



**NATIONAL**

## **THE STATUTE OF CATALONIA: EQUALLY UNCONSTITUTIONAL, BUT MORE CONFUSING**

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*The text passed by Congress, the lower house of the Spanish Parliament, of the proposed new Statute of Catalonia (not a reform of the previous statute, but an entirely different statute) sought to tone down the obviously unconstitutional nature of the text passed by the regional parliament of Catalonia on 30 September 2005. However, this revision has not only failed to address the problem of unconstitutionality, but has exacerbated the sense of legal uncertainty, moved further in suppressing Spain as a social reality, and confirmed that what is in reality a party political agenda is being imposed as a general law on all the Catalans. This represents a serious attack on freedom and political pluralism.*

### **Nationalism as a Point of Departure**

Catalan nationalism has acquired a leading role since the last general elections because of the prominent position that the Spanish Government has given the movement, in spite of the number of seats it actually won. On 14 March 2004, work began on constructing a new territorial order and on 30 September 2005, a text was approved by the regional parliament of Catalonia which the Catalan Parliament itself chose to call a statute, but which is really essentially a constitution:

- a) It sought to impose from Catalonia exactly what the central government can do in terms of basic legislation.
- b) It established a model of bilateral relations between Catalonia and Spain, entities that are at different political levels. Furthermore, the model established

- was not one that could be generally applied.
- c) It made Europe Catalonia's natural context for relations, forgetting the Spanish angle.
  - d) It drew up a specific catalogue of rights, duties and principles for Catalonia, which in some cases contradict the provisions of the Spanish Constitution.
  - e) It established a judicial structure that contradicts the unified nature of judicial authority laid down by the Constitution.
  - f) Via the Statute, it enshrined a series of national symbols specifically for Catalonia.

The proposals of 30 September were only without risk for the separatists, and they also offered them a hope: that of securing a Catalan State. In order to justify the subsequent revision process, it was argued that the proposing parties 'already knew' the original text would not be accepted, presupposing that: 1) in order to achieve 'x' in a series of negotiations, you must push for 'nx'; 2) that the proposed text was unconstitutional, although this was denied at the time; and 3) that the current version does comply with the Constitution.

On 21 January 2006, the Spanish Prime Minister and Artur Mas, the leader of CiU, the main opposition party in Catalonia, reached a pact regarding the Statute characterised by two facets: a lack of information regarding the negotiations, and a deterioration of the parliamentary process, given that the two leaders not only had the capacity to bend the will of their party followers, but also that of Parliament itself, regardless of where the debate led. The consequences of this were rather predictable. The verdict of the Constitutional Commission sought to attenuate the 'constitutionalizing' tone of the text, but in the process undermined the sense of legal certainty and assurance, because now the Statute is even more confusing.

**The verdict of the Constitutional Commission sought to attenuate the 'constitutionalising' tone of the original text contained in the new statute proposed for Catalonia. But it failed: the new version is still flagrantly unconstitutional, is more confusing and has created a great sense of legal uncertainty.**

#### **Persistent Unconstitutional Aspects and Growing Legal Uncertainty**

The problems alluded to above can be seen in the following points:

- The text contains flagrantly unconstitutional aspects: for example, the equivalence of nation and nationality in the Preamble, the incorporation of the adjective 'national' with regard to the symbols of Catalonia, and the elimination of any function for the Spanish Supreme Court in Catalonia other than that of the unification of doctrine. Another example is the incorporation of areas of responsibility that are the competence of central government, but for which powers have been partly delegated under Article 150.2 of the Constitution. Furthermore, the Statute (for example, Article 45.2) goes beyond the point authorised by Article 81 of the Constitution in developing fundamental rights by means of a specific organic law.
- It increases the sense of contradiction, even within a single article. For example, the regulation of parents' right to choose religious education for their children within a State school, itself defined as being secular, is clearly contradictory. In cases where this ambiguity affects powers, whether corresponding exclusively to the

Generalitat (the Catalan regional government), or whether they are shared with central government, this will inevitably lead to a conflict of competences. Numerous paragraphs contain expressions such as ‘without prejudice to’ or ‘whilst respecting the authority of central government with regard to’, followed by a list of the powers that would correspond to the Generalitat. This means that, in relation to matters other than those listed in each area and which are understood to be included, the responsibility for distributing powers between central government and the regional government remains in the hands of the body that has always possessed it, namely the Constitutional Court. In this respect, the Statute cannot avoid distinguishing between different areas and the functions that must be carried out in each of these areas.

- A number of unconstitutional situations may arise as a result of the ambiguity of certain references. What exactly is the law referred to in Article 20.2, which makes it possible for a patient to put on record in advance his decision to die in a dignified manner in case he is not able to do so at a later date? This would be an organic law, but in Catalonia certain laws already exist that regulate this matter, so that we can assume that, in the legislator’s mind, this will continue to be the case. Likewise, in Art. 33.3, there is some ambiguity regarding the way in which staff working at the various State bodies must provide accreditation of their knowledge of the two official languages.

- Unconstitutional consequences arise from the creation of various new bodies, such as the Council for Statutory Guarantees, which contradicts its own character as an advisory council (compared to the former Consultative Council), since its verdicts on draft legislation or proposals made by the Catalan Parliament that may affect the rights enshrined in the Statute are binding. (And this would include virtually any legislation, since what wouldn’t affect them?) This body thus acquires the role of co-legislator, at least in a negative sense, in the same way as the Constitutional Court. However, in terms of its power to present a prior appeal based on grounds of unconstitutionality, it has acquired a role that the Constitutional Court does not possess: an almost positive co-legislative capacity.

**The change of statute does not reduce the likelihood of a conflict of competences, or ‘safeguard’ any particular provision, as was intended; for the simple reason that, with the current constitutional arrangement, this is not possible.**

The attempt to draw up a ‘new statute’ instead of reforming the current statute, is not only incorrect in terms of procedure, but leads to confusion, because although a statute of autonomy may regulate the institutions and functions of a particular regional government, it does not represent a regional constitution, only a basic series of institutional regulations. In order to attenuate (either in reality or as a smokescreen) the unconstitutional nature of the original text, we now find an abundance of added locutions: ‘according to the law’, ‘without prejudice to the provisions of the Organic Law of ...’, ‘except when established otherwise in legal statute’. Two points can be made about this: first, it is all rather self-evident, since, although the initial text did not expressly state them as such, these provisos already existed simply because of the subordination of the statute to the Constitution; secondly, it represents a certain sense of despair, given that a large part of what the Statute augurs will not depend on regional government departments, and this is irrespec-

tive of the unconstitutional legislative activity that central government may undertake, as has occurred on occasion. Little is said about this technical inconvenience, given that the change of statute does not reduce the likelihood of a conflict of competences, or ‘safeguard’ any particular provision, as was intended; for the simple reason that, with the current constitutional arrangement, this is not possible.

### **Intangible Unconstitutionality**

Part of what remains in the new version is a vestige of an intention whose future symbol will be 30 September. What has remained? The idea of ‘something of one’s own’, which is applied to the Catalan language. Not everything is new in this Statute, as for example the linguistic model itself.

**An ‘Own’ Language.** The attribute ‘own’ given to the Catalan language in the Statute of 1979 is the cause of the over-regulation applied to the reform of the language issue, since now it has become one of the unique and distinguishing features that must be developed based on historical rights, as referred to in Article 5. This is one of the most controversial principles of all, given that these rights are attributed the role of providing the foundations of Catalan self-government, in spite of the warnings that were made in this respect by the Consultative Council of the Generalitat, and even a verdict issued by a group of expert constitutionalists commissioned by the PSOE. Critics point out that the thousand-year-old tradition of Catalonia cannot be assimilated into the historical rights outlined by the Constitution, given that the latter refer exclusively to the territories that enjoyed *fueros*, or special privileges enshrined in law. This does not mean that the Catalan language is not subject to legal protection due to its undeniable importance as a cultural and social phenomenon, since this protection is established in the Constitution, although not in the articles expressly cited by Article 5 of the Statute, but in Article 3.2.

According to the draft Statute, there are three official languages in Catalonia: Catalan, Castilian (Spanish) and Aranese. Differentiating these languages has a political significance: Castilian cannot be Catalonia’s ‘own’ language, because this adjective could only refer to a language that creates the degree of distinguishing reality which is being sought after.

The language also receives special treatment in other ways: in the rights of Catalans (the right of linguistic choice, with only the choice of Catalan being protected); teaching (where it is the instrumental language at all educational stages) and institutions (judicial authority, records, the administration, etc.) This monolingual educational model was implied in the Linguistic Regulation Act of 1983 and was activated in the decrees on linguistic immersion of the early 1990s, which in turn were given legislative authority in 1998 with the Linguistic Policy Act. What has changed now is the rank of the regulation that is being proposed. What is more, bearing in mind that the Statute is even more resistant to change than the majority of the provisions enshrined in the Constitution, the matter would be frozen in the terms currently established by the Statute.

**The reform process does not serve freedom. It promotes the irreversibility of a social and economic party model. This strikes a fatal blow at the very heart of the system, denying the role of parliament, and ultimately of the public, in defining how it wishes to**

## develop at each stage of its political life, as agreed within a constitutional framework.

**Catalonia and Spain: a Question of Terminology.** The Statute, which has some 223 articles and numerous provisions supplementing them, makes reference to Spain nine times. It mentions it twice in the Preamble (when referring to the peoples that make up the country), and in the rest of the cases, it has no other option but to mention it: the Bank of Spain, Paradores de Turismo de España (the State-owned network of hotels), treaties ratified by Spain, and when mentioning the territorial division of the body of land and property registrars. However, there are more than 150 mentions of the term State or Spanish State/central government. Some of these are unavoidable (e.g. the Bilateral Commission of the Generalitat and central government), but in many cases they are used for the same reason as by the media and politicians in Catalonia: to deny a reality (Spain) which, in line with Antonio Elorza's thesis on nationalism, if applied on a national basis, could lead to a negation of national realities as easily as such ideas have entered the collective unconscious in Catalonia. And this approach is now enshrined at a statutory level.

The Statute of 1979 hardly mentioned Spain either, but it assumed its role as the basic institutional regulation for the autonomous region, and neither Catalonia nor Spain were used as a linguistic point of reference for their respective situations other than in the Preamble. Neither of them were mentioned. In the text of this new Statute, Catalonia is mentioned 20 times in the Preamble, and more than 200 times throughout the regulation as a whole. The use of the conjunction 'and' to talk about Catalonia and Spain makes them seem excluding; 'and' and 'or' really signify exclusion.

**Many Rights, but Against Catalonia.** Title I adds a number of rights to those already recognised in the Constitution, which raises some problems: some are redundant (employment, culture, public services, etc.); others provide an opportunity to be long-winded (the rights of *women, the elderly, children and young people* not to suffer from discrimination); and some introduce an unconstitutional element through the type of regulation that is stipulated to develop the rights in question (such as the 'right to die', the secular nature of compulsory education, or promotion of popular referendums by the Generalitat and local councils). Although both the current drafting of the Statute and that of the equivalent statutes in the rest of Spain include some obligations and rights, what is new here is the very Title itself, which brings the Statute close, in terms of form and content, to the Constitution. In this respect, it is not unreasonable to believe that one of its pretensions is to place itself at the same level as the Constitution.

## The Statute curtails any political development or social development, and constructs the future of Catalonia not only on a sense of distrust towards Spain but, much more seriously, on a sense of distrust towards the very population whose interests it claims to serve.

Rather than securing a greater degree of freedom, what it achieves is a particular kind of social and economic model based on secularism, economic interventionism, and the formulation of a number of colourful rights and excessive social protectionism, all of which are now being questioned throughout Europe. The Statute

determines what we want to be in the future at the most general regulatory level. This strikes a fatal blow at the very heart of the system, denying the role of parliament, and ultimately of the public, in defining how it wishes to develop at each stage of its political life, as agreed within a constitutional framework. It attacks the traditional division of powers, which distributes power in addition to the constituent power, between the power of reform and the rest of the institutions which have been set up. And it undermines the conquest of a free territory based on the rule of law: the public is told not to trust in its capacity to elect the politicians who are to govern them, nor in the decisions that these politicians may take at any moment in history. The safeguarding of a particular kind of social model in the Statute curtails any political development or social development, and constructs the future of Catalonia not only on a sense of distrust towards Spain but, much more seriously, on a sense of distrust towards the very population whose interests it claims to serve.

**A Sole Duty.** The text talks about ‘duties’, but there is really only one duty, relating to the Catalan language. The secular nature of Catalan and its survival have served as a source of cohesion, in a probably more spontaneous and unconscious manner than the text seeks to ensure, although the same logic could be applied to Spanish, even beyond the borders of the country. This is all reflected in the Statute, in an exhaustively detailed manner and featuring a scope that is questionable, based on the duty of all Catalans to learn Catalan. This demand arises from the parallel that is drawn with Castilian Spanish as an official language throughout the entire State, although the application of the *in dubio pro libertate* principle in this area, considering the omission of any duty of this kind in the Constitution, raises doubts as to its constitutionality, not to mention its applicability, especially bearing in mind the references in other parts of the text that refer to people’s right to address Catalan institutions in either of the two official languages.

Linguistic duties within the field of education deserve special mention, as does the text’s constant recourse to indeterminate legal concepts and a monolingual educational model contrary to the choice of parents - a model that will also be extended to the universities. This is a political choice, but the enshrinement of this policy in the Statute simply highlights the stark difference between a friendly and bilingual social reality and an unreal and hostile political monolingualism. In order to implement this goal, in addition to the specific mechanisms that currently exist in Catalan legislation (such as the Department for Linguistic Guarantees), the Statute provides that this matter be monitored by the High Court of Justice of Catalonia, which leads to a conflict when we bear in mind that the fulfilment of these duties clashes with the text of the Constitution.

**Bilateralism is the issue of greatest political import. It formulates the ‘distinguishing reality’, establishes a model of relations between part of the territory of the State and the State itself that obviates any reference to the latter as a social reality (Spain) and presupposes that the regional institutions that relate bilaterally with the State do not actually belong to the State.**

**Bilateralism As an Essential Principle of Relations with the State.** The Title ‘Regarding the Generalitat’s Institutional Relations’ places the level of relations pursued by the Spanish State and the regional governments at the same level and then

goes on to refer to Catalonia's relations with the European Union. In this respect, the representative offices that the Catalan Region has already opened are given a status within the regulations. At an intra-State level, the principle of bilateralism comes into play in the relations between the Generalitat and central government/State when referring, among other aspects, to what is known as the Bilateral Commission, which is the general and ongoing framework for relations between the Generalitat and the central government. This bilateralism establishes a model of relations between part of the national territory and the State itself that obviates any reference to the latter as a social reality (Spain) and presupposes that the regional institutions that relate bilaterally with the State do not actually belong to the State. For example, take the case of appealing the modification of organic laws that relate to a large number of the powers and attributions described in the text, or the concept of basic legislation arising from the definitions and aspects discussed in the text. If Catalonia can modify these laws, Catalonia can determine the rest of the central regulatory structure. This is only made possible through an underlying and deliberate confusion or oversight: the Statute, insofar as it is an organic law, is hierarchically inferior to the Constitution, but even in its role as a special organic law (and still forming part of the 'constitutional block') it cannot, as a result of the fact that it is being formulated at a later point in time, repeal any law other than that contained in the statute it is designed to replace.

The designers of this Statute know this. That is why the modification of organic legislation remains conditional upon the effective fulfilment of many of the powers that are proposed. As a result, we are faced with a different problem, which has two aspects: political intention and its legal consequences. This raises a doubt: could an organic law which is required to implement the provisions of the Statute, should they be implemented (and what would happen if they are not?), be 'deactivated' if there was a different majority in the Spanish parliament than that at present? Or, conversely, would it be a question of resorting to 'freezing' its status as a result of the special importance of the legislation dealing with regional statutes and its costly reform procedure?

Bilateralism is the question of greatest political import; it formulates the 'distinguishing reality' and bases this on the identification of 'nationalities' in Article 2 of the Constitution with the term 'nations' which should receive recognition of their right to different treatment to regions and a recognition of their capacity for self-government. Without bearing in mind this key point, without acknowledging the fact that the reform option is not simply a federal State, but an asymmetrical federal State, it will be difficult to provide a consistent response to the situation.

**According to the proposals made in the new Statute, Catalonia can demand the modification of organic laws and Catalonia can determine the rest of the regulatory structure. In this respect, the reform option is not simply a federal State, but an asymmetrical federal State. It will be difficult to provide a consistent response to the situation without bearing this key point in mind.**

**The Nation and National Symbols.** The term 'nation' can be understood in many different ways. However, legally it is the cement that holds the State together. The nation sustains the State. The legal nation has a State (sometimes this is misun-

derstood, a gross error, given that it has led part of the Catalan terminological imagination to substitute Spain for the Spanish State); the nation in a non-legal sense can aspire to acquiring a State (self-determination) either today or tomorrow, but the State cannot grant this status to just any manifestation of nationhood (I would say to none), if they occur, and even though they do not claim to aspire to become a State, since it is a natural instinct for the nation to aspire to statehood. However, the Statute that the Commission has passed judgement on does not tackle this issue directly; it uses the Preamble to create an effect on the regulatory provisions that goes well beyond its ambit: the term ‘nationality’ referred to in Article 2 of the Constitution is not equivalent to a nation (nation in a legal sense, as it might appear in a legal text), but the Preamble ‘interprets’ the Constitution in order to establish this equivalence. I am not referring to the fact that many Catalans may not consider the terms to be equivalent, but to the twin supposition that Catalonia is really a nation (since this does not depend solely on what people believe and feel) and that the Statute can ‘tell’ the Constitution that this is the case.

From this perspective, it was almost inevitable that something that has formed part of the Catalan political vocabulary for some time (Catalan National Radio, National Archive of Catalonia, the National Theatre of Catalonia) would be raised to a rank within the statute. We now have a number of ‘national’ symbols to accompany this development: the flag, the national holiday and the anthem. In other words, according to this reasoning, in Catalonia the Spanish flag, the Spanish national holiday and the Spanish anthem are not national. Or would any of the promoters of this Statute be prepared to defend the contrary in Catalonia?

**Legally, the nation is the cement that holds the State together. The nation sustains the State. The Preamble of the Statute allows itself to ‘interpret’ the Constitution in order to make it say what it does not: that the term ‘nationality’ is equivalent to ‘nation’. However, the State cannot accept this claim, because the natural instinct of a nation is to aspire to statehood.**

### No Conclusion

The boundaries of statutory reform are the preservation of the constituent spirit (autonomy within a context of unity) and the spirit of the statute (constitutional loyalty, parliamentary freedom and public pluralism). Statutory reform does not mean a new statute and it must maintain the status quo regarding relations between Catalonia and the rest of the Spanish regions and between Catalonia and the rest of Spain; it must improve, and not worsen, the distribution of power; it must respect the principle of jurisdictional unity; it must apply the principle of autonomy within the framework of Article 149.1.1 and Article 139 of the Spanish Constitution; and,



above all, it must affirm a unique identity without negating a shared identity. This is exactly what the proposed text does not do. It does not improve self-government, because ambivalent expressions create conflict; it encourages all expressions of a specific identity, to the exclusion of a shared identity, which will undoubtedly make it difficult for this Statute to be applied over the next twenty years, in view of what it promises and fails to deliver. This intangible element, and not the specific examples of unconstitutionality within the text, is what has led some observers to talk about underhand constitutional reform.

**Any statutory reform must preserve the constituent spirit and the spirit of the statute: autonomy within the context of unity, constitutional loyalty, parliamentary freedom and public pluralism. None of this is respected in the reform proposed for Catalonia.**

I myself am Catalan. A statute designed by and for the political class makes it difficult for me to live both in Catalonia and in Spain, my two spiritual points of reference. I am not sure whether I would be prepared to die for them, but I have written this text in a desire that they be in harmony, and in the melancholy contemplation of the romantic and somewhat desperate resistance of some to be merged within a whole which is becoming increasingly diffuse and global, and is even blurring the borders of Old Europe.