Taking the Spanish government before the law

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I just filed a complaint with the European Commission, stating that the Spanish authorities, in their treatment of the Catalan referendum of 1 October, have violated the basic rights and freedoms protected by Article 2 of the EU Treaty. Every EU citizen can do this: that is, lodge a complaint against breach of EU law by a member state, by filling out a simple form available here.

Friends have advised me against this, cautioning that I might be aiding the eruption of a civil war between Spanish and Catalan nationalists: before embarking on a juridical strategy, we need to know whom it will serve. As I urge my fellow EU citizens, especially those in Spain, to follow suit, I would like to state clearly the grounds for my conviction that taking the current Spanish government to justice is not only a reasonable course of action, but one which is likely to tame the nationalist surge and steer the political process in Catalonia away from secession. It might in fact, be the only such path now available.

Much public outrage has been focused on the deployment of police force against peaceful voters, as a result of which close to 900 people were injured. The Spanish government has defended this as being a 'proportionate use of force' in the protection of the rule of law, as it deemed the referendum illegal – a position that the European Union seems to be condoning (as per the speech of Commission Vice-president Frans Timmermans at the European Parliament on 4 October). During the debates in the European Parliament, no one contested the illegality of the referendum – given that the Spanish Constitutional Court had pronounced it illegal in its judgment of 6 September. The Constitutional court, by the same logic, judged illegal the session of the Catalan Parliament planned for 9 October – in the aftermath of the referendum, on the grounds that the session *might* announce Catalonia's secession.9

Even if there are no sufficient legal grounds to hold the Spanish government to account for police brutality, I claim that its actions based on the two above-mentioned judgments of the Spanish Constitutional Court are in violation of the right to freedom of assembly and the freedom of speech (which a referendum embodies). There rights are protected by:

- Art. 10 and 11 of the European Convention on Human rights;

- Art. 19 and 20 of the United Nations' Universal Declaration of Human Rights;

- Art. 2 of the basic law of the EU (Lisbon Treaty).

The acts in question are also in violation of the Spanish Constitution and the Charter of Fundamental Rights of the European Union. The former is an obvious dead-end; the latter, however, also is. The rights enumerated in the EU Charter create obligations only for the institutions of the EU and for member states when implementing EU law. Within the jurisdiction of the EU, the only recourse, therefore, is to the short Article 2 of the Lisbon Treaty that binds member states to respect basic rights and freedoms (outside of the Charter of Rights).

It is my understanding that only a member state or the European Commission can file a complaint with the European Court of Justice that another member-state is in breach of EU law. However, any EU citizen can file such a complaint with the European Commission, which is obliged to respond

within 12 months, and possibly bring the case to the ECJ. This is what I have done and what I urge others to do. Beware of one caveat: one needs to specify how one is personally affected by the breach in question. I have stated that the Spanish government's violation of basic rights and freedoms damages the quality of democracy in the EU, which affects me personally.

Freedom at the mercy of 'the people'

Let me now clarify the grounds on which the Spanish Constitutional Court's decisions which have provided the legal basis for the actions of Mariano Rajoy's government should be pronounced in breach of EU and international law, and for which the Spanish authorities should be sanctioned.

In liberal democracies, no piece of legislation, not even the Constitution, is a *source* of basic rights and freedoms. The formal codification of rights can help their enforcement, but these basic rights stand above and beyond national constitutions, as 'the will of the people', or the decisions of public authority. That is why the Spanish Constitutional Court cannot claim that the Catalan referendum (i.e. the right to peaceful assembly and freedom of speech) can be suspended by force of Art. 2 of the Spanish Constitution which stipulates the indivisibility of the Spanish nation.

It is also unlawful to ban a session of the Catalan Parliament, as the Court did, on the grounds that the assembly *might* proclaim a secession which is prohibited by the said stipulation against secession. In the same logic, the Court might as well ban the talk and even the thinking about secession. Any Parliament in a liberal democracy has the right to convene and discuss whatever it likes.

These two rulings of the Spanish Constitutional Court purportedly give legal validity to the actions that the Spanish government undertook in its attempt to suppress the Catalan referendum, claiming it as illegal. However, even if the Court has given these actions of the government the appearance of *legality*, these actions lack *legitimacy*, as they violate basic rights and principles that stand beyond the Constitution, and are codified in binding international law.

By doing so, the Spanish Constitutional Court is reducing the legal doctrine of the Rule of Law that is foundational for liberal democracies (that is, law that upholds the supremacy of unconditional and universal basic rights in freedoms) to the doctrine of the 'rule by law' practiced in dictatorships.

Moreover, the Spanish Constitution makes a mockery of the Rule of Law by equating it to the will of the people (The Constitution pledges to "consolidate a State of Law which ensures the rule of law as the expression of the popular will".) The 'will of the people' is the mechanism of enacting popular sovereignty – that is, it serves democracy. The Rule of Law safeguards citizens from the abuse of power by making certain rights and freedoms unconditional and inalienable – that is, it serves freedom. When freedom is placed at the mercy of 'the people' the *liberal* in 'liberal democracy' dies.

Constitutional starting points and EU pressure

Let me add to this a historical consideration, even if it does not add legal weight to my arguments. The Spanish government draws justification for its actions from its duty to protect a Spanish Constitution that enabled the transition to democracy after the death of General Franco.

However, drafting the 1978 Constitution was overseen by the military and excluded the people from decisions on important matters such as the monarchy, the capitalist nature of the economy, equality of peoples, and the country's foreign alliances. In this sense it does not have the full legitimacy of a democratic constitution. Mr Puigdemont is right to argue, as he did in his speech at the Catalan Parliament when discussing the referendum results on 11 October, that the Catalan people saw this document as the *starting* point of the transition from dictatorship to democracy, not its final target, as the Spanish authorities did. On these grounds he is right to be requesting a revision of the basic law.

It is the systematic abuse of power by the central Spanish authority, under the guise of protecting a democratic Constitution, that is triggering the sense of injustice now fuelling the quest for Catalan independence – this quest is driven by a desire for decent political rule, not nationalist fantasies. As the Catalan Premier put it, “We are not criminals, we are not mad. We are normal people, and we just want to vote.”

The quest for independence will subside only once the abuse of power stops. This is what Mariano Rajoy would do if he were to act as a *statesman* whose goal is to stabilise Spain as a pluralist liberal democracy based on the consent of all Spaniards.

However, he has chosen to act as a *politician* instead – a leader of the nationalist People’s Party which came to power on the platform of suppressing Catalan autonomy. The more relentless his stance towards Catalonia, the stronger his support among Spanish nationalists, thus securing a win in the 2020 general elections. This is the reason why there is no hope that he will grant the citizens of Catalonia the basic right to vote that they have been demanding, and why he is now refusing the international meditation that might force him to play by the rules of liberal democratic governments.

It has also become clear that the European Union will not take, voluntarily, a formal stance against the abuse of power by the current Spanish government. But the EU might be forced to do so under the pressure of its citizens, and for this, it has provided both the procedure and the channels.

I propose that therefore the only recourse we have is a civil action of the kind I have undertaken: claims filed with the European Commission, the Council of Europe and the United Nations.