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Constitutional Questions on the Application of Article 155 SC to the Catalan Conflict

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Abstract

The main purpose of this article is to analyse the application of art. 155 SC to the constitutional conflict over the relationship between Catalonia and Spain, which has particularly intensified since the Parliament of Catalonia elections in September 2015. This topic is examined within the context of the other conflict-resolution channels available, such as the courts of justice, the Constitutional Court and political negotiation. This article examines the process by which this provision was developed during the constituent process, its constitutional limits and the requirements and conditions that the article itself places on the extraordinary measures that the State can adopt. Based on these general criteria, this study first examines the procedure by which art. 155 SC was applied, highlighting several serious problems that have hindered it from serving as a channel of dialogue and deliberation prior to the exercise of those extraordinary powers. This study also seeks to assess the constitutional suitability of the specific measures that have been adopted. It ends with a final reflection that highlights the inappropriateness of applying art. 155 SC as a means of dealing with a constitutional crisis like the one that has arisen in Catalonia.

Key words: constitutional conflict in Catalonia, State control over the Autonomous Communities, extraordinary State powers, article 155 Spanish Constitution, territorial State model, resolution of constitutional conflicts, territorial conflicts, Constitutional Court.

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1. Article 155 SC within the context of the State's means of control over the Autonomous Communities

It is common knowledge that in any composite state there are three ways to resolve conflicts among the different regional governing entities that comprise it: negotiation, recourse to the courts to resolve it by law, and the coercive imposition of one party over the other. In fact, these are the three routes available to resolve conflict between any two parties in general, such that any conflict-resolution instrument can be channelled to one of these three categories. And these three routes are also provided for in Spain, a State with autonomous regions since the enactment of the 1978 Constitution, albeit each route with different intensities and modalities.

Without any doubt, the route that prevails, at least in terms of its provision in the Spanish system, is the jurisdictional route, especially the recourse to the Constitutional Court (CC) through different instruments that allow the majority of conflicts with a constitutional dimension that may arise between the State and the Autonomous Communities to be heard by the CC (primarily appeals of unconstitutionality against acts with the rank of law, conflicts of jurisdiction, both positive and negative, and challenges to art. 161.2 SC; however, they are joined as well by the issue of unconstitutionality, which has also been used quite often in recent years as a way to get the Constitutional Court to review at judicial level whether regional laws fit the Constitution in both substance and with regard to the powers granted[1]. Among all these proceedings, which have been common throughout the entire development of the State of the Autonomies[2] at rates incomparable to those of systems around us, what stands out for its significance, and for its effects, is the challenge to the regional provisions and acts provided for in article 161.2 SC and title V of the Organic Law of the Constitutional Court (abbreviated LOTC), which allows the State government, and only it, to bring before the Constitutional Court any regional norm or action, de facto as well, which is considered unconstitutional for reasons not of jurisdiction but of substance[3]. This extremely broad capacity for appeal – in fact, the choice between constitutional or ordinary courts to deal with these controversies – is coupled with the legal procedural privilege of automatic suspension provided for in this same article, which is unquestionably its raison d'être. Indeed, according to art. 161.2 SC, simply by invoking it, the State government forces the CC to suspend the provision or the act challenged for a five-month period after it admits the appeal, during which time the Court must issue an opinion on whether to lift or maintain the suspension. The fact

[1] In the period 2007-2016, the CC has handed down 87 rulings in preliminary ruling proceedings of the laws of the autonomous communities citing unconstitutionality. See *Annuaire International de Justice Constitutionnelle*.

[2] In the same period, the CC has handed down 321 rulings on appeals of unconstitutionality which posed territorial conflicts and 121 rulings in positive conflicts of jurisdiction.

[3] However, the reasons for this challenge must be constitutional and not merely related to ordinary law, despite the statement in art. 77 LOTC ("regardless of the motive on which it is based"), given that the purview of the court "is limited to examining constitutionality, not legality" (Constitutional Court Ruling [CCR] 54/1982, FJ 7). There are significantly fewer of these challenges than those filed by other routes (6 during the same previous period).

that this legal procedural privilege extends[4] to all the proceedings that the State government – and only it – files with the CC gives the State government a very powerful intervention instrument in conflicts with the Autonomous Communities, which allows it to temporarily halt any regional initiative or action. In fact, this provision replaced the one contained in the draft Constitution[5] which established the State government's prior oversight of the laws approved by what were then called the "autonomous territories", such that if it opposed a given law, it could not be approved unless it had an absolute majority in the regional assembly. Both provisions thus clearly share the fact that they can temporarily veto the norms approved by the Autonomous Communities[6], albeit via different modalities and using different mechanisms.

Secondly, it is clear that territorial conflicts, and any others, can be resolved through negotiation between the parties. This is a route that is always possible which the parties can turn to it if they choose to, without the need for any specific legal provision to this effect. Nonetheless, the Spanish legal system also stipulates certain cases in which it somehow obligates, or urges, negotiations to be held to attempt to resolve conflicts. This is the meaning behind the submission of a prior injunction before lodging a conflict in authority – the LOTC (art. 62 and 63) authorises the State to do so but makes it obligatory for the Autonomous Communities – which at least opens an opportunity for dialogue before turning to the CC. This is also what the LOTC introduced in 2000 in relation to appeals for unconstitutionality via deferral of up to nine months, up from the original three months, before filing an appeal as long as the party can justify to the CC that negotiations have started in an attempt to resolve the conflict between the State and the affected Autonomous Community (AC)[7]. And more generally, this is the purpose of all the bilateral cooperation

[4] This extension of the suspension authority provided for in art. 161.2 SC is not as obvious as it may seem, because this article explicitly provides for it only in relation to the type of challenge it contains, which, as the CC has said (CCR 64/1990, dated 5 April 1990), must be a challenge of the laws of an Autonomous Community. However, the extension to appeals of unconstitutionality and positive conflicts of jurisdiction (obviously it makes no sense in negative conflicts) comes in art. 30 and 62 and 64.2, respectively. In the former, it is precisely an exception to the general rule of non-suspension – based on either validity or efficacy – of the laws challenged because of agreement to hear a direct appeal or a preliminary question of unconstitutionality. And in the latter, it is regarding conflicts of jurisdiction, with the simple final note that "all of the above notwithstanding the fact that the government may invoke article 161.2 of the Constitution, with the corresponding effects", included in art. 62 with regard to positive conflicts of jurisdiction, as further explained in art. 64.2. In both cases, this is the extensive interpretation of a specific element that the SC stipulates with regard to a given challenge – art. 161.2 SC – which also is somewhat extraordinary in nature, in that it allows controversies to be filed with the CC which would normally correspond to the ordinary jurisdiction. And it is specific element which is exceptional in itself because it breaks with an elementary principle of legal procedure: the equality of parties. All of this means that its application beyond the procedure for which the SC explicitly provides for is questionable, particularly when the suspension is applied to the laws of the Autonomous Communities. Doctrinal opinions, many of them dubious of the constitutionality of applying art. 161.2 SC to the laws of the autonomous communities, can be consulted in Medina Guerrero, *Comentario*, 446-447. With regard to conflicts of jurisdiction, see García Roca, *Comentario*, 1041 and forward.

[5] Art. 143 of the Draft Constitution, published in the *Boletín Oficial de las Cortes* on 5 January1978.

[6] In this same sense, Alzaga, *Comentario sistemático*, 708.

[7] Section 2 of art. 33 LOTC, added by Organic Law 1/2000, dated 7 January 2000, which stipulates that the timeframe for filing an appeal of unconstitutionality extends to nine months if the bilateral

committees created over time, more or less successfully, as provided for in the different Statutes of Autonomy, which are attributed negotiation functions both *ex ante* – on projects and affairs of mutual interest, precisely to prevent conflicts in these sensitive areas – and *ex post* – once the conflict has arisen yet before it is formalised in jurisdictional terms.

Thirdly, the 1978 Spanish Constitution also provides for the State's use of unilateral imposition, force or coercion to impose itself in a given conflict with an AC, in the event that the AC "does not fulfil the obligations that the Constitution or other laws impose, or if it is acting in a way that is seriously prejudicial to the general interest of Spain" (art. 155 SC). The purpose of this article is precisely to examine the scope of this last route, especially in view of its application for the first time in the constitutional conflict posed in Catalonia in October 2017.

2. The constitutional debate on the extraordinary State powers in art. 155 SC

It is widely known that art. 155 SC was introduced into the Spanish Constitution following the model of art. 37 of the Basic Law of Bonn (Grundgesetz, GG), of which it is virtually a verbatim copy[8]. However, they are different in three significant way, leading some authors to believe that the similarities are more superficial than substantive[9]. The first two are related to its literalness: on the one hand, art. 155 SC expands the circumstances under which it can be applied compared to what is provided for in art. 37 GG not only by stipulating the AC's failure to fulfil the obligations stemming from the Constitution or the laws, the sole circumstance cited in art. 37 GG, which refers specifically to the Constitution and the federal laws, but also by adding actions by the Autonomous Regions which seriously harm the general interest of Spain. Secondly, art. 155 SC adds a procedural element prior to the exercise of extraordinary measures, namely an injunction to the president of the Autonomous Community, which is important, as we shall see below. However, the third main difference is determined by the institutional context: in both cases, the measures available to the government – either federal or State – to obligate forcible compliance with the ignored obligations (or to protect the general interest, in Spain) must be approved by the second chamber. Yet for our purposes, the abysmal differences in the composition of the German Bundesrat compared to the Spanish Senate is widely known. In Germany, the federal government's measures in application of art. 37 GG can only be taken with the approval of all the governments of the *Länder*, while in Spain a governmental parliamentary majority is sufficient;

cooperation committee meets, if it agrees to initiate negotiations to resolve the discrepancies, and if the CC is notified of this agreement within the first three months after the publication of the law in conflict, and furthermore if it is published officially in the Official State Gazette and in the official gazette of the corresponding AC.

[8] Regarding the Bundeszwang provided for in art. 37 GG, see Albertí, *Federalismo y cooperación*, 213 and forward.

[9] Cruz Villalón, *La protección extraordinaria del Estado*, 685; in this author's opinion, the extension of the circumstances for invoking art. 155 SC to actions that seriously harm the general interest of Spain is particularly significant, as he believes that this ends up turning this provision into a general power clause.

this means that it is not difficult to attain the absolute majority required given the electoral system of the Senate, which usually amplifies the majority in the Congress of Deputies. As such, the Autonomous Communities have no say.

However, Germany is not the sole referent for comparisons on this matter. The constitutions of Austria, Italy and Portugal, looking just towards Europe, also contain clauses which authorise exceptional powers for the central government in the event of conflict with regional entities[10]. What these three countries have in common, beyond the obvious differences in their respective institutional contexts, and unlike German and Spain, is that all three have explicit provisions for some of the measures to be adopted – clearly the most incisive ones for the autonomy of the regional entities – in the exercise of the exceptional powers that they authorise. Without delving into the details of the conditions, procedure and modalities, it should be noted that Austria allows the Bundesrat to dissolve the Parliaments of the *Länder* at the request of the federal government (art. 100); in Italy, the regional councils may be dissolved by decree handed down by the President of the Republic (art. 126); and in Portugal, the President of the Republic is authorised to dissolve the governing bodies of the autonomous regions (art. 236). Because they entail maximal interference in the autonomy of the territorial entities affected, it has rightly been believed that they are measures that should be explicitly authorised in their respective constitutions.

The issue of which measures can be adopted is unquestionably one of the most important ones because it determines the scope of the extraordinary powers that the State government can wield in extreme situations, such as those under which art. 155 SC should be applied. Yet as mentioned above, this section does not outline these measures but instead limits itself to establishing two general conditions which must be met, referring to its purpose and its need. We shall return to these conditions below. However, throughout the constituent process, in the period when the current art. 155 SC was being drafted, this issue was discussed in such a way that can shed light on its interpretation.

Indeed, two amendments were submitted to the text that was being drafted (first art. 144 of the Draft Constitution, and secondly art. 149 of the draft approved by Congress, which was supposed to go through the Senate, both submitted by the UCD), which sought to explicitly introduce the possibility of dissolving "the regional

[10] Switzerland does not, although at times it is cited in this regard. Art. 52 of the 1999 Constitution contains the traditional Swiss legal institution of federal intervention (art. 15 and 16 of the 1874 Constitution), which is not really a control mechanism but more an assistance mechanism which allows (and obligates) the Confederation to intervene to protect the constitutional order of the cantons when this order is attacked or threatened and the canton is not able to preserve it, either alone or with the assistance of other cantons. This is the same philosophy that inspired section 4 of art. IV of the Constitution of the United States, which contains what is called the Guarantee Clause, which states that "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence". These guarantee or assistance clauses have little to do with the mechanism of art. 155 SC, yet they are cited as comparative referents in the Agreement of the State government, dated 21 October 2017, which deems the injunction formulated to the president of the Generalitat disregarded and proposes that the Senate approve measures to apply art. 155 SC.

assembly" – as it was called at the time – in the former[11] and of "dissolving the regional bodies" in the latter[12]. Neither of the amendments was approved, and therefore the concrete, specific provisions they contained on the possibility of dissolving the regional parliaments (or, in general, the regional governing bodies) were not included in the text of the Constitution. These two failed attempts were the continuation of an earlier one, which also failed, in which the *Alianza Popular* Parliamentary Group also sought to explicitly introduce a text in the Draft Constitution authorising "the suspension of one or more regional bodies" and the "appointment of a governor-general with extraordinary powers" as measures that the State government could take in the event of the *takeover* of an autonomous region "in dire cases"[13]. It is interesting to note here that the difference is that the two amendments discussed during this constituent process were meant for a text that was practically the same as the one that ended up being approved as art. 155 SC, while the AP's dissenting vote would have designed a completely different territorial model, and therefore the *takeover* which it proposed was one part of a system which was broadly rejected. Therefore, it can be claimed that a text quite similar to the definitive one currently in force refused to stipulate the dissolution of the regional assembly or other regional organs as a possible measure.

Naturally, one could debate the influence that the constituent debate should have on the current interpretation of this article, and whether or not it is conclusive in determining if certain measures have a place, such as the dissolution of Parliament or other bodies of the Autonomous Communities. Yet in any event, the fact that this option was on the table in the constituent debate and the parties refused to include it in the constitutional text cannot be irrelevant. Nor does it seem like a sound argument to consider that the refusal to include this text – with the lack of clarity in the constituent debates themselves, which contributed nothing with regard to this measure – was based on an understanding that this possibility was already implicit in the necessary measures contained in the general text, the text of the article, and therefore it was unnecessary to explicitly state it. Quite the contrary, the fact that amendments of this specific kind were submitted in fact indicates that they were not considered implicit and that therefore, if they were to be included, they had to be made explicit. This is congruent with the comparative experience, which shows us, in the cases of Austria, Italy and Portugal, that when there is the will to include this

[11] Amendment no. 736, of the UCD, with Mr Ortí Bordas as the first signatory, which requested adding a third section to art. 144 that would allow the king, at the proposal of the president of the government, after the deliberation of the Council of Ministers, and after having consulted the presidents of the Congress and Senate, to dissolve "the regional Assembly" "over the commission of acts that run counter to the Constitution, for seriously violating the law or for reasons of State security".

[12] Amendment no. 957, from Mr Alberto Ballarín of the UCD, to add a new section 3 to art. 149, which would stipulate that "the regional bodies could be dissolved if the measures adopted are not fulfilled, or for reasons of national security". There were plans to appoint an oversight commission made up of people elected by the regional assembly, which was supposed to call elections within three months (or without a timeframe if the dissolution was called for reasons of national security, such that the oversight committee would serve for the period of time set by the government, after which elections would be held).

[13] Art. 12 of the dissenting vote submitted by Mr Fraga Iribarne in title VIII of the Draft Constitution, which proposed an alternative territorial system to the one contained in the Draft.

kind of measure, one of such magnitude and so exceptional, it must be made perfectly explicit in the constitutional text itself[14].

This is how it has been viewed by much of the Spanish doctrine that has examined this question. Indeed, different authors have explicitly stated that they believe that the measures referred to in art. 155.1 SC do not allow for the dissolution of the Parliament or the dismissal of the government of the Autonomous Community[15]. They cite the basic, more or less explicit arguments that on the one hand, what art. 155.1 SC essentially does is call for the compulsion of the regional bodies, but under no circumstances does it have a penalising or punitive nature, while on the other, this kind of measure would be incompatible with the principles of necessity and proportionality which the measures adopted must fulfil. However, other positions have also been expressed, which, from an *Italian interpretation* of art. 155.1 SC, are more open to admitting that the generic and indeterminate expression in art. 155.1 SC referring to the necessary measures that can be adopted may include the dissolution of the regional parliament or other governing bodies[16].

In any event, I think that we could claim that there is general concurrence that despite its generic, indeterminate nature, art. 155 SC does not give the government unlimited powers or the Senate the power to approve them. Extraordinary powers, yes, but under no circumstances unlimited powers. First, there are at least two clear limits which stem from the systematic consideration of the Constitution as a whole: first, art. 155 SC cannot be used to reform either the Constitution or the constitutional system. It seems obvious that art. 155 SC is not an alternative to art. 168 and art. 168 SC, and this means that it cannot be used to modify or alter the rules of territorial organisation established, be they related to organisation-institutions, authorities or relations. A special regime could be established – especially a relational one – with regard to certain matters or issues, but this regime must be temporary and provisional and solely aimed at meeting the purposes that justify resorting to these extraordinary powers. And secondly, it cannot affect the rights and freedoms of constitutionally recognised persons. The suspension of rights is expressly provided for – and therefore limited – in the Constitution, such that it is impossible to apply it under conditions or with regard to rights that are not explicitly

[14] In the case of Germany, as is common knowledge, art. 37 GG has never been applied and therefore without a specific determination in the GG, the question of admissible measures has merely been the subject of doctrinal debate with the backdrop of the very traumatic historical experience of applying the extraordinary presidential powers provided for in art. 48 of the Weimar Constitution (which juxtaposed and encouraged confusion between the *Reichsexekution* and the *Diktaturkompetenz* with the state of exception provided for in paragraphs 1 and 2, respectively, of art. 48). Regarding admissible measures in Germany *ex* art. 37 GG, see Albertí, *Federalismo y cooperación*, 218 and forward, and García Torres, *El artículo 155*, esp. 1277 and forward, with numerous references throughout the entire study explicitly excluding the dissolution of the bodies of the *Länder*.

[15] For example, García de Enterría, *La ejecución autonómica*, 184; García Torres, *El artículo 155*, 1283; Gil-Robles, *Artículo 155*, 514; Aja et al., *Sistema jurídico*, 474; Ballart, *Coerció estatal*, 162.

[16] Vandelli, *El ordenamiento español*, 331; Tolivar Alas, *El control del Estado*, 187. Alzaga does not explicitly include or exclude this kind of measure, stating that the only limit is "reasonable proportionality" (*Comentario sistemático*, 678), similar to Gómez Orfanel, who stresses substitution measures (*Artículo 155*, 2580 and forward.). On the other hand, in the case of serious harm to the general interest, Vírgala does explicitly admit the dissolution of bodies, establishing the limit at the German Liquidation or British direct rule with regard to Ulster ("La coacción estatal", 103).

cited, either collectively (arts. 55.1 and 116 SC) or individually (art. 55.2 SC). Art. 155 SC could hypothetically be applied at the same time as exceptional situations which enable rights to be suspended, but these are two completely separate situations and each of them may be invoked under different conditions, which are totally different even if they may dovetail in time.

And on the other hand, the very text of art. 155 SC reveals two clear limits applicable to the measures which may be adopted: their purpose and their need. As mentioned above, this means that they must be subjected to a test of appropriateness and proportionality. Thus, it is not overly bold to state that the measures have to be aimed at forcing the Autonomous Community to fulfil the constitutional or legal obligations it has ignored or to protect the harmed general interest; therefore, they must adhere to this purpose – which, furthermore, must be outlined in the previous injunction that the State government sends to the president of the community. Secondly, they have to be necessary to achieve this purpose, in the sense that not only are they appropriate but there are no other reasonable alternative means that are less drastic or invasive. Thirdly, they should be proportional, in the strict sense, with the purpose justifying them, such that they should entail the least interference possible in the autonomy of the community. I believe that these considerations provide sufficient criteria – both negative, in the sense of excluding circumstances, and positive, in the sense of requiring certain conditions – to constitutionally assess the measures that can be adopted in the exercise of the extraordinary powers authorised by art. 155 SC.

3. The application of art. 155 SC in the conflict in Catalonia

With the injunction to the president of the Generalitat agreed upon by the Council of Ministers on 11 October 2017, the mechanism of art. 155 SC was put into motion for the first time. It was applied it to the constitutional crisis that had arisen in Catalonia around the sovereignty process that had taken place, especially in the 11th Legislature after the Parliamentary elections of September 2015. This injunction asked the president of the Generalitat to

> "confirm whether any authority from the Generalitat de Catalunya had declared the independence of Catalonia and/or whether in his declaration from 10 October 2017 before the Parliament the president had implied the declaration of independence, regardless of whether or not this declaration still stands".

He was granted a peremptory deadline to respond by 16 October at 10 am. If the response was positive (with the proviso that "any response other than a simple affirmative or negative response will be considered confirmation") he was summoned to

> "revoke or order the revocation of that declaration of independence in order to restore the constitutional and statutory order, and order the cessation of any action aimed at promoting, advancing or culminating what is called the constituent process leading to the declaration and configuration of Catalonia as a state independent from the rest of Spain, with full compliance with the resolutions handed down by the Constitutional Court."

The president of the Generalitat answered with two letters, dated 16 and 19 October, to the president of the Spanish government. In them, after outlining several considerations on the political situation in Catalonia, he asked for a meeting with the president of the government in order to initiate a dialogue process, and he announced in the second letter, that

> "if the State government persists in preventing dialogue and continues its repression, the Parliament of Catalonia may, if it deems it appropriate, proceed to vote on the formal declaration of independence on which it did not vote on 10 October."

The State government deemed that these letters avoided responding to the injunction, which it thus considered disregarded. Furthermore, it deemed that its content, which recognised the referendum held on 1 October after the CC had handed down a ruling on 17 October nullifying the law on the referendum of self-determination of Catalonia, entailed confirmation of the violation of constitutional order. Thus, on 21 October, the Council of Ministers adopted an agreement in which it deemed that the injunction submitted had been disregarded and proposed that the Senate approve a set of measures "needed to guarantee fulfilment of the constitutional obligations and the protection of the aforementioned general interest", with the goals of "restoring constitutional and statutory lawfulness, ensuring institutional neutrality, maintaining social welfare and economic growth, and assuring the rights and freedoms of all Catalans".

These measures were targeted in five different directions: A) to the president and vice-president of the Generalitat and to the Catalan government; B) to the administration of the Generalitat; C) to certain spheres of administrative activity; D) to the Parliament of Catalonia; and E) transversal measures. The purpose of this article is not to analyse these measures in detail, but the main ones in each sphere are worth noting in order to assess their suitability in dealing with the conflict in Catalonia. The main measures adopted in each sphere consisted in authorising the State government to:

> A) proceed to remove the president, the vice-president and the government of Catalonia and to replace them in the exercise of their duties with the bodies or authorities created or appointed by the State government. Specifically, the president of the Generalitat's authority to dissolve the Parliament and call elections was shifted to the president of the State government.
>
> B) place the administration of the Generalitat under the directives of the bodies created or appointed by the State government and authorise these bodies to adopt any provisions, acts and orders needed to exercise the authorities and duties they take on, and to subject the actions of the administration of the Generalitat to a system of prior notification or authorisation, stipulating the nullity of actions if this requirement is not met. Furthermore, the bodies created or appointed by the State government may object to the acts that require prior notification, and this objection is binding; they may appoint, remove or temporarily replace any authority, public official or personnel of the administration of the Generalitat and its associated bodies and entities; and they may ask disciplinary responsibilities to be applied to

the personnel of the Generalitat in the event that they fail to comply with the provisions, acts and orders adopted by the bodies appointed by the State government.

C) adopt certain singular measures on matters of public security and order[17]; economic, financial, fiscal and budgetary management[18]; and electronic and audiovisual telecommunications and communications[19].

D) prohibit the Parliament of Catalonia from carrying out the investiture of a President of the Generalitat until a new Parliament is assembled from the elections called by the president of the State government. Likewise, the Parliament's oversight duties of the actions taken by the bodies appointed by the government were removed, and this monitoring and oversight duty was instead assigned to the Senate, while political and governmental proposals were also forbidden from being addressed to the bodies appointed by the State government. What is particularly significant is the establishment of a prior oversight system of parliamentary initiatives, both legislative and non-legislative, by a body appointed by the State government, which must previously approve their submission.

E) finally, the section devoted to transversal measures stipulates: special provisions on the system of regional acts (stating the nullity of full rights and the inefficacy of any regional provisions, acts and resolutions that contravene the measures approved in the Agreement); publication in official gazettes (stipulating that any act or provision of any rank, and either administrative or parliamentary, published in the Official State Gazette of Catalonia or the Official Gazette of the Parliament of Catalonia without authorisation or counter to the agreements reached by the bodies created by the government will be null and void in the case of provisions, and will be neither valid nor effective in the case of resolutions, acts or agreements); modification of departments, bodies or entities (authorising the organisational power to be held by the bodies and authorities appointed by the State government); and special provisions regarding the disciplinary system (in the twofold sense of on the one hand considering fully null and void any proceedings which might have been initiated to sanction behaviours which constitute compliance with

[17] Placement of the *Mossos d'Esquadra* (Police of the Generalitat) under the orders and authorities of the bodies appointed by the State government and substitution the *Mossos* with troops from the State Security Forces and Corps.

[18] Exercise of the Generalitat's authorities in these areas by the bodies appointed by the State government, especially with the objective of guaranteeing that the funds transferred by the State and the revenues earned by the Generalitat were not earmarked for "activities or purposes related to the secessionist process or that contravene the measures" contained in the Agreement to enforce art. 155 SC.

[19] Exercise of the Generalitat's duties on matters related to telecommunications, digital services and information technologies by the bodies appointed by the State government, and the guarantee, with regard to the media operated by the *Corporació Catalana de Mitjans Audiovisuals*, to "broadcast truthful, objective and balanced information that is respectful of political, social and cultural pluralism and of the territorial balance, as well as knowledge of and respect for the values and principles contained in the Spanish Constitution and the Statute of Autonomy of Catalonia", yet without specifying the formula or mechanism for securing this guarantee.

resolutions from the CC or ordinary courts that nullify "activities or pursuits linked to or associated with the secessionist process", and on the other stating that for disciplinary purposes, noncompliance with the measures contained in the Agreement would be understood as noncompliance with the duty of loyalty to the Constitution and the Statute).

The Agreement of the Council of Ministers ultimately called for this set of measures to remain in place until the new government of the Generalitat resulting from the elections called took office, and while they were in place the government could ask the Senate to modify them or to put an end to them.

It went through the Senate very quickly, in a total of six days[20], and concluded with the Agreement of the Senate Plenary which approved the measures requested by the government on 27 October. It was published in the BOE on the same day. Likewise, as the application of art. 155 SC was being processed in the Senate during that week of heavy political tensions, the Parliament of Catalonia held a plenary session on the 26th and 27th to engage in a "general debate on the application of article 155 of the Spanish Constitution in Catalonia and its possible effects". At the end of the session on the 27th, after the conclusion of the Senate session which approved the measures requested by the government to apply art. 155 SC, the Parliament approved a draft resolution submitted by the group *Junts pel Sí* and CUP which reproduced the "Declaration of the Representatives of Catalonia" that the deputies had signed on the 10th of October, which contained a declaration on the establishment of the "Catalan Republic as an independent, sovereign, democratic and social state governed by the rule of law"[21].

The Senate approved the measures requested by the government, albeit with a few modifications, including the following:

–it directly attributed to the government, or the authorities or bodies appointed by the government, the duty to substitute the president of the Generalitat and the members of the Catalan government who were stripped of office,

–the references and provisions on the public audiovisual service of the Generalitat were eliminated, and

[20] Agreement of the Committee to admit the government request to the Senate to approve the measures and establish a joint commission with the General Commission of the Autonomous Communities and the Constitutional Committee to process the government request (21 October, *BOCG-Senate*, no. 162, 21 October); meeting of the committee to formulate a proposal (26 October); meeting of the Joint Committee to debate and vote on the proposal (26 October); plenary sessions (27 October). The president of the Generalitat submitted in writing the allegations provided for in art. 189 of the Senate Rules to the Commission (published in the *BOCG-Senate*, no. 165, 27 October). The meeting of the Committee and the spokespersons of the Commission prior to the Commission session held on 26 October (*Journal of Senate Sessions*, no. 183, 26 October, 2 and 3) refused to allow the government delegate of the Generalitat in Madrid, Mr Mascarell, to act as a representative of the president, and ultimately Senator Cleries took on this role. The dissenting votes were published in the *BOCG-Senate*, no. 166, 28 October.

[21] Resolution approved by 70 votes in favour, 10 against and 3 abstentions, with the absence of the deputies from the Socialist, Ciutadans and Popular parliamentary groups, who left the session before the vote.

–the State government's prior oversight of parliamentary initiatives was eliminated (with the argument, interesting to note, that it deemed that this ran counter to the Constitution).

Furthermore, it ordered the government to use the measures approved in a "proportional and responsible" way, "bearing in mind the evolution of events and the gravity of the situation".

The approved Senate Agreement and the government's initial Agreement proposing measures were published simultaneously in the BOE on the same day, 27 October 2017, and the following day the official gazette published the first measures adopted by virtue of that authorisation, which consisted in the following:

–the president[22] and the vice-president of the Generalitat and the remaining members of the Catalan government were stripped of their offices[23],

–the Parliament of Catalonia was dissolved and elections were called for 21 December[24],

–different bodies of the Generalitat were eliminated and the officials in charge of those eliminated bodies were stripped of their duties[25], and several senior Generalitat officials were dismissed[26], and

–bodies and authorities were appointed to effectively apply the measures authorised by the Senate, especially the substitution of the Catalan authorities stripped of their offices, an appointment which was made in favour of the president of the State government, the vice-president, the Council or Ministers and the ministers.

Likewise, on the following days, the elimination of other bodies from the administration of the Generalitat was approved and their leaders were stripped of their duties, as were any temporary personnel linked to the eliminated officials[27].

Thus far, the facts. However, for the purposes of this article what we must do is inquire into the constitutional questions sparked by the application of art. 155 SC in the terms under which it occurred. The constitutional questions in this case run in two directions: the first and most obvious one is whether the way the extraordinary powers *ex* art. 155 SC were applied abides by the Constitution, both from the procedural and formal standpoints and in relation to the types of measures adopted. Yet we must also question the suitability of the application of an instrument like 155 SC to a conflict like the one in Catalonia. The first question shall be discussed

[22] RD 942/2017, dated 27 October.
[23] RD 943/2017, dated 27 October.
[24] RD 946/2017, dated 27 October.
[25] Offices of the President and Vice-president, Advisory Council for the National Transition, Special Commission on the Violation of Fundamental Rights in Catalonia, Patronat Catalunya-Món-DIPLOCAT and government delegations abroad, except in the European Union (RD 945/2017, dated 27 October 2017).
[26] Government delegate in Madrid, permanent representative before the European Union, general secretary of the Department of the Interior, the general director of the Police (stripped of their duties via RD 945/2017, dated 27 October), and the major of the Mossos d'Esquadra (Order INT/1038/2017, dated 28 October 2017).
[27] RD 954/2017, dated 31 October (BOE dated 2 November 2017).

below in a brief, general way, while the second will be the subject of a reflection in the following section, which is also necessarily brief, to conclude this article.

The Senate Agreement approving the measures requested by the government in application of art. 155 SC has been the subject of appeals on the grounds of unconstitutionality[28], which the CC agreed to hear, thereby giving the Court the opportunity to rule directly on art. 155 SC for the first time[29]. Yet unfortunately, from the start, the Court has explicitly refused to hand down a timely opinion on the application of art. 155 SC while the measures imposed via its application are still in force[30]. It is not that the Court, given its traditional delay in resolving affairs, did not have the time to issue an opinion on the constitutionality of the measures while they were in force; instead, it explicitly refused to do so. After all, the only consequence of suspending the deadline for the government of the Generalitat to formulate allegations on the appeals filed until Royal Decree 944/2017 is no longer in force could be to authorise the Council of Ministers to exercise the duties corresponding to the government of the Generalitat de Catalunya. The commendable goal of avoiding a conflict of interest nonetheless means that effective constitutional justice is denied, because this Royal Decree is precisely one of the main measures adopted in application of art. 155 SC. This is not the place to suggest alternatives, but I am confident that other solutions could have been found that do not entail explicitly refusing to exercise effective constitutional justice as opposed to merely historical or pedagogical justice.

With regard to the formal and procedural aspects of the application of art. 155 SC in Catalonia, what stands out in my opinion is that the injunction phase was rendered meaningless because of the way it transpired. Indeed, it shows several serious flaws that affect the requirements and conditions stipulated in the Constitution which compromise its designated purpose in the process of applying art. 155 SC. The injunction phase provided for in art. 155 SC is in no way merely a

[28] Appeals submitted by more than 50 deputies from the Confederal Parliamentary Group of Unidos Podemos-En Comú Podem-En Marea and by the Parliament of Catalonia. The CC, however, did not agree to hear another appeal submitted by the government of the Generalitat on the grounds that it was premature, given that it was filed against the Agreement of the Council of Ministers on 21 October 2017 before it had been approved by the Senate (ITC 142/2017, 31 October 2017).

[29] In the CC's jurisprudence, there are several references to art. 155 SC, but not to its specific application, since this issue has never arisen until now. The Agreement of the Council of Ministers dated 21 October 2017 cites different CC rules which refer to art. 155 SC (SCR 25/1981, 27/1987, 49/1988, 215/2014). However, it does not cite CCR 76/1983 on the draft LOHPA; it had declared part of art. 7.2 of the draft LOHPA unconstitutional because it generally defined the circumstances in which art. 155 SC would be applied (FJ 12).

[30] In the admission provisions of the two aforementioned appeals (dated 10 January and 7 February 2018, respectively), the CC suspended the government of the Generalitat's deadline to submit allegations "in order to avoid a conflict in the defence of the interests of the State and of the Autonomous Community of Catalonia" until "[...] the Council of Ministers, in accordance with art. 5 of Royal Decree 944/2017, dated 27 October 2017, exercises the duties and authorities corresponding to the Council of Government of the Generalitat de Catalunya". Thus, the CC refused to hand down a ruling as long as the application of art. 155 SC lasted, which is precisely what was being challenged by the appeals, whose hearing was thus suspended. Without a doubt, this is a fraught balance between the right of defence on the one hand and the effectiveness of the jurisdictional review requested, which could have been resolved in a way that would not have entailed an explicit refusal to provide an effective response to the appeals.

formal requirement prior to activating the extraordinary powers that the provision authorises; instead, it plays an essential role in that first it determines the circumstances under which the application of extraordinary powers is justified – what, in the State government's view, constitutes noncompliance with the constitutional or legal obligations or what is an action that seriously harms the general interest of Spain – and it thus sets the terms of the debate between the State and the AC, with important effects on the jurisdictional oversight which may later be established. Secondly, similar to the way an injunction works in conflicts of jurisdiction, but more politically significant given the greater importance of the matter, the injunction phase opens the possibility for the parties to work towards a solution which would render it unnecessary to activate the extraordinary State powers.

The injunction that the State government issues to the president of the CA must logically first identify the noncompliance with the obligations or the harm to the general interest attributed to the CA, and secondly request the measures deemed appropriate to rectify the situation. In his or her response to the injunction, the president of the CA may, in turn, dispute both the action attributed to the CA and the rectifying measures requested by the government. The government then has to weigh the response and determine whether or not it is satisfactory for the purpose stated in the injunction, and propose that the Senate approve the measures needed if it believes that the response is inadequate. Finally, the Senate has to check that the injunction has been issued and disregarded (art. 189.1 of the Senate Rules) as a necessary condition for it to approve the measures requested by the government. When it works in this way, an injunction is actually a dialogue process between the State government and the CA, one which must necessarily take place before extraordinary measures are adopted; furthermore, it is focused on the CA's action that is the subject of the grievance and is politically overseen by the Senate. Therefore, it is a prior, complex phase in which three different actors must take part (State government and president of the CA, as well as the Senate), and it is therefore a decisive moment to justify turning to such an extraordinary instrument as art. 155 SC.

However, an examination of the actions taken in this phase of the injunction shows that several basic conditions of the procedure were neglected, which prevented it from serving the purpose it is assigned. Indeed first, one can observe a lack of congruence between the injunction initially issued by the Council of Ministers on 11 October and the Agreement taken by the same Council of Ministers on 21 October which deems the injunction disregarded and suggests measures for the Senate to approve. The initial injunction, in fact, focuses on – and is limited to – asking the president of the Generalitat to confirm whether or not any authority of the Generalitat has declared the independence of Catalonia. And, if the answer is affirmative, the president of the Generalitat is asked to revoke this declaration and cease any action related to the constituent process[31]. In contrast, the Agreement of

[31] The order in the injunction stated: "A. To ask the President of the Generalitat de Catalunya, in his capacity as the highest representative of the Generalitat and the ordinary representative of the State in Catalonia, under the protection of article 155 of the Spanish Constitution, the following: 1. To confirm whether any authority from the Generalitat de Catalunya had declared the independence of

the Council of Ministers dated 21 October, which deems the injunction disregarded, expands this scope extraordinarily, extending it far beyond both the initial purpose and the measures proposed. Thus, it generally alludes to manifest, obstinate and deliberate nonfulfillment by the Autonomous Community of Catalonia, by its top governmental and parliamentary institutions, of its constitutional obligations by launching this Autonomous Community's secession process from the Spanish State, with rebellious, systematic and conscious disobedience of the repeated rulings and injunctions of the Constitutional Court, thus seriously harming the general interest of Spain.

According to the Agreement, this attitude has caused serious harm to the model of constitutional coexistence and to the rights of all Spaniards, who are the holders of national sovereignty, and it has already generated notable damage due to the political instability caused, which diminishes the economic and social welfare of Catalans as a whole.

It next refers to the Parliament of Catalonia's approval of Laws 19/2017 and 20/2017, which were suspended by the CC, and to the determination expressed by the President of the Generalitat to recognise the referendum on 1 October. This, it says, constitutes even more serious harm to the general interest of Spain, since it states the deliberate desire to persist in the secession from Spain and thus to flagrantly attack the national sovereignty of the Spanish people and the territorial integrity of the State, which are the basic cornerstones of the Spanish Constitution.

All of this, it says, leads to "serious deterioration in the social and economic welfare of the Autonomous Community of Catalonia", which is "affecting the economic evolution in Catalonia and stands in contrast with the economic dynamism it has shown until now".

Obviously, all of these reasons, with their corresponding arguments, go far beyond what was stipulated in the initial injunction, with the consequence that these points could not have been part of the dialogue among institutions which the injunction should trigger. And on the other hand, as mentioned above, the measures it proposes also extend far beyond those initially requested, which sought to revoke the declaration of independence – if indeed it had been declared – and cease any actions related to the constituent process.

In this same Agreement, which should have been part of the dialogue between the two parties, the response of the President of the Generalitat contained in the two

Catalonia and/or whether in his declaration from 10 October 2017 before the Parliament the president had implied the declaration of independence, regardless of whether or not this declaration still stands. 2) To duly notify the government of the nation of his affirmative or negative response by 10 am on 16 October of this year. B. If the answer is affirmative, and for these purposes the absence of a response and/or any response other than a simple affirmative or negative response will be considered confirmation, he is asked, in accordance with article 155 of the Constitution, the following: 1. For the President and the government of the Generalitat de Catalunya to revoke or order the revocation of that declaration of independence in order to restore the constitutional and statutory order, and order the cessation of any action aimed at promoting, advancing or culminating what is called the constituent process leading to the declaration and configuration of Catalonia as a state independent from the rest of Spain, with full compliance with the resolutions handed down by the Constitutional Court."

letters sent to the president of the government are neither taken into consideration nor in any way considered in relation to either the request he was given – in which a denial that Catalonia's independence had been declared can clearly be gleaned – or the measures he proposed to channel the conflict, namely initiating a dialogue process which would begin with a meeting with the president of the State government. The fact that in its injunction, the State government said that any response other than a simple affirmation or denial of the declaration of independence would be considered confirmation is still astonishing. Obviously, the government is free to formulate the injunction in the terms it deems the most suitable, but it is unacceptable that it seeks to condition the other party's response and predetermine its effects. In any event, this reveals a conception of what an injunction is that in no way fits what we have seen, in that it is meant to be a dialogue phase prior to the use of extraordinary powers *ex* art. 155 SC.

In turn, in its Agreement dated 17 October, the Senate did not consider either the government's previous injunction or the president of the Generalitat's response when determining its noncompliance, as stipulated in art. 189.1 of its Rules. Furthermore, the Senate's very deliberation process was affected by the fact that it prevented the representative personally appointed by the president of the Generalitat from appearing to speak before the Commission, as noted above[32].

The conclusion reached by examining the procedure by which art. 155 SC was applied in the case of Catalonia is the categorical failure of the prior dialogue and deliberation process that the Constitution requires before adopting extraordinary measures, thus completely denaturing it and giving it no opportunity to fulfil the purpose for which it exists, in my opinion.

Regarding the measures taken, I shall only mention those approved by the Senate, which are the ones ultimately applied. Nonetheless, I believe that it is significant to note that the State government also proposed others, which the Senate itself explicitly rejected because they ran "counter to the Constitution"[33]. These were the measures that sought to establish prior control over the legislative and non-legislative initiatives of the Parliament of Catalonia, such that they could not be dealt with without either the explicit or tacit approval of the authority appointed by the State government for this purpose[34]. However, with regard to the Parliament, the measures upheld the prohibition from initiating the investiture process of a president of the Generalitat until new elections were held; the prohibition from exercising the monitoring and political initiative duties regarding the authorities and bodies designated by the government to apply the measures of art. 155 SC, which it says befall the Senate; and in general, the prohibition from "processing initiatives

[32] See note 20. It is difficult to understand the legal underpinning behind this denial, since art. 189.3 of the Senate Rules explicitly mentions the possibility that the president may "appoint, if s/he deems it suitable, a person to take on representation for these purposes". This denial is gratuitously burdensome, because it is difficult to understand the prejudice that could lead the president's personal representative not to be a member of the government of the Generalitat (which is the reason alleged) while thwarting the deliberation process on such a delicate, controversial matter as this one, a matter in which it is more essential than ever that the forms serve deliberation and not, conversely, that they become obstacles to it.

[33] Senate Agreement dated 27 October 2017, cited, section II.c.

[34] Section D.4, paragraphs 2 and 3 of the Government Agreement.

which run counter to these measures in their budget, target or purpose". Nonetheless, because the Parliament was dissolved and elections were called immediately, these measures had virtually no effect.

The measures that were in fact effective, and which are indeed at the core of the application of art. 155 SC, were dismissing the government, dissolving the Parliament of Catalonia and calling elections, as well as placing the entire administration of the Generalitat under the orders of the State government, which also entailed the authority to eliminate bodies and dismiss officials.

These measures can be analysed according to the constitutional demands and conditions which can be gleaned from art. 155 SC, as discussed above generally, to determine whether they fall within the extraordinary powers which art. 155 SC confers upon the State. This is not the place to undertake a detailed assessment of the constitutionality of these measures, but several general considerations are worth noting. The first is that they largely dovetail with the measures that were discarded in the constituent process, as discussed above. Indeed, both the dissolution of Parliament and the dismissal or cessation of the government were considered and rejected in the constituent debates. Interpreting the constitutional text in light of the constituent debates cannot be conclusive and definitive in shedding light on the meaning of a given precept, but in this case it is very difficult to claim that measures in art. 155 SC which were specifically rejected in the process of drafting the Constitution now fit there. Indeed, there are so few clear cases like this one, in which a given option was explicitly excluded from the constitutional text that was ultimately approved. The argument that these measures are implicitly included in the "necessary measures" is extraordinarily weak, as asserted above, not only because they were explicitly proposed (which is actually a symptom that they were not considered explicit) but also because of imperatives of elementary constitutional logic, which require measures of this importance to be stated explicitly, as they are in the cases of Italy, Austria and Portugal, as shown above.

The second observation is that these same measures affect fundamental rights, which is one of the basic limits to which they are subjected, also as discussed above. Indeed, both the removal of members of the government and the early dissolution of the Parliament affect the rights of political participation *ex* art. 23 SC for both citizens and the dismissed officials and representatives. Regarding the latter, it is clear that their dismissal for causes not provided for in the legal system and by a body other than the one established therein[35] affects their *ius in officium*, which is protected by art. 23.2 SC, as repeatedly stated by the CC[36]. After all, it is difficult to imagine what could more intensely affect the *ius in officium* of public officials and representatives than decreeing the early termination of the duties for which they were elected or appointed. For this reason, the legal system takes

[35] With regard to the deputies, early termination of the legislature is regulated in art. 75 and art. 67.3 of the Statute of Autonomy of Catalonia (SAC) (generally in art. 75 and with respect to failed investiture in art. 67.3, and in all cases the authority to dissolve it is held by the president of the Generalitat). With regard to the members of the government, they may also only be removed from their posts by the president (art. 68 SAC) and, with regard to the latter, their removal is also provided for in just a few and specific cases (art. 67.7 SAC).

[36] CCR 5/1983, 298/2006, among many others.

particular care to determine the cases in which this may be done and who may do it. And it is obvious that these conditions – the circumstances under which this may happen and the authorities who may do it – do not exist in this case, rendering it a violation of the rights of the elected representatives and members of the government protected by art. 23.2 SC. Likewise, citizens' right of political participation is also affected in that their elected representatives – and the members of the government who were subsequently appointed by the politicians whom the citizens had chosen in the ballot boxes – were unable to exercise their duties during the established period[37].

Finally, the measures adopted in application of art. 155 SC can be subjected to a test of proportionality based on the necessary conditions with respect to their *purpose* and their *necessity*, as explicitly stated in art. 155 SC itself, as highlighted above. However, there are several major obstacles to undertaking this examination which stem from the flaws in the prior injunction phase, as discussed above. The lack of congruence between the initial injunction and the Agreement which deemed it disregarded and proposed measures to be approved in the Senate casts doubt and uncertainty on decisive aspects, which generates a great uncertainty. However, the target of the injunction, with the identification of its purpose and the measures it proposes, can only be what appears as such in the Agreement of the Council of Ministers dated 11 October, which is what truly and effectively started the procedure. Therefore, the purpose which the adopted measures should seek is to get a response on the potential declaration of independence of Catalonia, and if this response is affirmative, the measures should be aimed at restoring constitutional order (measures which are asked of the president of the Generalitat, which, if not fulfilled, could give rise to the obligatory instructions provided for in section 2 of art. 155 SC). Therefore, it is very difficult to reasonably sustain, with a serious, rigorous application of the test of proportionality, that any of the basic measures adopted (removal of the government, dissolution of the Parliament and substitution of the leadership of the administration of the Generalitat) could satisfactorily pass this test.

None of the three basic measures adopted is adequate to achieve the purpose sought, and they are even less *necessary* to achieve this purpose in the sense that it could be achieved only through them and not through less harmful measures. After all, it is clear that revoking a declaration of independence – which was denied in the response to the injunction – and restoring the constitutional order, removing the president and the entire government and placing the entire administration of the Generalitat under the orders of the State government, and even transferring to the State government the organisational powers to eliminate bodies and dismiss officials, are clearly disproportionate measures in terms of both the possibility of using less harmful alternatives and the seriousness of these measures themselves and the damage they cause to the Community's autonomy. Likewise, the early dissolution of the Parliament cannot under any circumstances be ascribed to this purpose, since citizens can once again vote for a similar political majority, as in fact transpired. What is more, appealing to the ballot boxes in a situation like this is

[37] CCR 203/2001 affirms that the right that "art. 23.1 SC recognises for citizens would be devoid of content or ineffective if the political representative were deprived of it or disturbed in their exercise of it".

actually tantamount to asking the citizenry to issue a political judgement of the events that happened, which can be understood as being politically validated or condemned, depending on the results. This democratically expressed judgement will coexist with the judgements of the other actors in this process – importantly, the State government as well – in a relationship that can be uneasy and may extend over time and only serve to aggravate the conflict. In any event, because the same political majority can be reproduced, the dissolution of the Parliament and the calling of elections are not in themselves adequate measures to address noncompliance with or harm of the general interest of Spain, as accused.

4. A final reflection: Art. 155 SC and the ways to resolve the constitutional conflict in Catalonia

Everything said so far leads us to once again consider the suitability of applying art. 155 SC to resolve the constitutional conflict in Catalonia. And to do so, I believe that it is relevant to bear in mind that the application of art. 155 SC was not the only means used by the State government to deal with this constitutional crisis. Indeed, we should recall first that the State government has systematically appealed before the Constitutional Court all the actions, legislative and non-legislative, definitive and draft, juridical and political, which have been produced throughout what is known as the sovereignty process in Catalonia[38]. On all occasions, the government has

[38] Just between March 2017 and the date when art. 155 SC was applied, the following actions can be cited:
– Appeal of unconstitutionality submitted by the State government on 31 March 2017 against the Law on Budgets of the Generalitat for 2017, resolved by CCR 90/2017, dated 5 July 2017, which declares different sections of the Law on Budgets unconstitutional and null and void if the funds are spent to finance the referendum on the political future of Catalonia.
–Appeal of unconstitutionality submitted by the State government against the reform of the Rules of the Parliament of Catalonia dated 26 July 2017, on the processing of laws using the single reading procedure, which was resolved by CCR 139/2017, dated 29 November 2017, which declared the reform of the Rules constitutional as long as they do not prevent amendments from being processed.
–Appeal of unconstitutionality submitted by the State government against the Law of the Parliament of Catalonia on the referendum on self-determination, resolved by CCR 114/2017, dated October 2017, which declared it unconstitutional and null and void.
– State government challenge of the appointment of the members of the Electoral Commission of Catalonia by the Parliament, resolved by CCR 120/2017, dated 31 October 2017, which nullifies the appointments. Previously, the CC had imposed a coercive fine on the members of the Commission, as it deemed that they had taken actions that run counter to the suspension ordered (Constitutional Court Injunction [CCI] 126/2017, dated 20 September 2017), which it later lifted (CCI dated 14 November 2017) because the officials had stepped down. Likewise, coercive measures were imposed, and later lifted, on numerous public officials in charge of the electoral administration of Catalonia (CCI dated 21 September and CCI dated 8 November, respectively).
–State government challenge of the decree to call the referendum, resolved by CCR 122/2017, dated 31 October 2017, which declared it unconstitutional and null and void.
–State government challenge of the decree on complementary referendum rules, resolved by CCR 121/2017, dated 31 October 2017, which declared them unconstitutional and null and void.
–Appeal of unconstitutionality submitted by the State government against the Law on Transitory Legal System and Founding the Republic, resolved by CCR 124/2017, dated 8 November 2017, which declared it unconstitutional and null and void.
–Interlocutory appeal for enforcement submitted by the State government with respect to the "Declaration of the Representatives of Catalonia" approved by the Catalan Parliament on 27 October

invoked art. 161.2 SC to automatically suspend the act challenged, and at all times as well, the CC has ruled in favour of the State government by nullifying these acts[39]. It has furthermore used the authorities granted it by Organic Law 15/2015, dated 16 October 2015, which enormously expand the CC's powers to enforce its own resolutions by allowing it to personally warn certain public officials of their duty to prevent or paralyse any action which entails ignoring or evading the suspension, with a warning of criminal liability in the event of noncompliance, and even by directly imposing coercive fines.

In this way, it could be argued that at the request of the State government, the CC paralysed and nullified all the Community's actions aimed at developing the political sovereignty process.

Secondly, it should also be borne in mind that the administration of the Generalitat had been financially taken over since September 2017[40], such that it was prevented from making any expenditures on the sovereignty process. Apart from the debate that may arise over the legality or constitutionality of this takeover[41], which the ministerial order justified with Organic Law 2/2012 on budgetary stability,

2017, as well as the declaration on "The Constituent Process" approved on the same date, which was resolved by the CC (SCI dated 8 November 2017) by nullifying the aforementioned declarations because they contravene several earlier CC resolutions (especially CCR 114/2017, which nullified the law on the referendum and the provision which it admitted for processing and suspended the law on the Transitory Legal System). These challenges were joined by different incidents involving the enforcement of rulings and interlocutories previously handed down by the Court to stop certain parliamentary sessions from being held, or the processing of certain initiatives (e.g., the CC interlocutories dated 20 September 2017 which nullify the agreements of the Board of the Parliament of Catalonia which allowed for voting on the laws on the referendum and the Transitory Legal System), as well as different appeals on the grounds of unconstitutionality submitted by deputies from the opposition, based on which the CC suspended certain parliamentary sessions.

[39] With the sole exception of the appeal against the reform of the Rules of the Parliament of Catalonia, dated 26 July 2017, as mentioned in the previous note.

[40] Order HFP/886/2017 of the Ministry of the Treasury and Public Administration, dated 20 September 2017, stating the non-availability of credit in the budget of the AC of Catalonia for 2017, handed down after the Agreement of the Delegate Government Commission for Economic Affairs which adopts measures in defence of the general interest and to guarantee the public services of the Autonomous Community of Catalonia (published by Order HFP/878/2017, dated 15 September 2017), which asked the president of the Generalitat to adopt within 48 hours an agreement on the non-availability of its budget that would affect all the budgetary credits other than those explicitly stated in annexes I and II of the Agreement of the Delegate Government Commission for Economic Affairs, dated 20 November 2015, which stipulated an obligation of formal notification of the expenditures made by the Generalitat. The Order dated 15 September was replaced by Order HFP/128/2017, dated 22 September 2017, which published the Agreement of the Delegate Government Commission for Economic Affairs, which adopts measures in direct application of art. 155 SC and, in essence, attributes the Spanish government the authority to pay the Generalitat's creditors on its account. This Order renders the Agreement of the Delegate Government Commission dated 15 September without effect, and it stipulates that the Order dated 20 September would cease to be in force on 31 December 2017.

[41] In terms of both its purpose, which does not fall within the provisions of Organic Law 2/2012 on control of the public debt and deficit and spending rules, and the procedure followed, which ignores the processes and requirements explicitly stipulated by the same Organic Law, which is used as its legal underpinning (especially art. 6 related to forcible compliance with the agreement to not make budgetary credit available, which can only be adopted by applying art. 155 SC, with the authorisation of the Senate).

whose stated purpose is to "prevent activities counter to the legal system in place from being financed"[42], the fact is that via this instrument the State government put the finances of the Generalitat under its direct control, assuring that public funds were not allocated to activities related to the 1 October referendum or to the sovereignty process in general.

Through these two routes, then, the State government paralysed and nullified the actions of the Generalitat related to the sovereignty process and controlled its future actions in this vein by both financial oversight and the potential to file new cases before the CC, possibly asking for criminal liability in the event of noncompliance. However, the recourse to these instruments was not sufficient to resolve the conflict that had arisen in Catalonia, or at least it was not sufficient for the State government, which deemed it necessary to resort to the extraordinary powers of art. 155 SC as well. Yet as it was used, this route presents dire problems of suitability with the Constitution, as discussed above, nor did it resolve the constitutional conflict with Catalonia, as reality has stubbornly shown, especially after the Parliament of Catalonia elections[43]. The State's application of coercive extraordinary measures in the Community has revealed these measures' inefficacy as a way to resolve the conflict, showing that it cannot be resolved through the unilateral imposition of one party over the other, which is what art. 155 SC entails.

If this is so, and therefore neither the jurisdictional route nor unilateral coercion is a suitable way to resolve the constitutional conflict in Catalonia, the only solution left on the horizon is negotiation, as the only one left among the three cited at the beginning of this article as possible ways to deal with territorial conflicts or, more broadly, conflicts in general. And the recent comparative referents relevant to Spain, such as Canada-Quebec and United Kingdom-Scotland, show that the Constitution can indeed channel this kind territorial conflict resolution, and that even if ways or instruments have not been explicitly provided for, they can be established to provide a democratic resolution to the conflict that is acceptable to all parties. In these cases, the Constitution has been called to fulfil its underlying purpose of political integration and to become the spillway that carves a channel out of the conflict instead of becoming a rigid, immutable wall that acts instead like a dyke which prevents it from being channelled and ends up aggravating the matter.

A negotiated political solution is also consistent with the nature of the conflict in Catalonia, which is a true constitutional crisis that reflects a rupture of the constitutional consensus. What is at stake is the territorial model stemming from the 1978 Constitution, as it has been interpreted and developed in recent years. And the most obvious and natural way to deal with this crisis is by trying to rebuild the shattered constitutional consensus, in an attempt to find a solution that is satisfactory to all parties involved[44]. The dire problem emerges when it is impossible

[42] Statements of Order HFP/878/2017, dated 15 September 2017.

[43] Indeed, the results of the elections held on 21 December 2017 in application of art. 155 SC were a parliamentary majority that was also in favour of the pro-sovereignty parties, quite similar to the results of the elections held on 27 December 2015. The election results can be seen at https://www.parlament.cat/web/composicio/resultats-electorals/index.html.

[44] For this issue, I shall refer readers to E. Albertí (2016), *La reforma constitucional*, p. 243 and forward.

to reach a new constitutional consensus, because then the only alternatives are a forcible maintenance of the status quo (how/until when?) or rupture and a new beginning, or multiple new beginnings, with all the deep-seated questions of not only what but also how.

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