

## **SPANISH GOVERNMENT TRIGGERS ARTICLE 155: UNCHARTED LEGAL TERRITORY AHEAD**

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### **Key points**

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- **Article 155: Uncharted legal territory. Hard version of the “nuclear option” triggered for first-ever implementation**
- **Catalan home rule to be curtailed significantly: early election to be called regardless of the Parliament of Catalonia, Catalonia police (*Mossos d’Esquadra*) and Catalonia public broadcasters to be controlled by Spanish Government**
- **Practicalities unclear and doubts about logistical feasibility**
- **Independence of judiciary in Europe: Spain ranks low**
- **Clashing interpretations of the Spanish Constitution: the referendum was legal**

*After an extraordinary cabinet meeting of Spanish ministers on 21 October 2017, PM Rajoy announced Article 155 will be triggered to ensure “return” to framework of the Spanish Constitution. The measures announced so far are considered to be the hard interpretation of an article dubbed as the “nuclear option”. Even before being implemented for the first time, Article 155 foreshadows a huge amount of appeals the Constitutional Court will have to deal with.*

### **Article 155 will have severe consequences for Catalonia home rule**

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Spain’s Prime Minister, Mariano Rajoy, held a press conference Saturday afternoon to announce the outcome of the emergency cabinet meeting earlier that same day on how to invoke the Article 155 of the Spanish Constitution in Catalonia. According to Rajoy, Spain is to dismiss Catalonia’s president and the entire Catalan government and limit Parliament powers.

Pending Senate approval on 27 October 2017, the Government of Catalonia will be [stripped of its powers](#)<sup>1</sup>, with its functions assumed by the Spanish Government as of 28 October 2017. Moreover, measures could affect any “administration official or public servant of the Catalan administration” and its public enterprises can also be dismissed or temporarily replaced.

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<sup>1</sup> <https://www.theguardian.com/world/2017/oct/21/spain-prepares-to-seize-powers-from-catalonia>

### Early election regardless of Parliament of Catalonia

The Catalan administration, including its institutions and enterprises, will not disappear, but will instead be ruled by Madrid officials. It is not likely that a new president will be appointed. Indeed, the authority to [call early elections in Catalonia](#)<sup>2</sup>, currently belonging solely to the Catalan president, Carles Puigdemont, will also be seized. Consequently, Mariano Rajoy will be the only person who can call citizens to polling stations. According to the [measures presented](#)<sup>3</sup> by the Spanish government, the Catalan chamber will not be able to propose a new president, or to hold an investiture debate to elect one. The measures also stipulate that any resolution which lawmakers want to vote on will have to be approved by an authority “designated by the Spanish government.”

### Catalan Police (*Mossos*) controlled by Madrid

The Catalan police will also be affected, although in a different way than the government. The Mossos d'Esquadra will be directly controlled by “an authority created or designated” by the Spanish executive. It will give “direct instructions to the members of the Catalan police that will be compulsory.” What’s more, officers might be “replaced” by Spanish police officers “if necessary.” Moreover, it is likely that Spain's interior ministry [removes its commander](#)<sup>4</sup> Josep Lluís Trapero, who is already facing sedition charges.

### Freedom of the press compromised

Spanish authorities will also [oversee the running of Catalonia's public television](#)<sup>5</sup> and radio stations, which is seen as an attack on freedom of press. The Catalan Audiovisual Media Corporation said Sunday it “stands firm by its mission to offer all the citizens of Catalonia a public service of the highest quality, committed to ethical, democratic and pluralistic principles.”

### What does Article 155 actually mean?

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Article 155 is, *de facto*, uncharted legal territory as it is triggered for the first time and [available measures remain unclear](#)<sup>6</sup>. Both Article 155 and Article 116, the latter referring to Martial law, have one common point: temporality. With the Spanish Constitution recognising and guaranteeing the right to autonomy (Article 2) only a temporary suspension of autonomy would be constitutional.

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<sup>2</sup> <http://www.catalannews.com/politics/item/q-a-to-what-extent-is-catalonia-s-self-rule-suspended>

<sup>3</sup> <http://www.catalannews.com/politics/item/spain-to-dismiss-all-catalan-government-and-limit-parliament-powers>

<sup>4</sup> <http://www.bbc.com/news/world-europe-41704759>

<sup>5</sup> <https://globalnews.ca/news/3818687/mariano-rajoy-spain-catalonia-police-media/>

<sup>6</sup> A reference to the Basic Law for the Federal Republic of Germany is relevant as the Spanish Article 115 is said to be styled after the [German Article 37 \[Federal execution\]](#) (cf. page 36). The German article is equally void of detail and was never triggered either. However, Germany's federal structure features a Senate (*Bundesrat*) where Germany's *Länder* can effectively represent their territorial interests. However, this is not the case of the Spanish Senate (*Senado*) which does not represent a territorial counterbalance as a “majority of the senators are elected by the “provinces”, not on autonomous community level (cf. [“Why Spain is not a federal country”](#), Professor Ferran Requejo) and its powers are very limited compared to those of the Congress.

According to professor of Constitutional Law and [former lawyer of the Constitutional Court, M. Joaquín Uría \(University of Sevilla\)](#)<sup>7</sup>, Article 155 has to be implemented to take temporal decisions and cannot be used by the Spanish Government with the partisan aim of substituting the Catalan government and calling new election in Catalonia. This use of the Article 155 will conduct to two unconstitutional situations.

1. The Spanish government has not transmitted to the Senate precisely which type of specific measures will be pursued in Catalonia. The aim is to obtain the agreement of the Senate and then implement the Article 155 without any control of the Senate Chamber.
2. The Spanish government declared itself competent for the dissolution of the Catalan Parliament and for the cessation of the entire Catalan Government. These two measures appear contrary to the aim of temporality of the Article 155, because the current legislature of the Catalan Parliament will be definitely dissolved. Finally, to assume the political competences of the President of Catalonia doesn't have any relation with the ultimate objective of the Article 155: The Spanish Government is not allowed by the Constitution to decide the appropriate time to call a Catalan election. This competence belongs to the President of Catalonia.

Due to this biased interpretation of the Constitution, the Constitutional Court is awaiting a [large amount of appeals](#)<sup>8</sup>, which can come from Generalitat, MPs, or from political parties like left-wing Podemos. What everyone can confirm today is the lack of unanimity in the Constitutional Court referring to the constitutionality of the imposed limitations of Parliament and Catalan Government powers.

### **Independence of judiciary in Europe: Spain ranks low**

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Adding to clashing interpretations of the Spanish Constitution inside Spain, there has been criticism of the independence of the judiciary from relevant international sources. According to the "[The EU Justice Scoreboard 2017](#)"<sup>9</sup>, Spain ranks low (26<sup>th</sup>/28 Perceived independence of courts and judges among the [general public](#)"<sup>10</sup> and 26<sup>th</sup>/28, "Main reasons among the general public for the perceived [lack of independence](#)"<sup>11</sup>). Another recent input regarding the matter can be found in the [Compliance Report – Spain](#)<sup>12</sup>, of 10 October 2016, by the Council of Europe, Group of States against Corruption (GRECO). According to the "[Global Competitiveness Report 2016–2017](#)"<sup>13</sup> (World Economic Forum) Spain is ranked 32<sup>nd</sup>/138 overall but 65<sup>th</sup>/138 in [judicial independence](#)<sup>14</sup>.

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<sup>7</sup> [http://www.eldiario.es/tribunaabierta/aplicacion-inconstitucional-articulo\\_6\\_699990004.html](http://www.eldiario.es/tribunaabierta/aplicacion-inconstitucional-articulo_6_699990004.html)

<sup>8</sup> <http://www.lavanguardia.com/politica/20171022/432257868006/tc-asume-aplicacion-155-provocara-recursos.html>

<sup>9</sup> [http://ec.europa.eu/newsroom/document.cfm?doc\\_id=43918](http://ec.europa.eu/newsroom/document.cfm?doc_id=43918)

<sup>10</sup> page 37 figure 51

<sup>11</sup> page 38 figure 52

<sup>12</sup> <https://rm.coe.int/16806ca04a>

<sup>13</sup> [http://www3.weforum.org/docs/GCR2016-2017/05FullReport/TheGlobalCompetitivenessReport2016-2017\\_FINAL.pdf](http://www3.weforum.org/docs/GCR2016-2017/05FullReport/TheGlobalCompetitivenessReport2016-2017_FINAL.pdf)

<sup>14</sup> page 327

## Spanish Government's misuse of the legal system

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In addition, according to Catalonia's government, the Spanish Government's ideological misinterpretation and misuse of the legal system it claims to uphold has become blatantly patent in its actions against the Catalan Government in the run-up to and the wake of the 1 October referendum. The Spanish Government has for years repeatedly avoided any dialogue on Catalonia's political demands on the grounds of legalistic arguments. However, Catalonia's government has identified twelve cases in which the Spanish government has applied a misused of the legal system. [The details of these twelve cases are included in this enclosed document](#)<sup>15</sup>.

## Was the Catalan referendum legal?

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There are clashing interpretations of the Spanish **Constitution**. In the legal debate about Catalonia there have been recurrent references to the rule of law and the unity of the Kingdom of Spain. In this respect, prominent articles of the Spanish Constitution ought to be taken into account, particularly **Article 1.2** ("National sovereignty is vested in the Spanish people, from whom the powers of the State emanate") and **Article 2** ("The Constitution is based on the indissoluble unity of the Spanish nation, the common and indivisible country of all Spaniards; it **recognises and guarantees the right to autonomy of the nationalities and regions** of which it is composed, and the solidarity amongst them all"). In this context, Catalonia is to be considered one of the nationalities the Constitution refers to.

On 7 September 2017, Spain's Constitutional Court suspended the Catalan [Law 19/2017](#)<sup>16</sup>, of 6 September, of the Referendum on Self-determination. Later, on 17 October 2017 the Court ruled the Law 19/2017 to be unconstitutional.

Despite the recurrent use of the term by analysts and media, it must be made clear that in 2011 Spain's Constitutional Court [ruled](#)<sup>17</sup> referenda cannot be considered illegal and promoters are not to face penal charges (this ruling specifically annulled amendments to the Criminal Code by the conservative party PP via Organic Law 2/2005, of 22 June).

Moreover, the Catalan Law 19/2017 was conceived in agreement with international law enshrined in the Spanish Constitution. The International Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights, approved by the United Nations General Assembly on 19 December 1966, ratified and in force in the Kingdom of Spain since 1977 —published in Spain's Official Gazette, the BOE, on 30 April 1977— recognize the right of all peoples to self-determination as the first human right. This recognition predates the Spanish Constitution. Article 96 of the Spanish

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<sup>15</sup> [http://exteriors.gencat.cat/web/.content/00\\_ACTUALITAT/notes\\_context/Spains-misuse-of-the-judiciary.pdf](http://exteriors.gencat.cat/web/.content/00_ACTUALITAT/notes_context/Spains-misuse-of-the-judiciary.pdf)

<sup>16</sup> [http://exteriors.gencat.cat/web/.content/00\\_ACTUALITAT/notes\\_context/Law-19\\_2017-on-the-Referendum-on-Self-determination.pdf](http://exteriors.gencat.cat/web/.content/00_ACTUALITAT/notes_context/Law-19_2017-on-the-Referendum-on-Self-determination.pdf)

<sup>17</sup> [https://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2011-13309](https://www.boe.es/diario_boe/txt.php?id=BOE-A-2011-13309)

Constitution, adopted in 1978, establishes that international treaties ratified by Spain form part of its domestic legislation and, in Article 10.2, establishes that the rules on fundamental rights and public freedoms shall be interpreted in accordance with applicable international treaties on the matter.

The Parliament of Catalonia has continuously and unambiguously expressed Catalonia's right to self-determination in the past. This was manifested in [Resolution 98/III](#)<sup>18</sup>, on the Catalan nation's right to self-determination, adopted on 12 December 1989, and ratified in Resolution 679/V, adopted on 1 October 1998, in [Resolution 631/VIII](#)<sup>19</sup> of the Parliament of Catalonia, on the right to self-determination and on the recognition of public referenda on independence, adopted on 10 March 2010. More recently, Page 2 of 20 [Resolution 5/X of the Parliament of Catalonia](#)<sup>20</sup>, which approved the Declaration of Sovereignty and the right to decide of the people of Catalonia and [Resolution 306/XI](#)<sup>21</sup>, adopted on 6 October 2016, on the general political orientation of the Government of Catalonia, have asserted Catalonia's inalienable and indefeasible right to self-determination and have confirmed a parliamentary majority in favour of independence.

In recent opinions, the International Court of Justice has stated that, during the second half of the 20th century; there have been cases of new states that have exercised the right to self-determination without the exercise of this right to decide being motivated by the end of imperialism. The Court notes that the right of peoples to decide has evolved, and that, to counter this evolution, no new rule or custom has arisen at an international level to prohibit these new practices. The only limitation on the right to decide that the Court regards as enforceable is the unlawful resorting to force or other serious violations of the rules of international law.

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<sup>18</sup> <https://www.parlament.cat/document/nom/03b120.pdf>

<sup>19</sup> <https://www.parlament.cat/document/intrade/10550>

<sup>20</sup> <https://www.parlament.cat/document/intrade/7094>

<sup>21</sup> <https://www.parlament.cat/getdocie/11004110>