalan state was approved. In the event of a victory in the referendum for independence, this law provided for the proclamation of independence 48 hours after the official certification of the results and the calling of elections to elect a parliament which would draft a new constitution. In the event that independence lost, regional elections would be called. This law

⁷³ González Pascual Maribel/Toda Castán Daniel, Katalonien und Spanien: Bruch oder Verfassungsreform?, DÖV 7 (2016) 269 ff.

⁷⁴ Catalan Law 19/2017 on the Referendum on Self-determination, published on the same day in the Official Gazette of Catalonia (*Diari Oficial de la Generalitat de Catalunya*) and coming into force on its publication.

⁷⁵ Catalan Law 20/2017 on Legal Transition and Founding of the Republic, published the following day in the Official Gazette of Catalonia.

was also blatantly contrary to the constitutional order. The President of the Central Government used his powers to challenge both laws before the Constitutional Court and they were suspended.⁷⁶

Nevertheless, the Catalan Government held the pseudo referendum on 1 October 2017. The Autonomous Government called for the population to participate actively. The question posed was: “Would you like Catalonia to be an independent State in the form of a Republic?” After a day in which the use of force by the police against people who went to vote had a significant international media impact, the results of the so-called referendum on the self-determination of Catalonia were as follows: Of the 2,286,217 votes cast 2,044,085 were in favour of independence, 177,547 against, 44,913 were blank and 19,719 were invalid.⁷⁷

The referendum had no legal value whatsoever, not only because the referendum itself had been prohibited by the courts but also because the voting process lacked the guarantees of other electoral processes.

These results show that the vast majority of people who went to vote were supporters of independence. There were more than two million people in favour of this option (a level of support representing 43% of the electoral register) and the level of abstention was extremely high.⁷⁸ In accordance with the *Ley catalana de transitoriedad jurídica y fundacional de la República*, in the event that the option in favour of independence won, independence would have to be proclaimed within 48 hours. The political instability thus generated caused the so-called “flight of companies” based in Catalonia to other Autonomous Communities (more than three thousand, including the main banks and savings banks, have since transferred their head offices to other regions).⁷⁹

On 10 October 2017, the Catalan President *Puigdemont* appeared before the Catalan Parliament to assess the results of the referendum. In order to prevent the application of Article 155 SC, he stated, in a deliberately confusing session, that, in accordance with the results of the referendum: “I assume the mandate of the people whereby Catalonia becomes an independent State in the form of a republic [...]. I propose that the [Catalan] Parliament suspends the effects of the declaration of independence so that we can engage in dialogue in the coming weeks”.⁸⁰

After *Puigdemont*’s speech before the plenary session of the Parliament, the MPs of the pro-independence bloc (*JuntsxSí* and CUP) withdrew to a separate room (not in the Chamber itself) where they signed a dubious formal declaration of independence, whose content is very akin to a declaration of independence: “WE CONSTITUTE the Catalan Republic, as an independent, sovereign social and democratic State governed by the rule of law. [...] WE INITIATE the binding, participative, transver-

⁷⁶ These Catalan laws were also ruled unconstitutional: 17 October 2017, STC 114/2017, EU:ES:TC:2017:114 and 8 November 2017, STC 124/2017, EU:ES:TC:2017:124.

⁷⁷ Generalitat de Catalunya, Resultats del referèndum de l’1 d’octubre, available at <http://premsa.gencat.cat/pres_fsyp/AppJava/notapremsavw/303541/ca/govern-traslada-resultats-definitius-referendum-11-doctubre-parlament-catalunya.do> (23 March 2018).

⁷⁸ The results of the pseudo referendum on 1 October 2017 were not very different from those of the consultation on 9 November 2014: the pro-independence vote is not increasing.

⁷⁹ La fuga de empresas no sale gratis, *El País* 26 November, available at <https://elpais.com/economia/2017/11/25/actualidad/1511633431_709635.html> (23 March 2018).

⁸⁰ *Diari de Sessions, Parlament de Catalunya*, serie P, núm 83, 7.

sal, citizen-based, democratic constituent process”.⁸¹ This text was not even registered as a parliamentary initiative, neither was it voted on by the plenary session of the Chamber, so it was an event staged by the pro-independence bloc and signed without having followed any parliamentary procedure, without the formality of the plenary session and with no credibility whatsoever.

B. Response of the central State: the triggering of Article 155 SC and the measures approved

The response of the central State to this declaration of independence was to trigger, for the first time in the nearly forty years of existence of the State of Autonomies, Article 155 SC.

1. *The triggering of Article 155 SC, step by step*

It took seventeen days to initiate this procedure in two phases.

a. The initiative of the Central Government

On 11 October 2017, the Central Government as a collective body took the initiative and lodged a written complaint with the President of the Autonomous Region. This complaint constituted the act which led to the triggering of Article 155 SC. In this first phase (in the sphere of the government), the Constitution only establishes *when* such a complaint can be lodged (in the event of a breach of the Constitution and other laws, or of a serious threat to the general interest of Spain). In the written complaint, the Central Government stated that the unilateral imposition of independence in a part of the country on the pretext of an illegal referendum, and failing to comply with court rulings, constituted a situation of a clear and deliberate breach which justified the triggering of Article 155 SC.

The key point of the complaint was the section requesting that the President of the Catalan Government confirms whether or not independence had been declared.⁸² Only a reply in the negative would be acceptable (the absence of a response or another reply which was not negative would be considered as a confirmation of the declaration of independence). The complaint indicated the deadline for the reply (by 10.00 *am* on 16 October) and the effects thereof (the application of Article 155 SC if the declaration was not revoked).⁸³

⁸¹ The text of this declaration was not published in any official gazette. The text can be found in the media: La declaración de independencia de Cataluña que han firmado los partidos soberanistas, El País 11 October 2017, available at <https://politica.elpais.com/politica/2017/10/10/actualidad/1507630250_872602.html> (23 March 2018).

⁸² It asks the president of the Catalan government to “confirm if an authority of the Catalan government has declared the independence of Catalonia and/or if your declaration on 10 October 2017 before the plenary session of the Parliament implies the declaration of independence regardless of whether or not it is in force” (Section A.1).

⁸³ The text of the formal notice is available on the Spanish Government website: <<http://www.lamoncloa.gob.es/consejodeministros/Documents/11102017-requerimiento.pdf>> (28 March 2018).

On 16 October 2017, the President of the Catalan Government replied with a written request to initiate dialogue regarding the political situation in Catalonia: “The majority of the Catalan people wish to set on their path as an independent country within the European framework”.⁸⁴ Therefore, the issue about which he was proposing dialogue was independence. For the purposes of Article 155 SC, the important point was that he did not deny that independence had been declared. And if the declaration of independence was not denied, in accordance with the complaint lodged, Article 155 SC would be applied.

On 21 October 2017, the Central Government considered independence to have been declared and adopted an agreement whereby it proposed to the Senate a package of measures under Article 155 SC which was remitted to that Chamber for approval. In this case, the rationale behind the agreement of the Central Government not only alluded to the independence of Catalonia (as in the prior complaint) but it also invoked non-legal factors to justify the use of Article 155 SC such as the deterioration of the economic situation in Catalonia and the increasing social division in the region.⁸⁵

b. The procedure in the Senate

The procedure in the Senate is extremely important not only because it is there where the measures of Article 155 SC were approved but also because approval in that Chamber was given after a public debate. This debate allows the decision taken by the Central Government to be assessed. In this second phase, on the same day, 21 October 2017, the Central Government’s proposal was presented. In accordance with the Senate Regulations, an *ad hoc* Joint Committee was set up formed by members of the so-called General Committee of the Autonomous Communities and of the Constitutional Committee.⁸⁶

The President of the Catalan Government submitted arguments in his defence to the Chamber, claiming that the measures announced by the Government in application of Article 155 SC were unconstitutional and condemning the refusal of the Central Government to enter into a dialogue. The *ad hoc* Committee debated and voted in favour of the Government measures on 26 October and the Plenary Session did so on 27 October 2017.

In the Senate phase, it is important to emphasise that this Chamber does not serve the same function regarding Article 155 SC as the German *Bundesrat* does regarding to the *Bundeszwang* of Article 37 GG. The different nature of the two Chambers needs to be underlined once again. The Senate in Spain is not formed by Governments of the Autonomous Communities, but by members of political parties which stand in the election for the central Parliament. In Spain, on the basis of each legislature and its majorities, it can be simpler to obtain the approval of the Senate directly elected by

⁸⁴ Letter from the President of the Catalan Government in response to the request, available at <https://www.eldiario.es/catalunya/politica/respuesta-Puigdemont-segundo-requerimiento-Rajoy_0_698880158.html> (28 March 2018).

⁸⁵ Text of the Resolution of the Council of Ministers (Central Government Cabinet), available at <<http://www.lamoncloa.gob.es/presidente/actividades/Paginas/2017/271017-rajoycm.aspx>> (28 March 2018).

⁸⁶ BOCG Senado XII Legislatura, núm 162, 72.

the people and normally controlled by the same majority which supports the Central Government.⁸⁷

In the current legislature (2016–), the party in the Central Government (PP) lead by *Rajoy* (from June 2016 to June 2018) enjoyed an absolute majority in the Senate (149 senators out of a total of 266). Thus, the Central Government in Madrid was able to mobilise a clear majority in this Chamber when it came to supporting its initiatives.

After six hours of debate, the Senate approved the application of Article 155 SC. In general terms, the Senate voted in favour of the proposal presented by the Central Government, but not *en bloc*. As the Senate can make changes, some of the more controversial points initially proposed by the Central Government were tempered (as we shall see in the following section).

The application of Article 155 SC was approved in the Senate by 214 votes in favour, 47 against and one abstention. Support came from the party in Central Government (PP), the social democratic and main opposition party (PSOE) as well as the *Ciudadanos* and the Canary Island nationalist party.⁸⁸ The left-wing coalition (*Podemós*), the Basque Nationalist Party (PNV), and pro-Catalonian independence parties (ERC and PDeCAT, the successor to the former Catalanian nationalist party) voted against the measures. Two socialist regional ex-presidents (now senators), *José Montilla* and *Francesc Antich*, former Presidents of Catalonia and the Balearic Islands, absented themselves from the vote.

On 26 and 27 October 2017, the PSOE negotiated in the Senate with the PP to persuade the latter to accept an amendment which would suspend the triggering of Article 155 SC in the event that regional elections were called in Catalonia, but in the end this was not approved. The debate in the Senate was dominated above all by the two large state-wide parties (PP and PSOE).⁸⁹

The vote on the coercive measures of Article 155 SC took place in the Spanish Senate forty-five minutes after the Catalan Parliament declared independence. Although calling regional elections was a realistic option during the triggering of Article 155 SC, the Catalanian President discarded this possibility in one of the tensest days in the history of Catalanian politics. Instead, the approval of the resolution of 27 October 2017 was remitted to the Catalanian Parliament. This resolution included the text of the declaration of independence signed on 10 October, which declared Catalonia to be an “independent State” in the form of a republic and initiated a “constituent process” to draw up the Constitution of the new Catalan State. The initiative was voted by secret ballot.

The result was 70 votes in favour (out of a total of 135 seats) among the MPs who participated in the vote (of those present, the majority of the pro-independence bloc).⁹⁰ The remaining MPs (opposed to independence) walked out of the Chamber in protest.

⁸⁷ *Vírgala Foruria* (Fn 14) 79 f.

⁸⁸ These two parties (*Ciudadanos* and the Canary Island nationalist party) give parliamentary support to the central government in Congress, where the conservative party, PP, does not hold an absolute majority.

⁸⁹ *López Basaguren Alberto*, *The Secession Issue and Territorial Autonomy in Spain: Bicameralism Revisited*, *Perspectives on Federalism* 10 (2018) 258.

⁹⁰ Specifically, 70 “yes” votes, 10 “no” votes and 2 blank votes among the groups that participated in the vote (*JuntsxSí*, CUP and the left-wing coalition *Catalunya Sí Que Es Pot*). *Ciudadanos*, PSOE and PP left the chamber.

Thousands of people came out onto the streets to celebrate the proclamation of the “Republic”.

Thus, on the same day that the Catalan Parliament formally declared independence, the Senate approved the application of Article 155 SC by absolute majority. This approval did not entail an obligation on the part of the Central Government to apply the measures approved. The Senate merely authorised the Central Government to act in accordance with those measures. The decision as to whether or not to apply them was a political decision which corresponded to the Central Government. The measures approved by the Senate were published on 27 October 2017 in the Official State Gazette and entered into force on that same day.⁹¹

2. *The controversial measures approved under Article 155 SC*

The core of the first triggering of Article 155 SC is constituted by the “measures”. The measures adopted did not merely consist of issuing instructions to the regional authorities or of a partial replacement of certain regional bodies and the subsequent assumption of functions in certain spheres. Given the magnitude of the breach of the Constitution and the seriousness of the threat to the general interest of Spain, the Central Government felt justified to take more drastic measures which affected the Parliament, the Government and the Administration of Catalonia. Exceeding the political impact, the application of Article 155 SC has given rise to a debate whether certain measures, especially the more drastic ones, are constitutional or not (particularly the dismissal of the Government and the dissolution of the Parliament).

a. Measures regarding the President and the Catalan Government

The Catalan President and Government (along with the Parliament) have been driving forces behind a process of rupture of the constitutional framework, which is what a process of secession is. For that reason, the most drastic measures were directed against them. These measures included the dismissal of the President and the Catalan Government.⁹² In practice, this dismissal entailed the replacement of those regional authorities in all their functions. These functions were not exercised by a commissar but were assumed directly by the President of the Central Government (who replaced the President of the Catalan Government), the Vice-President of the Central Government (who replaced the Vice-President of the Catalan Government), the Central Government as a collective body (which replaced the Catalan Govern-

⁹¹ Resolution of the Council of Ministers (Spanish government) under Article 155 SC, after being passed by the Senate: Order PRA/1034/2017 of 27 October, publishing the Agreement of the Council of Ministers (Spanish government) of 21 October 2017, deeming, pursuant to Article 155 of the Constitution, that there was no reply to the notice sent to the president of the government of Catalonia requesting that the government of Catalonia begin complying with its constitutional obligations and cease conducting actions that seriously threaten the general interest. This was submitted to the Senate for approval of the measures necessary to guarantee compliance with constitutional obligations and to protect the aforementioned general interest (BOE 27 October 2017: Consolidated text that includes changes made in the Senate).

⁹² Order PRA/1034/2017 Section A.

ment) and its Ministers (who replaced each of the Catalanian Councillors/Regional Ministers).⁹³

b. Measures regarding the Catalanian Parliament

Among the measures aimed at the Parliament, the most notable has been the one which gives the President of the Central Government the power to dissolve the regional Chamber.⁹⁴ The Constitution established that the institutional system of the Autonomous Communities is a parliamentary system (Article 152 SC). Therefore, in normal circumstances, it corresponds to the President of the Catalanian Government to dissolve Parliament. As the latter had been dismissed, this power was transferred to the President of the Central Government. From the date these measures were approved, the President of the Central Government had six months in which he could call elections.

In practice, the President of the Central Government called for elections on 21 December 2017, seven weeks after the measures of Article 155 SC entered into force. Therefore, he did not wait for the six-month deadline to expire for calling elections. It is important to highlight the fact that the elections were called for 54 days after the day on which the coercive measures were approved. They could not be held earlier as this is the minimum period provided for by Spanish electoral law between calling elections and holding them.⁹⁵

The measures approved⁹⁶ did not provide for the dismissal of the then President of the Catalanian Parliament. However, it was established that this institution would function with a series of restrictions. For example, as long as the measures of Article 155 SC were in force and until the constitution of a new Parliament emerging from the elections of 21 December 2017, the Catalanian Parliament was not permitted to propose a candidate for the Presidency, nor hold a debate or vote on investiture. Furthermore, the function of control exercised by the Catalanian Parliament over the central State authorities designated to replace the regional authorities was taken away. This function of control of the actions of those central State authorities was exercised by the Senate. The Catalanian Parliament will continue with its legislative function but it cannot take any decision which runs contrary to the measures of Article 155 SC, or to the Constitution or to the Statute of Autonomy.

The Senate did not approve one controversial measure proposed by the Central Government which consisted in the obligation to remit the initiatives of the Catalanian Parliament to the corresponding authority of the Central Government in order for the latter to examine them and decide whether or not they were contrary to the mea-

⁹³ Royal Decree 944/2017 of 27 October, appointing the bodies and authorities responsible for enforcing the measures intended for the government and administration of Catalonia, authorised by resolution of the Senate plenary session on 27 October 2017 and approving the measures requested by the central government under Article 155 of the Constitution.

⁹⁴ Order PRA/1034/2017 Section A.

⁹⁵ Article 42 LOREG.

⁹⁶ Order PRA/1034/2017 Section D.

asures of Article 155 SC. Thus, this right of veto by the central authorities was suppressed during the parliamentary procedure.

c. Measures regarding the Catalanian administration

The measures aimed at the Catalanian Administration were both general and sectorial in nature.⁹⁷ As far as the measures of a general nature were concerned, it was established that the Catalanian administration would act under the instructions of the Ministries of the Central Government. Furthermore, in application of Article 155 SC, the latter could adopt the provisions, acts or decisions which were necessary for the exercising of their functions, establish a regime of notification/authorisation prior to any actions on the part of the Catalanian administration, and appoint and dismiss officials and employees of the regional Administration. In the event of a breach of these rules, the measures allowed for a study as to whether such a breach would entail disciplinary responsibility under current legislation. In practice, based on these measures, 250 senior officials were dismissed, particularly in the regional Departments of Foreign Affairs and Tax.⁹⁸

In addition to these general measures aimed at the Catalanian administration, a series of measures were adopted in application of Article 155 SC, which were aimed at three sectors: 1) the regional police force, 2) economic, financial and tax management, and 3) telecommunications and audio-visual media. These three sectors are closely linked to the secession process.

With the application of the measures of Article 155 SC, the Catalanian police force came under the control of the Ministry of the interior of the Central Government. In the same way, the Central Government was empowered to adopt measures which guaranteed that any money received by the Autonomous Region was not allocated to the secession process. In the field of telecommunications, the Central Government assumed the exercise of functions over this sector and the institutions belonging to it (and controlled, for example, the e-mail of the leaders of the pro-independence movement). However, the Senate did not approve the extremely controversial measures proposed by the Central Government for taking control of the regional television channel (TV3), which was heavily involved in the process of secession, under the pretext of guaranteeing “the broadcasting of accurate objective and balanced information”. It should be borne in mind that Article 20(1)(d) of the Spanish Constitution protects the right to “accurate information” (“información veraz”), understood as being information obtained diligently – it need not be the truth, nor is it required to be neutral and objective.

⁹⁷ Order PRA/1034/2017 Sections B and C.

⁹⁸ All the delegations of Catalonia abroad were closed. In the opinion of the central government, the so-called Catalan embassies exceeded the powers that autonomous communities have to promote themselves abroad and were intended to serve as embassies for the future Catalan state. The agency DIPLOCAT, believed to be an instrument to internationalise the Catalan conflict, was also abolished. Moreover, certain regulations that had been passed to act as a framework for the future Catalan treasury were rendered null and void.

d. Other measures

In addition to the actions aimed at the President, the Government, the Parliament and the Administration of Catalonia, a series of transversal measures were approved of which the main ones were as follows.

First: Measures relating to the legislation applicable by the substitute authorities (state or regional legislation, as the case may be) and the jurisdictional review of their decisions which would be governed by procedural law before the contentious-administrative courts corresponding to the substitute authorities.⁹⁹

Second (and especially controversial): All acts which contravened the provisions of the agreement by which the measures under Article 155 SC were approved would be declared void *ab initio*.¹⁰⁰ Furthermore, the substitute authorities had to authorise the norms and acts which were obliged to be published in the official gazettes (Official Diary of the Generalitat of Catalonia and Official Gazette of the Parliament of Catalonia). Linked to this authorisation, one measure declared void *ab initio* of all norms and acts published in the official gazettes without the authorisation of, or in contravention to what was agreed by, the substitute authorities.¹⁰¹

Third: The measures regarding the disciplinary and penalty regime for civil servants provided for two circumstances. On the one hand, voiding of any disciplinary proceedings initiated against civil servants who had complied with Constitution (envisaged in the event that this had occurred after the Catalan Republic had been declared). On the other hand, any civil servants in Catalonia who failed to comply with the measures approved under Article 155 SC would be in breach of their duty of loyalty to the Constitution and the Statute of Autonomy and this would constitute a very serious disciplinary offence.¹⁰²

e. Duration and review of the measures

The measures adopted in application of Article 155 SC were exceptional and drastic. Any measure adopted under Article 155 SC can only be temporary. Thus, it was envisaged that they remain in force from the date of their publication in the Spanish Official State Gazette (27 October 2017) until the new Government of Catalonia took office.¹⁰³ This new regional Government was to emerge from the Catalan elections of 21 December 2017.

Beyond that, the review of the above measures was also provided for. The Central Government could bring forward the cessation of the measures if the causes which gave rise to the application of Article 155 SC disappeared. Furthermore, it could propose to the Senate amendments to, or updates of, the measures initially agreed. In addition, the Senate expressly determined that the Central Government had to make “proportionate and responsible [use] of the measures approved by the Senate” on the

⁹⁹ Order PRA/1034/2017 Section E.1.

¹⁰⁰ Order PRA/1034/2017 Section E.2.

¹⁰¹ Order PRA/1034/2017 Section E.3.

¹⁰² Order PRA/1034/2017 Sections E.7 and E.8.

¹⁰³ Order PRA/1034/2017 Sections E.9 and E.10.

basis of events and adapt the application thereof if changes in the circumstances so advised.

The agreement of the Government regarding the measures adopted in application of Article 155 SC established that it would report back to the Senate every two months regarding the state of the application and execution of the measures provided for. In practice, the Government reported to an *ad hoc* Committee, the Joint Autonomous Communities and Constitutional Committee.¹⁰⁴

C. Controversies surrounding the application of Article 155 SC: does it violate the Constitution?

There is a fairly general (though not unanimous) agreement among political players and lawyers that the crisis in Catalonia meant that the application of Article 155 SC was inevitable. The initiation of a unilateral process of secession, based on a reiterated refusal to comply with the law and the rulings of the Constitutional Court, means that not only the first requirement for triggering this instrument (the breach of constitutional and legal obligations) was fulfilled, but also the second (the serious threat to the general interest of Spain).

However, this application of Article 155 SC in the Catalanian crisis has given rise to many doubts. The controversy has not arisen over “whether” this instrument should have been triggered or not, but rather over “how” it was used, both in terms of procedure and of the measures adopted.

Article 155 SC is a brief rule, with markedly vague wording, and with hardly any constitutional jurisprudence, and no agreement in the doctrine as to what and what not to do under this precept, as there was no previous experience either in Spain (until 2017) or in Germany, the country from which it was imported (due to the fact that, as indicated above, it has never been applied there). For this reason, many questions have arisen in the wake of the first application of this instrument.

There are divergent positions regarding the use of Article 155 SC in this specific case.¹⁰⁵ The controversy is also reflected in the two challenges lodged before the Con-

¹⁰⁴ While Article 155 SC has been in force, two people have appeared before the Senate. The first was by the deputy prime minister of Spain, *Soraya Sáez de Santamaría*, who appeared before the Senate on 18 December 2017 to provide details on the application of Article 155 SC, BOCG Senado XI Legislatura, núm 207, 1. The second was by *Roberto Bermúdez de Castro*, secretary of state for Territorial Administrations, who appeared before the Senate on 22 March 2018, BOCG Senado XII Legislatura, núm 254, 1.

¹⁰⁵ Among them, see the posts by *Álvarez Álvarez Leonardo*, El art. 155 CE ante el desafío independentista, Agenda Pública 10 October 2017, available at <<http://agendapublica.elperiodico.com/art-155-ce-ante-desafio-independentista/>> (28 March 2018); *Arroyo Gil Antonio*, Al amparo del art. 155 CE, Agenda Pública 20 October 2017, available at <<http://agendapublica.elperiodico.com/155-ce-permite-cesar-los-consellers-dudosamente-al-president/>> (28 March 2018); *Arbós Marín Xavier*, El 155 CE no permite convocar elecciones en Cataluña, Agenda Pública 20 October 2017, available at <<http://agendapublica.elperiodico.com/155-ce-no-permite-convocar-elecciones-cataluna/>> (28 March 2018); *Presno Linera Miguel Ángel*, Algunas certezas y no pocas dudas sobre la aplicación del art. 155 de la Constitución en Cataluña, El derecho y el revés (Blog) 21 October 2017, available at <<https://presnolinera.wordpress.com/2017/10/21/algunas-certezas-y-no-pocas-dudas-sobre-las-medidas-de-aplicacion-del-articulo-155-de-la-constitucion-en-cataluna/>> (28 March 2018); *Albertí Rovira Enoch*, 155 ¿De qué Constitución?, Agenda Pública 22 October 2017, available at <<http://agendapublica.elperiodico.com/155-de-que-constitucion/>> (28 March 2018); *Roig Molés Eduard*, 155 CE. Un estado de la cuestión I: causas, final-

stitutional Court against the application of Article 155 SC: one on the part of the Catalan Parliament, which was directly affected, and another on the part of *Podemos* (opposed to the application of Article 155 SC).¹⁰⁶ Thus, the Constitutional Court is going to have to rule for the first time on the matter. The controversy affects both the procedural aspects and, above all, the measures approved. What are the main issues on which the Constitutional Court will have to rule?

First: The use of Article 155 SC has raised questions about procedure. The Spanish Constitution establishes that the Central Government must first lodge a complaint with the President of the Autonomous Region before applying coercive measures. However, as we have seen, the text of the Constitution says nothing about the form and content of that complaint. At least, the complaint should be justified, *ie* the constitutional or legal breach and/or the serious threat to the general interest of Spain must be verified and must be attributed to an Autonomous Community, but there is little more discussion on this topic.

The grounds for triggering Article 155 SC were set out in the first application of this provision. However, the challenges before the Constitutional Court also raise questions about the grounds and the content of the complaint: is it necessary for the measures adopted later to be consistent with the grounds expressed in the complaint? And should the complaint notify the non-complying Autonomous Region as to the measures which will be applied in the event that it does not rectify its behaviour?

In the application of Article 155 SC there was no consistency between the grounds for triggering stated in the complaint (the declaration of independence) and the grounds reflected in the measures which were finally approved (in addition to the declaration of independence, the grounds in this latter case included the deterioration of the economic situation in Catalonia and the increasing social division in the region).¹⁰⁷

However, possibly the most important deficiency of form in the complaint lies in the fact that it did not list (and therefore did not give notification of) the drastic measures which were later adopted, including the dismissal of the President and the entire Catalan Government and the dissolution of Parliament.¹⁰⁸

If Article 155 SC says nothing expressly about how the complaint should be worded, which constitutional provisions should form the basis for interpreting the constitutional requirements which this notification should comply with? In contrast to the rest of the measures challenged, neither of the two appeals against unconstitutionality indicate which other constitutional provisions would be violated in these cases.¹⁰⁹

idad y procedimiento, IDP (Blog) 23 October 2017, available at <<http://idpbarcelona.net/155-ce-estado-la-cuestion-i-causas-finalidad-procedimiento/>> (28 March 2018); Roig Molés Eduard, 155 CE. Un estado de la cuestión II: el contenido de las medidas, IDP (Blog) 26 October 2017, available at <<http://idpbarcelona.net/155-ce-estado-la-cuestion-ii-contenido-las-medidas/>> (28 March 2018).

¹⁰⁶ The Constitutional Court has admitted for consideration both appeals on the grounds of unconstitutionality: BOE 17 January 2018 (appeals presented by the parliamentary group Podemos); BOE 9 February 2018 (appeal presented by the Parliament of Catalonia).

¹⁰⁷ For a criticism of this lack of consistency, see Roig Molés, 155 CE. Un estado de la cuestión I (Fn 105).

¹⁰⁸ For the formal notice specifying the measures, Satriestegui Gil-Delgado (Fn 9) 1879.

¹⁰⁹ Appellants tend to specify in their arguments the constitutional precepts which they understand to have been infringed.

The Constitutional Court must therefore interpret in which terms Article 155 SC requires compliance with a specific procedure and which constitutional principles the procedure must satisfy, but in the face of the silence of Article 155 SC, on the basis of which other precept(s) will it have to argue and construct its ruling?

The unwritten constitutional principle of constitutional loyalty (an equivalent to the German *Bundestreue*) is very weak as regards its configuration in Spanish constitutional jurisprudence, as it has not served to deduce positive obligations.¹¹⁰ For its part, the principle of legal certainty (Article 9(3) SC) is linked in the jurisprudence of the Constitutional Court to the need for foreseeability, certainty and protection of legitimate confidence. However, not every lack of foreseeability and certainty is susceptible to being unconstitutional because it violates the principle of legal certainty. It can only be understood to have violated the principle of legal certainty if it entails a reasonable uncertainty regarding the conduct required for its compliance or regarding the foreseeability of its effects.¹¹¹

In accordance with these two principles, the complaint should explain the grounds upon which it is based and provide notification of its effects. In this case, there was no consistency (as would have been reasonable) between the grounds of the complaint and the grounds reflected in the later agreement by which the coercive measures were approved, but there were grounds in both cases. In contrast, the complaint did not indicate the specific effects of Article 155 SC, *ie* the coercive measures which were being considered. Although the Constitutional Court may argue that, given the serious nature of the situation created by the Catalanian Parliament and Government, the option which most respected the principle of autonomy of the Autonomous Communities (Article 2 SC), and the most desirable, would have been for the said measures to have been specified in the complaint.

Second: The first application of Article 155 SC has raised questions above all about which specific measures can be applied under this rule. This is the key issue in the doctrine and in the two challenges lodged. The two most controversial matters on which the Constitutional Court will have to rule are: can the President of the Catalanian Government and the Catalanian Government be dismissed under Article 155 SC? And can the regional Parliament be dissolved and elections called under Article 155 SC?

These were the two most drastic measures adopted under Article 155 SC. The dismissal of the President of the Catalanian Government and his Government pursued a return to compliance with the Constitution. It seemed to be unlikely that the same people who had promoted the rupture with the constitutional framework by promoting an unauthorised referendum and a unilateral process of secession would obey the instructions of the Central Government. The dissolution of the regional Parliament sought to bring about a change in the parliamentary majority which had supported the breach of the Constitution and disobedience to the Constitutional Court.

¹¹⁰ For this reason, it is deemed to be a sort of regional soft law, *Cruz Villalón Pedro*, La doctrina constitucional sobre el principio de cooperación, in Cano Bueso Juan (ed), Comunidades Autónomas e instrumentos de cooperación interterritorial (1990) 121

¹¹¹ *Ugartemendia Eceizabarrena Juan Ignacio*, El concepto y el alcance la seguridad jurídica en el Derecho Constitucional español y en el Derecho Comunitario europeo, Cuadernos de Derecho Público 28 (2006) 24, 27, 29.

On the one hand, the principle of proportionality is going to be a significant parameter of constitutionality when it comes to judging the actions of the Central Government in the application of Article 155 SC. In addition to questioning the disproportionate nature of the measures adopted to re-establish compliance with constitutional obligations, both challenges wielded other arguments against this application of Article 155 SC.

One argument which is invoked recurrently is that during the drafting of the Constitution the inclusion therein of the possibility of dissolving the bodies of an Autonomous Community was expressly rejected.

It is true that the constituent assembly did not wish to regulate expressly, among the measures of Article 155 SC, the dissolution of regional bodies, but the Constitutional Court must clarify in what terms this exclusion in the constituent debate must be interpreted: does the Spanish Constitution not permit the dissolution of regional bodies as a coercive measure? Or did the constituent assembly not wish to explicitly regulate this eventuality and prefer a less defined wording which would permit the dissolution of these bodies in particularly serious cases, should the Government consider it suitable? This interpretation seems the most appropriate as it would permit the adoption of these drastic measures provided that the situations in question were particularly critical and that the measures were not indefinite.

Over and above that, the central question is whether or not alternative measures existed to those approved when a regional Government and Parliament advocate an attempt at secession and the rupture of the constitutional framework.

A key argument in favour of the constitutionality of these measures may be their provisional nature.¹¹² As soon as the Catalanian Parliament was dissolved, regional elections were called in the shortest period provided for by Spanish law (as stated, 54 days). The coercive measures would apply for seven weeks plus the time it took to form the new Catalan Government which emerged from the elections (how long this took was the responsibility of the Catalan political parties). The measures in question did not have a permanent effect nor were they open-ended, as this would clearly have been unconstitutional.¹¹³

Another argument that questions the constitutionality of the coercive measures adopted revolves around the principle of self-organisation of the Autonomous Communities. Based on this principle, the Statutes of Autonomy and regional law are the sources of law which regulate the causes of the dissolution of a regional Parliament, the power of the President of the Regional Government to dissolve the Chamber and the causes of the dismissal of the President of the Regional Government and the Government of the Autonomous Region. With the application of Article 155 SC, the President of the Central Government and his Government should not have assumed powers which, by virtue of the Constitution and the Statute of Autonomy, correspond to the regional authorities.

In this respect, the Constitutional Court will have to rule on the following issue: can the effects of these coercive measures under Article 155 SC be equated with an indirect reform of the Constitution and the Statute of Autonomy? The coercive mea-

¹¹² *Bothe* (Fn 40) Rz 25.

¹¹³ *Cruz Villalón* (Fn 20) 60.

asures cannot conceal a reform of distribution of powers provided for by the Constitution and the Statute of Autonomy. The provisional nature which these exceptional measures must necessarily have, and the indispensability thereof, may constitute two strong arguments for denying that these coercive measures constitute a reform of the Constitution and of the Statute of Autonomy which circumvented the procedures established for that purpose.

The coercive measures aimed at the President, the Government and the Parliament of Catalonia form the core of the controversy on which the Constitutional Court will have to rule, but there are many other controversial points. One of the most notable of these is the need for the prior authorisation by the Central Government authorities in order to publish acts or provisions in the Official Diary of the Generalitat of Catalonia. Can the Central Government under Article 155 SC refuse authorisation to publish an act or provision?

Publication is the last link in the process of adoption of a norm or act which gives it legal force, but in normal circumstances it is an formal act not subject to *placet* and it seems doubtful that the substitute authorities can veto the publication of a norm or act adopted in accordance with the applicable (either Catalanian or, where appropriate, state) legislation and, even more so when the unauthorised publication is declared void *ab initio*.

The ruling of the Constitutional Court on this application of Article 155 SC is destined to be one of its most important decisions due to the fact that it will be the first ruling on this matter, because it is an issue with a major political impact, and because of the role of the Constitutional Court as the highest interpreter of the Constitution (in which role it will rule on each of the controversial issues) by judging one of the most important decisions by the Central Government (backed by the Senate) in forty years of democracy.

Until the keenly awaited ruling of the Constitutional Court will be handed down, there is already a first institutional legal opinion on the part of the Council for Statutory Guarantees. This is a regional institution which issues initial opinions when the Catalanian Government or Parliament lodges an appeal before the Constitutional Court.¹¹⁴ In such cases, it is mandatory to request the opinion of this Council, though its decision is not binding either for the bodies which requested the opinion or for the legitimate appeals body. Evidently, nor does it have legal effects for the Constitutional Court.

The Catalanian Council for Statutory Guarantees issued an opinion on 5 December 2017 (at the request of MPs on the Standing Committee of the Catalanian Parliament belonging to the pro-independence parliamentary group *JuntsxSí*) in which it addressed issues on which the Constitutional Court will have to rule.

Regarding particularly the type of measures adopted, the Council ruled that the dismissal of the Catalanian President and Government was unconstitutional because the measure was neither gradual nor proportional. According to the Council, the dismissal of the Catalanian President and Government was applied directly, rather than by degrees, and this prevented the members of the Government thus dismissed from later

¹¹⁴ See the rules and regulations of the Council for Statutory Guarantees in Article 76 of the Statute of Autonomy of Catalonia.

acknowledging their willingness to recognise the breach and themselves apply the measures necessary for a return to constitutional normality, because the dismissal could not be revoked. Furthermore, once the Parliament had been dissolved, the dismissal of the Catalanian President and Government was neither a necessary nor an indispensable measure for achieving the objective pursued by Article 155 SC, because other, less restrictive measures could have been adopted. However, the Council does not specify more clearly in its arguments what those measures could have been.

The Council for Statutory Guarantees did not consider the dissolution of the Catalanian Parliament and the calling of elections to be unconstitutional.¹¹⁵

IV. Conclusion

Article 155 SC imported the federal execution (*Bundeszwang*) of the Basic Law of the Federal Republic of Germany. Spanish Constitutional Law has taken inspiration from German Constitutional Law in order to resolve a scenario of an especially serious crisis. However, Spain is not Germany (in spite of all the legal-constitutional structures imported and even much less in more domestic and less easily importable dynamics of functioning). For this reason, beyond the similarity between Article 155 SC and the *Bundeszwang*, there are substantial differences (the most notable, among the legal differences, being the absence in Spain of an institution equivalent to the *Bundesrat*), which convert Article 155 SC into something different from German federal execution.

The crisis in Catalonia in the autumn of 2017 was the first occasion on which the dreaded Article 155 SC has been applied. The practical dimension of Article 155 SC gives rise to many legal questions. The Constitutional Court will have to provide an answer to these when it rules on the appeals which have been lodged against the application of this instrument. (When? For the moment, no date has been set for the ruling.) Among other questions, a key issue which the Constitutional Court must examine is whether the principle of proportionality was applied correctly in this specific case and a central question: was there a (less drastic) alternative to the actions approved?

This will be the first time that the Constitutional Court will rule specifically and solely on Article 155 SC, and will thus establish criteria for interpreting this clause and provide, by means of its interpretation “a manual of use” as to what can and cannot be done under Article 155 SC, both in the form (the procedure) and in the content (the measures) of this precept.

¹¹⁵ The Council for Statutory Guarantees issued an initial decision: Ruling 13/2017 of 26 October, (at the request of the Catalan government) regarding the impending application of Article 155 SC, and a second decision: Ruling 14/2017 of 5 December, (at the request of three members of Parliament from the Standing Committee of the Catalan Parliament who are from the pro-independence Parliamentary group *JuntxsSí*), where it analyses whether or not the measures are in compliance with the Constitution and the Statute of Autonomy. In legal doctrine, the suspension or dissolution of bodies is the most disputed issue (Epigraph 2.D). In the case of Article 155 SC, *Roig Molés* (Fn 105) has no objections to the suspension of the government. Against the argument that Article 155 SC provides for the suspension of bodies, in particular the dissolution of Parliament, *Álvarez Álvarez* (Fn 105); *Arroyo Gil* (Fn 105); *Arbós* (Fn 105); *Presno Linera* (Fn 105); *Albertí Rovira* (Fn 105).

Article 155 SC is an instrument provided for in the Constitution and is therefore a legal instrument. But its use by the Central Government was a political decision to assume directly (without requesting the intervention of the courts, in contrast to the previous strategy of judicializing the Catalan question) the management of a constitutional crisis without precedent in the State of Autonomies. Article 155 SC was applied in order to re-establish in a part of Spanish territory the respect for legality which had been shattered by the abortive process aimed at the independence of Catalonia and the initiation of a unilateral process of secession in a part of Spanish territory which sought to suppress the Constitution and replace it with another.

Article 155 SC would be applied in Catalonia until a new Government could be formed in the Autonomous Community. After the elections in Catalonia on 21 December 2017 and for five months, the pro-independence bloc was unable to propose a candidate for President of Catalonia with any realistic chances of being sworn in. The candidate of the pro-independence bloc, *Puigdemont*, fled Spain in order to avoid serious criminal charges. The Catalan Parliament passed a law to permit *Puigdemont* to be sworn in by videoconference but the Constitutional Court suspended this law because, as it had already declared, the candidate for investiture must be present in person and cannot delegate his or her vote.¹¹⁶

In the face of this situation, on 14 May 2018, *Torra* was sworn in as President of Catalonia with a Parliament divided almost down the middle.¹¹⁷ In his inauguration speech he rejected the constitutional framework, declared that the only legitimate President of Catalonia is *Puigdemont* and made it clear that he is only a provisional candidate and that his intention is “to build an independent State in the form of a republic”.¹¹⁸

Torra named his government, but the Regional Ministers (*councillors*) chosen included four who were in an unusual situation: two were in preventive custody and two were abroad due to the criminal charges which had been filed against them. This decision constituted yet another challenge to the Central Government (and to the non-independence bloc) which had called for an “effective” Government (free of prison inmates and fugitives) in order to end application of Article 155 SC. The Central Government decided (with the parties which supported the application of Article 115 SC) not to publish these appointments in the Official Diary of Catalonia.¹¹⁹

¹¹⁶ Law 2/2018 of 8 May, amending Law 13/2008 of 5 November, on the presidency of the Generalitat and of the Government. Appeal of unconstitutionality no 2533-2018, BOE 9 May 2018. The Constitutional Court declared as a precautionary measure that “any nomination proceeding without the physical presence of the candidate” would be suspended ATC 28 January 2018.

¹¹⁷ The candidate was nominated with 66 “yes” votes (*JuntsxCat* and ERC), 65 “no” votes (*Ciudadanos*, PSC, *Catalunya en Común* and PP) and 4 abstentions (CUP) in a Catalan Parliament divided into two blocs.

¹¹⁸ Transcription of the nomination address Ple del Parlament, Sessió núm 9.1, 12 May 2018: Parlament de Catalunya, 4, available at <<https://www.parlament.cat/document/trancrificio/253981.pdf>> (14 May 2018).

¹¹⁹ The content of the letter sent by the government of Spain to the government of Catalonia on 19 May 2018: Moncloa notifica que no firmará la designación de ‘consellers’ presos y huidos, El Confidencial 20 May 2018, available at <https://www.elconfidencial.com/espana/cataluna/2018-05-20/govern-cataluna-nombramiento-torra-gobierno_1566340/> (20 May 2018). A report by the State Attorney’s office has confirmed the legality of the refusal to publish the appointments: Gobierno no publicará nombramiento consellers porwue no se ajusta a legalidad, La Vanguardia 29 May 2018, available at: <<http://www.>

The coercive measures approved in application of Article 155 SC included the possibility that Catalonia could not send any decision for official publication without the authorisation of the Central Government. However, applying this power to the appointment of the Regional Ministers opened up a new legal front because the decision as to who are Catalanian Regional Ministers is a political decision and corresponds exclusively to the new President, who is free to appoint and dismiss them because they are his government (pursuant to the Constitution and the Statute of Autonomy). Furthermore, appointing prison inmates and fugitives as Regional Ministers may not be opportune or viable, but legally their political rights remain intact (particularly the right to accede to public posts), because at the time they were designated as Regional Ministers no final judgment has been issued which disbars them from public office.

After the Central Government refused to accept these appointments, the President of Catalonia proposed four new Regional Ministers to replace those originally designated. With this step, the formation of Government in Catalonia was unblocked. After publication of the appointments in the official gazettes and the swearing-in of the new Regional Ministers on 2 June 2018, the application of Article 155 SC in Catalonia automatically came to an end after more than seven months. But, what now?

For the moment, this first triggering has established an important precedent. A taboo has been broken. Article 155 SC was the constitutional provision which had never been triggered. There was enormous caution regarding whether, when and how it should be used and what the consequences of its triggering would be. However, this first application has been much less problematic than might have been expected: there has been no rebellion on the part of civil servants, the application of Article 155 SC has not made it necessary to use force and neither have there been serious civil protests against its application.

That said, the application of Article 155 SC has not resolved the Catalanian conflict. The Central Government, when it was led by *Rajoy*, managed the Catalanian crisis from the very beginning from a position of immobilism, barricaded behind compliance with the Constitution, but this strategy has not prevented the number of people in favour of independence to grow to levels previously unheard of.

The dissolution of the Catalanian Parliament and the calling of elections in application of Article 155 SC did not achieve a significant change of opinion in the population of Catalonia. 4,392,891 people voted in the elections on 21 December 2017 (the biggest turnout in history, 79.9% compared with 74.95% in the previous elections in 2015). The voting has, once again, resulted in a parliamentary majority similar to that of the Catalanian Parliament which declared independence approximately two months earlier.

It is true that there has been a major change: for the first time, in 2017, the Catalan elections were won in terms of votes (but not in terms of seats) by a party openly opposed to independence (*Ciudadanos*) but, with the current electoral system, the parliamentary majority is again held by parties in favour of independence.¹²⁰ The results

lavanguardia.com/politica/20180529/443934971604/gobierno-no-publicara-nombramiento-consellers-porque-no-se-ajusta-a-legalidad.html (29 May 2018).

¹²⁰ After the 2017 elections, the pro-independence parties (*JuntxsCat*, ERC, CUP) have 70 seats (corresponding to 2,079,340 votes) and the parties opposed to independence (*Ciudadanos*, PSC, PP and

of the elections show that there are at least two million people in Catalonia (almost half the electoral roll) who continue to support pro-independence parties, who have once again obtained the majority (in parliamentary seats) with the same pro-independence message. However, the supporters of independence have not succeeded in increasing popular support in the elections and have not obtained a solid majority. The level of support for parties which openly advocate independence stands at 47.5%.

In the event of fresh elections in Catalonia, the data (from surveys and, therefore, provisional) confirm that the emotional and political tension acts as a stimulant for the pro-independence movement: *Ciudadanos*, a party clearly opposed to independence, would win the elections (with fewer votes than in this legislature), but the pro-independence bloc would once again obtain an absolute majority in Parliament.¹²¹

After the application of Article 155 SC, surveys in Catalonia confirm that the political positions in the region have not shifted:¹²² in 2018, the number of people who wish Catalonia to be an independent State ranges between 40% and 48%. More than half of those interviewed consider that Catalonia has not achieved a sufficient level of self-government (between 60.3%, and 65.1%). And a figure to reflect upon: if another referendum were to be held on the 1978 Spanish Constitution almost half the population of Catalonia would vote against it (45% compared with the 91% which backed it in 1978).¹²³

When can we expect a return to institutional, political, economic and social normality in Catalonia? The political and legal scenarios are extremely open-ended and constantly shifting.

Since the investiture of *Torra* as President of Catalonia on 15 May 2018, the Central Government and the main opposition party (PSOE), along with the other political forces which supported the first application of Article 155 SC, have stated their intention of not permitting “parallel” structures (on the one hand, a Council of the Republic abroad presided over by *Puigdemont* and, on the other hand, the Catalan institutions in Spain) and of triggering Article 155 SC once again in the event of further

CatComú-Podem have 65 seats (corresponding to 2,228,421 votes), with 57 seats (1,902,061 votes) corresponding to *Ciudadanos*, PSC and PP, plus 8 seats (326,360 votes) corresponding to *CatComú-Podem* which in the previous legislature (under the name *Catalunya Sí que es Pot*) did not wish to be affiliated to either bloc, defended the idea of a legal referendum and voted against unilateral secession. By party: those opposed to independence, the most-voted party, *Ciudadanos*, obtained 1,109,732 votes (36 seats), while the other parties opposed to independence (the social democratic party PSC and the conservative party PP) obtained the fourth and seventh position, respectively 606,659 votes and 17 seats and 185,670 votes and 4 seats. Among the pro-independence parties, the second and third places went to *JuntsxCat* and ERC with 948,233 and 935,861 votes respectively, with 34 and 32 seats, together with the radical left-wing party, CUP, in sixth place (195,246 votes and 4 seats). In fifth place, the left-wing coalition (*CatComú-Podem*) with 326,360 votes and 8 seats. For the electoral results of the Catalan election on 21 December 2017: Generalitat de Catalunya, Elecciones al Parlament de Catalunya 2017, available at <<http://gencat.cat/economia/resultats-parlament2017/09AU/DAU09999CM.htm?lang=ca>> (28 March 2018).

¹²¹ Centre d'Estudis d'Opinió, Barómetro de Opinión Pública 1ª ola 2018 (May 2018), available at <<http://upceo.ceo.gencat.cat/wsceop/6668/Resumen%20en%20Espa%C3%B1ol%20-885.pdf>> (14 May 2018).

¹²² Poll by the Catalan Centre d'Estudis d'Opinió on the political situation in Catalonia: Generalitat de Catalunya, Enquesta sobre context polític a Catalunya 2018 (January 2018), available at <<http://ceo.gencat.cat/ca/barometre/detall/index.html?id=6508>> (14 May 2018). Centre d'Estudis Opinió (Fn 121).

¹²³ Poll by Catalan Centre d'Estudis d'Opinió (Fn 122).

breaches of the Constitution.¹²⁴ For his part, President *Torra* has insisted on the provisional nature of his mandate, and fresh elections in Catalonia cannot therefore be discarded (at the most propitious moment) in which the pro-independence bloc would seek to obtain a clearer majority (which it does not have at present) by taking advantage of the mobilisation of the separatists.

However, the unity of the Central Government and the main parties opposed to independence has cracked. On 25 May 2018 a court ruling declaring that the party in Government (PP) had been financed illegally completely altered Spanish politics. The political scenario in Spain has taken an unusual turn, overthrowing forecasts, electoral prospects, political strategies and even a President of the Government. The PSOE presented a motion of no confidence which its candidate for President of the Government, *Pedro Sánchez*, won unexpectedly (with the support of *Podemos* and the nationalist and pro-independence parties). This marked the end of the *Rajoy* era.

On the same day that the new Government was formed in Catalonia and Article 155 SC ceased to apply, *Sánchez* was sworn in as new President of the Central Government. However, he will be governing Spain with a parliamentary minority (the PSOE has 84 MPs out of a total of 350) which means that early elections cannot be discarded (the current legislature ends in June 2020). In any event, the duration of the new Government has a short mandate.

In this context, the Catalanian pro-independence parties (along with the Basque nationalists) can once again play a decisive role (after a long period of invisibility in the Madrid Parliament), as they may have the necessary number of seats to decide (as in the past) who the next President of the Spanish Government will be. The Basque nationalists have requested a review of the territorial model and the Catalanian pro-independence parties have made it known that they expect something in return for their parliamentary support. In the pre-electoral contest, the populist logic of patriot (a politician who does not enter into pacts with supporters of independence) versus traitor (a politician who obtains their support) may install itself in Spanish political life.

Meanwhile, the Constitutional Court has to rule, for the moment *sine die*, on the constitutionality of the hard version of Article 155 SC triggered by the Central Government. But this legal remedy (including the hard version thereof) cannot by itself resolve the serious and complex political problem which has arisen in a Catalanian split down the middle and the challenge of how to attract two million people in Catalonia back to a common project, Spain, when those people have expressed their disaffection with that State in recent years.

We find ourselves in an extremely delicate situation requiring a way out which entails a return to the Rule of Law and to political negotiation. This need for dialogue and Politics must be more than just a mantra: it will be a complex process and it will be necessary to determine what to negotiate (from conflicting positions), where the limits are (perhaps the right to self-determination?), in exchange for what (conces-

¹²⁴ See the joint communiqué by the PP and the PSOE on 15 May 2018 in which they agreed to act jointly in response to any new illegal action and they invited the political forces that supported the application of Article 155 SC to join this agreement, available at <<http://www.lamoncloa.gob.es/presidente/actividades/Paginas/2018/150518rajoy-sanchez.aspx>> (15 May 2018).

sions which may generate a sense of unfair treatment and tensions with other regions), and how any agreement should be formalised (perhaps via constitutional reform).

The PSOE (now in the Central Government) is the only party to have proposed an overhaul of the territorial model via a constitutional reform in the federal sense. However, reforms of the Constitution are unusual in Spain due to the lack of a culture of political agreement to underpin them neither is there consensus at present nor the parliamentary majority to implement it. Furthermore, a federal reform cannot by itself be the remedy for renewing the Spanish territorial model, because federalism is not only a legal and constitutional structure but an acceptance of diversity. In Spain, there is a difficulty in accepting this territorial plurality which is not overcome only by constitutional reforms but by pedagogy about diversity.

In 2018, the year of the 40th anniversary of the Spanish Constitution, Article 155 SC has without doubt played a leading role and nothing can be discarded, not even that which appears impossible: a way out of the Catalan labyrinth. It is impossible to predict the future. Only one thing is certain: Article 155 SC has not resolved the Catalan conflict.

References

- Aja Eliseo*, Estado autonómico y reforma federal (2014).
- Alberti Rovira Enoch*, 155 ¿De qué Constitución?, *Agenda Pública* 22 October 2017, available at <<http://agendapublica.elperiodico.com/155-de-que-constitucion/>> (28 March 2018).
- Álvarez Álvarez Leonardo*, La coerción estatal del art. 155 CE en la estructura del Estado autonómico, *Teoría y Realidad Constitucional* 38 (2016) 277.
- Álvarez Álvarez Leonardo*, El art. 155 CE ante el desafío independentista, *Agenda Pública* 10 October 2017, available at <<http://agendapublica.elperiodico.com/art-155-ce-ante-desafio-independentista/>> (28 March 2018).
- Alzaga Villaamil Óscar*, Comentario sistemático a la Constitución española de 1978² (2016).
- Arbós Marín Xavier*, El Tribunal Constitucional como facilitador: el caso de la STC 42/2014, in *Parlamento vasco* (ed), *Instituciones de Derecho Parlamentario*, VIII. La última jurisprudencia relativa al Parlamento (2016) 21.
- Arbós Marín Xavier*, El 155 CE no permite convocar elecciones en Cataluña, *Agenda Pública* 20 October 2017, available at <<http://agendapublica.elperiodico.com/155-ce-no-permite-convocar-elecciones-cataluna/>> (28 March 2018).
- Arroyo Gil Antonio*, Al amparo del art. 155 CE, *Agenda Pública* 20 October 2017, available at <<http://agendapublica.elperiodico.com/155-ce-permite-cesar-los-consellers-dudosamente-al-president/>> (28 March 2018).
- Ballart Xavier*, Coerció estatal i autonomies. L'article 155 de la Constitució de 1978 (1987).
- Barceló Serramalera Mercè*, El derecho a decidir como instrumento constitucional para la canalización de problemas territoriales, *Fundamentos* 9 (2017) 363.
- Bauer Hartmut*, Art 37, in Dreier Horst (ed), *GG-Kommentar II*³ (2015) 1041.
- Boix Palop Andrés*, El conflicto catalán y la crisis constitucional española: una cronología, *El Cronista del Estado social y democrático de Derecho* 71-72 (2017) 172.
- Bothe Michael*, Art 37 GG, in Wassermann Rudolf (ed), *Reihe Alternativkommentare. Kommentar zum Grundgesetz für die Bundesrepublik Deutschland* (1989) 1914.
- Calafell Ferrá Vicente Juan*, La compulsión o coerción estatal (estudio del artículo 155 de la Constitución española), *Revista de Derecho Político* 48-49 (2000) 99.
- Cruz Villalón Pedro*, La protección extraordinaria del Estado, in Predieri Alberto/García de Enterría Eduardo (eds), *La Constitución española de 1978: estudio sistemático* (1981) 659.
- Cruz Villalón Pedro*, Coerción estatal, in González Encinar José Juan (ed), *Diccionario del sistema político español* (1984) 56.
- Cruz Villalón Pedro*, Estados excepcionales y suspensión de garantías (1984).
- Cruz Villalón Pedro*, La doctrina constitucional sobre el principio de cooperación, in Cano Bueso Juan (ed), *Comunidades Autónomas e instrumentos de cooperación interterritorial* (1990) 119.

- Cruz Villalón Pedro*, Das Grundgesetz in der spanischen Verfassungsentwicklung (1978–2008), in *Hohmann-Dennhardt Christine/Scholz Rupert/Cruz Villalón Pedro*, Las Constituciones alemana y española en su aniversario (2011) 61.
- Erbguth Wilfried/Schubert Mathias*, Art 37 GG, in Sachs Michael (ed), GG-Kommentar⁸ (2018) 1216.
- Farreres Comella Víctor*, Cataluña y el derecho a decidir, *Teoría y Realidad Constitucional* 37 (2016) 461.
- Fossas Espadaler Enric*, Interpretar la política. Comentario a la STC 42/2014, de 25 de marzo, sobre la Declaración de soberanía y el derecho a decidir del pueblo de Cataluña, *Revista Española de Derecho Constitucional* 101/2014, 273.
- Frowein Jochen Abr.*, Die selbständige Bundesaufsicht nach dem Grundgesetz (1961).
- Frowein Jochen Abr.*, Die Rechtsprechung des Bundesverfassungsgerichts zum Wahltreit, *AöR* 99 (1974) 72.
- Frowein Jochen Abr./Herzog Roman*, Rechtsgutachten zu der Vereinbarkeit der Verhältniswahl in kleinen Wahlkreisen (Dreier-Wahlkreissystem) mit dem Grundgesetz (1968).
- Frowein Jochen Abr./Peukert Wolfgang*, Europäische Menschenrechtskonvention EMRK-Kommentar³ (2009).
- García Torres Jesús*, El artículo 155 de la Constitución española y principio constitucional de autonomía, in Instituto de Estudios Fiscales (ed), Organización territorial del Estado (Comunidades Autónomas) (1984) 1189.
- Gavara de Cara Juan Carlos*, La homogeneidad de los regímenes electorales autonómicos (2017).
- Gil Robles José María*, Artículo 155: el control extraordinario de las Comunidades Autónomas, in Alzaga Óscar (ed), Comentarios a la Constitución Española de 1978 XI (1988) 501.
- Gómez Orfanel Germán*, Artículo 155, in Casas Baamonde María Emilia/Rodríguez Piñero Miguel (eds), Comentarios a la Constitución Española (2008) 2577.
- González Hernández Esther*, El artículo 155 CE y la LO 15/2015, de 17 de octubre de reforma de la LOTC: ¿Ineludible reciprocidad o círculo perverso?, *Teoría y Realidad Constitucional* 37 (2016) 529.
- González Pascual Maribel/Toda Castán Daniel*, Katalonien und Spanien: Bruch oder Verfassungsreform?, *DÖV* 7 (2016) 269.
- Huber Ernst Rudolf*, Deutsche Verfassungsgeschichte seit 1789 III³ (1988) und IV (1981).
- Instituto Nacional de Estadística (INE)*, España en cifras 2017 (2017), available at <http://www.ine.es/prodyser/espaa_cifras/2017/files/assets/common/downloads/publication.pdf> (28 March 2018).
- Kelsen Hans*, Die Bundesexekution, in Giacometti Zaccaria/Schindler Dietrich (eds), Festgabe für Fritz Fleiner zum 60. Geburtstag 24. Januar 1927 (1927) 127.
- López Basaguren Alberto*, Demanda de secesión en Cataluña y sistema democrático. El *procés* a luz de la experiencia comparada, *Teoría y Realidad Constitucional* 37 (2016) 163.
- López Basaguren Alberto*, Crónica de un gran error político y sus consecuencias o ¿cómo se sale de laberinto?, *El Cronista del Estado social y democrático de Derecho* 71-72 (2017) 58.
- López Basaguren Alberto*, The Secession Issue and Territorial Autonomy in Spain: Bicameralism Revisited, *Perspectives on Federalism* 10 (2018) 238.
- Lublin David*, How Catalonia's election was biased in favor of the separatists, *The Washington Post* 22 December 2017, available at <https://www.washingtonpost.com/news/monkey-cage/wp/2017/12/22/how-a-bias-in-catalonias-elections-helped-the-separatists-win/?utm_term=.2604c08edb3c> (28 March 2018).
- Nagel Klaus-Jürgen*, „Entweder Referendum oder Referendum“ – oder doch Neuwahlen? Der katalanische Unabhängigkeitsprozess und sein spanischer Kontext, in *Europäisches Zentrum für Föderalismus-Forschung* (ed), Jahrbuch des Föderalismus 2017 (2017) 399.
- Oliver Araujo Joan*, Los sistemas electorales autonómicos (2011).
- Pallarés Francesc/Astudillo Javier/Verge Tània*, Spain: Unresolved integration challenges in a party-led decentralization, in Dettnerbeek Klaus/Renzsch Wolfgang/Kincaid John (eds), *Political Parties and Civil Society in Federal Countries* (2015) 227.
- Presno Linera Miguel Ángel*, Algunas certezas y no pocas dudas sobre la aplicación del art. 155 de la Constitución en Cataluña, *El derecho y el revés* (Blog) 21 October 2017, available at <<https://presnolinera.wordpress.com/2017/10/21/algunas-certezas-y-no-pocas-dudas-sobre-las-medidas-de-aplicacion-del-articulo-155-de-la-constitucion-en-cataluna/>> (28 March 2018).
- Ragone Sabrina*, Das Unabhängigkeitsreferendum in Katalonien – Wie ist der Stand aus vergleichender und kontextualer Perspektive?, *DÖV* 9 (2018) 345.
- Requejo Rodríguez Paloma*, La resurrección del interés general en el Estado autonómico, *Revista de Derecho Político* 87 (2013) 151.
- Roig Molés Eduard*, 155 CE. Un estado de la cuestión I: causas, finalidad y procedimiento, IDP (Blog) 23 October 2017, available at <<http://idpbarcelona.net/155-ce-estado-la-cuestion-i-causas-finalidad-procedimiento/>> (28 March 2018).

- Roig Molés Eduard*, 155 CE. Un estado de la cuestión II: el contenido de las medidas, IDP (Blog) 26 October 2017, available at <<http://idpbarcelona.net/155-ce-estado-la-cuestion-ii-contenido-las-medidas/>> (28 March 2018).
- Roig Molés Eduard*, The Catalan Sovereignty Process and the Spanish Constitutional Court. An Analysis of Reciprocal Impacts, *Revista Catalana de Dret Públic* 54 (2017) 24.
- Sannwald Rüdiger*, Art 37 GG, in Schmidt-Bleibtreu Bruno ea (eds), *GG-Kommentar*¹³ (2014) 1143.
- Satrústegui Gil-Delgado Miguel*, Un instrumento para la defensa del Estado: el artículo 155 de la Constitución, in Parejo Alfonso Luciano/Vida Fernández José (eds), *Retos del Estado y la Administración en el siglo XXI: Libro Homenaje a Tomás de la Quadra-Salcedo* (2017) 1859.
- Schäfer Hans*, Bundeaufsicht und Bundeszwang, *AÖR* 78 (1952/53) 1.
- Solé Tura Jordi*, Nacionalidades y nacionalismos en España: Autonomías, Federalismo y autodeterminación (1985).
- Tolivar Alas Leopoldo*, El control del Estado sobre las Comunidades Autónomas (1984).
- Ugartemendia Eceizabarrena Juan Ignacio*, El concepto y el alcance la seguridad jurídica en el Derecho Constitucional español y en el Derecho Comunitario europeo, *Cuadernos de Derecho Público* 28 (2006) 17.
- Vandelli Luciano*, El ordenamiento español de las Comunidades Autónomas (1982).
- Virgala Foruria Eduardo*, La coacción estatal del artículo 155 de la Constitución, *Revista Española de Derecho Constitucional* 73 (2005) 55.
- Wolff Heinrich Amadeus*, Art 37 GG, in Hömig Dieter/Wolff Heinrich Amadeus (ed), *GG-Handkommentar*¹¹ (2016) 394.