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Abstract	The objective of this chapter is to draw attention to the constitutional erosion that has taken place in Spain in the last few years. The main erosion has occurred due to the Catalan pro-independence bid, whose illiberal traits like the disdain for the law and the Courts will be highlighted. The national government is also to be blamed for some reforms affecting the General Council for the Judiciary and some attempts to undermine its independence.	

Constitutional Erosion in Spain: From the Catalan Pro-Independence Crisis to the (Intended) Judiciary Reforms

Núria González Campañá

1 Introduction

In the last decade of the twentieth century, with the collapse of the Soviet Union and the fall of the Berlin Wall, liberal democracy seemed to have triumphed everywhere. However, despite the number of democracies began to grow, the liberal elements within many democracies have been declining. Zakaria was one of the first to warn that although "democracy is flourishing, constitutional liberalism is not" (Zakaria 1997, 23). So, the idea of democracy understood primarily as the will of the people is still globally ascendant, but liberal democracy is losing track. And Europe is the place where liberal democracy has declined most precipitously in recent years (Wind 2020, 3).

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In a liberal (or constitutional) democracy, democracy is not only about voting or about the wishes of the majority. This approach to democracy advances a "shallow conception, whereby democracy becomes simply a majoritarian principle prevailing over any other consideration" (Closa 2016, 249). This resembles the populist conception of democracy, which argues that politics should mainly be an expression of the general will of the people (Mudde 2004, 543). Constitutional democracy amounts to much more than mere aggregation of the preferences of the majority. As Closa argues

> By relegating rule of law (legality), "democracy as majoritarianism" breaks the axiological balance that characterizes democratic constitutionalism: the synthesis between the rule of majority and the Rule of Law. (Closa 2020, 52)

In effect, democracy means people deciding, but doing so according to rules that can only be changed following the amendment procedure foreseen in the very same rules, guaranteeing transparency, checks and balances, pluralism, fundamental rights and particularly rights of minorities. Viewed correctly, Rule of Law is not in conflict with democracy. In fact, the Rule of Law has been described by the European Commission as the "backbone of any modern constitutional democracy".[1]

But in certain populist narratives, the concept of democratic legitimacy takes prevalence over the principle of legality and the popular will is conceived as the main and only source of power. People's voice should have no limits, no restraints. Populism is inherently hostile to the idea and institutions of liberal or constitutional democracy. In fact, populism is one form of what Fareed Zakaria popularised as "illiberal democracy", but which could also be called democratic extremism (Mudde 2004, 561).

Democracies might fail in the hands of armed people, but they might also die slowly in the hands of elected (and populist) politicians: when independent judges look like enemies of the people or pluralism is seen as a risk, rather than a strength, a gradual erosion of democracy takes place, what has been labelled by Ginsburg and Huq as "democratic erosion": a process of incremental, but ultimately still substantial, decay in constitutional democracy (Ginsburg and Huq 2018).

[1] European Commission COM(2014) 158 final, *A new EU Framework to strengthen the Rule of Law*.

Spain, although still regarded as a full democracy by a variety of international index[2], is not alien to this phenomenon of populist narratives and constitutional erosion. As it will be shown, in the last years Spain has experienced some setbacks as for the quality of our constitutional democracy because of populist approaches. Some erosions have taken place at the national level, but others (in our view, the most relevant ones) have occurred at a subnational or regional level: for example, the Catalan secessionist bid led by the Catalan autonomous government.

The second section of this chapter provides an overview of the Catalan case highlighting the constitutional erosion that occurred in the last decade. The third part analyses how the Spanish central government has also undermined liberal democracy by promoting (although not completing) certain reforms in the judicial system. A short conclusion will wrap up the main ideas of this chapter.

2 The Catalan Crisis

In order to properly explore the populist narrative and constitutional erosion provoked by the Catalan crisis, a short overview of the main events occurred in the last years is offered.

Note that there are some populist elements in the Catalan crisis that have been addressed by some other scholars (Ruiz Casado 2020; Wind 2020; Queralt 2019; Barrio et al. 2018); despite being connected with what is developed here, they won't be covered in this chapter, since it focuses only on constitutional erosions. Such populist elements could read as follows: (i) how in the context of a harsh economic and political crisis (austerity policies and corruption scandals) the pro-independence bid became a scape forward, (ii) how the long-term-used slogan "Spain steals from us" became the battle cry of the pro-independence campaigns with the 2008 economic downturn (the idea that the subsidised Spain lives from the productive Catalonia was a common motto those years), (iii) how the classical and Manichean populist opposition between the people and the elite has been adapted to pit the good and naïve Catalan people against the oppressive and corrupt Spanish state (Barrio et al. 2018)

[2] In the 2020 Democracy Index prepared by The Economist Intelligence Unit, Spain is considered a full democracy, whereas France, Italy or Belgium are seen as flawed democracies. Spain scores 0,73 out of 1 in the World Justice Project Rule of Law index, like France and slightly better than Italy (0,66) or Portugal (0,70).

(which is nonetheless odd, for the Catalan independence is a project designed by Catalan elites and supported by the Catalan middle and upper-middle class, a revolt of the rich, one could argue)[3].

2.1 Overview of the Events with Constitutional Relevance

Since 2012, the government of Catalonia has attempted to organise a referendum or consultation on independence. The slogans used in the campaigns urging to the organisation of the referendum have underlined the idea that this request is a democratic one ("this is about democracy") and that Catalans have the right to organise such a referendum ("the right to decide")[4]. With these approaches, the referendum supporters tried to convey the idea that the expression of the general will was the paramount value that had to be taken into account. One has to note first that although polls suggested that a majority of Catalans were in favour of being asked about independence, surveys, polls and electoral results have consistently showed that Catalonia is split in two halves when it comes to secession, for there is no majority (let alone a clear majority) in favour of independence.[5]

In Spain, the lack of political will, along with rigid constitutional impediments, has prevented holding such a referendum. As for political will, it should be noted that "the very act of staging a constitutional referendum is itself both a declaration that a people exists and a definition of

[3] Real Instituto Elcano, *El conflicto catalán*, 22 October 2017, 20. http://www.realinstitutoelcano.org/wps/wcm/connect/c0f90dae-76d1-4a8e-8f78-0058f048a44b/Catalonia-Dossier-Elcano-October-2017.pdf?MOD=AJPERES&CACHEID=c0f90dae-76d1-4a8e-8f78-0058f048a44b last accessed 30 September 2021.

[4] In 2013, the Catalan Parliament passed the Resolution 5/X, of 23 January, proclaiming that the Catalan people is sovereign and that therefore it has the "right to decide" its own future.

[5] Note, for instance, the December 2017 elections, where the extraordinarily high turnout (79%), (in fact, the elections were considered "plebiscitarian") can give us an accurate picture of the Catalan people. Political parties supporting independence won an absolute majority (70 seats out of 127); however, the pro-independence forces were backed by around 47,60% of the electorate. The difference between the percentage of seats (55,12%) and the percentage of popular vote (47,60%) is an outcome of the Catalan electoral regime, in which rural districts where independentism is stronger are over-represented compared to the metropolitan area of Barcelona. In the 2015 and 2021 elections, results are very similar in terms of percentage of seats and votes, but the turnout in 2021 was much lower (51%), given the fatigue for the conflict.

that people" (Tierney 2009, 374- 375) and that constitutional referendums in general, and independence referendums in particular, can have a "vital nation-building role" (Tierney 2009, 366). It is assumed that accepting the organisation of such a referendum would mean admitting the national and sovereign character of Catalonia. Many feel that this would threaten the national sovereignty of the Spanish people as a whole. This is one of the main reasons that underpins the Spanish main political forces' opposition to the organisation of such a referendum.

As for constitutional impediments, one must bear in mind that the current Spanish constitutional legal order does not admit that the inhabitants of an Autonomous Community decide by themselves the dismemberment of the country. The position of the Spanish Constitutional Court (SCC) (summarised in, among others, Judgments 42/2014 and most notably 259/2015) reads as follows: considering the Catalan people as sovereign (and, therefore, entitled to organise a referendum on secession) is against Articles 1.2 and 2 of the Spanish Constitution. Article 1.2 of the Spanish Constitution establishes that "[n]ational sovereignty belongs to the Spanish people, from whom all State powers emanate". Thus, national sovereignty cannot be divided. Article 2 proclaims that "[t]he Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards". The Court held[6] that an Autonomous Community cannot unilaterally call a referendum of self-determination to decide on its integration in Spain, because sovereignty is only reserved to the Spanish nation. The SCC accepts that the so-called right to decide is a legitimate political aspiration. However, this aspiration, since precluded in the current constitutional framework, should be channelled through the appropriate procedure: constitutional amendment. This position is based on the fact that Spain is a constitutional democracy, where ordinary laws have to be subject to a supreme norm, the Constitution.

Despite the clarity and severity of the Court's position, in September 2017, the pro-independence majority in the Catalan Parliament passed two laws: 19/2017, on a referendum on self-determination, and 20/2017, on the foundation of the Republic. Both laws, ordinary Catalan laws, established that they prevailed over the Spanish Constitution and the Catalan Statute of Autonomy. Needless to say, an ordinary Catalan law cannot amend the Spanish Constitution or the Catalan Statute of

[6] The main reasoning of the Court is to be found in *Fundamentos Jurídicos* 3 and 4 of the Judgment 42/2014, of 25 March.

Autonomy. Besides, the extraordinary parliamentary procedure used to approve those norms reduced the period for discussion and amendment to less than a day for each bill, leaving no time for the opposition to study the norms. The Catalan Legal Advisory Council itself rejected the move, since it was also an attack to the rights of the parliamentary opposition.

Both laws were immediately challenged before the SCC, which suspended the laws and their effects, based on the preceding doctrine of the Court and later on declared both of them, by unanimity, unconstitutional (Judgments 114/2017 and 124/2017). However, the referendum took place on 1 October 2017, although without procedural guarantees. The voting led to harsh confrontation and some violent clashes with police, who were trying to prevent its occurrence, pursuant to Court orders. According to the Catalan government, 43% of the population went to the polls to vote in favour of independence.[7]

Despite a massive and unprecedented demonstration against independence that took place in Barcelona on 8 October, the former Catalan President Carles Puigdemont declared unilaterally the independence of Catalonia on 27 October. In response, the Spanish Senate enacted coercive measures in Catalonia like the imposition of the direct rule by the Spanish government (Article 155 of the Spanish Constitution): the dissolution of the Catalan Parliament and the Catalan Cabinet and the call for early elections on 21 December 2017. Surprisingly and despite initial concerns and hesitation in Madrid, direct rule was tolerated (without protests or uprisings) by Catalan society and civil servants. Probably, since independence has never been embraced by a truly large majority of the Catalan voters, the pro-independence parties lacked the internal support to further continue the game. Meanwhile, Supreme Court judges initiated criminal actions against the main Catalan authorities with the preventive imprisonment of some of them. (Such criminal consequences might also be a reason for the lack of resistance). Others, like former President Puigdemont, left Catalonia to escape from the judicial charges. All of the imprisoned politicians were finally convicted in October 2019[8], but in June 2021, all of them were pardoned and released from prison.

[7] The fact that the referendum was not an official one might explain the low turnout. In an official one, one could have expected to see a much higher turnout, since "the average turnout in the 40 independence referendums held since 1980, has been 86%". Qvortrup, "Independence Referendums. History, legal status and voting behaviour", 136.

[8] Criminal Judgment 459/2019 of the Supreme Court, Criminal Chamber, Section one, Rec 20907/2017, of 14 October 2019.

Now that the main events with constitutional relevance have been overviewed, let us review some of the illiberal traits of the Catalan separatist crisis eroding Spanish constitutional system: (1) the allegedly democratic character of a referendum on secession and (2) the disdain for the law and the judiciary because of the unrestricted approach to the popular will.

2.2 The Allegedly Democratic Character of a Referendum on Secession

Catalan pro-independence leaders have done great efforts to convince the people that organising a referendum on secession is a question of democratic quality. "Voting is normal in a normal country" was some of the most repeated slogans in the years preceding 2017. However, there are a few caveats that must be noted. In a democracy, people vote on a regular basis in competitive and representative elections. In some democracies, there are also referendums. But only in a few of them (e.g. Canada and the UK), it has been allowed to vote on the secession of a part of the country. Many other constitutional democracies have rejected the idea that a subnational entity can organise a referendum on secession (González Campañá 2019).

Catalan pro-independence leaders have assumed that democracy should trump any other legal principle (Vilajosana 2014, 195). They simplified the issue by stating that democracy is mainly about voting, and they misled the people by making them believe that a referendum on secession is "normal" or "ordinary". This misleading approach to a complex and emotional issue is one of the reasons why some scholars early on warned about the populist trait of the Catalan pro-independence movement (Castellà 2014, 235).

But the "democratic" flaws of the referendum do not refer only to the laws that Catalan authorities ignored. One of the grossest manipulations is the one around the allegedly democratic character of the referendum on secession itself. Such a referendum cannot be justified on the basis of democracy, because it is organised and designed by other pre-democratic elements: language, history, culture… The elements according to which Catalans apparently form a distinct nation separated from the rest of Spain. The delimitation of the demos entitled to decide is a pre-democratic choice. Margiotta explains clearly that the triggering motivation behind a referendum on secession is not democracy, but nationalism:

> Territory and voters must, in some way, be determined before deciding anything. In practice, the right to secede is granted on the basis of nationality. (Margiotta 202, 21)

That is why she argues that "it seems impossible to justify secession entirely in terms of democracy, as it is always necessary to refer to the pre-democratic determination of criteria for belonging to the secessionist group" (Margiotta 202, 23). Or as Closa puts it, "[i]n purely democratic terms (i.e. majority of a group), there is not prima facie criterium to assert that the democratic right to secede of a group [Catalans]must prevail over the equally democratic rejection of this right expressed by a majority of the wider demos which comprises the seceding one [Spaniards as a whole]" (Closa 2020, 55). In effect, why is it more "democratic" that only Catalans decide the destiny of Catalonia and Spain instead of all Spaniards? The democratic principle comes into the equation only after the demos entitled to secede has been decided. It is only then that the democratic (procedural) question enters the equation: how the chosen demos is going to decide?

Thus, as seen, the claim about the democratic character of the referendum on secession is, at least, misleading.

2.3 The Disdain for the Law and the Judiciary Because of the Unrestricted Approach to the Popular Will

In constitutional terms, populism refers to the unrestricted popular sovereignty. People can't be wrong and therefore, leaders and parliaments should find out the way to carry out people's aspirations, regardless of the letter of the law. This is exactly what has occurred in Catalonia in the last years, notably in the fall of 2017.[9] There was an emphasis on the Catalan people as the true holders of sovereignty whose will could only be expressed through a plebiscite. In fact, it is common to populists to promove referenda as a more democratic and legitimate instrument of decision-making than the ordinary instrument's representative democracy (Wind 2020, 30).

[9] There was a previous discrediting task promoted by Catalan institutions. For instance, note the Catalan Parliament Resolution 1/XI, of 9 November 2015, where it is established that the Catalan Parliament will no longer be subject to decisions adopted by the "Spanish State", in particular those coming from the Constitutional Court, for, according to the Resolution, "it lacks legitimacy and competence".

The referendum became a moral goal, the only tool to allow for the political expression of the people's will, "to the detriment of political representation and other kind of consociational arrangements" (Barrio et al. 2018, 1001).That is why despite the preparations of the 2017 referendum had been declared null and unconstitutional by the Constitutional Court (Judgment 90/2017, of 5 July, declaring null and unconstitutional the budget allocated to conduct the referendum), pro-independence Catalan leaders insisted on their will to disobey legal requirements (Barrio et al. 2018, 1001). On 7 September 2017, the Constitutional Court suspended the referendum and warned Catalan elected politicians of their duty to comply with the law and the possible criminal responsibilities. But such warnings did not stop Catalan authorities. Oriol Junqueras, former Vice-President of the Catalan government, had insisted several times that "voting is a right that prevails over any law" and that "we [Catalan government] will disobey the Spanish laws, but we will obey the mandate that we have in the Catalan Parliament".[10]

As explained in the introduction, this opposition between legitimacy (that comes from the Catalan people, even if there is no clear majority and society is deeply divided when it comes to secession) and legality implies an illiberal version of democracy. The idea of the government of the people is taken literally and checks and balances on the popular will are rejected (Kriesi 2014, 363).

The disdain for the law is also to be found in the way the illegal referendum was implemented. Here, the standards established by the Venice Commission are noteworthy.[11] As Castellà reminds us, the Venice Commission emphasises, besides legitimacy, "the need to respect the Rule of Law, and in particular to comply with the legal system as a whole, especially with the procedural rules" (Castellà 2020, 158). The 2017 referendum failed to comply with many of the Venice Commission requirements:

[10] "Para blindar la consulta entraríamos en el Govern". *El Mundo*, 14 September 2014, https://www.elmundo.es/cataluna/2014/09/14/54149260268e3e6b608b457a.html last accessed 30 September 2021.

[11] Among the general studies of the Venice Commission, Code of Good Practice on Referendums CDL-AD(2007)008rev and the Revised Guidelines on the holding of referendums CDL-AD(2020)031. A summary of the criteria to be found in Venice Commission, Compilation of Venice Commission Opinions and Reports concerning Referendums CDL(2017)002.

- "referendums cannot be held if the Constitution or a statute in conformity with the Constitution does not provide for them".[12] Both the Spanish Constitution and the Catalan Statute of Autonomy do not provide for a referendum on secession;
- "an impartial body must be in charge of organising the referendum".[13] The electoral commission that the Catalan Parliament had appointed (without any type of qualified majority) to supervise the referendum was dissolved after the Constitutional Courts imposed its members with coercive fines (Decrees 123 and 124/2017, of 19 and 20 September 2017) and was not replaced;
- "Political parties or supporters and opponents of the proposal must be able to observe the work of the impartial body".[14] There was no provision to include opponents to overlook the work of the electoral commission;
- "the absolute minimum period between calling a referendum and polling day should be four weeks. A considerable longer period of preparation is desirable, however".[15] The Law of Referendum (Law 19/2017), an *ad-hoc* law, was passed only three weeks before the date of the referendum.

The Venice Commission had been approached by the Catalan government in their search for international legitimacy. In his letter of 2 June 2017, Mr Buquicchio, President of the Venice Commission, underlined that the Venice Commission, "the official name of which is European Commission for Democracy through the Law, has consistently emphasised the need for any referendum to be carried out in full compliance with the Constitution and the applicable legislation".[16] The Catalan authorities decided to ignore the suggestions of the President of the Venice Commission and the Judgments of the Spanish Constitutional Court. This can only be explained by a populist and radical interpretation of the popular will.

[12] Venice Commission, Revised Guidelines on the holding of referendums CDL-AD(2020)031, 10.

[13] Ibid., 11.

[14] Ibid., 12.

[15] Ibid., 16.

[16] Document available at https://www.venice.coe.int/files/Letter%20to%20the%20President%20of%20the%20Government%20of%20Catalonia.pdf last accessed 30 September 2021.

In sum, in the last years, in Catalonia we have been used to a simplistic and demagogic narrative that tells us that anything can be subject to a vote, even depriving others from their rights. At the end, the secession of Catalonia is about deciding to deprive some of our current fellow citizens, those who live in the rest of Spain, of the possibility of keeping their citizenship rights in Catalonia. Or as Stephane Dion eloquently explains, secession is about breaking the civic solidarity that unites citizens (Dion 2021, 97; Ovejero 2021, 41).

This populist narrative also argues that popular will is enough to trump the law, even if that popular will is not as clear as it is portrayed by the Catalan authorities. This is a risky enterprise: denying the relevance of the law and only raising it when it suits the political leadership. Such an approach is putting a great strain on the constitutional and liberal character of our democracy because it is not only undermining the Rule of Law, but the inherent pluralism to any constitutional democracy. Pluralism rejects the homogeneity of society and sees it, instead, as a heterogeneous collection of groups and individuals with often fundamentally different views and wishes (Mudde 2004, 544). On the contrary, Catalan authorities have attempted to portray the Catalan people as a homogenous community whose allegedly majoritarian will has to prevail over any law.

2.4 Spanish Reaction to the Catalan Pro-independence Crisis

The above section has provided an overview of the constitutional erosion provoked by Catalan leaders. We should also pay attention to the Spanish reaction thereof. Was there any type of populist behaviour that led to constitutional abuse? The section will not be covering all angles of Spanish response to the Catalan crisis (not even those with a constitutional dimension, like triggering Article 155 of the Spanish Constitution), but those elements who have arisen concerns related to populism and constitutional erosion. Thus, here one has to reflect upon two different scenarios: firstly, to what extent the denial to negotiate an independence referendum can be considered an erosion of the constitutional system? Secondly, what about the judicial response to the imprisonment of Catalan leaders?

From 2012 to 2017, Spain's government rejected all calls by Catalan leaders to negotiate an independence referendum. One could argue that Spain's government did not facilitate a political solution and engaged in obstruction through silence and persistent refusal. The government did not attempt to offer any alternative to calm down the situation, but used

"the Constitutional Court as a shield against the excesses of the pro-independence authorities" (Queralt 2019, 265). Spanish authorities' reaction can be considered a political error, for the response to this populist crisis should also come from politics, not only from Courts. But this poor handling of the revolt falls short of being a violation of human rights or a threat to democracy or Rule of Law (Campins 2015, 480; Qvortrup 2020, 138).[17]

As for the judicial response to the Catalan crisis, Spain's government has been criticised by the Parliamentary Assembly of the Council of Europe in a Resolution adopted in June 2021.[18] Such Resolution urged Spanish authorities, among others, to consider pardoning the Catalan politicians convicted and to enter into a dialogue with all political forces in Catalonia. The debate about pardoning the Catalan convicted politicians who had been found guilty in 2019 by the Supreme Court for sedition and misuse of public funds had been ongoing in Spain for months. On 22 June 2021, the Spanish government formally pardoned them, against the opinion of the Supreme Court and the Prosecutor and without requesting them to disown their political opinions and despite they did not show any type of regret. Besides, a dialogue table between the Spanish and Catalan governments to discuss the "political conflict" was already prompted in February 2020, and it has been reactivated in 2021 after the pardoning of the convicted politicians.

Having said that, it is fair to address the flaws of the Resolution as well, since it is based on a false presumption, namely, that "Catalan politicians were prosecuted and eventually convicted to long prison terms for sedition and other crimes, *inter alia* for statements made in the exercise of their political mandates". But in fact, none of the politicians were convicted for the expression of their opinions, as the Supreme Court stated in Judgment 459/2019:

> The object of the criminal charge – as we have declared proven – is the shattering of the constitutional agreement, and their doing so through the approval of laws in open and recalcitrant disregard of the orders of the Constitutional Court. What is sanctioned, in short, is not voicing an opinion

[17] In fact, the European Court of Human Rights dismissed in May 2021 the application of two Catalans injured during the 1 October referendum on the ground of lack of human rights violations.

[18] Parliamentary Assembly of the Council of Europe, Resolution 2381 (2021), *Should politicians be prosecuted for statements made in the exercise of their mandate?*.

> or advocating a secessionist option, but defining a parallel, constituent legality and mobilising a mass of citizens to oppose the implementation of the legitimate decisions of the judicial authority, holding a referendum declared illegal by the Constitutional Court and the High Court of Justice of Catalonia, whose result was the necessary condition for the entry into force of the law of transition, which implied a definitive break with the structure of the State.[19]

In this paragraph, the Supreme Court was, *inter alia*, reminding the position of the SCC: the pro-independence demand is a legitimate political aspiration, but since it is precluded in the current constitutional framework, it requires first a constitutional amendment. Spanish constitutional legal order, unlike Germany, does not contain eternity clauses and, therefore, such amendment would be legal, if enough majorities in the Spanish Parliament are secured.

This is why there are no strong reasons to argue that there has been a sustained constitutional erosion prompted by Spain's response to the Catalan crisis, notwithstanding the political errors that might have been committed by Spanish governments.

3 Spain's Government (Some of Them Intended) Reforms of the Judiciary

As stated in the introduction, although the main populist erosion to the Rule of Law in Spain is taken place at the regional level, at the national level there are as well reasons for concern.

In a constitutional democracy, to protect fundamental rights and minorities, the expression of the general will has to be limited by the independence of counter-majoritarian key institutions, notably the judiciary. In effect, one of the key elements of a sound liberal democracy is the independence of the judiciary. Without independent judicial constraints on political majorities, a political system cannot properly be called a liberal democracy. If Courts are not independent and impartial, how can we be sure that they will enforce the Rule of Law for all rather than pursue a particular governing majority's interests? (Wind 2020, 87)

[19] The long judgement (almost 500 pages) along with short summaries in English can be found at: https://www.poderjudicial.es/cgpj/es/Poder-Judicial/Noticias-Judiciales/El-Tribunal-Supremo-condena-a-nueve-de-los-procesados-en-la-causa-especial-20907-2017-por-delito-de-sedicion.

In the last years, within the EU, we have witnessed across several Member States, whose governments have been described as populist (namely Poland and Hungary), attempts to interfere with the judiciary by removing judges, ousting of jurisdiction, and court packings. Some of these attempts have been successful, others have been stopped by the European Court of Justice case law and by political pressure exercised by the European Commission (Magaldi 2021; Becerril 2020; Kochenov 2019; Pech and Scheppele 2017). These judiciary reforms can erode greatly any constitutional democracy. The concerns are high, particularly also because of the difficulties to counteract these tendencies. Unfortunately, Spain is not alien to this peril, although, needless to say, the Rule of Law backsliding cannot be compared to Poland or Hungary.

3.1 The Long-standing Crisis of the General Council for the Judiciary

In the 2020 Rule of Law Report country chapter on the situation in Spain,[20] the European Commission warns, among other things, about the fact that the General Council for the Judiciary (GCJ) has been exercising its functions *ad interim* since December 2018. But it is in the 2021 edition that the Report is deeply worried about the path taken by judiciary reforms in Spain, particularly the (attempted) reforms surrounding the GCJ.[21]

In Spain, the GCJ is the body of judicial self-governance and ensures the independence of courts and judges, yet it does not form part of the judiciary.[22] It was established to ensure the independence of the judiciary, in particular the independence regarding the executive. It exercises disciplinary action and is competent to appoint, transfer and promote judges. The GCJ consists of the President of the Supreme Court and 20 individuals, 12 judges and 8 lawyers or other jurists. The GCJ members are appointed for a non-renewable period of five years. While the Spanish Constitution requires the 8 jurists to be appointed by a three-fifth majority in each Chamber of the Spanish Parliament, it does not specify how the 12

[20] European Commission SWD(2020) 308 final, 2020 Rule of Law Report, Country Chapter on the rule of law situation in Spain.

[21] European Commission SWD(2021) 710 final, 2021 Rule of Law Report, Country Chapter on the rule of law situation in Spain.

[22] Article 117 of the Spanish Constitution

members representing judges are to be appointed.[23] The appointment process has undergone significant changes over time and represents one of the most sensitive and contested issues. Initially, the 12 judges were elected by judges. This model was changed in 1985 by a reform prompted by the then-Socialist government. In effect, the regulation of the Judicial Council was reorganised and established by Organic Law 6/1985, of 1 July, on the Judicial Power and since then, the Parliament is also responsible for the appointment of the 12 judges with a three-fifth majority.

The 1985 reform was challenged before the Constitutional Court, that in its Judgment 108/1986, of 29 July, upheld the constitutionality of the law, but voiced some concerns regarding the shift of power to the legislature and the risk of partisan politics in the appointment procedure (Torres 2018, 1773). In effect, the Court stated (i) that the preferred model for the selection of members is direct election by judges and magistrates, (ii) that involving the Parliament entails the risk of allocation of seats depending on the parliamentary strength of political parties, and, therefore a risk of politicisation of the judiciary (iii) and finally that the appointment of members according to partisan criteria "was not admissible". Surprisingly, and despite the Court clearly understood the risks of the reform, it concluded that since there was the possibility of an interpretation in accordance with the spirit of the Constitution, there were no grounds to declare the law unconstitutional (Porras 1987, 234). The Court hoped for the best, expecting that due to its warnings the political formations would not allocate the GCJ seats according to their parliamentary representation.[24]

In practice, the three-fifths majority requirement, rather than promoting broad political consensus, has led the Socialist Party and the Popular Party (the two main parties in Spain) to appoint the 20 candidates between them, with the inclusion of members recommended by smaller political groups, depending on whether these groups support the party in power (either the Socialist or the Popular). The risks foreseen by the Constitutional Court have become unfortunate realities. It should not surprise that as a result of this practice, the GCJ is perceived as a highly politicised body that undermines not only its own legitimacy, but also the legitimacy of the

[23] Article 122 of the Spanish Constitution.

[24] Following subsequent reforms (namely, Organic Law 4/2013, of 24 June, on the amendment of the General Council of the Judiciary), the 12 judges appointment is made upon receiving from the Council a list of candidates who have received the support of judges' associations.

whole Spanish judiciary. Carmona refers to the situation as a "partisan colonisation" (Carmona 2020). This poses a serious problem, since Courts need to be not only independent but also perceived as independent (Torres 2018, 1779). In effect, public perception that justice is impartial is the foundation for the confidence which citizens must have in their judicial system.

As it has been shown, the Spanish model of appointing GCJ members has been, at least since 1985, contrary to the spirit of the Spanish Constitution. It is also against European standards. These standards are to be found in the 2010 Council of Europe Recommendation on judges: independence, efficiency and responsibilities. When it comes to Judiciary Councils, it provided that "at least half of members of such councils must be judges chosen by other judges from all levels of the judiciary" (para. 27).[25] The 2010 Venice Commission Report in the Independence of the Judicial System argued that "the council should have a pluralistic composition with a substantial part, if not the majority, of members being judges. Except for ex-officio members these judges should be elected or appointed by their peers".[26] Bottom line being that at least a significant number of the members of the Judiciary Councils has to be appointed by judges themselves, not by politicians.

In the past, with the two mainstream parties reaching agreements quickly to renew the body, breaching European standards seemed no urgent problem. However, now, in times of polarisation and populist policies, when the Spanish Parliament is more fragmented than ever, reaching this type of agreements entails more costs for both parties. And deadlocks can occur. Secondly, with the attention that the Polish judiciary reforms have attracted, any type of government intervention in the judiciary raises suspicions and concerns in Europe, so the Spanish case cannot be overlooked.

3.2 The Current Crisis of the General Council of the Judiciary

Since December 2018, the GCJ has been exercising its functions *ad interim*, waiting for a renewal. Negotiations between the Socialist and the

[25] Council of Europe Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities.

[26] Venice Commission, Report on the independence of the Judicial System. Part I: the independence of judges CDL-AD(2010)004.

Popular Party are in a stalemate. They have been unable to reach any agreement. The acting president of the GCJ has repeatedly brought to the attention of Parliament the need to proceed with the nomination of new members and has referred to the current situation as an "institutional anomaly".[27] It is true that the Venice Commission has stressed the importance of providing for qualified majorities to ensure that a broad agreement is found, but it has also warned against the risk of stalemates. Given that qualified majorities strengthen the position of the parliamentary opposition, the Venice Commission has also underlined the greater responsibility minorities hold not to misuse this power and the need "to conduct their opposition in a way loyal to the system and the idea of legitimate and efficient democratic majority rule".[28] The Spanish opposition, the Popular Party, with its insistence in blocking the renewal is showing a poor spirit of cooperation.

In 2020, the two parliament groups that sustain the government coalition in Spain (the Socialist Party, PSOE and Unidas Podemos) tabled a bill[29] aimed at changing the election system of the judges of the GCJ to an absolute majority of a second vote. Thus, the 12 judges of the GCJ would continue to be elected by Parliament, but the necessary majority of three-fifth would only be required in a first vote. If such a majority cannot be reached, then the election would be made in a second vote with absolute majority. This would mean that the parliamentary majority that sustains the government will be enough to decide the composition of the GCJ putting the independence of the body at high risk. In short, the proposal was aimed to replace the three-fifth majority requirement by the less demanding absolute majority, so that there is a correlation between the composition of the GCJ and the parliamentary majority. Following criticism because of the attack to the separation of powers and the populist motivation against counter-majoritarian institutions, in May 2021, the parliamentary groups sponsoring the draft law withdrew it. In this regard, it is to be noted the Letter of the President of GRECO (Group of States against Corruption of the Council of Europe) to the Spanish Head of

[27] Press Release of the GCJ of 23 December 2019. Again, on 5 September 2021, the President of the GCJ, Carlos Lesmes, during the opening speech of the judicial course, appealed to constitutional patriotism and generosity and urged to renew the GCJF so that it can disappear from the stage of partisan struggle.

[28] Venice Commission, Opinion on the draft law on amendments to the law on the Judicial Council and judges of Montenegro CDL-AD(2018)015, para 38.

[29] Proposal of an Organic Law to modify Organic Law 6/1985, of 23 October 2020.

Delegation from 14 October 2020,[30] where Mr Marin Mrčela regretted that "[t]his legislative initiative departs from the Council of Europe standards concerning the composition of judicial councils and election of their members and may result in a violation of the Council of Europe anti-corruption standards". Also, the European Commission reacted saying that the reform would endanger judicial independence and exacerbate the impression that the Spanish judiciary may be vulnerable to politicisation.

The withdrawal of the draft law was welcomed, but the problem is that, in fact, the current situation is already problematic. For instance, in 2021, the European Commission ranked Spain number 22 (out of 27) in the EU Justice Scoreboard[31] in terms of independence perceived by the general population, attributing this lack of autonomy mainly to political interference. The reform would have just worsened it and would have moved Spain closer to Poland. Note, for instance, the Polish GCJ equivalent body, the Krajowa Rada Sądownictwa (KRS), already famous among EU lawyers, because of the ECJ case law dealing with legislative reforms affecting it. In 2016, a Polish reform changed the way its members were appointed. While in the past, 15 of its members were elected by Judges, since then those members were going to be elected by the Parliament, with the result that 23 out of 25 members were going to be elected by either the Parliament or the Government (Magaldi 2021). The EU questioned the level of influence of the legislative or executive authorities given that a majority of members are appointed directly by these authorities.[32]

Although this intended reform was finally not passed, the government did pass another law affecting the GCJ. On 25 March 2021, the Parliament passed a law establishing an *ad interim* regime for the GCJ that drastically reduces its functions when acting with an expired term of office.[33] Until then, the law foresaw that the GCJ remains fully functional until a new

[30] Document available at https://rm.coe.int/letter-to-spain-14-10-2020/1680a010c8, last accessed 30 September 2021.

[31] European Commission COM(2021) 389, The 2021 EU Justice Scoreboard. A similar problem had already been detected in the EU Justice Scoreboard of recent years, with Spain being considered one of the EU countries with the worst perception about judicial independence among its citizens. Urías, *Spain has a Problem with its Judiciary*.

[32] Commission Recommendation (EU) 2017/1520 of 26 July 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374 and (EU) 2017/146.

[33] Organic Law 4/2021, of 29 March, by virtue of which the Organic Law 6/1985, of 1 July, on the Judiciary, is modified in order to establish the legal regime applicable to the ad interim General Council of the Judiciary.

one is in place. This reform, already in force, prevents the GCJ *ad interim* from carrying out its most important function, which is to appoint senior judicial officials. Thus, the law prevents the acting Council to appoint the president of the Supreme Court, presidents of Provincial Courts and High Courts of Justice, president of the National High Court and presidents of Chambers and Supreme Court judges. It also removes other powers of the GCJ, such as the legitimacy to promote conflicts of competence between constitutional bodies. It reduces the powers of the GCJ to merely bureaucratic aspects. Such disempowerment will persist until the new GCJ is elected. The reform might cause paralysis and malfunction in Courts. The GCJ had requested the Congress to consult, during the legislative procedure, relevant stakeholders like the Venice Commission, but the Parliamentary majority supporting the government bill ignored the request and approved the reform, despite the opposition of the majority of judges' associations.

In short, the behaviour of both the government (trying to capture the GCJ with its parliamentary majority and reducing the powers of the current *ad interim* GCJ) and the opposition (rejecting any renewal of the body) erodes the legitimacy of one of the key institutions to sustain the Rule of Law in Spain.

4 Conclusions

After the atrocities committed in WWII, there was a widespread recognition of the need to limit the power of the popular will with an emphasis on promoting rigid constitutionalism and human rights. Constitutional democracy replaced majoritarian democracies (Wind 2020, 80). But many of the tenets we took for granted are questioned these days. The recent wave of populism has been accompanied by a notion that democracy is most genuine when the will of the people is unlimited. It is argued that institutions like Courts should not interfere with the majoritarian view, since Courts, because they do not reflect (automatically, at least) the will of the people, are elitist (Wind 2020, 54). Such populist approach is eroding the legitimacy of one of the central pillars of the post-WWII legal order: counter-majoritarian institutions, particularly Courts (Wind 2020, 55).

It has been shown that, in the last years, Spain has experienced some setbacks as for the legitimacy of the Courts and the proper functioning of its judiciary. First of all, the disdain shown by Catalan authorities towards

the decisions of the Constitutional Court showing a false opposition between legitimacy (i.e. will of the people) and legality (Court's judgements) is a major illiberal (or populist) trait. But one should not forget either the disloyal behaviour of both the national government and the opposition when it comes to the renewal of the GCJ or the reduction of its functions. This also undermines the quality of Spanish constitutional democracy.

Bibliography

Barrio, Astrid; Barberà, Oscar and Rodríguez Teruel, J. "'Spain steals from us!' The 'populist drift' of Catalan regionalism". *Comparative European Politics* 16, (2018): 993-1011.

Becerril, Belén. "Las instituciones europeas ante la crisis del Estado de Derecho en Hungría y Polonia". *Historia y Política* 44, (2020): 113-144.

Campins, Mar. "The European Union and the Secession of a Territory from a EU Member State". *Diritto Pubblico Comparato ed Europeo* XVII, no. 2 (2015): 479-502.

Carmona, Ana. *Renovación de los órganos constitucionales, ¿Misión Imposible?*. Agenda Pública, 21 September 2020. https://agendapublica.es/renovacion-de-los-organos-constitucionales-mision-imposible/.

Castellà, Josep M. "The Venice Commission and Referendums on Secession". In *Venice Commission Thirty-years Quest for Democracy through Law 1990-2020*, edited by Simona Granata-Menghini and Ziya Caga Tanyar, 156-167. Lund: Juristförlaget i Lund, 2020.

Castellà, Josep M. "La secesión catalana, entre la política y el derecho". *Anuario Facultad de Derecho Universidad de Alcalá* VII (2014): 227-240.

Closa, Carlos. "A critique of the theory of democratic secession." In *Between Democracy and Law*, edited by Carlos Closa, Costanza Margiotta and Giuseppe Martinico, 49-61. London: Routledge, 2020.

Closa, Carlos. "Secession from a Member State and EU Membership". *European Constitutional Law Review* 12 (2016): 240-264.

Dion, Stéphane. "Democracy against unilateral secession." In *Across Boundaries: Essays in honour of Robert A. Young*, edited by André Blais, Cristine de Clercy, Anna Lennox Esselment and Ronald Wintrobe, 83-112. Montreal: Mc-Gill-Queen's University Press, 2021.

Ginsburg, Tom and Huq, Aziz Z. *How to save a constitutional democracy*. Chicago: The University of Chicago Press, 2018.

González Campañá, Núria. "Secesión y constitucionalismo comparado". *Revista de Derecho Político* 1, no. 106 (2019): 105-135.

Kochenov, Dimitri. "Elephants in the Room: The European Commission's 2019 Communication on the Rule of Law". *Hague Journal on the Rule of Law* 11 (2019): 423-438.

Kriesi, Hanspeter. "The populist challenge". West European Politics 37, no. 2 (2014): 361-378.

Magaldi, Nuria. "El TJUE reafirma su competencia sobre el control de la organización judicial de los Estados Miembros". *Revista Jurídica de Catalunya* 3 (2021a): 813-820.

Magaldi, Nuria. *La politización del CGPJ y el caso de Polonia: aviso a navegantes.* Agenda Pública, 5 October 2021b. https://agendapublica.es/la-politizacion-del-cgpj-y-el-caso-de-polonia-aviso-a-navegantes/.

Margiotta, Costanza. "An update in secession as the "ultimate right": For a liminal legality". In *Between democracy and Law. The Amorality of Secession,* edited by Carlos Closa, Costanza Margiotta and Giuseppe Martinico, 9-29. London: Routledge, 2020.

Mudde, Cas. "The Populist Zeitgeist". *Government and Opposition* 39, no. 3 (2004): 541-563.

Ovejero, Felix. *Secesionismo y democracia*. Barcelona: Página Indómita, 2021.

Pech, Laurent and Scheppele, Kim L. "Illiberalism within: Rule of Law backsliding within the EU". *Cambridge Yearbook of European Legal Studies* 19 (2017): 3-47.

Porras, Antonio J. "El Consejo General del Poder Judicial según la STC 108/1986, de 29 de julio, sobre la Ley Orgánica del Poder Judicial". *Revista Española de Derecho Constitucional* 7, no. 19 (1987): 225-244.

Queralt, Argelia. "The Populist Drift of the Catalan Pro-Independence Movement". In *Integration and Desintegration in Europe*, edited by Jörn Axel Kämmerer, Markus Kotzur and Jacques Ziller, 253-280. Baden-Baden: Nomos, 2019.

Qvortrup, Matt. "Independence Referendums. History, legal status and voting behaviour". In *Between democracy and Law. The Amorality of Secession,* edited by Carlos Closa, Costanza Margiotta and Giuseppe Martinico, 133-153. London: Routledge, 2020.

Ruiz Casado, Juan Alberto. "Articulations of populism and nationalism: the case of the Catalan independence movement". *European Politics and Society* 21, no. 5 (2020): 554-569.

Tierney, Stephen. "Constitutional Referendums: A theoretical inquiry". *The Modern Law Review* 72, no. 3 (2009): 360-383.

Torres, Aida. "Judicial Self-Government and Judicial Independence: the Political Capture of the General Council of the Judiciary in Spain". *German Law Journal* 19, no. 7 (2018): 1769-1800.

Urías, Joaquín. *Spain has a Problem with its Judiciary.* Verfassungsblog, 15 January 2020. https://verfassungsblog.de/spain-has-a-problem-with-its-judiciary/.

Vilajosana, Josep M. "Principio democrático y justificación constitucional del derecho a decidir". *Revista d'Estudis Autonòmics i Federals* 19 (2014): 178-210.
Wind, Marlene. *The tribalization of Europe*. Cambridge: Polity Press, 2020.
Zakaria, Fareed. "The Rise of Illiberal Democracy". *Foreign Affairs* 76, no. 6 (1997): 22-43.

Author Queries

Chapter No.: 8 0005296824

Queries	Details Required	Author's Response
AU1	In note 5, please check if comma in the percentage value can be changed to period. For example, 46,60% should be 46.60%.	
AU2	In the sentence "In fact, it is common to populists…" "ordinary instruments representative democracy" has been changed to "ordinary instrument's representative democracy". Please check if that is okay.	
AU3	References "Magaldi (2021), Magaldi (2021), Margiotta (2020), Urías (2020)" were not cited anywhere in the text. Please provide in text citation or delete the reference from the reference list.	