

The independence referendum in Germany

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In its Decision (Beschluss) of 16 December 2016, the German Constitutional Court rejected the constitutional appeal (Verfassungsbeschwerde) lodged by a Bavarian citizen after the application for a referendum on the independence of Bavaria was rejected. The issue is of little interest in Germany, where a debate on the independence of one of its regions barely exists. However, it is logical that Spain pays attention to this case as apparently 2017 will be again the year where Catalans will gain independence.

The Constitutional Court has solved the case in three sentences. The Court states in the first place that the Federal Republic of Germany is a national state (Nationalstaat) based on the constituent power of the German people. Länder are thus not the masters or owners (Herren) of the Constitution. This means that there is no room for regional secessionist movements in the Constitution. Given the sparing and assertive reasoning of the Court it is not easy to construe it. What is clear is that, according to the Court, an independence referendum violates the German constitutional order.

It is interesting to remember that, concerning the first point, the Spanish Constitutional Court has made a similar statement. Following the Catalan Parliament's claim to be the "trustee of the sovereignty and expression of the constituting power" (Resolution 1/XI), Judgment 259/2015 of the Constitutional Court confirmed that the only constituting power and only subject of sovereignty was the Spanish people. This statement is linked with the second point, by virtue of which Länder are not the masters of the Constitution. A typical German expression which had been used not only with respect to Länder but also with regard to the EU: States are not the masters of the Treaty. In a multi-level constitutionalism the State and its Constitution are placed as a reference both bottom-up (European Union) and top-down (Länder). In our case, it means that a territory cannot decide on a matter affecting the constitutional order as it is the German people where sovereignty lies. This idea had been brought up by the Spanish Constitutional Court in its Judgment 103/2008 concerning the Ibarretxe Plan, a proposal by former Basque President Juan José Ibarretxe that proposed a free association between the Basque Country and Spain on an equal footing, and that including a right to self-determination. Later, Judgment 42/2014 specified the content of that decision: the decision on the political future of the State could not be made in a unilateral manner by a part of this because that would mean violating the principle of national sovereignty.

Nevertheless, the main doubts refer to the last point of the Court: there is no room in the Constitution for secessionist claims to be made through a referendum. Is there really no room in the current constitutional framework, or does it rather mean that a pro-independence referendum would never be possible, not even after reforming the Constitution? In Spain, the opinion of the Constitutional Court is clear (see Judgment 42/2014): secession is not recognized in the Constitution but is a legitimate political aspiration that can only be carried out through a process pursuant to the constitutional legality, that is, through a constitutional reform, which in Spain does not present material limits. It looks like the German Court does not even open up this possibility. It does not specifically mention anything in this sense and, in addition, it ends up affirming in a general way that secessionist claims, whatever they are, violate the constitutional order.

At first glance one could believe that these two different approaches respond to the existence of two elements in the German system that cannot be modified and which do not exist in Spain: the so-called eternity clauses. An analysis of Article 79.3 of the German Constitution, however, reveals that none of these clauses refer to territorial integrity but to the federal organization, the protection of human dignity and the definition of the State as democratic and social. It is also hard to tell if the Court has implicitly created an eternity clause from the nature of the German national state which would make it indivisible. Affirming that Länder are not the masters of the Constitution could even mean that the Constitution cannot allow under any circumstance a decision concerning the country's integrity to be taken by a part of it instead of by the whole. To sum up, more concretion on this matter would have been advisable. But, again, the decision might have not been more specific because under the German perspective this is not a real problem.

As a conclusion, with this decision Germany has joined the list of federal states (or alike) that do not recognize the right to secession to its members, just like the US or Italy. Other countries do allow secession through their Constitutions (Saint Kitts and Nevis, Ethiopia) or through referendums based on the flexibility offered by their constitutional framework (Canada, the UK). As we all know, Spain is halfway through these different options, as referendums are not recognized by the Constitution but their inclusion through the reform of this legal text is not forbidden either.