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Challenges to Constitutional Adjudication in Spain: the Autonomous State and the Financial Crisis*

SOMMARIO: 1. Areas of constitutional tension. – 2. The Spanish Constitutional Court. – 3. Territorial conflicts. – 4. The financial crisis. – 5. Conclusions.

1. Areas of constitutional tension.

The Spanish Constitution has been reformed only on two occasions up to the present day. The first reform took place in 1992 to adapt the constitutional text to the Treaty on the European Union and was limited to incorporating the addition of "and passive" to the right to suffrage that article 13.2 recognises for foreigners in municipal elections[1]. The second revision had a greater reach and occurred in 2011, incorporating the principle of budgetary balance into Article 135 of the Constitution[2], being a precursor to others that would have to follow other European countries in application of the subsequent Treaty on Stability, Coordination and Governance in the Economic and Monetary Union[3], to "calm" the markets in the context of the financial crisis[4].

This absence of reforms in almost 40 years has been possible thanks to the great flexibility that diverse mechanisms grant to the Constitution for later development[5], which

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[1] The reform of article 13.2 of the Spanish Constitution came into force on 28 August 1992.

[2] The reform of article 135 of the Spanish Constitution came into force on 27 September 2011.

[3] http://www.consilium.europa.eu/en/european-council/pdf/Treaty-on-Stability-Coordination-and-Governance-TSCG/

[4] In the case of Spain the reform is related to the letter from the President of the European Central Bank, Trichet, to President Zapatero, dated 5 August 2011, which would not be published until the end of 2013, in a book of memoires by the then ex-President of the Government. Paradoxically, the letter did not expressly demand a constitutional reform, unlike in the case of Italy. This letter can be found at: http://ep00.epimg.net/descargables/2013/11/27/2b10649fe77a0775a23fb7eb465ab974.pdf.

[5] Cfr., my work "Potere costituente e limiti alla revisione costituzionale visti dalla Spagna" lecture given at the Congress on Constituent power and limits to the constitutional review, organized by the Master on parliamentary institutions "Mario Galizia" (Political Science Department, University of Rome, "La Sapienza") and the Foundation "Paolo Galizia – Storia e Libertà", Rome, 2015, in Press.

have made possible, amongst other things, the configuration of a specific model of territorial pluralism and the opening up to the process of European integration. The territorial model depends on a large extent on the Statutes of Autonomy, rules subjected to the Constitution, which have given rise to what is known as the "Autonomous State". It involves a type of State that is materially federal, to which it refers to the extent of the competencies held by the territories, but lacks some of the institutions of the Federal State, which has led to problems in its practical functioning and also generated noticeable tensions in constitutional jurisprudence. These tensions have increased in the present day, as a result of the recent claim for sovereignty in Catalonia.

Spanish constitutional history has been conflictive and problematic since the beginning of the 19th century. Periods of democratic stability have been very brief and it can be said that, beyond the experience of the Second Republic, which ended tragically with the military uprising and the civil war, Spain has only enjoyed democratic normality in the years following the political transition, with the elections of 15 June 1977, which have given rise to a period of almost forty years of pacific coexistence in Spanish society. However, the Franco dictatorship also lasted some forty years and its effects have been noticed in the problems it created and enhanced, and which have been present for a long time.

Conditioned by the repression of the Franco regime, the question of the incorporation of the Basque Country into Spain must be considered, which has presented a number of problematic profiles of adaptability from the moment of the drawing up and passing of the Constitution. For many years the Basque Nationalist Party has been the main actor in negotiations with the State, as it has been the party that has controlled the autonomous government for the longest time. Attention must also be drawn to a number of tensions arising as a consequence of a temporary sovereignist drift that gave rise to the failed "Ibarretxe Plan", and which has been to some extent reflected in constitutional jurisprudence.

Although it cannot be said that Catalan independence movement has developed as a result of the repression of Franco regime, it is nevertheless possible to perceive a double incidence in its evolution: on the one hand, the traces left by the repression of the dictatorship in relation to the Catalan identity and language. On the other hand, the persistence of a centralist political culture inherited from Francoism, which doesn't only affect the current conservative government (PP) but also some sectors of the main opposition party (PSOE). This centralist culture has also had an impact on constitutional jurisprudence in recent times.

The persistence of cultural patterns inherited from Francoism in our political class is perceptible in conservative sectors. Perhaps this explains the regrouping of all the right-wing sectors, which is a particular characteristic of our political system, as there is no relevant extreme right party. All parliamentary representation of the right-wing sectors (except that referred to nationalist parties in some Autonomous Regions) has been

concentrated until recently in the Partido Popular (People's Party). However, beyond the survival that Francoism could have in conservative sectors, there also exists a reflection of guidelines and values in Spanish society that are not very democratic. This survival manifests itself in many areas, from the scarce capacity for dialog and consensus from the political agents, to the widespread centralist mentality and, of course, in that referring to the level that political corruption has reached in our country. A political culture that is not yet completely democratic would inevitably have some kind of influence on institutions such as the Constitutional Court.

Beyond the "internal" questions of a national State, the context of globalisation and supranational integration has also influence the work of constitutional jurisdiction in others spheres. On the one hand, that of European integration, which has required an adjustment in the relationships between legal orders not always well resolved by the Constitutional Court although respectful, in general terms, of the principle of primacy and the preferential application of European law[6]. The preventative control mechanism of the International Treaties has been activated as much for what is referred to as the Treaty on the European Union as for the Constitutional Treaty project, giving rise to a relevant doctrine in matters of relations between European and internal law. Furthermore, the area where was most needed the corrective intervention of the Constitutional Court, the measures related to the financial crisis, has been where it was more absent, with a completely permissive attitude that has led to validate uncritically those measures.

2. The Spanish Constitutional Court.

In the Spanish constitutional system, the Constitutional Court has a fundamental role. Our country has a model of concentrated jurisdiction, with a Court that has the monopoly of the control of the constitutionality of the laws (with the exception of the *ultra vires* control of legislative delegation, which is explained by historical reasons)[7] and that also carries out an important function of the protection of Fundamental Rights, via "recurso de amparo" (appeal for constitutional protection filed by citizens). The Constitutional Court is also responsible for the solution of the conflicts of powers that could arise between the State and the Autonomous Communities or between the Autonomous Communities themselves and the conflicts between the constitutional bodies

[6] Cfr., my work "Primato del diritto europeo e identità costituzionale nell'esperienza spagnola", lecture given at the Congress on European law primacy and defense of constitutional principles, organized by the Jurisprudence Department, University of Ferrara, 2016, in Press.

[7] The doctrine in Spain already understood, from before the passing of the Constitution, that this control was exercised over a power to make regulations and not a legislative power. The Constitutional Court itself considers that the raising of the question of unconstitutionality on the part of ordinary courts is unnecessary where it involves controlling "the excesses of legislative delegation", this being an assumption in which the capacity of control "not only corresponds to the Constitutional Court, but ordinary jurisdiction as well". Constitutional Court Judgment (hereafter STC) 47/1984, of 4 April, Legal Ground (hereafter FJ) 3.

of the State. Likewise, control of the constitutionality of International Treaties also falls to the Constitutional Court, which can also be activated as a preventive control.

Control of the constitutionality of laws can come about through two channels. On the one hand, there can be direct control (action of unconstitutionality) at the instance of the President of the Government, the Ombudsman, fifty Deputies or fifty Senators. Likewise, referring to the Autonomous Communities, the legitimacy in putting forward an appeal of unconstitutionality against State laws, provisions or enactments having the force of law that may affect their own area of autonomy, falls on the executive collegiate bodies and Autonomous Parliaments. The jurisprudence of the Constitutional Court reveals a flexible interpretation of the requirement that these laws "may affect their own area of autonomy" which, furthermore, is a condition imposed in the Organic Law of the Constitutional Court but does not appear in the Constitution itself.

The other channel provided for the control of the constitutionality of laws is the question of unconstitutionality. To this regard, where a judge or a court, *motu proprio* or at the request of a party, considers that an enactment having the force of law which is applicable to a case and on which the validity of the ruling depends may be contrary to the Constitution, the judge or court shall raise the question before the Constitutional Court. The legal process shall be suspended until the Constitutional Court pronounces on the question of unconstitutionality. I must be taken into account that, whilst the action of unconstitutionality is subject to a limited period, the question of unconstitutionality can be filed at any time, as long as the required procedural conditions are given. For this reason, the question of unconstitutionality allows the control of the constitutionality of laws to be left open where the period for the action of unconstitutionality has ended.

The Spanish Constitutional Court has carried out a very important function of interpretation and development of a constitutional system of Fundamental Rights, the guarantee of constitutional provisions and principles and the construction of the Autonomous State. In that which refers to the spheres of constitutional tension we can say that it has been a body of great prestige at the time of its founding and that it carried out its functions showing a considerable independence from the political parties and, especially, the parliamentary majority. This prestige has been weakened over time, unfortunately, as political parties have occupied positions in the institutions of our constitutional system. Its decisions have been increasingly predictable as well as the votes of the judges, which certainly do not contribute to promote their image of independence.

3. Territorial conflicts.

Within the tensions that the Constitutional Court has been suffered, especially noteworthy is that which has occurred within the sphere of the autonomous regions in recent years with specific proposals for reforming the Statutes of Autonomy, in particular in the case of the Basque Country and Catalonia, as well as the drift towards pro-

sovereignty that has taken place in Catalonia subsequent to the ruling on its Statute of Autonomy by the Constitutional Court.

To that referring to the Basque Country, it involved a failed reform, formulated as a "Proposal for reform of the political statute of the autonomous region of the Basque Country", which would be roundly rejected by the Chamber of Deputies on 1 February 2005 following a long political and doctrinal controversy in which the complete unsuitability of the proposal to the Constitution in many of its aspects was revealed. Both because of its philosophy and the reach of many of its provisions, the "Ibarretxe Plan" (named after the President of the Basque Government who launched it) was unacceptable and would not have been approved under its terms by Parliament without producing a large rupture in the constitutional system. Furthermore, political negotiation was ruled out from the beginning, given the evident difficulty in finding formulas for consensus that could eliminate the serious problems of constitutionality presented by the Plan.

The later attempt of a popular consultation can be considered as an epilogue to this failed Plan, via Basque Parliament Law 9/2008, of 27 June, declared unconstitutional and void by STC 103/2008, of 11 September. This law authorised the President of the Basque Government (the *Lehendakari*) to put two questions to a non-binding consultation of the citizens of the Basque Country, amongst which were the beginning of a process of negotiation to reach "a Democratic Agreement on the exercise of the *right to decide* of the Basque people", an agreement that would have to be put to referendum before the end of 2010. The Constitutional Court considered that the holding of a referendum was a competence of the State and, as such, the Law violated the stipulations of Article 149.1.32 of the Constitution. As far as the "right to decide" of the Basque people is concerned, the Court declared that the identification of a subject equipped with a right of such a nature is impossible without a prior reform of the Constitution[8]. As we will see, in the subsequent jurisprudence relating to Catalonia this argument will be reiterated but with a more elaborated doctrine that contains some differentiating aspects of interest.

The failed Ibarretxe Plan will be followed by other statutory reforms, already within the constitutional framework, headed by the Statute of Catalonia, the object of a great political controversy and of a claim before the Constitutional Court, lodged by the Partido Popular. Of the eight Statutes reformed in the last period of statutory reform concluded to date (which affect the majority of the population and territory of Spain, although not the majority of the 17 Autonomous Regions), five were the object of challenge before the Constitutional Court, a challenge that was accepted in three cases, affecting one complete article of the Statute of Andalusia and another of the Statute of Catalonia, a paragraph of an article of the Statute of Castille and Leon and another three specific paragraphs of articles or specific sections of the Statute of Catalonia. Taking into account the hundreds

[8] "The procedure that is sought to open, within its own reach, cannot but affect all Spanish citizens, as it would addressed the redefinition of the order constituted by the sovereign will of the Nation, whose course, constitutionally speaking, is none other than that of the formal revision of the Constitution" (FJ 5).

of articles that have not been affected by any declaration of unconstitutionality, it could be said that the Constitutional Court has validated the fundamental lines of the statutory reforms. Notwithstanding, this cannot prevent us from recognising that some of the declarations of unconstitutionality have affected aspects that had a great symbolic and political value, which has generated an extremely negative feeling regarding the pronouncements of the Court[9].

In effect, 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. The result of the challenge to the Statute of Catalonia has had a very damaging effect on the Autonomous State. In general, we can say that the Autonomous State as we currently know it would not have been possible without the impressive jurisprudential efforts of the Constitutional Court. However, 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.

It could even be said that the most important tension towards the Constitutional Court has occurred during the challenge against the Statute of Catalonia, generating important changes in aspects fundamental to the conception of the Autonomous State (for example, in relation to the position of the Statutes of Autonomy in the Spanish constitutional system). From a political point of view, the most obvious consequence of the pronouncement of the Constitutional Court on the Statute of Catalonia has been a pro-independence drift, which has found a motive in the judgment for promoting disaffection for the 1978 Constitution and the State itself.

This evolution has been reinforced by a feeling of discontent that is also related to the financial crisis and with the funding of this Autonomous Region. The total absence of

[9] Furthermore, it must also be taken into account that the doctrine of the Court has been particularly confusing in some areas, and is has focused on a potentially regressive sense in relation to matters of great importance for the Autonomous State, such as that relating to the constitutional function of the Statutes of Autonomy. The issue here, however, is a doctrine that is clearly inconsistent with that which has been maintained by the Court since its first pronouncements on this matter.

dialogue to attempt to solve this problem adequately, via a new constitutional consensus that makes possible – through a reform of the Constitution - the integration of the Catalan specificity within a common project, is leading towards the increase of the political conflict. Among the latest jurisprudential developments in this conflict we have to mention the Judgment 42/2014, of 25 March, in which the Constitutional Court partially upheld the challenge filed by the Government of the Nation against Resolution 5/X of the Parliament of Catalonia, which approved the "Declaration of sovereignty and the right to decide of the people of Catalonia", considering as "unconstitutional and void the so-called first principle entitled *Sovereignty* of the Declaration approved by Resolution 5/X of the Parliament of Catalonia".

At the same time, the Court affirms in the same Judgment 42/2014 that "the references to the "right to decide of the citizens of Catalonia" contained in the title, initial part, and in the second, third, seventh and ninth principles, second paragraph, of the Declaration approved by Resolution 5/X of the Parliament of Catalonia are not unconstitutional if they are interpreted in the sense expounded in legal grounds 3 and 4 of this Judgment". For the constitutional Court (FJ 4): "the proposal of conceptions that attempt to modify the foundations of the constitutional system itself have a place in our legal system, as long as it is not prepared or defended through an activity that breaches democratic principles, fundamental rights or any other constitutional mandates, and the attempt at its effective attainment is carried out within the scope of Constitutional reform procedures, as respect for these is always, in any event, mandatory". It involves a significant jurisprudential evolution, with a more adjusted and open interpretation than STC 103/2008 of 11 September, which we alluded to when talking about the Basque Country.

The jurisprudential pronouncements of 2015 are largely related to the popular consultation promoted by the Government of Catalonia on 9 November 2014, carried out under non-legal conditions, without its result (with an otherwise relevant participation but minority in terms of the number of voters) can be considered valid. Constitutional Court Judgments 31/2015, of 25 February (which annuls some of the precepts of the Law of the Parliament of Catalonia 10/2014, of 26 September, on non-referendum popular consultations and other forms of citizen participation), 24/2015 of 25 February (which annuls Decree 129/2014, of 27 September, on the holding of a non-referendum popular consultation on the political future of Catalonia) and the STC of 11 June 2015 (which declares the actions of the Generalitat of Catalonia in relation to the holding of the consultation as unconstitutional).

A new challenge was presented with the aim of holding "plebiscite" elections in Catalonia on 27 September 2015. On the one hand, the pro-independence parties lost the "plebiscite" in these elections by not obtaining more than 48 per cent of the votes of the electorate. However, due to the electoral system, they gained a sufficient majority of seats to form a new government and propel new measures orientated towards a possible

declaration of independence[10]. For its part, the Government of the Nation has continued to lodging appeals to the Constitutional Court as a brake, challenging the Parliament of Catalonia[11] and promoting a reform of the Organic Law of the Constitutional Court to grant it direct sanctioning powers against those who fail to comply with its decisions[12]. It is evident, however, that the jurisdictional response cannot solve a political problem such as the one raised in Catalonia and which is going to provoke more tensions with the Constitutional Court.

In general it could be said that the doctrine of the Constitutional Court in autonomy matters has changed towards a less integrating and less flexible approach than the one that had been produced in the construction of the Autonomous State, precisely at the most delicate moment of the evolution of territorial questions and when a doctrine that followed the previous line of integration was most necessary. The reasons must be searched for in the increase in political tension in relation to the demands that were firstly related to autonomy and then pro-independence from Catalan nationalist sectors, and in the strategies of the main political parties (PP and PSOE), excessively reflected in the position of the Constitutional Court.

4. The financial crisis.

Surprisingly, the doctrine of the Constitutional Court has upheld practically all of the measures adopted in relation to the financial crisis as much in terms of formal questions (mass use of Decrees-Laws) as material ones. In contrast to what has occurred in relation to the territorial conflicts, which have generated the greatest tension to which the Constitutional Court has been subject in its history, in relation to the laws relating to the financial crisis there has been a lack of social pressure towards the Court. This is surely explained by the fact that the two big parties (up to the 20 December 2015 election, when the Spanish political system substantially changed with the end of the bi-party system) that have alternated in government (PP and PSOE) have assumed, to a greater or lesser extent, the "economic interpretation of the Constitution" that has been imposed on our constitutional system, as in other European countries.

This does not mean that there has been no internal debate in the Constitutional Court, as shown by the dissenting votes cast in relation to many judgments in recent years. But this internal debate has been more a consequence of the personal conviction of the dissident judges than a social and media tension on the Court projected by the big parties.

[10] Resolution of the Parliament of Catalonia 1/XI of 9 November 2015 on the beginning of the political process in Catalonia, as a consequence of the electoral results of 27 September 2015.
[11] STC 259/2015, of 2 December, which declared the unconstitutionality and nullity of the Resolution of the Parliament of Catalonia 1/XI.
[12] Organic Law 15/2015, of 16 October, on the reform of Organic Law 2/1979, of 3 October, of the Constitutional Court, for the enforcement of Constitutional Court Decisions as a guarantee of the Rule of Law.

The surprising thing about this political "consensus" is that the financial crisis has generated a massive attack on the foundations of the Constitution to which it appears that it is this area where the greatest tension in relation to the Constitutional Court and its doctrine should have produced.

In effect, since it began to manifest the current economic crisis we have witnessed a progressive limitation of the formal and material conditions that have defined up to now pluralist democracy along with a weakening of the normativity of the Constitution. This affectation of pluralist democracy and the constitutional order is linked to an economic interpretation of the Constitution that is being imposed in the European public debate. The essential characteristics of this "economic interpretation of the Constitution" could be summarised thus:

1. Firstly, this economic interpretation is not limited to inserting the economic aspect into the social order, rather it is attempting, on the contrary, to be the backbone for the entire social order and the Constitution itself from this economic aspect, in such a manner that aspires to an overall conception of the entire constitutional system based on the economy. On this point it contrasts with the idea of the economic constitution, which was configured as a part of the Constitution that regulated economic reality, but not the entire constitutional system, and was compatible with the idea of democracy as a process of the articulation of plural interests of society.

2. The economic constitution did not seek to interfere, as such, in the realisation of other constitutional principles and rights, beyond the tension that reflected between rights and principles of a diverse origin and nature. Moreover, this internal tension of the economic Constitution was precisely a guarantee of pluralism and constitutional democracy, as it allowed social conflict to be articulated, one of the essential functions of constitutional Law. In contrast, the economic interpretation of the Constitution is now not limited to interacting, as one more factor, with other constitutional principles or rights, rather it attempts to subject these principles and rights not just to the economy, rather to a specific economic orientation, which is presented as the only one possible, the only viable way out to solve the crises and rationally regulate the economy.

3. The result of this intention is an alteration of the constitutional meaning of constitutional principles and rights. Thus, for example, democracy is no longer presented as a process, but as a product, with a functional sense. The idea of democracy as a product has been driven by the financial crisis, in the sense that decisions are adopted independently of the result of electoral processes (be it by non-application of electoral programmes in the design of government policies, or via a change in governments in itself). Democracy is thus presented to citizens - in Countries most affected by the crisis - as a finished product, in which they cannot participate. This product is assessed in economic terms depending on

their effectiveness: if policies have an effect on the economic plan, then democracy is working. It is even said that the bad functioning of the economy is equivalent to a bad functioning of democracy and that, therefore, external intervention is justified and even democratically legitimate, because it is a way of correcting deficiencies in the democratic system.

4. This economic approach of democracy is equally applied to other constitutional principles and rights. For example, to the principle of autonomy, to the territorial autonomy, which is perceived with distrust because it is said that it increases public expenditure. Needless to say, social rights are also now just interpreted from the perspective of the need to limit spending. The entire system of constitutional interpretation of these principles and rights, which has been incorporated into European constitutional culture for decades, is now displaced and subject to economic and functional criteria. This regression does not just affect social rights but also to the constitutional configuration of the rights and freedoms most linked to the functioning of pluralist democracy, in such a way that the economic interpretation of the Constitution negatively affects not just the material conditions but also the formal conditions of pluralist democracy.

5. From a constitutional point of view this economic interpretation of the Constitution tends to reject social and political conflict, thus impeding the Constitution from fulfilling one of its essential functions, which is to articulate and channel social and political conflicts, and it is also generating a historical regression from this perspective. In effect, there is a return -with other approaches- to the situation of the first constitutionalism, which restricted the public process through the subjective limitation of the conditions of access to the public space, via census suffrage (reducing it to the social sectors that shared the same interests and values). Now, this economic interpretation of the Constitution is leading to the same result: denying conflict through the imposition, in this case, of objective conditions to the public process that predetermine political options, options that will no longer depend on electoral processes, as has occurred up to now in the pluralist democracy. Pre-established policies are applied by virtue of specific economic criteria, whatever the result of these processes, and without attending to the programmes that governing parties present during the elections[13].

[13] As Enrique Guillén points out: "Facing the financial crisis that affects the EU hypertrophying the concept of necessity, and devaluing that of choice, leads to the crisis reaching a political dimension in the European project unknown until now. In this sense, if the concepts of politics, legitimacy, popular sovereignty, in short, democracy and choice are not recovered in the sense that of the emergence of an authentic European government subject to the political responsibility of the holders of sovereignty, it will be difficult for us to overcome the political-constitutional and moral crisis (because democracy is an individual and collective project of emancipation) which is damaging the EU and the Member States". Enrique Guillén López "La crisis económica y la dirección política: reflexiones sobre los conceptos de necesidad y de elección en la teoría constitucional", *Revista de Derecho*

These features can be found in the political and constitutional debate on the crisis in Spain and other countries, and also to some degree in the doctrine of the Constitutional Court related to the financial crisis, which has been limited to validate the policies of the governing majority, without carrying out an effective control of constitutionality that establishes the constitutional limits that should be taken into consideration in the development of European policies[14]. In the face of this economic interpretation of the Constitution that has been finally imposed, it would have been desirable for the Constitutional Court to assume (as some of the dissenting votes that have opposed the majority doctrine have done, in some way) a "constitutional interpretation of the economic crisis" that serves to recover pluralist democracy and revitalise the normativity of the Constitution, based on the following arguments:

1. The constitutional interpretation of the crisis should be projected both in the formal and material level. In the formal level, questioning the limitations to political pluralism that has arisen as a result of an economic approach that is presented as a sole viable alternative. These limitations to pluralism prevent the Constitution from fulfilling its nuclear function of channelling fundamental social and political conflicts. It is necessary to recover this constitutional function, articulating channels of dialogue orientated towards constructing consensus on the basis of the different possible alternatives. In the material level, the constitutional interpretation of the crisis should contribute to revitalising the normativity of the Constitution and the entire system of constitutional rights. It should prevent this system of rights from becoming a dead letter in the face of the dominant economic interpretation, and strengthen the mediating role of the Constitution amongst European policies (whatever their orientation) and state policies.

2. The economy-based approach should be questioned in its essential nucleus, which is affecting the formal conditions of pluralist democracy: the idea that there is only one-way out of the financial crisis. The debate about whether it is the best or the worst is something that corresponds to economists and, in fact, it is a discussion under way that is manifesting itself in the different solutions that, for example, the United States and Europe are giving to the crisis. What interests us from the constitutional point of view is to indicate that there is no a unique solution to the crisis and that, in the attempt at reducing

Constitucional Europeo, n. 20, Julio-Diciembre de 2013 at: http://www.ugr.es/~redce/REDCE20/articulos/12_E_GUILLEN.htm

[14] In the case Spain, in the opinion of Augusto Aguilar: "Unfortunately, the recent attitude of the Constitutional Court has not been one to preserve the social question or citizens' rights. Its discourse seems to hold to the government's mantra of budgetary austerity", Augusto Aguilar Calahorro, "El impacto de la crisis económica en España: el renacimiento de la política frente a la economía", in *The impact of the Economic Crisis on the EU Institutions and Member States*. Edited by Francisco Balaguer Callejón, Miguel Azpitarte Sánchez, Enrique Guillén López and Juan Francisco Sánchez Barrilao. Thomson Reuters Aranzadi, Pamplona, 2015, pp. 161-185.

answers to the crisis to one, there is unfortunately a deep anti-democratic attitude that tries to remove pluralist democracy from the solution to political conflicts.

3. In the material level, this constitutional interpretation of the crisis is not contrary to the principle of budgetary equilibrium, or to the idea of austerity, but it questions whether the budgetary balance can only be achieved via policies of spending reduction that limit social rights. This approach is questionable because, firstly, it fails to take into account the financial burdens that have been generated by the EU member states most affected by the crisis as a result of their belonging to the Euro zone. These additional financial burdens are produced via the increase in the risk premium and the supplementary debt that has been generated due to the dependence on the ECB to face the financial speculators, compared to the EU states that are not in the Euro zone and whose central banks still have the possibility of confronting the crisis in the national context. Secondly, the constitutional interpretation of the crisis questions the fact that the emphasis is put exclusively on spending reduction without taking into account other measures for increasing incomes, such as the fight against tax fraud, which could also contribute towards budgetary equilibrium.

4. The constitutional interpretation of the financial crisis is orientated towards correcting the democratic regression that is occurring with the economy-based argument that today dominates the European public debate. Firstly, incorporating pluralism once more into the constitutional system and bringing democratic solutions to political conflicts, via negotiation and consensus amongst political and social agents. This revitalisation of pluralism is also the first track for recovering the rights and freedoms currently in crisis. The recovery of fundamental rights depends, firstly, on citizen participation in the formulation of the policies necessary to overcome the crisis. The dependence between fundamental rights and the configuration of political power is a constant in the history of constitutionalism. At present, this relationship of dependence allows us to say that a structural coherence exists between pluralist democracy and fundamental rights. Thus, questioning a discourse such as the economic interpretation of the Constitution not only has the consequence of rebuilding the formal conditions of pluralist democracy, but also fundamental rights.

5. The second path for correcting democratic regression and promoting the recovery of fundamental rights consists in revitalising the normativity of the Constitution. The Constitution must continue to be a mediating factor between European and national policies. We have seen an examples of countries affected by the crisis inside the Euro zone, such as in the case of Portugal, in which its Constitutional Court has assumed this function of the Constitution with the declaration of the unconstitutionality of some of the austerity measures set in motion by the government. It is necessary to break with the

automatism with which the policies of austerity are being applied. The Constitution must continue to deploy its regulatory effectiveness and to force political powers to adjust their national policies to constitutional mandates. The economy-based interpretation that is being applied to budgetary equilibrium cannot arrive at the extreme of converting it into "a Constitution within the Constitution", in a principle that invades everything and invalidates everything within the constitutional system. The constitutional interpretation of the crisis must situate the principle of budgetary equilibrium within the constitutional context, as one more element of a system that must respect the formal and material conditions of pluralist democracy.

The Constitutional Court has lost many opportunities to assert a constitutional interpretation of the crisis and, on the contrary, has assumed the basic features of this economic interpretation of the constitution that is producing so much damage to European constitutional heritage in general, and to some member States of the European Union. There has been an acceptance of formal infringements on the Constitution[15] and alterations to the balance of power between legislative and executive[16], with few corrective pronouncements[17] beyond completely obvious cases[18]. There has also been a validation, via STC 215/2014, of 18 December, of the damage to the autonomy of the Autonomous Regions, and the recentralisation generated by Organic Law 2/2012 of 27 April, on Budgetary Stability and Financial Sustainability[19]. It is a decision from the Constitutional

[15] In matters reserved for Organic Laws, for example, in STC 215/2014, of 18 December, as 5 of the 12 Constitutional Court judges express in their dissenting vote: Adela Asua Batarrita, Luis Ortega Álvarez, Encarnación Roca Trías, Fernando Valdés Dal-Ré and Juan Antonio Xiol Ríos.

[16] cf., to this regard, Sabrina Ragone, "la incidencia de la crisis en la distribución interna del poder entre parlamentos y gobiernos nacionales", in *The impact of the Economic Crisis on the EU Institutions and Member States*. Edited by Francisco Balaguer Callejón, Miguel Azpitarte Sánchez, Enrique Guillén López and Juan Francisco Sánchez Barrilao. Thomson Reuters Aranzadi, Pamplona, 2015, pp. 519-542.

[17] With practically no effect, such as the case of STC 211/2015, of 8 October, which declared Article 124 of Royal Decree-Law 8/2014, of 4 July, on *the passing of urgent measures for growth, competitiveness and efficiency* as unconstitutional, due to a lack of accreditation of the enabling condition to urgently pass a reform of the regulation of the state tax on deposits in credit entities. The judgment did not affect material regulation as the content of this decree had previously been incorporated into a law, the Law 18/2014, of 15 October, on *the passing of urgent measures for growth, competitiveness and efficiency*.

[18] In the case of STC 26/2016, of 18 February, relating to Decree-Law 14/2012, of 20 April, *on urgent rationalisation measures for public spending in the educational sphere.* It is a Decree-Law that was remitted to a regulation for its later development and therefore the absence of enabling condition in relation to the urgency was evident: "the effect of modifying a regulation that is not immediate, rather differed to a subsequent administrative decision" or which contained a stipulation lacking any prescriptive content and, therefore, also devoid of this urgent character: "The precept, when it introduces a mere possibility of action that depends on the will of the legitimate subjects does not have prescriptive content, in a way that it does not instantly modify the existing legal situation" (FJ 5c). In a similar sense STC of 16 April 2016.

[19] In STC 215/2014, of 18 December, which re-reads the areas of competence of the State, which according to the Court "enables it to adopt the measures necessary to comply with mandates from the European Union, with a view to reducing the public deficit and the attaining of economic stability and the gradual recovery of budgetary equilibrium" (FJ 3b).

Court, based on a purely rhetorical argument[20], which not only affects the Autonomous State but also limits the competences of the Autonomous Communities to implement policies that guarantee constitutional rights such as education and health, linked to autonomous competencies. The same can be said in relation to the right to housing, regarding which the Constitutional Court has intervened in the promotional measures adopted by some Autonomous Communities, accepting the claim of the state[21]. We could say that, to a large extent, the doctrine of the Constitutional Court prior to the crisis has taken refuge in the numerous dissenting votes cast in relation to the judgments[22].

5. Conclusions.

The Spanish Constitutional Court has been subject to strong tensions in relation to the territorial questions that could affect the integrity of the State, initially regarding the Basque Country and then regarding Catalonia. Constitutional Court doctrine has suffered a certain regression in recent years if its previous potential for integration is taken into consideration, which served to make the construction of the Autonomous State possible. Current challenges surpass the possibilities of the Constitutional Court because of the fact that political tension has shifted from statutory reforms to the Constitution itself with a very significant progress of the pro-independence positions in Catalonia. We are, therefore, facing a political problem that demands negotiation and agreements such as what happened in the United Kingdom in relation to Scotland.

Regarding the financial crisis, despite the fact that we find ourselves before a climate in which a progressive dismantling of our constitutional heritage is taking place (undermining the territorial autonomy too), due to an "economic interpretation of the

[20] See, for example, this paragraph of Legal Ground 4b of Constitutional Court Judgment 215/2014: "We have before us a number of measures that, despite affecting the scope of autonomy of the Autonomous Communities, must be considered legitimate from a constitutional point of view as they are directed at the correction of the deviation produced regarding allowing both the fulfilment of the individually marked objectives and the homogenous action of all of the entities implicated, in terms of the attaining of the collectively accepted objective". The same occurs with generic statements that lack real content, in light of the strict conditions established in state legislation: "Organic Law 2/2015 leaves the decision on policies to adopt in the hands of the Autonomous Communities, in terms of the achievement of the objective of stability, be it adjusting income, reducing spending or affecting one group or another" (FJ 7 a).

[21] It is the case of STC 93/2015, of 14 May, which partially upholds the claim of unconstitutionality lodged by the Government of the State against Law 1/2010, of 85 March, which regulates the right to housing in Andalusia. Regarding Catalonia, the STC 62/2016, of 17 March, has partially upheld the claim by the Government of the State against Decree-Law 6/2013, of the Generalitat of Catalonia on the prohibition of disconnection of electricity supply or gas, in order to protect the vulnerable consumer.

[22] Amongst the many examples that could be mentioned, that of the dissenting vote presented by the judges Fernando Valdés Dal-Ré, Luis Ortega Álvarez, Adela Asua Batarrita and Juan Antonio Xiol Ríos, in STC 49/2015, of 15 March 2015, which rejects the claim of unconstitutionality against Article 2.1 of Royal Decree-Law 28/2012, of 30 November, *on measures of consolidation and guarantee of the Social Security system*, which questions the consideration by the majority of the court towards the updating of pensions as a "mere expectation of rights" when it is an authentic "acquired" right when the prior established condition is met.

Constitution" that has been imposed on Spain and other European countries, there has not been significant tension aimed at the Constitutional Court which has endorsed, in general terms, the measures adopted by the parliamentary majority. Despite the doctrine of the Court being the object of internal debate, as evidenced by the large number of dissenting votes, the truth is that there has been no social debate in relation to this doctrine, unlike the case for territorial conflicts, where such debate has existed and continues to exist.