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The Political Approach to Constitutionalism of the Spanish Radical Right Party Vox

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Abstract

From 2018, the radical right party Vox is part of the political landscape in Spain. The purpose of this article is to scrutinize and assess Vox' political approach to constitutionalism. To do so, the article analyses Vox' electoral manifesto and some of the main speeches of the party's leaders, in order to address three main topics. First, the article will explain how key themes of liberal constitutionalism feature in the narrative of the party. Second, the article analyses if Vox' policy proposals can be described as illiberal. Third, the article doctrinally assesses to what extent such proposals are compatible with the Spanish Constitution. Based on these analyses the article contributes to literature on radical right parties and on illiberalism, describing the main traits of Vox' current political approach to constitutionalism. It is argued that these traits can be summarized in three main features: partisan use of constitutional rhetoric, constitutional double-standards combined with selective constitutionalism, and unconstitutionality of core policy proposals

Key words

Radical right parties – Illiberalism – Legal Constitutionalism – Vox – Spanish Constitution

I. Introduction

In the last years several countries have witnessed the emergence of two inter-related phenomena: the rise of populist radical right parties¹ and the erosion of liberal-constitutional guarantees in processes of rule of law backsliding.²

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¹ Cas Mudde, *Three decades of populist radical right parties in Western Europe: So what?*, 52 EUR. J. POLIT. RES. 1–19 (2013).

² Laurent Pech & Kim Lane Scheppele, *Illiberalism Within: Rule of Law Backsliding in the EU*, 19 CAMB. YEARB. EUR. LEG. STUD. 3–47 (2017).

Populist radical right parties are defined as parties that ‘share a core ideology that includes the combination of (at least) nativism, authoritarianism and populism’.³ Meanwhile, illiberal systems can be deemed as a form of ‘functioning of a public power that upholds the main constitutional structure but lacks normative commitment to constraints on public power’.⁴ Theoretically, rule by a populist radical right party might not lead to a process of rule of law backsliding, and political illiberalization might be led by a party of an ideology other than populist radical right. However, there seems to be a conceptual link between both, since literature defines radical right parties as rejecting political pluralism, counter-majoritarian institutions or minority protection.⁵ Furthermore, in practice it is not infrequent to see these two phenomena occurring together. In this regard, the experiences of Poland and Hungary are telling.⁶

Before 2018 Spain was still described in political science literature as one of the few exceptions to this rise of populist radical right parties in Europe.⁷ In December that year this landscape abruptly changed. Vox, a party led by a radical former member of the conservative *Partido Popular*⁸, won for the first time seats in the Parliament of the Autonomous Community of Andalusia. Far from obtaining a modest result, the party grew from 0.46 (in 2015) to 11 per cent (in 2018) of the popular vote, and obtained 12 seats in a Parliament of 109 members. In the April 2019 general elections, the party obtained slightly more than 10 per cent of the vote and 24 seats in the Spanish *Congreso de los Diputados*. Only a few months later, in the November 2019 elections, Vox became the third most voted party, with 52 seats and more than 15 per cent of the vote. This way Vox, a party featured by an anti-immigration, Spanish-nationalist and catholic-identitarian discourse⁹ that had so far remained in the margins of the political system, became a serious political contender. While the ‘populist’ nature of Vox remains contested, existing literature on the party seems to point at it being of radical right ideology.¹⁰ Spain is no longer an exception in European politics.

The emergence of Vox in Spain is disquieting precisely because of the aforementioned *de facto* coupling between radical-right ideology and rule of law backsliding. Spain’s democracy takes, from a legal perspective, a legal-constitutionalist approach to constraining power. In other words, in the process of transition to democracy after Franco’s dictatorship constitution-makers opted in Spain for an entrenched, rigid constitution, which includes a catalogue of fundamental rights and which is to be protected and enforced by a Kelsenian style constitutional court. However, in countries like Hungary and Poland, legal constitutionalism has been unable to deter rule of law backsliding in the context of an ongoing process of political illiberalization.¹¹ Parties in power in these countries have

³ Mudde, *supra* note 1 at 3.

⁴ Tímea Drinóczy & Agnieszka Bień-Kacała, *Illiberal Constitutionalism: The Case of Hungary and Poland*, 20 GER. LAW J. 1140–1166, 1165 (2019).

⁵ Carles Ferreira, *Vox como representante de la derecha radical en España: un estudio sobre su ideología*, 51 REV. ESP. CIENC. POLÍTICA, 79 (2019).

⁶ See *inter alia* CARLOS CLOSA & DIMITRY KOCHENOV, REINFORCING THE RULE OF LAW OVERSIGHT IN THE EUROPEAN UNION (2016); Wojciech Sadurski, *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding*, 18 SYD. LAW SCH. - LEG. STUD. RES. PAP. 1–70 (2018).

⁷ Sonia Alonso & Cristóbal Rovira-Kaltwasser, *Spain: No Country for the Populist Radical Right?*, 20 SOUTH EUR. SOC. POLIT. 21–45 (2015).

⁸ Ferreira, *supra* note 5 at 76.

⁹ See Ferreira, *supra* note 5.

¹⁰ *Id.*

¹¹ Bojan Bugarič & Tom Ginsburg, *The Assault on Postcommunist Courts*, 27 J. DEMOCR. 69–82 (2016).

undermined constitutional checks and balances in order to reinforce executive power.¹² The approach to Public Law by ruling parties in Poland and Hungary is thus unambiguously illiberal.

With this background, this article enquires which are the main traits of Vox' political approach to constitutionalism. To do so, the article uses three main sources of information. First, I analyse what so far is Vox' most important policy document: the political part of its electoral manifesto entitled '100 urgent measures for Spain'. Second, I analyse the parliamentary speeches of Vox' leader Santiago Abascal during the session of investiture of the current President of the Government Pedro Sánchez Castejón. Third, I analyse Abascal's speeches during the vote of no confidence against Sanchez's government promoted by the very Vox party.

Methodologically, these sources are analysed in a threefold manner. First, I carry out a word frequency query using the software Nvivo, in order to understand the main themes of the party's manifesto and of Abascal's speeches, and in particular the role played by key concepts of liberal constitutionalism in the narrative of the party. Second, I analyse selected policy proposals of the party in order to assess to what extent such proposals can be defined as illiberal. Third, I carry out a doctrinal analysis of the proposals of the party to scrutinize their compatibility with the Spanish Constitution. On the basis of these analyses, the article argues that Vox' political approach to constitutionalism in Spain consists in three basic features: partisan use of constitutional rhetoric, constitutional double-standards coupled with selective constitutionalism, and unconstitutionality of a wide range of core policy proposals.

This article is structured as follows. After this introduction I present a working definition of 'illiberalism' in its Public Law sense, as this concept will be central to the rest of the article. I then move on to contextualize Vox as a radical right party. In the following section I analyse Vox' general narrative and the role of liberal-constitutional concepts in it. Subsequently, I scrutinize Vox' central policies to assess their compatibility with liberal approaches to constitutionalism in general. After that, I analyse the compatibility of those proposals with the current Spanish Constitution. The following section, a corollary of all the former analyses, responds to the research question of the article, presenting what I consider the main traits of Vox' political approach to constitutionalism. The last section concludes.

II. Illiberalism and constitutionalism: a working definition

The notion of illiberalism has gained popularity in recent years¹³, in opposition to the traditional public law concept of liberal constitutionalism.

Liberal forms of constitutionalism are characterized by the existence of strong constraints on power.¹⁴ In European continental systems based on legal constitutionalism -as it is the case of

¹² Bojan Bugarič, *Neoliberalism, Post-Communism, and the Law*, 12 ANNU. REV. LAW SOC. SCI. 313–329 (2016); Gábor Halmai, *Illiberal Constitutionalism? The Hungarian Constitution in a European Perspective*, in VERGASSUNGSKRISEN IN DER EUROPÄISCHEN UNION 85–104 (Stefan Kadelbach ed., 2018).

¹³ Pech and Scheppele, *supra* note 2.

¹⁴ Giovanni Sartori, *Constitutionalism: A Preliminary Discussion*, 56 AM. POLIT. SCI. REV. 853–864 (1962).

Spain-, many of these constraints are legal in nature. At the centre of this system of constraints there is a normative constitution, which is placed above the political institutions and actors and is binding upon them. Such normative constitution is often rigid, meaning that it cannot be easily amended, and includes a catalogue of fundamental rights that must be respected by the authorities of the State. Constitutional review of legislation, often performed by a Constitutional Court or a similar organ, is put in place to ensure that constitutional mandates are effectively respected by the public powers. Frequently, a judicial council is created to maximize judicial independence.

Liberal constitutionalism does not seem to be immune, however, to the authoritarian tendencies of some political actors. In his piece on what he called ‘abusive constitutionalism’, Landau referred to systems in which the formal procedures of constitutional amendment are used to make the system substantially less democratic.¹⁵ As put by Levitsky and Ziblatt, in our time ‘blatant dictatorship -in the form of fascism, communism, or military rule- has disappeared across much of the world. Military coups and other violent seizures of power are rare. Most countries hold regular elections. Democracies still die, but by different means. Since the end of the Cold War, most democratic breakdowns have been caused not by generals and soldiers but by elected governments themselves (...). Democratic backsliding today begins at the ballot box’.¹⁶

As said above, liberal constitutionalism, especially in its legal version, includes a series of arrangements that are aimed at securing limited government and political freedom: catalogues of fundamental rights, constitutional courts, rigid normative constitutions and independent mechanisms of judicial governance. Regarding the organic part of constitutions, illiberalism is not featured by the suppression of these institutions, but rather by their political take over. In illiberal systems, institutions are mutated so that they enable rather than constraint the executive.¹⁷ In this article, ‘illiberalism’ as a form of Public Law, would be characterized precisely by the weakening of those checks on power. I believe that this idea is in line with at least some prominent works in the field.¹⁸ The work of Halmai for the case of Hungary illustrates very well this relationship between illiberalism and institutions: ‘In this illiberal system, the institutions of a constitutional state (Constitutional Court, ombudsman, judicial or media councils) still exist, but their power is strongly limited’.¹⁹ Bugarič takes a similar approach when explaining the creation of an illiberal system also in Hungary: ‘...an illiberal constitutional order by systematically dismantling checks and balances and thereby undermining the rule of law. The major deficiency of the new constitutional structure is that it vests so much power in the centralized executive that no real checks and balances exist to restrain this power’.²⁰

With regards to the dogmatic part of constitutions, and in particular to fundamental rights, research on illiberalism has emphasized the undermining of the institutional arrangements that guarantee their effectiveness. Again, Halmai’s explanation proves essential to understand

¹⁵ David Landau, *Abusive Constitutionalism*, 47 UNIV. CALIF. DAVIES LAW REV. 189–260, 195 (2013).

¹⁶ STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE. WHAT HISTORY REVEALS ABOUT OUR FUTURE 5 (2018).

¹⁷ *Id.* at 78.

¹⁸ Although see, for a different approach, the intersecting work by Paul Blokker, *Varieties of populist constitutionalism: The transnational dimension*, 20 GER. LAW J. 332–350, 339 (2019).

¹⁹ Halmai, *supra* note 12 at 99.

²⁰ Bugarič, *supra* note 12 at 326.

this aspect: ‘Also, as in many illiberal regimes, fundamental rights are listed in the constitutions, but the institutional guarantees of these rights are endangered through the lack of independent judiciary and Constitutional Court’.²¹ Additionally, literature in the field has mentioned the danger that illiberalism poses, specially, for minority rights. For instance, Sajó argues that ‘the resentment that animates the acceptance of illiberal democracy (...) is becoming the spirit that legitimates institutional restrictions of rights and provides emotional justification of majoritarianism that finds no restriction to the popular will in fundamental rights’.²² This later passage underlines, in my view, the conceptual concomitances between illiberalism and populism that I advanced earlier in this article.

In summary, in illiberal systems, liberal arrangements -especially constraints on power- are recycled into elements functional to the illiberal system of governance, which maximize executive power and its long-term rule.²³ Meanwhile, the effectiveness of fundamental rights is undermined. The continued existence of façade liberal institutions, together with the holding of regular elections, legitimizes illiberal rule. The political control of such institutions by the executive, in turn, reduces constraints of governmental political action.

III. Contextualizing the new Spanish radical right party Vox

The emergence of Vox can be contextualized in the fourth wave of the post-war far right, which started approximately in the twenty first century.²⁴ Within far right parties, Mudde draws an important distinction between extreme right parties –which reject the essence of democracy- and radical right parties, which accept the essence of democracy while rejecting elements of liberal democracy such as minority rights, rule of law and separation of powers.²⁵ According to the author, the fourth wave of post-war far right is characterized by the mainstreaming and normalization of radical right parties across the world.²⁶ The emerging consensus seems to be that Vox belongs in this category of radical right parties.²⁷ In this regard, Vox is in the company of several other parties, from the Italian League to the Austrian FPÖ or the Polish Law and Justice, to mention just some examples in neighbouring European countries.

In the context of Spanish politics, recent literature has made an early effort to define Vox and locate it within the main political cleavages of the country. According to Turnbull-Dugarte et

²¹ Halmai, *supra* note 12 at 99.

²² Andrés Sajó, *Society, Constitutionalism and Democracy*, 4 POL. SOCIOLOGICAL REV. 395–412, 410 (2019).

²³ Pablo Castillo-Ortiz, *The Illiberal Abuse of Constitutional Courts in Europe*, 15 EUR. CONST. LAW REV. 48–72 (2019).

²⁴ CAS MUDDE, *THE FAR RIGHT TODAY* 3 (2019).

²⁵ *Id.* at 7.

²⁶ *Id.* at 3.

²⁷ *Id.* at 40.; Stuart J. Turnbull-Dugarte, José Rama & Andrés Santana, *The Baskerville’s dog suddenly started barking: voting for VOX in the 2019 Spanish general elections*, 2 POLIT. RES. EXCH. 1781543, 3 (2020); Ferreira, *supra* note 5.

al. Vox adopts a conventionally conservative agenda in the economic arena, focusing on market liberalism, reduced state intervention and cutbacks to the welfare state.²⁸ Equally or even more important is Vox’ position in the territorial politics of Spain: the party exhibits a clear Spanish nationalist stance and it has grown in opposition to peripheral nationalism in some Spanish Autonomous Communities, and particularly to Catalan independentism. As Mudde suggests, Vox’ rapid growth in Spain has been aided by ‘tensions around Catalanian independence’, along with factors such as the corruption scandals of the traditional conservative party *Partido Popular*.²⁹ For Ferreira, the party exhibits a conception of ‘Spanishness’ clearly rooted in ethnonational myths and coupled with clearly nativist and xenophobic proposals.³⁰ Finally, the party sides with authoritarian values in the socio-cultural axis.³¹ Ferreira has documented the authoritarian tendencies of the party; according to the author ‘a model of society based on law and order is present in the majority of political positions of Vox’.³²

IV. Vox’ narrative and the vocabulary of liberal constitutionalism

Political parties emphasize certain concepts and themes in their speeches and documents, while other concepts are conspicuously absent from their narratives. These emphases and absences supply important information about the ideology of the party in question, as well as about its framing of politically salient issues. In order to understand this for the case of Vox I first ran a word frequency query of the electoral manifesto of the party, as well as of some of the main parliamentary speeches of the party leader Santiago Abascal.

Table 1 shows the output of that query for the electoral manifesto, indicating which were the twenty most frequent concepts in the document³³, the number of times that each concept appeared, the weighted percentage of each concept as a share of the total of words in the manifesto, and the words that were grouped under each concept.

Table 1. Word frequency query of Vox’ electoral manifesto

Word [with English translation]	Length	Count	Weighted Percentage (%)	Similar Words
Nacional [national]	8	18	0.61	nacional, naciones
España [Spain]	6	16	0.54	España
Españoles [Spaniards]	9	15	0.51	español, españoles
Ley [law]	3	12	0.41	ley, leyes

²⁸ Turnbull-Dugarte, Rama, and Santana, *supra* note 27 at 3.

²⁹ MUDDE, *supra* note 24 at 174.

³⁰ Ferreira, *supra* note 5 at 87.

³¹ Turnbull-Dugarte, Rama, and Santana, *supra* note 27 at 3.

³² Ferreira, *supra* note 5 at 88.

³³ To do so, I used the software NVivo. I run a word frequency query of words with a minimum length of 3 characters, removing words that were politically irrelevant (such as certain determinants or prepositions). I opted for a grouping with stemmed words.

Empresa [enterprise]	7	12	0.41	empresa, empresas
Públicos [public]	8	12	0.41	público, públicos
Estado [state]	6	11	0.37	Estado
Española [Spanish]	8	11	0.37	española, españolas
Familias [families]	8	11	0.37	familia, familias
Hijos [kids, progeny]	5	9	0.30	hijo, hijos
Impuesto [tax]	8	9	0.30	impuesto, impuestos
Reducción [reduction]	9	9	0.30	Reducción
Seguridad [security, safety]	9	8	0.27	Seguridad
Vida [life]	4	8	0.27	Vida
Ayudas [aids]	6	7	0.24	ayuda, ayudas
Inmigrantes [immigrants]	11	7	0.24	inmigrante, inmigrantes
Lengua [language]	6	7	0.24	lengua, lenguas
Organismos [organisms]	10	7	0.24	organismo, organismos
Plan [plan]	4	7	0.24	Plan
Protección [protection]	10	7	0.24	Protección

Own elaboration upon primary sources

The analysis showed the emphasis in some of the concepts and themes that radical right parties prioritize. To start with, there is a clear ethno-nationalist undertone in the manifesto, consistent with the findings of literature in the field³⁴. It is not surprising that the most frequent word in the document is “national”, followed by “Spain” and “Spaniards”. Secondly, the party’s conservatism can be seen in the frequency of concepts such as ‘families’, ‘progeny’ and ‘life’. Additionally, the concepts of ‘immigrant’ and ‘immigrants’ also appear prominently in the list of most frequent words in the manifesto, and are repeated up to 7 times in the text, in line with the nativist, anti-immigration nature of the party.³⁵

Contrary to this, concepts related to liberal constitutionalism are much scarcer. The word ‘democracy’ [in Spanish, ‘democracia’] is not mentioned at all in the manifesto. The word ‘freedom’ [‘libertad’ in Spanish] only features once in the manifesto, and it does so in relation to the freedom of the parents to choose the schooling of their kids. The concept of ‘derecho’, which can refer either to a subjective right or to an objective legal system, features however six times in the manifesto, although frequently in relation to the central themes of the party, like the protection of the right to speak and learn Spanish. The concept of ‘Constitution’ (in its public law sense) only appears once in the whole manifesto.

Vox’ narrative in its manifesto does not take an explicitly antagonistic approach against liberal constitutionalism. Neither does the party commit enthusiastically to it. On the contrary, main themes of liberal constitutionalism, such as references to democracy and freedom, are largely absent from the document, which instead features some the favourite topics of radical right parties: nationalism, conservatism and anti-immigration policies.

This approach to constitutionalism, however, seemed to have changed in some of the most important parliamentary interventions of Vox’ leader Santiago Abascal: his speeches during the investiture session of Pedro Sánchez in January 2020 (Table 2) and during the vote of no

³⁴ See Ferreira, *supra* note 5 at 81.

³⁵ *Id.* at 83.

confidence against the coalition government between PSOE and Podemos in October 2020 (Table 3).³⁶ Interestingly, in these speeches the tone of the party is a different one, and key themes of liberal constitutionalism seem to play a more significant role in the overall narrative of the party.

Table 2. Word frequency query of Santiago Abascal’s speeches during the investiture session of Pedro Sánchez in January 2020

Word [with English translation]	Length	Count	Weighted Percentage (%)	Similar Words
Espanoles [Spaniards]	9	49	0.90	Español, españoles
Gobierno [government]	8	45	0.82	Gobierno, gobiernos
Sánchez	7	44	0.81	Sánchez
España [Spain]	6	43	0.79	España
Socialista [socialist]	10	31	0.57	Socialista, socialistas
Vox	3	18	0.33	Vox
Mujeres [women]	7	16	0.29	Mujer, mujeres
Soberanía [sovereignty]	9	16	0.29	Soberanía, soberanías
Elecciones [elections]	10	13	0.24	Elecciones
Ley [law]	3	13	0.24	Ley, leyes
Libertad [freedom, liberty]	8	13	0.24	Libertad, libertades
Estado [State]	6	12	0.22	Estado
Instituciones [institutions]	13	12	0.22	Institucional, instituciones
Comunistas [communists]	10	11	0.20	Comunista, comunistas
Mentiras [lies]	8	11	0.20	Mentira, mentiras
Poder [power]	5	11	0.20	Poder
Separatistas [separatists]	12	10	0.18	Separatista, separatistas
Tribunales [tribunals, courts]	10	10	0.18	Tribunals
Constitución [constitution]	12	9	0.16	Constitución
Nacional [national]	8	9	0.16	Nacional

Own elaboration upon primary sources

The clearest example of this change in approach can be observed in the speeches by Abascal in the session of investiture of Pedro Sánchez in January 2020. To start with, the word ‘constitution’ now features prominently among the key topics of his discourse. In most occasions, it is to claim that the Spanish Constitution of 1978 is under attack. Similar are the cases of the concepts of ‘libertad’ (liberty, freedom) and ‘instituciones’ (institutions), that

³⁶ Similarly to Table 1, for Tables 2 and 3 the word frequency query was ran for words of 3 or more characters, with stemmed words. In this case, in order to focus on words with clear political meaning, a several words had to be removed from the list: not only determinants and prepositions, but also nouns, some of which were political but had not clear implications and were irrelevant to understand the narrative of the party (*inter alia* ‘señorías’, ‘diputados’, ‘partido’ etc).

appear frequently in Abascal’s discourse. In almost all occasions, these terms are used to argue that the freedoms of Spaniards and the institutions of Spanish democracy are under attack or under threat. Constitution, freedom and institutions, three concepts that are central to liberal constitutionalism, now feature prominently in Vox’ narrative, that portrays itself as a defender of these ideas that, according to Abascal’s discourse, are endangered. This new constitutional narrative is combined with permanent references to the actors which the party antagonizes. Thus, the concepts ‘communists’ and ‘separatists’ also feature prominently in Abascal’s discourse.

Table 3. Word frequency query of Santiago Abascal’s speeches during the vote of no confidence against the government in October 2020

Word [with English translation]	Length	Count	Weighted Percentage (%)	Similar Words
España [Spain]	6	166	0.76	España
Españoles [Spaniards]	9	149	0.69	español, españoles
Gobierno [government]	8	132	0.61	gobierno, gobiernos
Sánchez	7	111	0.51	Sánchez
Vox	3	73	0.34	Vox
Estado [State]	6	67	0.31	estado, estados
Políticas [policies, politicians]	9	45	0.21	política, políticas
Iglesias	8	40	0.18	iglesia, Iglesias
Poder [power]	5	36	0.17	poder, poderes
Naciones [nations]	8	36	0.17	nacional, naciones
Censura [censorship, no confidence]	7	35	0.16	Censura
Libertad [freedom, liberty]	8	35	0.16	libertad, libertades
Políticos [politicians]	9	32	0.15	político, políticos
Mujeres [women]	7	31	0.14	mujer, mujeres
Nación [nation]	6	30	0.14	Nación
Casado	6	28	0.13	Casado
Separatistas [Separatists]	12	26	0.12	separatista, separatistas
Europa [Europe]	6	25	0.12	Europa
Dinero [money]	6	23	0.11	dinero, dineros
Future [future]	6	22	0.10	futuro, futuros

Finally, it is worth analysing Abascal’s speeches during the vote of no confidence against Sanchez’s government in October 2020. The main categories of liberal constitutionalism are somewhat less present in the discourse, but they are still used with certain frequency. Furthermore, their function in the overall narrative of the party continues to be the same, with

Vox alleging that central features of liberal constitutionalism are endangered. Vox continues in these speeches to pretend -explicit or implicitly- to play the role of defender of central ideas of constitutionalism. The concept of ‘libertad’, for instance, features prominently among the most frequently used concepts in Abascal’s speeches. Its use continues to be one of denouncing what Vox’s leader considers to be the endangering of freedoms in Spain. Although the word ‘constitution’ is used some twenty times (in the context of speeches altogether adding up around 3.500 words), this time it does not appear in the list of the most used concepts of the party. However, again, when used, this concept appears is in the context of a narrative where the constitution is allegedly endangered and Vox is plays a role of protector.

V. Vox’ proposals: towards illiberal public law?

The previous section analysed the general narrative of Vox and the role that liberal-constitutional concepts play in it. In this section, I focus on the party’s policy proposals, in order to understand the extent to which they are compatible with the standards of liberal constitutionalism. To do so, I focus on the party’s manifesto. This document, however, is often unclear, so additionally I use speeches of the leaders of the party as a secondary source of information. As it would be impractical to analyse in this article all of the policy proposals of this party, my focus is here only on a selection of them, those dealing with basic aspects of the institutional design of Spain and some rights and civil liberties.

a. Illiberals’ favourite target: the reforms of the Constitutional Court and the Judicial Council

The essence of illiberal public law is the weakening of checks on power.³⁷ For that reason the reform of judicial institutions plays a key role in illiberal politics. Constitutional courts are powerful counter-majoritarian institutions that can constraint governments and, in extreme cases, protect the liberal elements of the democratic system of government through the protection of the Constitution.³⁸ Judicial councils are designed to protect the judicial branch from executive interference by taking competences over judicial careers off the hands of politicians.³⁹ It is not surprising, then, that these two institutions -constitutional courts and judicial councils- have been one of the preferential objects of attack by illiberal governments in many countries.⁴⁰

In the case of Vox, reform of these two judicial institutions plays an important role in their electoral manifesto. Vox seemed to have realized that both the Judicial Council and the

³⁷ Landau (n 14) 191.

³⁸ TOM GINSBURG & AZIZ HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* 187–189 (2018).

³⁹ Garoupa, Nuno; Ginsburg, Tom, *The Comparative Law and Economics of Judicial Councils*, 27 *BERKELEY J. INT. LAW* 53–83, 57 (2009).

⁴⁰ See, in the case of constitutional courts, Bugarič and Ginsburg, *supra* note 11.

Constitutional Court of Spain were suffering a reputational crisis and put forward radical proposals for their transformation. In point 93 of their manifesto, the party proposes the reform of the judicial branch to achieve ‘true independence from political power’, so that all the members of the Supreme Court and the Council for the Judiciary will be elected by merit and among members of the Justice community.

This proposal has to be seen in the context of the current design of the Spanish Judicial Council, whose members are appointed by both chambers of the Spanish Parliament by qualified majority of three fifths. This design has been criticized by supranational institutions, such as the Group of States Against Corruption of the Council of Europe.⁴¹ Furthermore, the coalition government between PSOE and Podemos recently put forward a proposal that would have further deviated the design of the Spanish Judicial Council from international standards: the proposal, that now seems to have been dropped, would have lowered the majority threshold in the Parliament to appoint some members of the Judicial Council to just an absolute majority.

This background helps to understand some of the speeches of Vox’ leader Abascal in relation to the judiciary. For instance, when the President of the Government Pedro Sánchez accused Vox of making opposition to the system, Abascal replied ‘which system? The system in which you control the judges? The system in which you decide who are all the members of the Judicial Council?’.⁴² However, paradoxically, Vox’ criticisms of the proposed reform of the Spanish Judicial Council in Spain ran in parallel to a defence of the control of the Polish Judicial Council by the Law and Justice government. In this regard, Iván Espinosa de los Monteros –the spokesperson of Vox in the Congress of Deputies- tweeted that the reform proposed by the Spanish coalition government would put Spain ‘far below the level of Poland, where the reform was an electoral promise supported by the majority of the Polish people to oust a corrupt caste of communist judges. In part thanks to that promise, Law and Justice won the elections twice in a row’.⁴³

Regarding the Constitutional Court, the party proposes its suppression, with its functions being carried out by a newly-created Chamber of the Supreme Court. In some speeches by Abascal we can find some context for this proposal. For Vox’ leader, the current Spanish Constitutional Court is ‘perhaps not behaving as a truly independent court. But you appoint them, judges are called progressive and conservative! We do not propose the elimination of the Constitutional Court, we propose that there is a chamber of constitutional affairs in the Supreme Court and that judges and only judges can decide on constitutional issues’.⁴⁴ This

⁴¹ See for instance <https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/168098c67d> (last visited December 28, 2020)

⁴² Diario de Sesiones del Congreso de los Diputados. Año 2020 XIV Legislatura Núm. 55, Sesión plenaria núm. 52 de 21 de octubre de 2020, page 57, at [https://www.congreso.es/web/guest/busqueda-de-publicaciones?p_p_id=publicaciones&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&publicaciones_mode=mostrarTextoIntegro&publicaciones_legislatura=XIV&publicaciones_id_texto=\(DSCD-14-PL-55.CODI.\)#\(P%C3%A1gina3\)](https://www.congreso.es/web/guest/busqueda-de-publicaciones?p_p_id=publicaciones&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&publicaciones_mode=mostrarTextoIntegro&publicaciones_legislatura=XIV&publicaciones_id_texto=(DSCD-14-PL-55.CODI.)#(P%C3%A1gina3)) (last visited December 28, 2020)

⁴³ See <https://twitter.com/ivanedlm/status/1316441333444288515?lang=en-gb> (last visited December 28, 2020)

⁴⁴ Diario de Sesiones del Congreso de los Diputados. Año 2020 XIV Legislatura Núm. 55, Sesión plenaria núm. 52 de 21 de octubre de 2020, page 58, at [https://www.congreso.es/web/guest/busqueda-de-publicaciones?p_p_id=publicaciones&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&publicaciones_mode=mostrarTextoIntegro&publicaciones_legislatura=XIV&publicaciones_id_texto=\(DSCD-14-PL-55.CODI.\)#\(P%C3%A1gina3\)](https://www.congreso.es/web/guest/busqueda-de-publicaciones?p_p_id=publicaciones&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&publicaciones_mode=mostrarTextoIntegro&publicaciones_legislatura=XIV&publicaciones_id_texto=(DSCD-14-PL-55.CODI.)#(P%C3%A1gina3)) (last visited December 28, 2020)

proposal is in fact not unprecedented, and had been put forward in the past by some former prominent leaders of the conservative *Partido Popular*.⁴⁵

Vox' proposals for the reform of the Constitutional Court and the Judicial Council affect core aspects of Spain's liberal constitutionalism. But taken in their literality, and as they appear in the party's manifesto, they are not in themselves illiberal. The mere suppression of the Constitutional Court does not necessarily need to lead to an illiberal system: liberal democracies can, and frequently do work without constitutional courts. Furthermore, Vox' proposal of creating a Constitutional Review Chamber in the Supreme Court resembles the Estonian model, which is very *sui generis* but seems to be a fully legitimate option for modelling constitutional review in a democratic society. Similar is the case of the Judicial Council. The proposal to appoint members based exclusively on merit departs from the standards of institutions such as the European Network of Councils of the Judiciary, which recommend a democratic system of election by peer judges.⁴⁶ However, Vox' proposal does not seem to be in itself illiberal, and it tackles one of the core problems of the current Judicial Council in Spain: its politicization due to the parliamentary appointment.⁴⁷

Faced with two institutions suffering from a reputational crisis linked to their politicization, Vox tries to portray itself as a defender of the independence of these two organs that are central to liberal constitutionalism in Spain. This is in line with the overall narrative of the party, described in the previous section, which uses central themes of liberal constitutionalism, argues that they are endangered, and presents itself as their defender. This, however, contrasts with the much more illiberal approach of Vox' leaders to the process of rule of law backsliding in countries like Poland, showing a disconcerting element of ambiguity in the narrative of the party.

b. The vague proposal for reform of the electoral system

Unlike many traditional autocracies, illiberal forms of governance include the holding of regular elections.⁴⁸ For that reason, illiberal elites have a strong interest in controlling the electoral process in order to preserve their power. Electoral laws are of the utmost importance in this regard, because they can help illiberal actors to legitimize their rule by the ballot without having to fear the real electoral competition that characterizes liberal democracies.

Vox' proposals for the electoral system are relatively undetailed. They are contained in points 11 to 13 of their 'urgent measures' document. In particular, proposal 11 calls for the 'reform of the electoral system so that the vote of all Spaniards is worth the same, and so that deputies are accountable to voters and not so much to political parties. Part of the deputies will be elected in a national district'.

⁴⁵ EFE, *Aguirre propone eliminar el Tribunal Constitucional y hacerlo una sala del Supremo*, ABC ESPAÑA, June 21, 2012, https://www.abc.es/espana/abci-aguirre-tribunal-constitucional-201206210000_noticia.html?ref=https:%2F%2Fwww.google.com%2F (last visited Dec 28, 2020).

⁴⁶ For a discussion, see Michal Bobek & David Kosar, *Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe*, 15 GER. LAW J. 1257–1292 (2014).

⁴⁷ Pablo José Castillo Ortiz, *Councils of the Judiciary and Judges' Perceptions of Respect to Their Independence in Europe*, 9 HAGUE J. RULE LAW 315–336 (2017).

⁴⁸ LEVITSKY AND ZIBLATT, *supra* note 16 at 77.

As can be seen, despite referring to a core element of the political system, Vox' proposal for the electoral reforms lacks concretion and it looks *a priori* difficult to interpret. The idea that the reform should guarantee that 'all votes are worth the same' might refer to the fact that less populated districts are currently overrepresented in the Spanish parliament. It might also refer to the correlative underrepresentation of small parties in the Spanish *Cortes Generales*, especially when their vote is not concentrated in specific electoral districts. More importantly, given the vagueness of Vox' proposal for electoral reform, it is difficult to know its impact in the preservation of and respect for political pluralism. Paradoxically, if the reform actually had the effect of correcting the parliamentary underrepresentation of small parties in Spain, it could increase pluralism, political fragmentation, and the number of veto players in processes such as constitutional amendment. This would be in contradiction with other aspects of Vox' proposals and narrative, which have clear anti-pluralist implications, as I will show below. Additionally, a very disquieting note in this part of the manifesto is the statement about the accountability of deputies 'to voters and not so much to political parties' which -while equality vague- has certain populist, anti-establishment undertones.

It is worth noting that this proposal in Vox' manifesto takes place in a context of significant debate in Spain about the electoral system. Other parties also included in their manifestos for the November 2019 elections proposals for its reform. For instance, Ciudadanos –a member party of Renew Europe- included in its manifesto a proposal for representation in the Congress of Deputies to be conditional to obtaining a 3 per cent of the vote nationally –or 6 per cent in the case of coalitions-, as well as proposals to 'increase the proportionality of the electoral system'.⁴⁹ Podemos also included in their manifesto several proposals about electoral reform, many of them aimed at making the system more proportional, together with a proposal to allow the exercise of the right of suffrage at the age of 16.⁵⁰

c. Euroscepticism and anti-decentralism: concentrating power at the Spanish level

Unlike horizontal division of powers, vertical division of powers is not universally regarded as a necessary condition for liberal constitutionalism. Unitary states are not per se anti-democratic, and political decentralization is not a necessary –nor a sufficient- condition of constitutional democracy. However, decentralization is often seen as a desirable check on power, and it is central to certain constitutional traditions. According to Borzel and Sprungk "The classical liberal understanding of checks and balances is based on the horizontal division of power between the different branches of government (Locke 1690, Montesquieu 1748). The Fathers of the American Constitution, however, developed a system of checks and

⁴⁹ Electoral manifesto of *Ciudadanos* for the November 2019 Spanish general election, proposals 206 ff. See on line at <https://www.ciudadanos-cs.org/programa-electoral> (last visited Dec 28, 2020)

⁵⁰ El Confidencial, *Este es el programa electoral de Podemos para las elecciones generales del 10-N*, EL CONFIDENCIAL, November 10, 2019, https://www.elconfidencial.com/espana/2019-11-10/programa-electoral-unidas-podemos-elecciones-generales-noviembre_2292867/ (last visited Dec 28, 2020).

balances, in which the horizontal dimension of power between legislature, executive and judiciary is complemented by a vertical division of power”.⁵¹

In the case of Spain, vertical division of powers is twofold. On the one hand, Spain has since the transition to democracy in 1978 adopted a model of political decentralization called State of Autonomies. In this model, several aspects of Spain’s political power are decentralized into Autonomous Communities, each with their own government and parliament, subject to the Spanish Constitution. On the other hand, Spain is a Member of the European Union –and of the Council of Europe-. This double vertical division of powers is important for two reasons. First, because different levels of government at the supranational, national and subnational level hold different competences, thus creating systems of reciprocal checks and balances. Second, because at each level of government we can find binding catalogues of rights. The Spanish Constitution has a catalogue of fundamental rights; the Autonomous Communities have also extensive catalogues of legal rights in their Statutes of Autonomy, the highest-ranking rule of the legal system of the communities which is subject to the Spanish Constitution; and finally, the European Union has a Charter of Fundamental Rights, while the Council of Europe has the European Convention of Human Rights –to which Spain is a party-.

Vox’ proposals would radically alter this scenario. The party proposes a true re-centralization of power, weakening the both the vertical division of powers and the afore-mentioned multilevel protection of rights.

1. *The subnational level.* Many of Vox proposals focus on the subnational level, and more precisely on the suppression of Spain’s State of Autonomies. It is symptomatic that the party’s first proposals in its electoral manifesto are devoted to this topic. The first point in its 100 proposals document deals with the suspension of Catalan autonomy until ‘the defeat of the coup’⁵² in this Autonomous Community. Vox’ proposal number 6 puts forward the transformation of the State of Autonomies into a unitary State ‘with only one government and parliament’. And its proposal number 10 deals with the suppression of the special fiscal regimes of the Basque Country and Navarra.
2. *The supranational level.* If Vox’ proposals for the subnational level are very explicit, its approach to the supranational level is often more ambiguous. Vox has a critical and sceptical approach to supranational organizations. Regarding the Council of Europe, although the party is not explicit about abandoning the European Convention on Human Rights, the proposal 91 of their manifesto pledged to ‘recover national sovereignty in the application of rulings in Spanish courts, so that terrorists, rapists and serial killers cannot benefit from European organisations’. This approach would involve a weakening of the multi-level rights protection in Spain. Regarding the European Union the party advocated in its proposal 96 for ‘pushing for new European treaties in line with the proposals of the Visegrad group regarding borders, national

⁵¹ Tanja A. Borzel & Carina Sprungk, *Undermining Democratic Governance in the Member States? The Europeanization of National Decision-Making*, in DEMOCRATIC GOVERNANCE AND EUROPEAN INTEGRATION : LINKING SOCIETAL AND STATE PROCESSES OF DEMOCRACY 113–136, 115 (2007).

⁵² In the original in Spanish: ‘la derrota sin paliativos del golpismo’.

sovereignty and respect for the values of European culture, increasing the weight of Spain in decision-making processes’. Such proposal must be read together with proposal 97, about a proposed cut in European public expenditure and the exclusive state competence in international relations. These two proposals seem to point to a Eurosceptic approach to the EU which however would not imply a Spanish exit from the organization. However, again in this aspect, the party took an ambiguous attitude. That is the case because in its proposal 99 it pledged to abandoning supranational organizations ‘if they are contrary to the interests of Spain’ and in its proposal 83 it claimed that the party will prioritize ‘the needs of Spain and Spaniards vis-à-vis the interests of oligarchies, lobbies and supranational organizations’. So while Vox did not seem to propose a ‘Spaxit’ straight away, this possibility did not seem to be out of the scenario for the party during the general elections. Furthermore, the Eurosceptic narrative of Vox can also be seen in the speeches of Abascal. For instance, during the investiture session of Pedro Sánchez as President of the Government in 2020, Abascal accused Sanchez of willingness to ‘replace the national sovereignty (...) to give the power to the oligarchs in Brussels’.⁵³ In his speeches during the vote of no confidence against Sánchez, he went further and compared the European Union to totalitarian political systems.⁵⁴

d. A restrictive approach to rights and freedoms

Rights and freedoms are a final aspect of Vox’ proposals that is worth analysing. The reason is the conceptual link between these and a functional democracy.

Vox’ approach to rights regulation has a clear ultra-conservative and nativist flavour, with Catholic-identitarian undertones. In the manifesto of the party there is a lengthy list of proposals affecting rights, often in a restrictive way. The rights of migrants are one of the targets of the party. For instance, the party proposes the deportation of undocumented migrants (proposal 14), underlining the anti-immigration profile of the party. In line with this, in its proposal 31 Vox pledges to publish data of nationality and country of origin of criminals. And in their proposal 59 they pledge to the elimination of free access to health care for undocumented immigrants and co-payment for legal residents with less than 10 years of permanence in Spain, the Spanish public health system covering exclusively emergency services in these cases. Vox has also been characterized as featuring an ontological

⁵³ Diario de Sesiones del Congreso de los Diputados. Pleno y Diputación Permanente. Año 2020 XIV Legislatura Núm. 2, Sesión plenaria núm. 2 de 4 de enero de 2020, page 51. See at [\(https://www.congreso.es/web/guest/busqueda-de-publicaciones?p_p_id=publicaciones&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&publicaciones_mode=mostrarTextoIntegro&publicaciones_legislatura=XIV&publicaciones_id_texto=\(DSCD-14-PL-2.CODI.\)#\(P%C3%A1gina3\)\)](https://www.congreso.es/web/guest/busqueda-de-publicaciones?p_p_id=publicaciones&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&publicaciones_mode=mostrarTextoIntegro&publicaciones_legislatura=XIV&publicaciones_id_texto=(DSCD-14-PL-2.CODI.)#(P%C3%A1gina3)) (last visited Dec 28, 2020).

⁵⁴ Diario de Sesiones del Congreso de los Diputados. Año 2020 XIC Legislatura Núm. 55, Sesión plenaria núm. 52 de 32 de octubre de 2020, page 19 [\(https://www.congreso.es/web/guest/busqueda-de-publicaciones?p_p_id=publicaciones&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&publicaciones_mode=mostrarTextoIntegro&publicaciones_legislatura=XIV&publicaciones_id_texto=\(DSCD-14-PL-55.CODI.\)#\(P%C3%A1gina3\)\)](https://www.congreso.es/web/guest/busqueda-de-publicaciones?p_p_id=publicaciones&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&publicaciones_mode=mostrarTextoIntegro&publicaciones_legislatura=XIV&publicaciones_id_texto=(DSCD-14-PL-55.CODI.)#(P%C3%A1gina3)) (last visited Dec 28, 2020).

islamophobic profile.⁵⁵ In relation to this, the party proposes the prohibition of the teaching of Islam in schools -but not of other religions- in its proposal 25. The party also has proposals affecting areas such as gender and sexuality. In their proposal 56, Vox commits to suppressing in the public health system ‘surgical interventions other than health-related’ like ‘gender change and abortion’. Finally, proposal 71 is a commitment to the protection of the ‘natural family’, which must be interpreted as the protection of heterosexual families to the exclusion of families structured around homosexual partners. The list of proposals affecting rights could go on.⁵⁶ Frequently, the pattern in the area of rights protection seems to be the erosion of the rights of minorities, especially of those minorities that are excluded from the party’s conception of Spanishness. In this regard, the party clearly fits the definition of illiberalism provided for earlier in this article, according to which illiberal actors pose of risk to rights protection.⁵⁷

These proposals are complemented by other ones that target rights which are central to the most basic aspects of the democratic process. The first of them is their proposal number 2: the illegalization of political parties, associations and NGOs that seek the ‘destruction of the territorial unity of Spain and its sovereignty’. According to this proposal, political parties that seek the independence of parts of Spain would be illegalized. A second aspect which has a potential to undermine basic elements of liberal democracy is their proposal number 3: the increase in penalties for offenses to ‘Spain and its symbols’, clearly affecting freedom of expression.

Interestingly enough, in Abascal speeches, the illegalization of pro-independence political parties is justified using a constitutionalist rhetoric: ‘so yes, we have proposed the illegalization of separatist parties, but not because we are against political pluralism, rather because political pluralism cannot be an excuse to destroy the fundamental law, to destroy the Constitution and to destroy the unity in which our Constitution is based’.⁵⁸ At the same time, other leaders of the party have gone even further than the electoral manifesto in their suggestions that Vox would be willing to illegalize political rivals. Iván Espinosa de los Monteros declared that ‘it should be analysed whether there is a right to be in the political game for those that do not believe in the unity of Spain and those that do not renounce to Marxism, that has left so many deaths’, a statement that was interpreted as referring to Podemos -a party member of the current coalition government in Spain-.⁵⁹ Likewise, Javier Ortega Smith, Vox’ Secretary General, threatened with illegalizing the Basque Nationalist

⁵⁵ Laura Cervi, *Exclusionary Populism and Islamophobia: A Comparative Analysis of Italy and Spain*, 11 RELIGIONS. 516 (2020).

⁵⁶ For other works on Vox’ approach to minorities and their rights, see *Id.*; Diego Mo Groba & Paloma Castro Martínez, *El issue de la inmigración en los votantes de VOX en las Elecciones Generales de noviembre de 2019*, 19 REV. INVESTIG. POLÍTICAS SOCIOLOGICAS RIPS 39–58 (2020).

⁵⁷ See Sajó, *supra* note 22 at 410.

⁵⁸ Diario de Sesiones del Congreso de los Diputados, Pleno y Diputación Permanente. Año 2020 XIV Legislatura Núm. 55, Sesión plenaria núm. 52 de 21 de octubre de 2020, page 81. See at [\(https://www.congreso.es/web/guest/busqueda-de-publicaciones?p_p_id=publicaciones&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&publicaciones_mode=mostrarTextoIntegro&publicaciones_legislatura=XIV&publicaciones_id_texto=\(DSCD-14-PL-55.CODL\).#\(P%C3%A1gina3\)\)](https://www.congreso.es/web/guest/busqueda-de-publicaciones?p_p_id=publicaciones&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&publicaciones_mode=mostrarTextoIntegro&publicaciones_legislatura=XIV&publicaciones_id_texto=(DSCD-14-PL-55.CODL).#(P%C3%A1gina3)) (last visited Dec 28, 2020)

⁵⁹ Vox plantea ilegalizar a Podemos por no defender la unidad de España ni renunciar al marxismo, EUROPAPRESS, March 18, 2019, <https://www.europapress.es/nacional/noticia-vox-plantea-ilegalizar-podemos-no-defender-unidad-espana-renunciar-marxismo-20190318142221.html> (last visited Dec 28, 2020).

Party (PNV)⁶⁰, despite this party does not even currently propose the independence of the Basque Country from Spain.

e. A provisional balance: illiberal proposals?

Constitutions can be understood as systems in interaction. Liberal constitutionalism should not be deemed as a catalogue of separate, disconnected institutions and arrangements. Rather, liberal constitutionalism is about types of interaction among the many institutions foreseen in the constitution that are able to produce constrained government and political freedom. Systems based on illiberal public law often contain institutions similar to their liberal counter-parts, but which are subject to small institutional variations so that, in their interaction, they produce unconstrained executive power.⁶¹ The standard against which a proposal needs to be measured in order to assess whether it has illiberal tendencies is, thus, this one: its proclivity to increase or unconstraint the powers of the executive. But for a system as a whole to be illiberal, it is necessary that different illiberalizing aspects of institutional design accumulate so that in their interaction they produce unconstrained rule.⁶²

Vox' manifesto includes proposals for almost every core aspect of liberal constitutionalism: checks on power, electoral system, vertical distribution of power, civil rights, etc. The party's proposals for the reform of the Judicial Council and the replacement of the Constitutional Court are not in themselves conducive to accumulation of powers in the executive. Similar is the case of proposals for reforms of the electoral system, the ambiguity of these proposals being such that their effects on liberal democracy are difficult to assess. Finally, proposals related to the vertical division of powers in Spain do seem to have the capacity to reduce constraints on the executive, or at least on political majorities at the Spanish level.

However, the aspect of Vox' proposals that most clearly clashes with liberal constitutionalism is that related to fundamental rights. First, there is the issue of the restrictions on the rights of minorities proposed by Vox, which is congruent with the definitions of illiberalism presented earlier in this article. Second, there are the threats of illegalizing rival political parties. Levitski and Ziblatt refer to 'mutual toleration' as a key aspect of democracy: the idea that 'as long as our rivals play by constitutional rules, we accept that they have an equal right to exist, compete for power, and govern'.⁶³ As I showed above, Abascal justified his proposal to illegalize separatist parties in the idea to protect the Spanish Constitution. But many of the leaders of Vox have discussed the possibility of illegalization of a wide range of political parties, based on their ideology. Interestingly, as I will show in the next section, it is the very Spanish Constitution the one that rejects the possibility of illegalizing parties on the grounds proposed by Vox' leaders.

⁶⁰ Lluís Muñoz Pandiella, *¿Qué partidos y qué candidatos son favoritos en las elecciones de España?*, FRANCE 24, November 9, 2019, <https://www.france24.com/es/20191107-partidos-candidatos-favoritos-elecciones-espana> (last visited Dec 28, 2020).

⁶¹ See on this Kim Lane Scheppele, *The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work*, 26 GOVERNANCE 559–562 (2013).

⁶² See *Id.*

⁶³ LEVITSKY AND ZIBLATT, *supra* note 16 at 102.

VI. Legal constitutionalism in Spain: a constraint on Vox' policies?

The previous section analysed Vox' policy proposals on the light of the concept of illiberalism. This section analyses the extent to which such proposals are compatible with the Spanish Constitution, and the extent to which the Spanish constitutional system could be able to impose some constraints on Vox in a 'worst case scenario': a scenario in which the party was to implement all of its proposals in the most illiberal possible way

a. Vox' proposals before a rigid constitution

Many of Vox' proposals mentioned in the previous section of this article have a clearly unconstitutional flavour, and their implementation would require constitutional reform. In fact, recently, Vox' leader Abascal framed the measures put forward by his party as part of a proposal for "wide constitutional amendment".⁶⁴

In general, constitutional rigidity is featured by a trade-off. Flexible constitutions can easily adapt to new social realities, but this comes at the cost of accepting majoritarian rather than consensual reforms of the constitution. Rigid constitutions are harder to adapt to societal changes and new political demands, but when they are amended the reforms reflect a wide political consensus in which political minorities and opposition members are also included.⁶⁵ The Spanish Constitution can be generally said to belong to the second type: it is a rigid constitution.

The procedure of constitutional amendment in Spain is contained in Arts. 166 to 169 of the Spanish Constitution (hereinafter 'SC'), which establish a double mechanism. According to Art. 167 SC, for most constitutional provisions reform entails a majority of three fifths of each chamber of the parliament⁶⁶, plus a referendum if requested by at least one tenth of the

⁶⁴ Diario de Sesiones del Congreso de los Diputados, Pleno y Diputación Permanente. Año 2020 XIV Legislatura Núm. 55. Sesión plenaria núm.52 de 21 de octubre de 2020, page 87. See [https://www.congreso.es/web/guest/busqueda-de-publicaciones?p_p_id=publicaciones&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&publicaciones_mode=mostrarTextoIntegro&publicaciones_legislatura=XIV&publicaciones_id_texto=\(DSCD-14-PL-55.CODI.\)#\(P%C3%A1gina3\)](https://www.congreso.es/web/guest/busqueda-de-publicaciones?p_p_id=publicaciones&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&publicaciones_mode=mostrarTextoIntegro&publicaciones_legislatura=XIV&publicaciones_id_texto=(DSCD-14-PL-55.CODI.)#(P%C3%A1gina3)) (last visited December 28, 2020)

⁶⁵ See inter alia, Benz, *Balancing Rigidity and Flexibility: Constitutional Dynamics in Federal Systems*, 36 WEST EUR. POLIT. 726–749 (2013); James Melton & Tom Ginsburg, *Does the constitutional amendment rule matter at all?: Amendment cultures and the challenges of measuring amendment difficulty*, 13 INT. J. CONST. LAW 686–713 (2015).

⁶⁶ Art.167 SC also foresees a mechanism for the case in which there is no agreement between the Houses of the Parliament. In that case, a Joint Committee of both Houses is created which shall submit a new text of the amendment to be voted by the Congress and the Senate. If this procedure also fails, the Congress may pass the amendment by a two-thirds majority if such amendment has been passed by an overall majority of the members of the Senate.

members of either House of the parliament. Spanish constitutional doctrine has emphasized the role of this optional referendum in the protection of minorities.⁶⁷

For special constitutional provisions -such as the Preliminary Part of the Constitution, Chapter II, Division 1 of Part I, and Part II of the Constitution- Art.168 foresees an even more rigid procedure for amendment. This consists of a requirement that the amendment is approved by a two-thirds majority of the members of each House, after which the *Cortes Generales* shall be immediately dissolved. Then, new elections take place, after which the new chambers of the parliament elected must pass again the amendment by a two-thirds majority in each of them. Subsequently, the amendment is to be submitted to ratification in referendum.

The problem for Vox is that many of its proposals, in particular many of those analysed above in this article, would be necessitated of constitutional reform, including rigid amendments of the Constitution.⁶⁸ This renders such proposals scarcely viable from a political-constitutional perspective. Table 4 summarizes the (un)constitutionality of many of Vox' proposals, indicating for each proposal some –but not all- of the main constitutional provisions affected, as well as the procedure of amendment for each of them.

Table 4. Constitutionality of Vox' Proposals

Type of constitutional amendment	Procedure of amendment	Proposals (main constitutional articles affected)
No amendment	None	<ul style="list-style-type: none"> - Withdrawal from European Union - Withdrawal from ECHR - Change membership of Council for the Judiciary (but see Art.122.3)
Ordinary amendment	3/5 majority in parliament + optional referendum	<ul style="list-style-type: none"> - Suppression of the Constitutional Court (Arts. 159-165) - Change of electoral system (Art.68)
Rigid amendment	2/3 majority in parliament + elections + 2/3 majority in new parliament + referendum	<ul style="list-style-type: none"> - Suppression of autonomous communities (Art.2) - Suppression of parties contrary to the unity of Spain (Arts.6 and 22)

Own elaboration

⁶⁷ José Manuel Santos, *La reforma del procedimiento de reforma constitucional en España*, 96 REV. DERECHO POLÍTICO 13–48, 26 (2016).

⁶⁸ Pablo José Castillo Ortiz, *Vox y la Constitución*, EL PAÍS, March 14, 2019, https://elpais.com/elpais/2019/03/12/opinion/1552413986_316642.html (last visited Jul 5, 2019).

Depending on the constitutional feasibility of their implementation, Vox' proposals analysed in the previous section can be classified in three types. Firstly, there are those proposals that are not necessitated of constitutional amendment. Withdrawals from the European Union and from the European Convention of Human Rights, if the party were to finally opt for them, are two of them, as membership of these is not explicitly mandated in the Spanish Constitution.⁶⁹ Similar is the case of the proposal to base 'on merit' the membership of the Council for the Judiciary, albeit there is one caveat in this regard: Art.122.3 SC establishes that eight members of this institution will be appointed at the proposal of both chambers of the Spanish parliament. A flexible interpretation of this provision, however, would facilitate this reform by assuming that the chambers of the parliament might propose for appointment candidates based 'on merits', to use the literality of Vox' proposal.

Secondly, however, other proposals are more difficult to implement, as they would necessitate the use of the ordinary procedure of constitutional amendment.⁷⁰ The Constitutional Court, for instance, is explicitly regulated in the Spanish Constitution, inter alia in Arts.159 to 165. The suppression of Constitutional Court, therefore, would involve the derogation of one complete Part of the Spanish Constitution (Part Nine) out of the ten Parts that compose it, plus a number of additional provisions in other Parts of the constitution.⁷¹ Similarly, the Constitution regulates the electoral system establishing that the districts for elections to the Congress of Deputies are the provinces. The creation of a Spanish-wide electoral district, as suggested by Vox, would require the amendment of Art.68 SC –as paragraph 2 of this provision states that 'the electoral district is the province', and possibly of Art.69 SC if it was to affect also the Senate.⁷²

Thirdly and finally, some of Vox' proposals are unconstitutional and affect constitutional provisions protected by the rigid procedure of amendment.⁷³ The Autonomous Communities, which the party aims at suppressing, are regulated in several parts in the Constitution. As the constitutional regulation of this question lacks detail in some aspects⁷⁴, the constitutional case-law has played a central role in the design of the current territorial design of Spain.⁷⁵ This being said, certain aspects of the setup of the State of Autonomies are clearly defined in the Constitution –specially in Chapter Three of Part Eight, as well as in Art.2 SC- and Vox proposals clash with this constitutional regulation. For instance, Art. 2 SC recognizes the 'right to autonomy of nationalities and regions' in Spain, this provision being protected under the rigid procedure of amendment. Vox' idea of suppressing the Autonomous Communities is thus an unconstitutional proposal, necessitated of a very demanding procedure of

⁶⁹ Note, however, that the Spanish Constitution does mention now the European Union in Art.135. I believe that a more expansive interpretation could be put forward according to which such mention involves the constitutional entrenchment of Spanish membership of the EU, thus withdrawal from the organization requiring constitutional amendment. This would further complicate Vox' political agenda.

⁷⁰ See Castillo Ortiz, *supra* note 68.

⁷¹ *Id.*

⁷² *Id.*

⁷³ See *Id.*

⁷⁴ See Gregorio Cámara Villar, *La organización territorial de España. Una reflexión sobre el estado de la cuestión y claves para la reforma constitucional*, 101 REV. DERECHO POLÍTICO 395–430 (2018).

⁷⁵ See inter alia rulings such as Constitutional Court Ruling (*Sentencia del Tribunal Constitucional*) 76/1983 of 5 August; Constitutional Court Ruling 247/2007 of 12 December; Constitutional Court Ruling 31/2010 of 28 June.

constitutional reform for its implementation.⁷⁶ Similar is the case of Vox' proposal to illegalise parties contrary to the unity of Spain.⁷⁷ The Spanish Constitution, in Article 6, establishes that the creation and activities of political parties are free within the limits of the respect to the Constitution and the Law. In its case law, the Constitutional Court has stated that the Spanish legal system cannot impose 'adhesion to the legal system and the Constitution'⁷⁸. This implies that political parties are free to stand against the content of the Constitution as long as the factually respect it.⁷⁹ To give an example, political parties are allowed to defend the independence of an Autonomous Community, even if the Constitution protects the unity of the Spanish nation, as long as those parties accept that in order to reach their goals they would have to amend the Constitution following the formal procedures to do so.

b. The Spanish constitutional system and its constraints on illiberal actors

Constitutional reform is not, however, the only way that a radical party has to implement unconstitutional proposals. When such reform is extremely burdensome, as it is the case of Spain, a shortcut is the control of the Constitutional Court.⁸⁰ We have seen this in countries like Poland.⁸¹ Whoever controls the interpreter of the constitution controls also the meaning of the Constitution: if illiberals in power control the constitutional court, the latter can declare the constitutionality of materially unconstitutional legislation, *de facto* freeing the executive from constitutional constraints.⁸² As put by Ginsburg and Huq, 'courts, once created, can become a kind of *instrument* of [democratic] erosion. Political leaders may want to imbue them with extensive formal powers once they are captured, stock them with cronies, and turn the law loose on their enemies'.⁸³

Takeover of the Spanish constitutional court is however not so easy. Art. 159 of the Spanish Constitution establishes that the *magistrados* are appointed for 9 years by four different actors. Four constitutional judges are appointed by Congress of Deputies by a three fifths majority, four are appointed the by Senate by the same majority, two are appointed by the Government and two are appointed by the Council of the Judiciary. This mechanism of appointment has given rise to the creation of party quotas and the politicization of the institution.⁸⁴ But the system renders control of the constitutional court by a single party much more difficult. This is especially the case in a scenario of high political fragmentation as the current Spanish political landscape.

⁷⁶ Castillo Ortiz, *supra* note 68.

⁷⁷ *Id.*

⁷⁸ Spanish Constitutional Court Ruling 48/2003 of 12 March.

⁷⁹ Miguel Angel Presno, *¿Ilegalización de partidos independentistas? ¿Bromea o qué?*, EL PERIODICO, October 19, 2017, <https://www.elperiodico.com/es/opinion/20171019/ilegalizacion-de-partidos-independentistas-bromea-o-que-6365213> (last visited Feb 13, 2019).

⁸⁰ Joanna Fomina & Jacek Kucharczyk, *The Specter Haunting Europe. Populism and Protest in Poland*, 27 J. DEMOCR. 58–68, 62 (2016).

⁸¹ Sadurski, *supra* note 6.

⁸² Castillo-Ortiz, *supra* note 23.

⁸³ GINSBURG AND HUQ, *supra* note 38 at 190.

⁸⁴ See Nuno Garoupa, Fernando Gomez-Pomar & Veronica Grembi, *Judging under Political Pressure: An Empirical Analysis of Constitutional Review Voting in the Spanish Constitutional Court*, 29 J. LAW ECON. ORGAN. 513–534 (2011).

The design of the Spanish Constitutional Court is not the only element with a potential to offer resistance to an eventual government with illiberal tendencies. For instance, the fact that certain aspects of the electoral system are constitutionalized should offer certain guarantees. In this sense, the Constitution establishes the universal, free, equal, direct and secret character of the suffrage in Spain (Art.68.1SC), the four year mandate for the members of the Congress of Deputies (Art.68.4SC) and Senate (Art.69.6 SC), or the criteria of proportional representation in electoral districts for the Congress of Deputies (Art.68.3 SC), to mention just a few aspects. The Constitution also offers other guarantees, such as the institution of the Ombudsman (*Defensor del Pueblo*). This institution is regulated by Organic Law, which requires an absolute majority of votes in the Congress of Deputies (Art.54 SC). To mention just a final example, the fact that the design of the Council of the Judiciary is partly constitutionalized (Art.122 SC) is also significant, even if –as explained earlier- in this later case there is a significant debate in the country about the adequacy of the current setting up of the institution.⁸⁵

The fact that all of these central elements of the political design of democracy in Spain are constitutionalized, together with the rigidity of the procedure of constitutional amendment and the design of the Constitutional Court, suggests that the Spanish constitutional system could offer certain resilience in a worst-case scenario.

VII. Characterizing Vox' political approach to constitutionalism

In this section I present the corollary to the analyses carried out throughout this article, describing the central traits of Vox' political approach to constitutionalism in Spain. Such traits can be summarized in three characteristics: partisan use of constitutional rhetoric, constitutional double-standards combined with selective constitutionalism, and unconstitutionality of a wide range of policy proposals.

- a. *Partisan use of constitutional rhetoric.* Vox does not hesitate to use themes of liberal constitutionalism, and to selectively mobilize the Spanish Constitution and some of its provisions, as part of its political narrative. For instance, in its manifesto Vox emphasizes that Art.149 of the Spanish Constitution gives the Spanish State exclusive competence in international relations (proposal 97). In such proposal, the party is using the Spanish Constitution to back its agenda of centralization of political power in Spain. Vox' manifesto also underlines the importance of the constitutional right of all Spaniards to use Spanish language and their duty to know it (proposal 4). In their speeches, Vox leaders have mobilized frequently the Spanish Constitution, allegedly to 'defend' it against political opponents. Recently, Vox' spokesperson in the Spanish Congress of Deputies, Espinosa de los Monteros, stated that his party would increase 'its

⁸⁵ Aida Torres Pérez, *Judicial Self-Government and Judicial Independence: the Political Capture of the General Council of the Judiciary in Spain*, 19 GER. LAW J. 1769–1800 (2018).

efforts in defence of the Constitution that these days is being attacked by the enemies of Spain’ and that ‘Vox likes the Constitution of 1978, notwithstanding certain aspects that we aspire to improve’.⁸⁶ Abascal, current Vox’ leader, qualified the investiture of the social democrat candidate Pedro Sanchez as President of the Government as an ‘ambush against the Constitution’.⁸⁷ For from portraying themselves as critics of the Spanish Constitution, Vox’ leaders seem to have opted for a strategy of rhetorical use of constitutional themes, that are mobilized against political rivals.

- b. *Constitutional double standards and selective constitutionalism.* Vox, thus, makes a partisan use of themes of liberal constitutionalism and aspects of the Spanish Constitution. Interestingly, however, this is coupled with a sympathetic approach towards governments of countries featuring processes of rule of law backsliding, showing comradery with them. In its electoral manifesto, Vox only refers in a limited number of instances to such countries, but when it does so it is never to mention the processes of rule of law backsliding that they are undergoing. On the contrary, the mentions to these countries are aimed at aligning Vox with some of the policies of their governments. For instance, proposal 96 of Vox’ manifesto, mentioned above, declares that the party wants to push for a new European treaty ‘in line with the proposals of the Visegrad group regarding borders, national sovereignty and respect for the values of European culture’. And proposal 99 aims at the creation of an agency for aid to threatened Christian minorities ‘imitating Hungary’s initiative’.⁸⁸ As explained earlier in this article one of Vox leaders, Espinosa de los Monteros, did not hesitate to defend the takeover of the Polish judicial council by the government of that country.

This ambiguous approach to constitutional themes is further complemented by the selective adhesion to certain liberal-constitutional rules, institutions and principles. This is done while the party ignores or rejects other important aspects of liberal constitutionalism. Vox does not reclaim the label of illiberal party, much less that of anti-democratic party. Instead, Vox presents itself as simply another option in the democratic menu of political parties in a pluralistic society. The party’ manifesto even includes certain proposals allegedly aimed at increasing the ‘independence of the judicial branch’ – such as the reform of the Judicial Council. Yet, these proposals are combined with traits such as the anti-pluralist element of the party’s narrative. The public speeches of Vox’ leaders in which they hinted at the illegalization of a wide

⁸⁶ Ricardo Rubio, *Vox promete redoblar su defensa de la Constitución aunque aspira a reformarla*, EUROPAPRESS, December 6, 2019, <https://www.europapress.es/nacional/noticia-vox-promete-redoblar-defensa-constitucion-aspira-reformarla-20191206114946.html> (last visited Jan 15, 2020).

⁸⁷ Maite Loureiro, *Abascal, contra Sánchez: “Esta investidura es una emboscada a la Constitución,”* LIBERTADDIGITAL, April 1, 2010, <https://www.libertaddigital.com/espana/politica/2020-01-04/abascal-muy-duro-contra-sanchez-esta-investidura-es-una-emboscada-a-la-constitucion-1276650298/> (last visited Jan 15, 2020).

⁸⁸ See also Ferreira, *supra* note 5 at 91.

range of political rivals because of their ideas is probably one of the most disquieting aspect of this political party.

- c. *Unconstitutionality of several core policy proposals.* A final, important trait of Vox' political approach to constitutionalism is its relation with the current constitutional status quo in Spain. In its manifesto, the party seemed to disregard constitutional constraints, ignoring the fact that many of their policy proposals were incompatible with the 1978 Spanish Constitution. This is consistent with Ferreira's interpretation, according to which Vox can be classified as a party that is contrary to the constitutional framework in force in Spain.⁸⁹ Furthermore, for this reason, the implementation of Vox' proposals would be necessitated of a very complex and consensus-oriented constitutional amendment, that looks *prima facie* difficult to achieve for the party. As explained earlier, leaders of the party have now recognized that implementation of their policy preferences would be necessitated of a comprehensive constitutional reform.

A couple of hypotheses can be put forward to explain this trait of Vox' approach to constitutionalism. First, when the party ran on this manifesto for the first time in the April 2019 election, Vox was an extra-parliamentary force. Even in the second election of November 2019 Vox seemed to be far away from the prospect of winning the election. The manifesto was therefore not going to be implemented, for the simple reason that Vox would not be in power. In that scenario, the cost of presenting unconstitutional proposals is low, as the opportunity to transform them into legislation would simply not take place. If that were actually the case, logic suggests that the closer Vox gets to securing a position of power in Spain, the more it should moderate its proposals to make them compatible with the Spanish Constitution and, therefore, more implementable. A second, more pessimistic hypothesis would suggest that Vox' dissatisfaction with the constitutional status quo is more deeply ingrained in the party's ideas. From this perspective, Vox has a radical programme that it wants to implement, and constitutional constraints are perceived as an obstacle to get rid of in order to implement it. Which of these two hypotheses holds true might have a deep impact in the future evolution of the party, and potentially in Spanish politics in the medium run.

With this background, it is worth resourcing to Mudde's description of populists' approach to constitutionalism as 'opportunistic'.⁹⁰ Vox makes a frequent use of the Spanish Constitution in its narrative, mobilizing it against political opponents. But in parallel to this, the party proposes a wide range of policy reforms that are incompatible with the constitutional status quo. Furthermore, while the party mobilizes themes and ideas of liberal constitutionalism in its narrative, its leaders support illiberal reforms in other countries and argue in favour of an

⁸⁹ *Id.* at 93.

⁹⁰ CAS MUDDE, ARE POPULISTS FRIENDS OR FOES OF CONSTITUTIONALISM? (2013).

anti-pluralist agenda in Spain. Whether confusing, contradictory or simply opportunistic, what is clear is that Vox has a tense and ambiguous relationship with liberal constitutionalism and the Spanish Constitution.

VIII. Conclusion

This article has enquired which are the main traits of Vox' political approach to constitutionalism. Given that this research is focused on the specific case of this Spanish radical right party, it is advisable to take a very modest approach to the generalization of the findings of the article. Still, I hope that this research will offer some clues for future work on the political approaches to constitutionalism of other radical right parties, to the extent that similarities between them allow it.

Vox has a paradoxical relation with liberal constitutionalism. The party presents itself as reformist, rather than illiberal. Many of the proposals put forward by Vox, taken individually and in their literality, do not need to lead to the erosion of democratic institutions. A democracy can survive without a constitutional court. Unitary states do not need to be undemocratic. And democracy is possible outside the European Union and the Council of Europe. However, at the same time, the party frequently takes a clearly anti-pluralist stance and its leaders threaten with the illegalization of political rivals, as well as the restriction of the rights of minorities. And the party has showed a clear support for illiberal reforms in neighbouring European countries.

Vox' ambiguity vis-à-vis liberal constitutionalism is in itself reason for concern. In a worst case scenario, the Spanish constitutional framework might act as a constraint on Vox' most illiberal policies. This would add further tension to the relationship of this radical right party with liberal constitutionalism. Confronted with a constitution that prevents it from advancing its policy preferences, the party might opt either for a moderate pragmatism or for a radical anti-constitutionalism.⁹¹ A further radicalized Vox with enough political support could put Spain in a dangerous path.

In countries with illiberal actors in power we have already observed the consequences of this.⁹² Ginsburg and Huq define democratic erosion as the 'slow and incremental path by which the core structures of democratic self-rule are eroded piecemeal'.⁹³ In this regard, Vox' proposals and narratives combine elements that look prima facie innocuous with other ones that have clear illiberal undertones. Furthermore, as already explained, the Spanish constitutional system seems to include elements that would allow certain resistance vis-à-vis an illiberal government. But nothing suggests that Spain is an exception to the general rule identified by literature on democratic backsliding: even if constitutional provisions can constraint authoritarian leaders, they are often, alone, insufficient to prevent democratic

⁹¹ Castillo Ortiz, *supra* note 68.

⁹² Inter alia Sadurski, *supra* note 6; Halmai, *supra* note 12; Drinóczi and Bień-Kacała, *supra* note 4.

⁹³ GINSBURG AND HUQ, *supra* note 38 at 238–239.

deterioration when the main political actors are not committed to protecting political freedom.⁹⁴

⁹⁴ LEVITSKY AND ZIBLATT, *supra* note 16.