13 Constitutional interpretation and populism in contemporary Spain

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13.1 Introduction

The relationship between populism and constitutional interpretation has various aspects that must be analysed before concluding with the negative response that could be given in the first place regarding the specific interpretation of constitutional jurisdiction in Spain. In reality, one of the essential functions of constitutional jurisdiction is precisely to control the effects that populist movements can bring about,[1] especially when they achieve majorities with government policies that are contrary to the constitution, with a tendency to limit the rights of minorities and opposition or to close down the political process, making it difficult to alternate in power. From this perspective, it could well be said that populism and constitutional interpretation are two basically incompatible terms, especially at the level of constitutional jurisdiction.

Naturally, the definition of what populism is considered to be and also of what is understood by constitution and constitutional interpretation are prior factors that can determine different responses to this radical incompatibility. As regards populism, there is a wide variety of movements of a diverse nature whose classification is not easy, although there have been notable attempts to do so through political science, sociology and constitutional law.[2] Left-wing populisms are not the same as those on the right, national populisms or those with a religious inspiration, those with an ethnic component or those that do not even have a very precise ideological line beyond

1 Cf. David Prendergast, 'The Judicial Role in Protecting Democracy from Populism' (2019) 20 German Law Journal 245–262; cf. also Gilmar Ferreira Mendes, 'Jurisdicción constitucional, democracia en crisis y efectividad de los derechos fundamentales en Brasil' in P. Häberle, F. Balaguer Callejón, I. Sarlet, C. Strapazzon and A. Aguilar (Coords.), *Derechos fundamentales, desarrollo y crisis del constitucionalismo multinivel. Libro Homenaje a Jörg Luther* (Thomson Reuters 2020).

2 Pierre Rosanvallon, *Le Siècle du populisme. Histoire, théorie, critique* (Éditions Le Seuil 2020) Kindle Edition; Mark Tushnet, 'Varieties of Populism' (2019) 20 German Law Journal 382–389; Isaiah Berlin, 'To Define Populism' in *The Isaiah Berlin Virtual Library*; Gábor Halmai, 'Populism, Authoritarianism and Constitutionalism' (2019) 20 German Law Journal 296–313.

questioning the traditional political class or appealing to the people and to plebiscitary democracy.

The analysis carried out here attempts to be essentially constitutional and is based on some very precise theoretical lines that will allow us to point out the problems that populism poses in its essential features and in relation to the constitutional rule of law and normative constitutions. The latter are the constitutional models implemented in Europe as of the end of the Second World War with the new Italian Constitution of 1947 and the German one of 1949, which were followed by other European countries later, including Spain in 1978. This analysis is consistent with the idea of measuring populism in relation to a specific constitutional model and therefore without diluting the analysis in a generalist perspective that can use the names 'constitution' or 'constitutional' to accommodate even populist regimes. Such a perspective denatures the historical meaning of a constitution in the context of modern constitutionalism and the scientific analysis itself and can end up legitimizing profoundly undemocratic political action under the guise of a 'democracy' based on direct appeal to the people, to the nation or to a constitutional identity paradoxically set up by extra-constitutional elements.[3]

The fact that populism has penetrated the constitutional interpretation of some constitutional jurisdictions, as a consequence of the situation of democratic involution in some countries governed by populist or national populist movements, should not be a hindrance to pointing out the radical incompatibility between that constitutional interpretation and the model of the constitutional state in force in Europe. That is what we are going to do here, indicating the reasons for this incompatibility from a constitutional perspective.

In many countries that follow the model of normative constitutions, as is the case of Spain, the articulation of the constitutional jurisdiction is very technical, which makes it relatively impervious to new forms of constitutional interpretation that may arise with the arrival of populist movements. This does not mean that constitutional jurisprudence is itself technically faultless or that it is not subject to political tensions, partisan influences or even to conditions derived from particularly sensitive public opinion, in certain areas, deriving from particularly sensitive public opinion in certain areas.[4]

There are several reasons why, in countries like Spain, the wave of populism may reach, if it does, jurisdictional institutions somewhat later than other state institutions or the centre of political and social debate. Indeed, there are a number of basic antagonisms between the system of constitutional jurisdiction and populist movements that could be explained in

3 Halmai (n 2) 306 et seq.

4 On this matter, I refer the reader to the study I carried out on constitutional jurisprudence in Spain: Francisco Balaguer Callejón, 'Constitutional Courts under Pressure – New Challenges to Constitutional Adjudication: The Case of Spain' in Zoltán Szente and Fruzsina Gárdos-Orosz (eds.), *New Challenges to Constitutional Adjudication in Europe: A Comparative Perspective* (Routledge 2018) 164–184.

relation to the following dichotomies: reason v. will; constitutional democracy v. majority democracy; pluralistic democracy v. plebiscitary democracy; constitutional order v. popular or national sovereignty. Some of these variables (such as majority democracy or popular or national sovereignty) are not totally incompatible with the normative constitution, as we will see, but only partially with some of their temporal and spatial coordinates.[5]

All of these aspects can hinder populist stances from becoming established at the jurisdictional level of constitutional interpretation. However, in the opposite direction, it should be noted that these stances are taking up more and more space in public debate, so that there may be a growing 'diffuse' influence of populism on constitutional interpretation, which ultimately ends up affecting the constitutional jurisdiction in countries where this has not yet happened. This diffuse influence upon constitutional interpretation does not necessarily have to do with specific content or even with techniques of interpretation, but may be related to cultural guidelines and new paradigms that are being introduced in our societies through social networks and applications developed by technological companies.[6] Some trends in particular could be noted. (1) The fragmentation and radicalization of public sphere, which hinder the constitutional purpose of society's overall organization and the articulation of fundamental consensus. (2) A new perception of time requiring immediate responses to political and constitutional problems, which inevitably may also influence the work of constitutional jurisprudence and make difficult long-term planning characteristic of constitutions. (3) The difficulty of articulating an effective guarantee of constitutional rights against technological companies and Internet applications. (4) The configuration of truth in the public space that is currently conditioned by phenomena such as fake news and post-truth, which find an especially favourable environment to spread in social networks. (5) The intervention of global agents and foreign groups in domestic public debate through social networks, which also affects the way in which the constitution is interpreted, because it distorts the internal domestic constitutional interpretation according to external foreign interests.

As we can see, we are dealing with a dialectic in which opposing forces operate, generating tension around the relationship between constitutional interpretation and populism. Some of these forces act against the penetration

5 In other words, the spatial and temporal coordinates defined in the constitutional rule of law in contrast with the legal rule of law. For example, majority democracy is not acceptable at the constituent moment, when a fundamental consensus is required, whereas national or popular sovereignty has no place under the constitutional order, in which all powers must be subject to the constitution. In the previous legal rule of law, however, these coordinates did not exist: the law expressed sovereign power as defined by the majority decision. Francisco Balaguer Callejón, *Fuentes del Derecho* (Tecnos 1991).

6 Francisco Balaguer Callejón, 'Las dos grandes crisis del constitucionalismo frente a la globalización en el siglo XXI' in *Nomos. Le attualitá nel diritto, 2018. Anticipazioni Convegno: Passato, presente e futuro del costituzionalismo e dell'Europa*. http://www.nomos-leattualitaneldiritto.it/wp-content/uploads/2018/09/Balaguer_Costituzionalismo.pdf.

of populism in the interpretation of the constitution, essentially at a jurisdictional level. Others, on the other hand, act in favour of this penetration, albeit still in a diffuse way in many countries, but already generating cultural guidelines and new paradigms that are affecting the constitutional interpretation.

The radical incompatibility between populism and constitution occurs because populism breaks up the constitution's space and time coordinates. Unlike constitutional parties, populist movements want to be both part and whole, constitutive moment and subsequent constitutional periods, suppressing conceptual boundaries and depriving the constitution of its essence and its very meaning. The breakdown of those coordinates is not merely a formal matter because the constitution exists upon those coordinates and ceases to exist if they disappear. When they disappear, jurisdictional control of the ruling majorities is not possible, and the guarantee of fundamental rights is not possible at the constitutional level.

At the core of these space and time coordinates of the constitution is pluralism, the recognition that the people or the nation cannot be anything other than a group of free people who have different approaches to politics and society and who pool their partial truths to build a common constitutional order, to which all submit equally. Therefore, there is not absolute truth or a fundamentalist interpretation of the constitution in favour of a specific group, nor can the people or the nation become instruments to denature the constitution itself.

Populist and nationalist movements concur on a fundamentalist way of understanding truth. The constitutional interpretation by the populist and national populist movements is impregnated with this absolutism, with this perception of the truth as something exclusive that belongs to them, so that they do not need to see the other fragments of the mirror, those belonging to other people and other social sectors, to determine the truth.[7] The constitutional interpretation by the populist and national populist movements is totally conditioned by their prior truth, the people or the nation that they consider superior to the constitution.[8] From this perspective, these movements tend to legitimize themselves directly through the people or the nation. But their interpretation of the will of the people or the nation is not mediated by the constitution itself. Instead, it is presented as a will that the political leaders of these movements know directly and even represent directly.[9]

7 Francisco Balaguer Callejón, 'Interpretación constitucional y populismo' (2020) 33 Revista de Derecho Constitucional Europeo.

8 Because, as Alessandro Morelli indicates, populism does not tolerate any form of limitation of popular sovereignty which it identifies with the political majority. Alessandro Morelli, 'El reduccionismo populista y sus efectos en la representación política y en la jurisdicción' (2019) 31 Revista de Derecho Constitucional Europeo n 31.

9 It could be said that they even 'embody' it through a 'représentation-miroir', through the man-people, the leader who reflects in himself all the members of the people. Rosanvallon (n 2) 50 et seq.

In this way, populisms end up breaking the logic of constitutional state and normative constitutions. By resorting to preconceptions that they place above the constitution, they distort the norms of the constitution and turn it into an inert object, to be manipulated according to their political interests. The interpretation that populist and national populist movements make of the concepts of people and nation disconnects them from their constitutional context by considering them as preconceptions that existed before the constitution and that can be placed above it in the event that those movements consider that there is a conflict with the constitution. In this way, these movements end up breaking up the rationale behind the constitution by appealing to a primary political power that they claim to represent while attributing a partial political ideology to the constitution, incompatible with the idea of wholeness and fundamental consensus that the constitution represents. Through their self-attributed ability to interpret the will of the people exclusively, they also attribute themselves the ability to interpret the constitution exclusively, subordinating it moreover to the will of the people or the nation.

13.2 The political and social context of Spain

The political and social context of Spain has been transformed in a very significant way in recent years. As in other countries, the financial crisis in Spain led to important changes in the political structure, with an end to bipartisanship that had been a constant in national politics. In the electoral processes prior to the separatist crisis in Catalonia, the political system fragmented into four significant national parties: two conservative ones and two progressive ones: PP and Ciudadanos against PSOE and Podemos.

After the outbreak of the separatist crisis in Catalonia, a new reorganization of the political sphere took place, initially with the highly significant growth of Ciudadanos, a party of Catalan origin that has manifested itself since its creation against Catalan nationalism. The last general elections saw the decline of this party and the rise of VOX, which can be considered a populist national party with relations with other parties of this nature in Europe, basically coinciding in their political programmes, despite the diversity of these movements in Europe[10] and what is being promoted by Steve Bannon and the American far right.[11] While the initial transformations in the political system (with the four parties indicated) originated in the financial crisis, those that occurred later have been driven by the separatist crisis in

10 Cf. the report by J.A. Aunión and Ignacio Povedano, published in the newspaper *El País* on 14 June 2020, based on a survey of 50 academics from 20 countries that specialize in studies of populism. Despite this heterogeneity, it places VOX clearly within these national populist or right-wing populist trends: 'Donde se sitúa VOX en la ultraderecha europea', https://elpais.com/internacional/2020-06-13/donde-se-situa-vox-en-la-ultraderecha-europea.html.

11 Interview by Daniel Verdú with Steve Bannon, *El País*, 25 March 2019: https://elpais.com/internacional/2019/03/24/actualidad/1553454729_290547.html.

Catalonia, which has led to a split in the traditional PP vote that had grouped together all the conservative sectors.[12] Part of that vote initially went to Ciudadanos and later to VOX.

At the time of writing (July 2020), Podemos is part of the Government of Spain through a pact with the PSOE and has greatly moderated its speech so that its populist character (since it has been defined as such by specialists in the analysis of populism[13]) is not perceptible in its political performance. Among the conservative parties, VOX clearly ranks among the national populist movements being promoted by the American far right through social networks.[14] Alongside this nationwide populism, one must also take into account the populist movements in Catalonia, in particular the old Convergencia, which has changed its name several times and has clearly leaned towards populism in recent years; as well as CUP, a secessionist movement too, but on the other wing of the political spectrum. In Catalan secessionism the orientation towards populism is not linked to a political ideology that fits neatly into the parameters of other European populist movements (for example, anti-immigration). As we shall see, its affiliation with populist movements has to do with its rejection of constitutional democracy, its contempt for judicial institutions and specifically the constitutional court, and its interpretation of the constitutional order in a populist sense with regard to the structural aspects of the democratic rule of law that we have defined in the Introduction to this chapter.

The fragmentation of the political system has not reached the constitutional jurisdiction because until now its members' appointments have been agreed between the PSOE and the PP. Although the PP has to compete with VOX for an electoral space that it previously monopolized, it cannot be said that it has taken a complete turn towards populism beyond the government of the regional Community of Madrid, where the populist tendency was already traditional and has been reinforced in recent times. As far as this study is concerned, it should be noted that for the moment, no populist movement has managed to promote candidates to the Constitutional Court, nor have they managed to generate a jurisprudential line of interpretation of the constitution that can be defined as populist.

13.3 Populist challenges to constitutional jurisprudence

The fact that populism has not hitherto permeated the jurisprudential interpretation of the constitution in Spain does not imply that the constitutional jurisdiction has not had to face the challenge of populism in some of its rulings. In particular, the long series of rulings related to secessionism in

12 Balaguer Callejón (n 4).

13 Rosanvallon (n 2).

14 Manuel Viejo and Antonio Alonso, 'La estrategia de Vox en redes sociales: ya es el primer partido en Instagram, la plataforma con más jóvenes' *El País*, 16 December 2018. https://elpais.com/politica/2018/12/12/actualidad/1544624671_005462.html.

Catalonia acted precisely to counteract the populist tendencies at the base of some parties that have encouraged action aimed at Catalan independence. They are rulings in which the Constitutional Court has had to interpret the possibilities and limits of the constitution in relation to the proceedings and secessionist postulates.

It should be noted, however, that this has been a problem to which the Constitutional Court itself contributed in a very relevant way through STC 31/2010, as we indicated in a previous work on this subject.[15] Despite this, the Constitutional Court has subsequently assumed a more open position in relation to the procedures that the Catalan secessionists could have activated to reform the Constitution, indicating that the Spanish Constitution may not only be reformed but also even admits its total revision.[16] Therefore, from the constitutional perspective, the secessionists' claims could have followed the constitutional channels through an initiative for constitutional reform promoted by the Autonomous Community region itself, which is provided for in the Spanish Constitution,[17] but paradoxically they have never tried, although they could have done so. Another matter would be the success or failure of such an initiative for reform during its subsequent processing, based on political negotiation between all the parties involved. But what is not constitutionally acceptable to the Constitutional Court is unilateral action contrary to the constitutional order.

The list of pronouncements of the Constitutional Court related to this topic is very long[18] and has not ceased since 2014 to today. In 2014, the

15 Balaguer Callejón (n 4). As indicated previously in that work: 'Constitutional Court Judgment 31/2010, of 28 June, relating to the Statute of Catalonia, declared that just one complete Article of the Statute was unconstitutional together with another three specific paragraphs of Articles or specific clauses that do not affect relevant legal issues related to the reform. However, its political impact was very negative as it unnecessarily affected questions of identity and because of the circumstances under which the pronouncement of the Constitutional Court was made … STC 31/2010, in relation to the Statute of Catalonia, has fostered a large drive towards pro-independence positions and an evolution towards these positions on the part of the main nationalist party, which has been the governing party throughout almost the entire existence of the Autonomous Region. The motives are not just in the judgment; they are also related to the challenge to the Statute by the Partido Popular, despite no claim being lodged by the same party against the Statute of Andalusia, which contains a large number of similar articles to that of Catalonia. The many types of incidents suffered by the process before the Constitutional Court (challenges of judges, leaks of draft judgments, etc.) contributed to generating a growing feeling of discontent in a large part of Catalonian society in relation to the Constitutional Court'.

16 STC 42/2014, of 25 March.

17 Article 166 of the Spanish Constitution establishes that 'The right to propose a Constitutional amendment shall be exercised under the terms contained in clauses 1 and 2 of Article 87', in accordance to Article 87.2, 'The Assemblies of the Autonomous Communities may request the Government to pass a bill or refer a non-governmental bill to the Congressional Steering Committee and to delegate a maximum of three Assembly members to defend it'.

18 Cf. a very comprehensive reference to the rulings in Francisco Balaguer Callejón (Coord.), *Manual de Derecho Constitucional* (Tecnos 2020).

Constitutional Court marked a very relevant jurisprudential line[19] which partially upholds the claim lodged by the Government of Spain against a decision on the 'Declaration of Sovereignty and the Right to Decide of the People of Catalonia'[20]. The Constitutional Court established that the so-called first principle entitled 'Sovereignty' of the Declaration approved was 'unconstitutional and void'. At the same time, the Court affirmed that the references to 'the right to decide' of the citizens of Catalonia are not unconstitutional if it is interpreted in the sense set forth in legal foundations 3 and 4 of this ruling. Thus,

> The proposal of conceptions that seeks to modify the very foundation of the constitutional order is possible in our legal system, provided that it is not prepared or defended through an activity that violates democratic principles, fundamental rights or other constitutional mandates, and the attempt to achieve them effectively is carried out within the framework of the constitutional reform procedures, since respect for these procedures is always and in any case inexcusable.

In 2015 there were other pronouncements from the Constitutional Court, most notably the last one of that year, related to the result of the 'plebiscitary' elections to the Catalan Parliament called for 27 September of that year.[21] The secessionist sectors that had given these elections a plebiscitary nature clearly lost the 'plebiscite', as they failed to exceed 48% of the vote. However, they obtained the majority of seats in parliament and began a complicated drift towards sovereignty incompatible with minimum respect for democratic rules, since a minority cannot impose independence on the majority of society (independence being a matter that would in any case require a reinforced majority of no less than the two-thirds required to reform the Statute of Catalonia). Another decision of the Constitutional Court[22] states the unconstitutionality and nullity of Resolution 1/XI of the Catalan Parliament, adopted on 9 November 2015, 'on the start of the political process in Catalonia as a result of the electoral results of 27 September 2015'. The Court clearly indicates in FJ7 of that ruling that

19 STC 42/2014, of 25 March.

20 Resolution 5/X of the Parliament of Catalonia, approving the 'Declaration of Sovereignty and the Right to Decide of the People of Catalonia'. The first section of that Resolution states: 'The people of Catalonia have, for reasons of democratic legitimacy, the character of a sovereign political and legal subject'. On the basis of this self-attribution of sovereignty, the keys to exercising the right to decide are defined, indicating: 'the Parliament of Catalonia agrees to initiate the process to make effective the exercise of the right to decide so that the citizens of Catalonia can decide their collective political future'.

21 Paloma Biglino Campos, 'Cataluña, federalismo y pluralismo político' (2016) 37 Teoría y Realidad Constitucional 449–459.

22 STC 259/2015 of 2 December.

> [t]he autonomous chamber cannot establish itself as a source of legal and political legitimacy, to the extreme of claiming the power to violate the constitutional order that sustains its own authority.

The jurisprudential lines of the Constitutional Court were maintained in 2016 and 2017, with new pronouncements[23] that were to continue in 2018, 2019 and 2020.[24] Of particular relevance were the Constitutional Court's two rulings, both on 2 July 2019,[25] in relation to the application of Article 155 SC.[26] The application of Article 155 followed repeated disobedience by the Catalan secessionists as regards the resolutions of the Constitutional Court and as a consequence of Catalonia's declaration of independence which, although subsequently suspended by the President of the *Generalitat* himself several seconds after it was pronounced, generated great political tension that could only have been resolved without state intervention by calling elections to the Parliament of Catalonia, which the President of the *Generalitat* finally refused to do. The national government then decided to request authorisation from the Senate (upper house of the national parliament) on

23 The jurisprudential pronouncements of 2015 have to do with the consultation promoted by the Generalitat on 9 November 2014. They are the Constitutional Court's sentences 31/2015, of 25 February (in which some precepts of the Law of the Parliament of Catalonia 10/2014, of 26 September, of non-referendum popular consultations and other forms of citizen participation, are annulled), 32/2015 of 25 February (in which the Decree 129/2014 of 27 September on calling the non-referendum popular consultation on the political future of Catalonia is annulled) and the STC 138/2015 of 11 June (in which the actions of the *Generalitat* of Catalonia regarding the calling of the consultation are declared unconstitutional).

24 As regards 2018, the ATC 5/2018 of 27 January, the ATC 68/2018 of 20 June or the SSTC 10/2018 of 5 February; 46 and 47/2018 of 26 April and the STC 136/2018 of 13 December and others can be mentioned. In 2019, we must consider the STC 19/2019, of 12 February, which declares the provision for the investiture of a candidate for President of the *Generalitat* in his or her absence as unconstitutional. In the same sense, the STC 45/2019 of 27 March declares the unconstitutionality of several provisions of the Law of the Parliament of Catalonia 2/2018, of 8 May, annulling the legal precepts of the autonomous community that made it possible for a candidate to the presidency of the *Generalitat* of Catalonia to be invested without being present in person, as well as for remote meetings of the governing council to be held.

25 SSTC 89/2019 and 90/2019 of 2 July 2019.

26 Article 155 of the Spanish Constitution (inspired by Article 37 of the German *Grundgesetz*) was used to intervene the *Generalitat* of Catalonia and call for elections. Accordingly to this Article:

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 prejudicing 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 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.

21 October 2017 to apply this constitutional precept after its request to the President of the Autonomous Community of Catalonia was not heeded. The Senate granted its approval, and the Government of the Nation dismissed the Government of the Autonomous Community of Catalonia and called for elections to form a new government in that Community. Two appeals of unconstitutionality were lodged against the Senate Agreement, one by members of Congress (lower house of the national parliament) of the parliamentary group Unidos-Podemos-En Comú Podem-En Marea,[27] and the other by the Parliament of Catalonia, which also challenged all the provisions issued in implementation or application of the measures authorized by the Agreement.[28] In both cases the Constitutional Court rejected the appeals except for one very specific aspect: the attribution of a lack of validity of rules or acts published without authorization because the Constitutional Court understood that they could affect legal certainty.[29] As regards the rest, the Court declared full compliance with the constitution in the implementation of Article 155 already carried out recalling, in the face of the appellants' allegations to the contrary, that the constitutional conditions required for their application were indeed met, taking into account the repeated failure of the Government and Parliament of the *Generalitat* to comply with the decisions of the Constitutional Court itself.[30] In any event, the Court also defined the general conditions to which it must be submitted, indicating that

> This norm allows the temporary alteration of the functioning of the autonomous institutional system, but in no way can it lead to the indefinite suspension of autonomy and, still less, to the institutional suppression of the autonomous community itself.

27 Resolved through STC 89/2019 of 2 July.

28 Resolved through STC 90/2019 of 2 July, which on the other hand dismisses the challenge to these provisions, thus limiting the scope of the recourse to the Senate Agreement by rejecting 'the alleged existence of an alleged "normative unit" in which what was agreed by the Senate and the provisions or acts adopted in its execution would seem to be included'.

29 For the Constitutional Court (STC 89/2019), it is legitimate for these acts to be subject to authorization while Article 155 is being applied so as to ensure that such application is effective and to establish prior controls to that effect in relation to what is officially published 'but in the event that such controls are circumvented or are ineffective, legal certainty (Article 9.3 EC) prevents the remedy from being that such publication is deemed to be unverified'.

30 STC 89/2019: 'To reach this conclusion, it is enough to recapitulate what this Court has declared in the pronouncements issued in relation to provisions and acts that form part of the so-called "constituent process aimed at the creation of an independent Catalan state in the form of a republic" (STC 90/2017, 5 July, FJ 3, among others). This process was launched by the resolution of the Parliament of Catalonia 1/XI, of 9 November 2015 "on the initiation of the political process in Catalonia as a consequence of the electoral results of 27 September 2015" (declared unconstitutional and null and void by STC 259/2015 of 2 December, which in turn was repeatedly violated by the *Generalitat*: AATC 141/2016, of 19 July; 170/2016 of 19 December; 24/2017 of 14 February and 123 and 124/2017 of 19 September)'.

The implementation of Article 155 SC cannot give rise, therefore, to a limitation of indefinite autonomy over time, but that it must have a determined or determinable time limit. For the Constitutional Court,

> Art. 155 CE is not an end in itself, but an instrument to guarantee the validity and effectiveness of the constitution in cases in which it is evident that only this way is it possible to restore the constitutional order.[31]

Among the latest pronouncements of the Constitutional Court in relation to this issue of separatist tensions in Catalonia, it is worth noting those related to monarchy.[32] In addition to these judgments, there are others that have to do with particular situations related to the judicial processes that have taken place in the criminal jurisdiction or with appeals for legal protection of rights motivated by actions of the Parliament of Catalonia.[33]

Especially noteworthy is the high number of applications for enforcement that the Constitutional Court has had to rule upon due to non-compliance with its rulings by the secessionist sectors.[34] Such contempt shown to the Constitutional Court contrasts with the attitude of the rest of the Catalan and national political actors who do respect its decisions. Although the secessionists have never obtained the majority of the votes in the elections to the Catalan Parliament (never exceeding 48% of the popular vote), they do have the parliamentary majority due to the disproportionality of the electoral system. This has allowed them to continue forming a government and passing parliamentary resolutions that challenge the Constitutional Court

31 In addition to these pronouncements by the Spanish Constitutional Court, there have been two others by the ECtHR and one by the ECJ. (In the ECtHR in the case of *Aumatell i Arnau v. Spain* of 4 October 2018 and in the case *Maria Carme Forcadell i Lluis and others v. Spain* of 28 May 2019.) The claim was declared inadmissible in both cases. In the ECJ, in its ruling of 19 December 2019 (Case c-502/19, Junqueras case) on a question referred for a preliminary ruling by the Spanish Supreme Court, it was decided in favour of recognizing the immunity of Oriol Junqueras from the moment that he was elected a Member of the European Parliament.

32 STC 98/2019 of 17 July, in which two paragraphs of Resolution 92/XII of 11 October, of the Parliament of Catalonia, related to the disapproval of the Head of State carried out by the autonomous Parliament and with the abolition of the Monarchy are declared void. Likewise STC 111/2019 of 2 October, which annulled Resolution 298/XII of 7 March of the Parliament of Catalonia creating a 'Commission of Inquiry into the Monarchy'.

33 To mention a few examples, the STC 75/2019 of 22 May, the STC 155/2019 of 28 November, in both cases with three dissenting opinions on the court's decision; the STC 115/2019 of 16 October, with one dissenting opinion; the SSTC 3 and 4/2020 of 15 January, with two dissenting opinions; SSTC 2 and 5/2019 of 15 January; STC 22/2020 of 13 February, with three dissenting opinions; STC 9/2020 of 28 January, with three dissenting opinions; SSTC 10 to 12/2020, all of 28 January; SSTC 36 and 37/2020 of 25 February, with three dissenting opinions and STC 38/2020, also of 25 February.

34 Along with those mentioned in previous notes, in the year 2019 alone, we can mention those ruled on by the Constitutional Court in AATC 180, 181, 182, 183 and 184, all of them from December 2019. In 2020, AATC 9 to 11/2020, the two of January 28 and AATC 16 and 18/2020, both from 11 February.

by ratifying agreements that have been declared null by the constitutional jurisdiction. Examples of this attitude are very numerous; it is enough to point out the Constitutional Court Orders issued in execution of previous sentences with which the *Generalitat* of Catalonia has clearly not complied and to which we have previously referred.[35] So the fundamentalist nature of populist attitudes, which obviate the conditions of the rule of law to emphasize the unlimited will of parliamentary majority (even if the latter does not represent the majority of the population as in the case of Catalonia) against the current constitutional framework, is evident here. For this reason, they repeatedly fail to comply with the rulings of the Constitutional Court, while the controversial reform of the Constitutional Court Organization Act of 2015 (LOTC), which gave the Constitutional Court itself additional powers to enforce its rulings, has not served to prevent such non-compliance.[36]

In the case of Catalonia, this intention by the secessionists to represent the people as a whole, thereby nullifying pluralist democracy, is constant. For example, when it is stated [37] that 'the will expressed on many occasions by Catalan society to maintain Catalonia as one people shall be guaranteed', it is obvious that more than half of Catalan society does not want independence, so that more than half of its members end up being expelled from this concept of 'one people'. The truth is, however, that the people of Catalonia express themselves through democratic institutions within a constitutional framework that must be observed, because the legitimacy of Catalonia's institutions derives from this framework.

However, the secessionists accept this constitutional framework as regards whatever interests them, while infringing upon whatever goes against their political projects because they appeal to a superior will, that of the 'people' whom they alone represent. But it is not the will of the real, plural people, i.e. the people that express themselves through democratic institutions under the rule of law; rather, it is they themselves constituted as a unique 'people', from which they exclude the majority of citizens because they do not coincide with their political positions. For this reason, they repeatedly fail to comply with the resolutions of the Constitutional Court, because they do not accept any legal limit to their will, which is defined as the authentic will of the Catalan people.

35 Vid *supra* the ATCs mentioned in notes 24, 30 and 34.

36 By means of Organic Law 15/2015 of 16 October on the reform of Organic Law 2/1979 of 3 October on the Constitutional Court, for the execution of the decisions of the Constitutional Court as a guarantee of the rule of law. This Law would be challenged before the Constitutional Court by the Government of the *Generalitat* of Catalonia and the Basque Government, appeals that were rejected by the Constitutional Court in the SSTC 185/2016 of 3 November (that of the Basque Government) and 2015/2016, of 15 December (that of the *Generalitat* of Catalonia) although the debate on the reform was also raised in the Court itself leading to the presentation of dissenting opinions by various judges.

37 Resolution of the Parliament of Catalonia 5/X, of 23 January 2013, approving the 'Declaration of Sovereignty and the Right to Decide of the People of Catalonia'.

These populist groups thus consider themselves as a part of the people when it suits their interests (when they stand for election, form a government, lodge appeals with the Constitutional Court) and as a whole when it is more useful for their projects (when they do not respect the rules that establish limits to the power of the majorities or the government, or when they do not accept the Constitutional Court's resolutions). They exercise the political power of the ruling majority within the constitutional framework when it interests them, yet they cross the border of that framework by exercising a constituent power when it seems convenient for their purposes. In doing so, they break not only the current Spanish Constitution but also any possible constitutional and democratic organization of coexistence. This is clearly evidenced in Law 19/2017 of 6 September on the self-determination referendum, declared unconstitutional by the Constitutional Court,[38] in which the parliamentary majority of Catalonia intends to exercise sovereign power, stating in its Article 3.1 that 'the Parliament of Catalonia acts as representative of the sovereignty of the people of Catalonia'. But neither the Parliament of Catalonia nor the State Parliament represents the sovereignty of the people; proof of this is that its laws can be prosecuted by the Constitutional Court and annulled for violating the Constitution.

This attitude can be seen even more clearly in article 3.2 of the same Law 19/2017 of the Parliament of Catalonia, which indicates that this law 'prevails hierarchically over all the rules that may conflict with it, while it regulates the exercise of a fundamental and inalienable right of the people of Catalonia'. In other words, a law that is approved within the framework of the Constitution and the Statute of Autonomy by a narrow parliamentary majority that does not represent even 48% of the voters is above the Statute of Autonomy and the Constitution itself. In short, the legal framework by which Parliament has a series of powers is accepted, but the limitation of those powers by the legal framework is not accepted. What benefits the interests of populists (the rules that define a parliamentary majority) is accepted, but it is not accepted what does not interest them (the rules that define the limits established by the rule of law for that parliamentary majority).

All of this must be qualified, however, with two observations. The first is that the populist drift of the Catalan secessionist sectors is atypical in the sense that they do not share the radical political programmes of other European populist sectors. But what they do share is fundamental in being able to be classified as populists: the claim to represent the people as a whole, the use of a concept of democracy that rejects pluralism and constitutional democracy and the contempt for constitutional jurisdiction, the resolutions of which they systematically disregard.

The second observation is that, in the populist evolution of the Catalan secessionist movement, there is (as in many other populisms) an ultimate reason that is only partially attributable to them: the blockade of politics, the

38 STC 114/2017 of 17 October.

inability of the rulers to manage problems through the Constitution and to give political solutions to those problems within the constitutional framework. The responsibility here clearly lies with the Popular Party government, which allowed the political problem to grow without applying the means to solve it before it finally led to a radical confrontation. The context of an economic crisis, for its part, also contributed to the development of increasingly intense political tension.

13.4 The health crisis and the constitutional interpretation

One last aspect to consider is related to the health crisis we are experiencing. The health crisis itself carries with it a specific constitutional interpretation that has to do with the exceptional situation that we are experiencing in which rights such as life, health and physical integrity must be preserved. Populists in governments or in the opposition tend to question measures of social distancing and to propose options more favourable to the maintenance of economic activity or the exercise of certain freedoms than to the preservation of people's lives and health. This is a question that deserves to be analysed because it shows the incompatibility of populism not only with procedures but also with constitutional principles and values.

Although not all populist movements have taken this position, a truly relevant part of them is following it even if this means, as known from specific epidemiological reports, causing an extraordinary increase in lethality that would bring the number of deaths to over a million in some countries.[39] Examples of this attitude in governments can be seen in the President of the United States, the President of Brazil and the opposition in AfD in Germany, for example, or in VOX in Spain. Their motives are varied and range from mere political opportunism to deeper reasons that have to do with the diverse nature and the social and political context in which these conservative populisms have developed in the 21st century compared to previous political movements such as fascisms.[40] In the case of Spain, the protest against social distancing measures has been led by VOX, which has called for demonstrations against the government.

On the question of the right to demonstrate in relation to social distancing measures, the Constitutional Court had the opportunity to rule,[41] and it did

39 This is the case of the Imperial College report, which indicates that the mitigation strategy could cause, in the best of hypotheses, some 250,000 deaths in the United Kingdom and between 1.1 and 1.2 million deaths in the USA. Cf. *Report 9: Impact of non-pharmaceutical interventions (NPIs) to reduce COVID-19 mortality and healthcare demand*.

40 Francisco Balaguer Callejón, 'Crisi sanitaria, globalizzazione e diritto costituzionale' (2019) 10 Atti della giornata di studi in onore di Paolo Ridola, Rivista italiana per le scienze giuridiche 795–812; see also 'A crise da democracia na época de Weimar e no século XXI' (Instituto Brasiliense De Direito Publico 2020) and 'Crisis sanitaria y derecho constitucional en el contexto global' (2020) 46 Teoría y Realidad Constitucional.

41 ATC 40/2020 of 30 April.

not accept, to process a petition for constitutional protection of rights filed by a trade union organization. The Constitutional Court directly assessed the basis upon which the prohibition had been established to determine whether it was proportionate and whether the limitation of the right corresponded to the constitutional requirements. That is, it was not because the declaration of the state of alarm was in itself an impediment to exercising the right, but because in the specific circumstances of the case, the demonstration could endanger the rights to health, physical integrity and life. The Court concludes that the measures proposed by the organizers did not allow avoiding this danger.

Other lower courts have accepted appeals contrary to the denial of authorization for demonstrations by the governmental authority. This does not necessarily contradict the doctrine of the Constitutional Court, since each specific case must be assessed in relation to the justification of the prohibition and also to the measures proposed by the organizers to prevent the spread of the virus. However, the truth is that in the demonstration by VOX in motorized vehicles in Madrid and in other cities, the passage of ambulances was blocked,[42] which was one of the aspects that the Constitutional Court had considered relevant in its decision, taking into account the current health situation, in order to refuse the appeal.

13.5 Conclusions

In many countries that follow the model of normative constitutions, as is the case of Spain, the articulation of the constitutional jurisdiction is very technical, which makes it relatively impervious to new forms of constitutional interpretation that may arise with the arrival of populist movements. However, in the opposite direction, it should be noted that these populist stances are taking up more and more space in public debate, so that there may be a growing 'diffuse' influence of populism in constitutional interpretation, which ultimately ends up affecting the constitutional jurisdiction in countries where this has not yet happened.

Populism breaks up the constitution's space and time coordinates. Unlike constitutional parties, populist movements want to be both part and whole, constitutive moment and subsequent constitutional periods, suppressing conceptual boundaries and depriving the constitution of its essence and its very meaning. By resorting to preconceptions that they place above the constitution, they distort the norms of the constitution and turn it into an inert object, to be manipulated according to their political interests. The interpretation that populist and national populist movements make of the concepts of people and nation disconnects them from their constitutional context by

42 See for instance, *Huffington Post* and *Diario de Cantabria*: https://www.huffingtonpost.es/entry/ambulancias-manifestacion-vox_es_5ec93d8dc5b62d9c3d2953c7?ncid=NEWSSTAND0006; https://www.eldiariocantabria.es/articulo/santander/protestas-motorizadas-vox-bloquean-paso-ambulancias-santander/20200523155726076557.html

considering them as preconceptions that existed before the constitution and that can be placed above it in the event that those movements consider that there is a conflict with the constitution.

In Spain there has been until now no influence of populist movements on the jurisprudence of the Constitutional Court. There has been, however, control by the Constitutional Court over some such movements of regional scope whose actions have tried to distort the logic of the constitution. These movements appeal to a concept of people they claim to represent in its entirety, excluding the majority of the population, which has a different political approach, and rejecting the constitutional procedures of the rule of law. In these movements, the intentional manipulation of concepts typical of populisms is clearly perceived in that they intend to mix and confuse the constitutive with the constitutional moment and the whole with the parts, breaking up the logic of the constitutional state.

On the other hand, the health crisis is also generating a conflict in the prevailing constitutional interpretation in favour of the rights to health or to life, which is being questioned by populist movements whether in governments or in the opposition (in Spain, the latter is the case) that encourage the continuity of economic activity or the exercise of certain freedoms as opposed to measures of social distancing. Some jurisprudential responses to this tension have already been given in Spain, with the Constitutional Court ruling in favour of the preservation of the rights to life and health.