



HUMAN RIGHTS
REGRESSION: ELECTED
OFFICIALS' FREEDOM
OF EXPRESSION AND
THE SEPARATION OF
POWERS IN THE
KINGDOM OF SPAIN

APRIL 2017

SÍNDIC

EL DEFENSOR
DE LES
PERSONES

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1. INTRODUCTION

Pursuant to Article 78.1 of the Statute of Autonomy of Catalonia (SAC), the Catalan Ombudsman has the duty to protect and defend the rights and freedoms recognized by the Constitution (SC) and the Statute itself. Article 4 of Law 24/2009, of December 23, on the Catalan Ombudsman, reiterates this mandate by stating that “the Catalan Ombudsman works to ensure the protection and defense of the rights and liberties recognized by the Constitution, by the Statute, and the relevant implementing rules.” Further, it adds within this framework that the Ombudsman can prepare monographic and special reports.

The references made by the SAC and Law 24/2009 to the SC, and the fact that the SC and SAC themselves acknowledge the role of autonomous institutions in the application of international treaties show that, despite the fact that the Catalan Ombudsman’s scope of competencies is circumscribed to Catalonia and its administrations, this institution cannot be alienated from the laws and public policies that, though they may have their origin at the state or international level, directly affect Catalonia.

Both the SC and SAC include charters of fundamental rights. What is more, Article 10.2 of the SC states that “the rules relative to fundamental rights and freedoms that the Constitution recognizes will be interpreted in accordance with the Universal Declaration of Human Rights and the international treaties and agreements on these topics ratified by Spain.”

Spain is party to numerous international treaties in the realm of human rights, among which are the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 1950), as well as most of their optional protocols, and international agreements on civil and political rights, as well as those relative to economic, social and cultural rights (New

York, 1966). It is subject to the jurisdiction of the European Court of Human Rights of the Council of Europe, and has accepted the competency of various human rights committees of the UN. The case law of these entities—though only the rulings of the former have binding judicial power—are generally understood as the authentic interpretation of the treaties to which they are bound, and that form part of the interpretative fund of the constitutional and statutory rights.

In this context, this report will analyze the impacts on human and fundamental rights that, in the view of this institution, are taking place in Spain, with a special effect in Catalonia. This regression affects recognized rights and freedoms in the Catalan Spanish fundamental regulations, as well as the international legal framework. This has been denounced in annual reports 2014, 2015 and 2016 and several monographic reports submitted to Catalan Parliament.*

Democratic and rights regression may come from a number of origins. As will be seen in this report, there are laws approved by the Spanish Parliament that damage or jeopardize rights and fundamental freedoms on their own. The Catalan Ombudsman believes this to be true of the most recent reform of the Organic Law on Public Safety or the Criminal Code. In other cases, it is the courts’ interpretation that does not comply with constitutional, statutory and international human rights standards. Last, often political or administrative decisions, even those of public policy, constitute flagrant violations of rights recognized in the highest judicial regulations.

In methodological terms, the report is structured into two main parts. First, and based on the definition found in the case law of the European Court of Human Rights on freedom of expression, the authors analyze the new Spanish legislation (Public Safety Act and Criminal Code) and their impact on the criminalization of dissident opinions.

* For this report the Catalan Ombudsman has had the co-operation of the Human Rights Institute of Catalonia and the unique contributions of professors Joan Queralt and Joan Vintró of the University of Barcelona and occasional contribution of José María Mena, former Head of Prosecutor’s Office of Catalonia.

Second, at the institutional level, the report focuses on the international positions seeking reform to fully guarantee the separation of powers. Specifically, emphasis is placed on the reform of Article 92.4 of the Organic Law on the Constitutional Court, and on Judgment 185/2016 of the Constitutional Court, which settles the contestation against it, and has made clear the insufficient quality of powers separation in Spain.

The second part of the research effort deals with the restrictions on freedom of expression affecting what is known as the Catalan Process. These include restrictive measures that use the courts of justice as mechanisms of pressure against acts by citizens or political representatives, which in a democratic system should be considered forms of the legitimate exercise of freedom of expression or demonstration, conceived to influence the democratic system and modify certain situations or rules. This part of the report features, first, an analysis of some of the court cases and governmental reactions that have come about in the framework of

the so-called *sovereignty process*, to the extent that they are aimed at elected officials—at both the autonomous community and local levels—who, according to the case law of the European Court of Human Rights, enjoy added protection regarding their right to the freedom of expression and political participation.

On March 30, 2017, the Parliament of Catalonia notified the Catalan Ombudsman of Motion 107/XI, according to which, under Article 27.3.a) of Law 24/2009, it was agreed to file a complaint with the Ombudsman “because of the politicization, and lack of independence and objectivity, of the Spanish judiciary, prosecutors and the Constitutional Court.” This report was anticipated in the Annual Report of the Catalan Ombudsman submitted to the Parliament on 1 February 2017. Therefore it does not derive from that motion but can partially respond to some of the matters brought up therein.

Barcelona, April 2017.

2. HUMAN RIGHTS AND SEPARATION OF POWERS IN THE SPANISH CONTEXT

2.1. RIGHT TO FREEDOM OF EXPRESSION

The right to freedom of expression is an essential part of a democratic society's foundation. It is one of the core conditions for its progress and the development of each of its members¹ and, therefore, it is an essential right for the protection of European democratic public order in the area of human rights.

Article 10.1 of the European Convention on Human Rights stipulates that "This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."

By considering that the exercise of freedom of expression involves duties and responsibilities, the European Convention recognizes that this right is subject to regulation, on the condition, nonetheless, that the restrictions or punishments be established by law, and constitute measures necessary in a democratic society to achieve the various legitimate purposes that have been listed. As stipulated in Article 10.2:

"2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

From this point on, the European Court of Human Rights has repeatedly stated its position on the content and limits of these rights:

1. Freedom of expression is one of the essential foundations of democratic society, one of the basic conditions for its progress and the development of each of its members. Subject to paragraph 2, **"it is applicable not only to "information" or "ideas" that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb."** It must be so for the pluralism, tolerance or spirit of openness, without which there can be no democratic society. As stated in Article 10, there are exceptions that must be interpreted in a restrictive manner, and the need for restriction must be established in a compelling manner;² This principle is not to be overlooked in analyzing the possible regression in freedom of expression taking place in Spain and specifically, in Catalonia.

2. Given that the freedom of expression is one of the essential foundations of democratic society, **the restrictions outlined in Article 10.2 of the European Convention must be justified only in situations that present special seriousness.** To justify these restrictions in accordance with the European Convention, it is imperative to establish that the information or ideas under debate may bring about a real and serious—not merely hypothetical—risk or damage for the "protection of the reputation or rights of others", for preventing "the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary." It is necessary for it to be objective—not merely subjective—seriousness, decided at the governmental or judiciary level.

3. The European Court holds that, **although freedom of expression is essential for everyone, it is even more so for political parties and their active members.**³ They represent their electors, express their concerns and defend their interests.

¹ The case of *Handyside v United Kingdom* ECHR, 7th December, 1976, para. 49, *inter alia*, a doctrine that has been held up to the present day.

² The case of *Jerslid vs. Denmark*, ECHR, 23rd December, 1994, para. 37, *inter alia*, a doctrine that has been upheld to the present day.

³ The case of *Incal vs. Turkey*, ECHR, 9th June, 1999, para. 46, *inter alia*, doctrine that has been upheld to the present day.

Therefore, the opinions, proposals or criticisms expressed from the opposition have a very small range of restriction or limitation.

With regard to criticism of politicians, the margin of admissible critical speech is broader when referring to a government (and to a lesser degree, an individual politician) than when reference is made to a simple private citizen. Furthermore, the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the attacks and criticisms of its adversaries. **Nothing is less desirable for competent authorities of the state than to resort, in their capacity as guarantors of public order, to criminal measures, intended to react appropriately and without excess for these purposes.**⁴

4. Another of the aspects influenced by restrictions on the freedom of expression refers to certain social interests that directly affect the values inherent to democratic societies. One of these is protecting the defense of the State and social organization.

Freedom of expression is one of the mostly deeply democratic rights, and has been since the origins of liberalism. The constitutionally-allowed limitations are few and very strict. Therefore, the defense of the state and social organization—national security, territorial integrity, public safety, defense of order and crime prevention—may justify certain interference by public authorities in the exercise of freedom of expression. According to the case law of the European Court, these interferences mainly affect the military discipline system and the measures adopted in the fight against terrorism.⁵ This notwithstanding, the restrictions cannot be unlimited, and therefore must be of exceptional character.

In synthesis, the European Court of Human Rights assesses measures to restrict the right to freedom of expression based on the

existence of the public's interest to know. Given the importance of the freedom of expression in a democratic society, the European Court has determined that the restrictions set forth in Article 10.2 of the European Convention must be justified solely in situations that are characterized by special seriousness, when the information or ideas in question can bring about real and serious, not merely hypothetical, risk or damage for the protection of some of the legitimate purposes established in Article 10.2 itself; a real risk or damage which, as will be shown, does not occur in any of the cases analyzed in this study.

2.2. LEGISLATIVE RESTRICTIONS ON THE RIGHT TO FREEDOM OF EXPRESSION IN SPAIN: PUBLIC SAFETY ACT AND CRIMINAL CODE

Amnesty International's 2016/17 report begins its section devoted to Spain with this statement: "Throughout the year, unwarranted restrictions on the rights to freedom of expression, information and assembly were imposed, on the basis of the 2015 legislative amendments to the Public Safety Act and the Criminal Code".⁶

In fact, in the recent past, Spain has passed administrative and criminal legislation that, in the opinion of this institution, excessively restricts fundamental rights and freedoms in a manner incompatible with the case law of the European Court. We agree with the analysis of those who state that at first there were cutbacks in economic, social and cultural rights and that, as a result of the social mobilizations caused by this regression, the State has reacted with clear restrictions on civil rights. The 2015 reforms of the Criminal Code (Organic Law 1/2015, of 30th March) and the Organic Law on Public Safety, the so-called LOSC (Organic Law 4/2015, of 30th March) are proof of this. Along these lines, it is also worth mentioning that both reforms were preceded by preceptive, highly critical reports from the Council of State, the General Council of the Judiciary and the Spanish Attorney General's Office. Further,

⁴ The case of *Castells vs. Spain*. ECHR, 23rd April, 1992, para. 46, *inter alia*, doctrine that has been upheld to the present day.

⁵ The case of *Zanca vs. Turkey*, ECHR, of 25th November, 1997, para. 55, *inter alia*, doctrine that has been upheld to the present day.

⁶ Amnesty International, 2016/17 Report. *The State of the World's Human Rights*, p. 182.

both laws have been the object of complaints of unconstitutionality, still unsettled at this time.

The **LOSC** implements a model of administrative control that prioritizes the presumption of veracity of Spain’s law enforcement bodies and agencies before the presumption of innocence, a fundamental principle of any democratic system, with a vague, unspecific wording that gives an excessive range of action to executive powers in the restriction of individual freedoms, including freedom of expression: in the obligation to identify oneself, both for nationals and foreigners; in the powers granted to security police as refers to entries and searches, the identification of individuals, the possibility to establish security perimeters, checkpoints and inspections; in actions to maintain and re-establish public safety in assemblies and demonstrations; in special administrative security powers for police, namely obligations to conduct documentation registration, listing of establishments and facilities obliged to implement security measures,

supervision of the conduct of spectacles and recreational activities, elimination of guarantees in identification, body searches, special security measures and the use of video cameras, and in the punishment regimen, a broad range of fines of prohibitive amounts, even costlier than the economic punishments from the criminal realm, and the establishment of a central offender registry.

The **LOSC** has a focus of marked repression of political protest and dissidence, in a context of growing social struggles on the country’s streets. This is true to such an extent that some authors have been able to identify the protest that legislators had in mind for each type of offender.⁷ The following table shows the reactive nature of the Law before pre-existing forms of protest. It is also interesting to highlight that, according to official data of the Ministry of the Interior for the period prior to ratification of the Law (2012-2015), there was no increase in actions (illegal demonstrations, etc.) that would justify the need for it.⁸

Fines	Classification of offense	Protest-related offenses	Protest type
100-600 €	Minor	Holding unnotified or prohibited gatherings or demonstrations. The organizers or promoters will be held responsible.	15-M. (Considered habitual practice of social movements)
		Exhibition of dangerous objects with threatening intent, as long as this does not constitute a crime or serious offense.	Strike pickets carrying sticks or poles (perhaps the signs themselves). Student movement
		Violation of pedestrian traffic or route restrictions that cause minor disturbances.	15-M: demonstration with an unknown route (habitual practice by social movements).
		Disrespect toward member of Law Enforcement Agencies (LEA), when this does not constitute a crime.	Aturem el Parlament (Stop Parliament), 25-S confronting police officers protecting buildings.
		Occupying or remaining inside any property against its owner’s will, when this does not constitute a crime. Likewise, occupation of a public thoroughfare against the law or authority’s decision.	Okupas (Squatters): for resisting eviction. 15-M: camping in public areas when prohibited by law, the mayor or deputy delegate of the Spanish government.

⁷ Oliver Olmo, P.; Urda Lozano, J. C. *Protesta democrática y democracia antiprotesta. Los movimientos sociales ante la represión policial y las leyes mordaza.* (Democratic Protest and Antiprotest Democracy. Social movements before police repression and gag laws.) Pamplona: Pamiela, 2015.

⁸ <http://www.interior.gob.es/web/archivos-y-documentacion/reunion-y-manifestacion1>

Fines	Classification of offense	Protest-related offenses	Protest type
100-600 €	Minor	Not having a national ID card (DNI) or not reporting it lost.	15-M: not carrying a national ID card (DNI) or stating several times it has been lost.
		3rd and additional losses of the National ID card in one year.	
		Damaging or ruining public or private movable or immovable assets in the public thoroughfare, when this does not constitute a crime.	Strike pickets Student movement (this includes graffiti)
		Climbing on buildings or monuments with imminent risk of causing damage to persons or property.	Greenpeace: Climbing on the Spanish parliament building, climbing on other buildings, unfurling banners, climbing on nuclear power stations.
		Removal of enclosures or other elements installed by LEA, when this does not constitute a severe offense.	Aturem el Parlament (Stop Parliament), 25-S: confronting police officers protecting buildings; removal of barriers that block traffic.
601 - 30.000 €	Serious	Disturbance of security in public events, spectacles or religious ceremonies.	PAH (Anti-Evictions Platform): escraches (doorstep demonstrations) at political rallies. FEMEN: performances in churches.
		Severe disturbance of security in demonstrations before the Spanish Parliament, Senate and legislative assemblies in Autonomous Communities, although they were not assembled, when this does not constitute a crime.	Aturem el Parlament (Stop Parliament), 25-S Certain labor or citizen demonstrations
		Causing disturbances on public thoroughfares, areas or facilities, or blocking public thoroughfares with vehicles, refuse containers, tires or other objects, when in either case a severe disturbance of public security is caused.	Strike pickets blocking roadways with burning tires.
		Acts meant to hinder a public employee from performing their duties, as long as they do not constitute a crime.	Aturem el Parlament (Stop Parliament), 25-S blocking the passage of and booing national and autonomous members of parliament. PAH: escraches against politicians. Observation Squads: impeding police pursuit of migrants.
		Disobedience or resisting authority or its agents, when this does not constitute a crime, as well as refusal to identify oneself or the allegation of false or incorrect data.	15-M; passive disobedience; not carrying one's National ID card (DNI) and not being able to identify oneself; refusal to identify oneself.
		Refusal to dissolve gatherings and demonstrations in public places because they are illegal or because there has been a disturbance of the peace.	15-M; refusal to dissolve camps; not carrying one's National ID card (DNI) and not being able to identify oneself; refusal to identify oneself.

Fines	Classification of offense	Protest-related offenses	Protest type
601 - 30.000 €	Serious	Disturbance of the development of a legal gathering or demonstration, when this does not constitute a crime.	PAH Protests at political rallies
		Intrusion into infrastructures that provide basic services, including overflying them, when there has caused severe interference in their operation.	Greenpeace Ecologist or eco-pacifist and anti-military demonstrations *
		Lack of cooperation with LEA in the verification or prevention of crimes.	All social movements
		Unauthorized use of personal or professional images or data of authorities or LEA members that could jeopardize their personal or family's safety, or the success of an operation.	15-M: requesting the badge number from the police officer repressing a demonstration; filming police officers using excessive force with demonstrators and passers-by.
30.001 - 600.000 €	Very serious	Unnotified gatherings or demonstrations in or around infrastructures that provide basic services, including overflying them, when persons' lives have been put at risk.	Greenpeace Ecologist or eco-pacifist and anti-military demonstrations * * Anti-military actions in military facilities are the competency of military jurisdiction (Art. 61 of the Military Criminal Code).

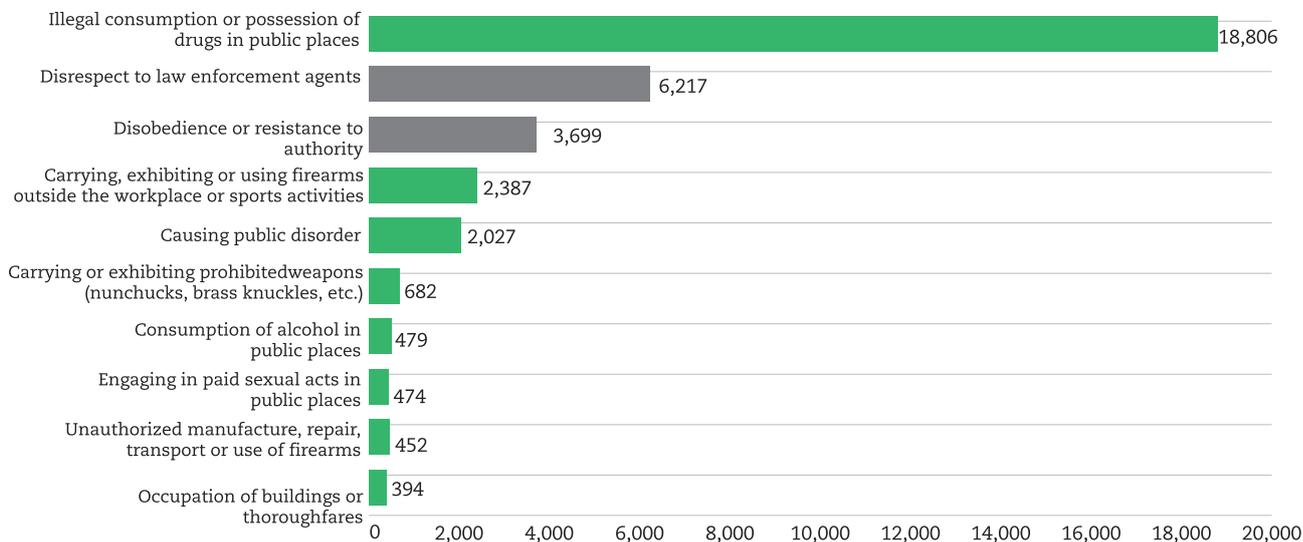
The LOSC provides the State's various administrations with an arsenal of administrative punishments that can be used to repress social protest. This administrative repression of protest acquires centrality and autonomy in the control-punishment system. It acquires autonomy because it offers ad hoc solutions to the most pressing concerns of a power system that has been notably affected by the scope, public knowledge and influence capacity of protest movements, added to a more difficult jurisdictional control by the courts of the judiciary. Further, it acquires centrality because administrative punishments are no longer situated around the perimeter of criminal law, as they take a central role in the defense of a certain concept of public order. The following table, based on official data from the Ministry of the Interior, shows the extremely broad use of the LOSC in its first months in force.

Especially significant is the fact that in the seven months covered by the table, over 10,000 punishments have been levied for disrespecting or disobeying authorities; offenses in which the reporting agent is both victim and witness.

With good reason, the Spanish Ombudsman presented certain general recommendations regarding the application of the LOSC in the institution's 2015 Report, in which it was urged that its application be limited to truly serious disturbances of public order. This year, in its 2016 Report, the institution decries a number of cases of abuse, particularly regarding limitations on the right to assembly and freedom of information (Section 3.4 of the Report). Mention must be made of the agreement among all opposition parties in the current legislature to at least reform the LOSC, although it is still too early to know the scope of the revision.

Graph 1: Administrative punishments according to the Organic Law on Public Safety (LOSC)

(As of July 2015 to January 28, 2016)



Source: Spanish Ministry of Interior

As concerns the **Criminal Code**, and specifically regarding offenses associated with the freedom of expression, it should be remembered that not all excesses in the right protected by Article 20 of the SC must necessarily be translated as criminal behavior. Therefore, when it is difficult to specify the dividing line between a crime and a fundamental right, lawmakers and the judiciary must choose the form of protection of the legal asset at risk that is less damaging to the fundamental right in question. It is worth recalling that ECHR case law has reiterated that, even when it is appropriate to punish a certain conduct, the legitimacy of the State to levy punishment is diminished if it does not respect fair proceedings that conclude with punishment proportionate to the legal asset to be protected. What is in jeopardy with disproportion is what is known as the fragmentary character of criminal law. Criminal law should only enter where it is indispensable, as other branches of the legal framework can offer better protection and guarantees for citizen and collective rights, normally at a lower personal and social cost. This should be the case as long as the excesses of the current LOSC disciplinary regime are avoided. For example, the vast majority of former offenses, repealed by the Criminal Code now in force, have been incorporated into the LOSC with higher economic fines and fewer guarantees of defense.

In any event, excessive intervention of criminal law in social life brings about a reduction in the realm of individual freedom, which is incompatible with the basic idea of a society based on freedom, and is especially injurious if used for political representatives and elected officials.

Measures against individuals, especially when they hold elected office, should constitute measures of last resort to take for ideological reasons that affect the integrity of the State. In the view of this institution, following case law of the European Court of Human Rights, such measures should be limited as much as possible to scenarios of violence, turmoil and in general, any true risk to this integrity. If not, the image of the justice system being used as a servile tool against a political position, even if from a technical and judicial perspective it may be justified, is not understood by a large part of society, with the consequent harm to the prestige of the rule of law, while a possible premature limitation on freedom of expression and political debate also comes about.

For all of these reasons, possible interpretations oriented to not resorting to criminal proceedings to resolve political conflicts must be sought. Along these lines,

it could be possible to resort to absent material unlawfulness when the behavior does not constitute a true affectation of the legal asset protected by criminal law. Or, if otherwise preferred, resort to the possibilities of classic teleological interpretation of the rules, or the consideration of criminal law as the last resort that, although it is not useful to judicially repeal criminal laws, must be used to interpret them, by referring to the constitutional principle of proportionality (Judgment of the Spanish Constitutional Court - STC 136/1996).

Of special concern are the interpretations that are not only designed to reduce criminal intervention to the last resort, but seem to seek exactly the opposite. This is the case, for example, of going beyond the concept of provocation to associate certain rhetoric, with which one may or may not agree, with a crime as severe as sedition, which could lead to all the cases in which freedom of expression comes into play. It must be noted that the Spanish criminal code is extraordinarily abundant in provisions to protect the prestige of institutions, and punishment of any insults against them: the Crown (Art. 491), the Spanish parliament and autonomous community parliaments (Art. 496), the government, the General Council of the Judiciary, the Constitutional Court, autonomous governments or high courts of justice of autonomous communities (Art. 504), etc. These criminal categories must be delimited insofar as they may conflict with the freedom of expression. As long as they are in force, it is also possible to avoid their application when the expressions do not represent a true peril for the protected constitutional institutions, which occurs in the majority of cases. It is plain to see that political systems that are insecure due to their lack of social consensus must resort to criminal law to protect their prestige.

Last, and although this report will not include a detailed account of it, mention must be made of the ratification, in the last legislature, of a third law associated with public order, the **National Security Act** (Law 36/2015). As its name implies, it has a very broad scope, mostly coinciding in its objectives with the Public Safety Act, and is characterized by a marked concentration of powers in the central government of Spain.

2.3. EMBLEMATIC CASES OF MISAPPLYING THE CRIMINAL CODE FOR “GLORIFYING ACTS OF TERRORISM” AND “HATE SPEECH”: THE CASE OF THE PUPPETEERS

What became known as the “case of the puppeteers” has brought to light a number of critical reflections related with the freedom of expression as a fundamental right and the limits it can have, though this politicized, disproportionate use of crimes associated with terrorism is not new.

One of the most disproportionate examples of this phenomenon was the arrest of 14 year-old Èric Bertran. In 2004, Èric was accused of allegedly committing terrorist threats for sending an e-mail to a supermarket chain to request labeling in the Catalan language, signed in the name of his website “The Army of the Phoenix”. Thirty agents from the Civil Guard’s anti-terrorism department came to his home and accused him of making terrorist threats. Weeks later, he testified for four consecutive hours in the High Court of Spain. The next day he was made to take a psychological exam that lasted two more hours. He faced a sentence of eight years in a reformatory. In the end, mass pressure brought to bear on the company that had reported Èric to the police made them withdraw the complaint. Èric was not tried.

The acts involving the puppeteers took place on February 5, 2016, when the puppeteering company “Titeres desde Abajo” (Puppeteers from Below) put on the show *La Bruja y Don Cristóbal* (The Witch and Mr. Cristóbal) in the Plaza Canal Isabel II. In it, they intended to satirize “the four powers that govern Spanish society”, to wit: property owners, the Church, law enforcement agencies and the courts (each power was represented by a stereotypical puppet). The story, portrayed as part of the municipal program of the Carnival festivities, and rated viewable by general audiences, included the rape of a nun, the later murder of the rapist, police brutality against the witch, followed by a trial concluding with the witch being sentenced to death by hanging. Through trickery, the witch got the judge to hang himself, and once dead, she hung a sign on him that read “Gora Alka-ETA”.⁹ With this content, the group aimed to criticize alleged police brutality and the manipulation of an investigation with false evidence.

⁹ “Gora ETA” is the familiar cry of support for the ETA Basque separatist terrorist group. The construction “Alka-ETA” pronounced in Spanish, could be construed as “Al-Qaeda”. Thus, equivocally: “Long Live ETA / Al-Qaeda”. - Translator’s Note.

As acknowledged by the judge of Central Trial Court no. 2 of the High Court of Spain, it is relevant to underscore that the work was put on in Esperanto and Latin, and so its content was unintelligible for the majority of the audience. This circumstance in itself would invalidate the possibility of appreciating a hate crime (Art. 510 CC) based on contempt of victims or the crime of glorifying terrorism (Art. 578 CC), as neither the factor of public communication nor intentionality characteristic of this type of crimes can be appreciated.

This notwithstanding, the plaintiffs stated during the trial that the mere public exhibition of the sign “Gora Alka-ETA” constituted an act of glorifying terrorism. This statement apparently overlooks the fact that the sign contains a play on words with the names of the terrorist organizations Al-Qaeda and ETA. Furthermore, it cannot be ignored that everything took place in the framework of a satirical puppet show. In addition to the basic structure of the law regarding glorification of terrorism, pursuant to the reiterated and abundant doctrine of the Supreme Court (well-compiled, among others, in the sentences of 5th June, 2009, 30th May, 2011 and 28th June, 2013, all three of which are mentioned in the interlocutory decree) it is a requisite that there be an unquestionable and overarching will to praise terrorist activity that presides over the individual’s behavior in order for a crime to exist.

Along these lines, considering the context of the show, it is unlikely that the presence of any legal grounds for the admission of an accusation pursuant to Article 578 of the Criminal Code would be appreciated. Under this perspective, the opening of any judicial proceedings without any further evidence than the event that took place in the Plaza Canal Isabel II is especially questionable, regardless of the eventual closure of the case.

The same reflection could be reached regarding the application, in this and other cases, of Article 510 of the Criminal Code. It must be borne in mind that the origin of this article is the fight against hate speech

promoted by the European Union as well as the Council of Europe. This criminal category requires an unequivocal and overarching will to praise hate and harm against a given group, or offend in the meaning, with content at least approaching psychological damage in the criminal sense of the term, a person or group. As such, it has been indispensable to prosecute the distribution of Nazi literature in Barcelona, or support victims of sexual orientation or gender identity harassment. That said, this important precept cannot be used with purposes other than those it was created for, and as occurs with the crime of glorifying terrorism, it does not appear that glorification of terrorism or hate speech elements could come about within a humorous context. The criminal intent or offense, to use criminal terminology, must be appreciated for it to exist. In this regard, a critical evaluation of the content of the show, and the unsuitability of its performance before minors—for which the municipal government made a formal apology—is perfectly legitimate, but it should have never been the object of criminal proceedings.

The last element that denotes maladministration of justice in this emblematic case is the use of pre-trial detention against the puppeteers for a five day period, an example of evident disproportion between the objective facts, their criminal relevance (null in the final instance) and the use of coercive mechanisms by the state.

In any event, the analysis of the case of the puppeteers, that could be extended to other scenarios,¹⁰ is clearly illustrative of the disproportionate use of the criminal code to coerce the free exercise of the right to freedom of expression, and to try to criminally punish voices that conflict with the official rhetoric of governmental bodies. Although the case was ultimately closed—in other cases acquittals have been handed down—this kind of case exemplifies what the ECHR calls the “chilling effect”, which has a severe practical impact on the exercise of human rights and fundamental freedoms.¹¹

¹⁰ This is the case of Rita Maestre, councilor of the Ahora Madrid party in the Madrid municipal government, sentenced in first instance for an alleged crime against religious sentiment, though she was later acquitted by the Provincial Court of Madrid.

¹¹ The case of Ricci vs. Italy, ECHR, 8th January, 2014, para. 52.

2.4. SOCIAL MEDIA AND FREEDOM OF EXPRESSION

Charges of glorifying terrorism and hate speech expressed in social media also deserve special mention, as it seems that public authorities lack clear criteria for distinguishing the exercise of freedom of expression, as bothersome as it may be, from attacks and expression of hate against groups or persons for their belonging to a certain group.¹² In any event, it appears that the abuse of these criminal categories is endemic throughout the European Union, as, according to Amnesty International, last year, “Hundreds of people were prosecuted, in violation of the right to freedom of expression, for offenses of apologizing for or glorifying terrorism, especially in France, often for comments posted on social media, and less frequently in Spain”.¹³

There has been recent news coverage of up to seven trials underway in the Spanish High Court that have to do with speech expressed on social media (mainly Twitter) that the Civil Guard has considered “glorification of terrorism”. Most of them are attempts at humor—often in bad taste—that can be considered offensive, but that in a democratic country should be accepted as expressions of free speech.

The outcome of these trials is unforeseeable because, in the first months of 2017 alone, there have been at least four contradictory precedents. Initially, examples could be the guilty sentence of musician César Strawberry, of the musical group Def Con Dos, who posted tweets referring to Carrero Blanco, the king of Spain, ETA and the GRAPO terrorist groups, and the acquittal of Ahora Madrid councilor Guillermo Zapata, who tweeted jokes about Holocaust victims or the terrorism victim Irene Villa before taking office.¹⁴ Recently, another Twitter user, Arkaitz Terron, was also acquitted by the High Court of Spain (judgment of 21st March, 2017). As in Strawberry’s case, his tweets made

frequent references to Carrero Blanco. On the other hand, the High Court of Spain has sentenced a young woman named Cassandra Vera to one year in prison and seven years of disqualification for having made several jokes about Carrero on Twitter (judgment of 29th March, 2017).¹⁵

On another note, while still rejecting excessive criteria regarding hate crimes, the Catalan Ombudsman has begun ex-officio proceedings, and notified the Prosecutor’s Office of the publication of aggressive tweets against the Catalan people on the occasion of such tragedies as the Germanwings airliner crash, or the murder of a teacher at Joan Fuster secondary school in Barcelona (in the latter case, the Spanish Ombudswoman also addressed the Spanish Prosecutor’s Office), and also following the booing of the Spanish national anthem at the King’s Cup football final in 2015. The Catalan Ombudsman is aware that the Prosecutor’s Office of Catalonia has begun investigations into these affairs, and that a judgment was recently handed down.

Given the confusion existing around hate crimes and glorification of terrorism, it is necessary to review the legislation in force and case law doctrine to achieve a more perfect balance with freedom of expression.

2.5. THE GRECO REPORT

In any democracy with rule of law, scrupulous respect for the principle of separation of powers is essential. However, in the opinion of relevant international bodies, Spain is showing signs of erosion where this principle is concerned.

Especially symptomatic along these lines is the complaint of the Council of Europe, in the so-called GRECO Report, which criticizes Spain for not heeding its recommendations to strengthen judicial independence.¹⁶ In 2013, the Group of States against Corruption (GRECO) of the Council of

¹² Especialmente ilustrativo en este respecto, Laia Serra, “El efecto boomerang de llevar a juicio el discurso del odio”, (The Boomerang Effect of Taking Hate Speech to Court) *eldiario.es*, 21st March, 2017.

¹³ Amnesty International 2016/17, v.s., p. 50. The report goes on to say: “A proposed EU Directive on Combating Terrorism, which was still pending adoption at the end of the year, would lead to the proliferation of such laws.”

¹⁴ Manuel Cancio, “La banalización del terrorismo en España: la Ley y (algunos) jueces”, (“The Banalization of Terrorism in Spain: the Law and [Certain] Judges) *eldiario.es*, 3rd March, 2016.

¹⁵ German Teruel, “Cassandra y el por qué tuitear chistes no es delito”, (“Cassandra and Why Tweeting Jokes is not a Crime”) *Agenda Pública*, 30th March, 2017.

¹⁶ Groupe d’États contre la Corruption, quatrième cycle d’évaluation, Prévention de la corruption des parlementaires, des juges et des procureurs, Rapport de conformité sur l’Espagne, GrecoRC4 (2016)1, 10th October, 2016.

Europe made eleven recommendations to Spain to better fight corruption among members of parliament, judges and prosecutors. Nearly three years later, it believes that there **has not been a satisfactory response to any of the eleven measures proposed then**. Six of the measures have not even been begun.¹⁷

Generally speaking, the measures recommended by GRECO focus on achieving greater independence for the judiciary, but also for prosecutors, and giving parliamentary activity more transparency. According to GRECO, the response in these three chapters is “disappointing” and “globally unsatisfactory”.

Among other measures, GRECO has criticized Spain for **not guaranteeing the independence of the General Council of the Judiciary**. The institution reminds Spain that “political authorities shall not be involved, at any stage, in the selection process of the judicial shift”, and underscores that the Spanish Government has not analyzed, as it was urged to do, the result of the 2013 reform, which maintained the confirmation of judges’ appointments by Parliament. The criticism of the Spanish system for appointment to the General Council of the Judiciary (CGPJ) is particularly severe in this report from the Council of Europe. It should not be overlooked that the CGPJ appoints all of the judges of the Supreme Court, and all presidents of high courts of justice and provincial courts. It must also be noted that since the enactment of the 1978 Constitution, the mechanism by which General Council of the Judiciary members are appointed has been legislated on several occasions, and that none of the systems have satisfactorily guaranteed the independence of the judges’ governing body.

Among these recommendations was that of analyzing and demonstrating effective independence of the CGPJ, considering the reform undertaken several months beforehand. This reform was approved with only the votes of the Popular Party, and maintained the power of Parliament and the Senate to appoint the twenty members of the CGPJ. Further, until that

time, the appointments made by the Council (the most important ones of the judicial career) were decided within the council by qualified majority of the members (three fifths of the votes). Now they are decided by simple majority, a negative change in light of previous reports from the Council of Europe. The Council saw in the qualified majority less room for political bargaining, as “there (had to be) a joint agreement of all political forces represented in Parliament.”

According to GRECO, the Spanish government has not carried out any analysis to demonstrate that the highest body of judges has gained independence. It has only stated to the Council of Europe that “the reform seeks the maximum possible consensus in the system of appointment of judges among their own ranks, which in turn would appease the political debate once the appointment is confirmed in Parliament.” Spain also claimed that the appointment method had to be respected because it was taken up in the Spanish constitution. This did not convince GRECO, which stated that, “the Constitution does not specify the way in which judicial members of the CGPJ are to be selected.” This notwithstanding, according to certain authors, this amounts to a politicization of the CGPJ, which negatively affects the judicial system overall.¹⁸

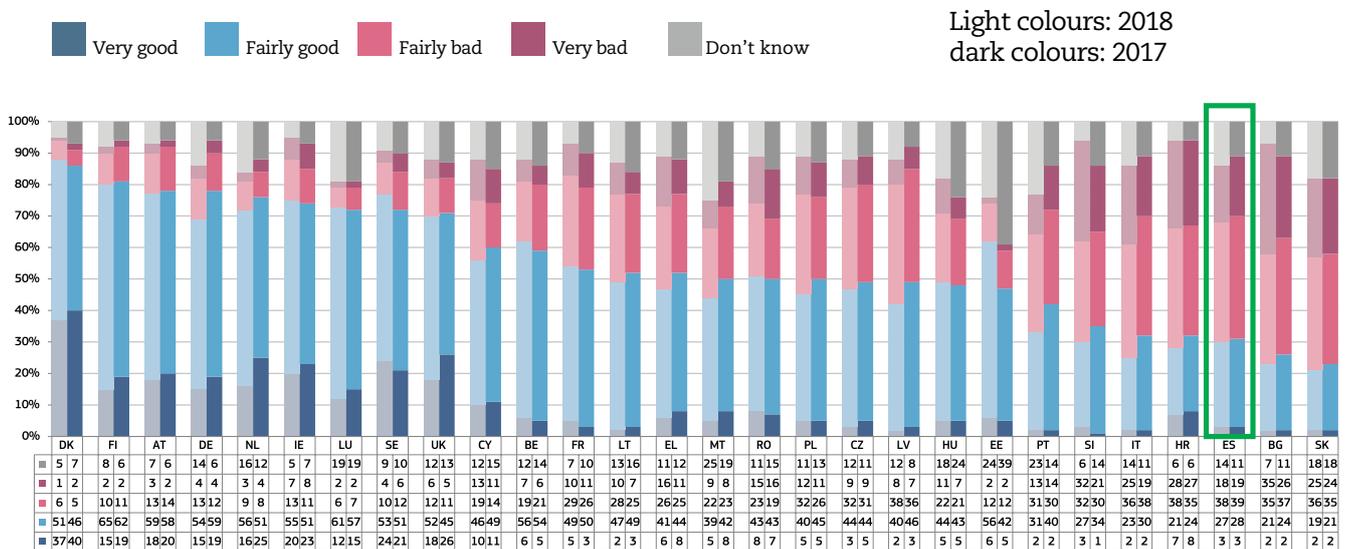
European anti-corruption experts have expressed their concern in the report regarding the generalized opinion among judges that their highest governing body does not respect the principle of independence (according to an internal survey) and the fact that Spain still occupied 25th place (of 28) in public perception of judicial independence, according to an analysis carried out by the EU (in the latest Eurobarometer, Spain dropped to 26th—or last—place in the lack of perception of independence of the judiciary). For GRECO, it is fundamental to “recast public trust” in their institutions.

¹⁷ LThe six measures to fight corruption that the Group of States had requested, and that Spain has not adopted, are: 1. The Parliament and the Senate adopt a code of conduct with practical application measures; 2. That there be created a register of lobbyists and a code of conduct for the profession; 3. That measures be taken to guarantee control over the declaration obligations of members of parliament; 4. That the legislative framework governing the General Council of the Judiciary (CGPJ) be analyzed; 5. That objective criteria and evaluation requirements be laid down in law for the appointment of the higher ranks of the judiciary, and 6. That the limitation period for judges’ disciplinary procedures be extended.

The five partially adopted measures are: 1. That the scope of data MPs must make public be reconsidered. 2. That judges adopt a public code of ethics; 3. That the method for selection of the General Prosecutor’s and their term of office be revised; 4. That prosecutors adopt a code of ethics and 5. That a specific regulatory framework for disciplining prosecutors be established.

¹⁸ Joan Queralt, “Preservar la Judicatura” (Preserving the Judiciary), *El Periódico*, 17th October, 2016.

Graph 2: Perceived independence of courts and judges among the general public



Source: Eurobarometer

There are other examples of the lack of institutional respect for courts; in this case, those of the international level. There are such examples as those of the 2012 judgment of the Grand Chamber of the European Court of Human Rights, which declared illegal the so-called *Parot doctrine*, as it made for a retroactive application *in peius* of criminal law. Or the more recent 2016 judgment from the European Court of Justice, on the so-called *floor-rate clauses*, which obliged Spanish banks to return in full all amounts collected from minimum interest rates. The Spanish government received both judgments explicitly expressing its opposition to them, and attempting to postpone the implementation of their legal effects within the Spanish legal framework.¹⁹ Despite it all, the first judgment is now fully operative, as its implementation depended exclusively on the Spanish High Court, while the second appears to be on its way, through intervention of the Supreme Court, even though it denies retroactivity to a date before 2013, and the real state bill does not recognize the level of guarantees set by Europe.

2.6. REFORM OF THE ORGANIC LAW ON THE CONSTITUTIONAL COURT

One of the greatest examples in recent times of the unclear separation between powers in Spain has been the reform of the Organic Law on the Constitutional Court, motivated by the sovereignty process in practice.

Introduction

Lately, there has been increasing social debate on the judicialization of politics and the politicization of justice (including constitutional justice) as a sign of the weakening of the separation of powers in Spain. This deterioration is especially serious when it affects the institution created to ensure compliance with the terms of the Constitution. Indeed, constitutional courts are created exclusively to guarantee that a body (the Constitutional Court – CC) will supervise the other bodies so that they comply with the terms of the Constitution. Therefore, it is indispensable to guarantee their independence vis-à-vis the other powers of the State.

¹⁹ A thorough summary of the first case can be found in this article, published at that time (October, 2013): <http://ara-info.org/el-tribunal-de-estrasburgo-desestima-el-recurso-del-gobierno-espanol-y-falla-a-favor-de-ines-del-rio/>

In recent years, there have been a number of signs that have made for an institutional crisis in the CC, and undermined its credibility as an independent body. On one hand, there have been controversies such as a member's recusal of the judgment regarding the Statute of Catalonia, political in-fighting and delays in new appointments (as is now occurring in Catalonia in certain institutions of statutory relevance), or even the fact that the individual who had been its president until recently had clear ties with the political party that governs the State. On another, the recent reform of its organic law, and the judgment of the CC that endorses it signify, in the words of the then-member of the CC Adela Asúa, that the CC is "abdicated" from the exercise of its duties.²⁰

There now follows a critical analysis of the Organic Law on the Constitutional Court. The analysis will focus on the CC judgment (CC 185/2016, of 3rd November, 2016) in which it endorses the constitutionality of the reform of the Organic Law on the Constitutional Court (LOTCC).²¹ That said, it must be borne in mind that no attempt will be made to determine which would be the correct case law. The aim is merely to demonstrate that the actions of the institutions in accordance with the national and international parameters of the rule of law are essential to guarantee the fundamental rights of individuals.

The reform

Organic Law 15/2015 was ratified by the Spanish Parliament in urgent proceedings at the end of the 10th legislature. It introduced new wording of Article 92.4 of the Organic Law on the Constitutional Court (LOTCC) in the following terms:

"In the event it is found that a judgment handed down in the exercise of its jurisdiction is being infringed upon, the Court, either on an ex-officio basis or at the behest of one of the parties to the proceedings presented before it, must require the relevant institutions, authorities, public or private

employees who are to comply with it to inform as to its compliance within the time frame the court sets."

Once the report is received, or the time frame has elapsed, if the Court determines there to be total or partial infringement of its judgment, it may adopt any of the following measures:

a) Levy a coercive fine ranging from three thousand to thirty thousand euros on the authorities, public or private employees who do not comply with the Court's judgments. Said fine may be reiterated until the full compliance ordered has been achieved.

b) Agree on the suspension from their duties of the public authorities or employees from the administration responsible for the infringement, for the time necessary to ensure observance of the Court's pronouncements.

c) Alternative execution of the judgments handed down in constitutional proceedings. In this case, the Court can invoke the aid of the country's Government, and for it to adopt the measures necessary to ensure compliance with the judgments, in the terms it determines.

d) Deduce the necessary testimony from private citizens to demand any relevant criminal liability."

The reform allows the CC to apply executive measures to force the other powers to fulfill its judgments. Punishments that are ambiguous as regards their content, with no time limitation, that affect individuals protected by special provincial rights, to which there is no possibility of appeal, and that are taken without providing the affected party without any hearing. In short, exorbitant measures from any democratic perspective of punitive law, whether criminal or administrative.

These changes were promoted by the Popular Party in October, 2015, when it had absolute majority in the Spanish Parliament, and from the minutes of the session in which the reform was debated, it can be deduced that their sole,

²⁰ "[...] we are facing a deplorable 'abdication' in the exercise of constitutional jurisdiction." p. 61, CC Judgment 185/2016, of 3rd November, 2016.

²¹ Judgment 185/2016, of 3rd November, 2016, which can be consulted at: https://www.tribunalconstitucional.es/NotasDePrensaDocumentos/NP_2016_088/2016-00229STC.pdf (later, the judgment on the appeal filed by the Autonomous Government of Catalonia was handed down. In it, the CC responded in terms similar to those of the aforementioned judgment. It can be consulted at: https://www.tribunalconstitucional.es/NotasDePrensaDocumentos/NP_2016_100/Sentencia_2015-07466STC.pdf).

exclusive purpose was the fight against the Catalan sovereignty process.

The law was the object of two appeals filed with the Constitutional Court itself. It rejected them in judgments nos. 215/2016 and 185/2016, both of which received dissenting votes from judges Asúa, Valdés and Xiol.

Two notes on the judgment

Analysis of the social and political context of the laws examined is vitally important in the reasoning espoused by a CC

Constitutional Courts must give pronouncements on the most difficult matters that arise in a society. Is abortion constitutional? What about euthanasia? Or cloning? The list is never-ending, as are the questions to which the Constitution does not contain a clear answer, either because there is no unanimity in society, or because the debate has come about in a post-constituent era. Constitutional Courts often have to argue the constitutionality of laws about which society is divided, and in which the Constitution can be interpreted to validate the arguments of either side. This means that Constitutional Courts must resort to different types of interpretative techniques, one of which is contextualization.

In this judgment, at no time is the judicial analysis connected with the social reality that has triggered the reform, which was none other than the sovereignty process in Catalonia. As the three magistrates state in their dissenting vote, the new wording of Article 92.4 (v.s.) does not actually grant the CC competencies for the execution of judgments, but equips the Court with sanctioning competencies in one very specific area: **sanctioning autonomous community authorities who do not comply with CC judgments**. Although the law does refer to the coercive power of the CC for it to execute judgments in case of non-compliance by any person, body, authority, etc., the dissenting votes analyze the article in depth, and eliminate one by one the cases in which it would not be applicable, until reaching the conclusion that it could only be applied in cases of actions by autonomous governments and authorities. The lack of such an analysis in the judgment only underscores the CC's will to

disconnect analysis of the law from autonomous communities. Apparently, the CC does not want to make it clear that it is not a matter of configuring a general power over the execution of its judgments, but rather a specific one to compel autonomous community authorities.

An anomalous competency for a Constitutional Court: sanctioning competencies

Article 92.4 LOTC grants the CC the capacity to force compliance with its judgments through personal punishments. On another note, it must not be forgotten that the execution of judgments is not usually an element that makes up the competencies of the Constitutional Court. Those involved in the constituent process did not desire it (although lawmakers were allowed to develop the CC), nor can it be said to be very common in comparative law. To the contrary, in the states of our surroundings that have Constitutional Courts, the executive is usually responsible for supervising the execution of CC judgments. The fact that the CC is given this capacity is another element to be on guard against concerning ties between the government and the CC.

According to reiterated ECHR case law (the Engel doctrine) and that of the Constitutional Court itself, the article in dispute does not equip the CC with powers to execute a judgment, but rather with new sanctioning competencies. As indicated, this competency targets individuals with special provincial rights and violates the principle of legality, as it does not determine the measures or categories to apply, nor does it have any time limitation.

By constitutional design, the CC does not have sanctioning powers in Spain or any other state with Constitutional Courts.²² Therefore, this modification in the LOTC makes for a sweeping change in the design of one of the basic institutions of the constitutional state.

The analysis proposed in the dissenting votes must be borne very much in mind, as this is a change that affects the structure of the democratic state, as well as a fundamental right (Art. 23 SC and Art. 6 of the European Convention on Human Rights - ECHR). There can be no doubt that any sanctioning measure must respect the formal and material guarantees required by the Spanish

²² The only exception in the European Union is Austria, and only for the crime of treason.

Constitution as well as the international treaties ratified by Spain. According to the dissenting votes, this is a punitive law that does not respect these rules, is ambiguous, unnecessary and disproportionate.

The severity of the introduction of this punishing power grows to the extent that the SC now establishes that it is possible to discipline the autonomous communities that do not heed the constitutional order (Art. 155 SC). In this point, judge Juan Antonio Xiol has stated that “[...] the model of Art. 155 SC takes as its basis the concept that the conflict must be resolved, *prima facie*, by political authorities; and, to the contrary, the organic legislator in the Organic Law on the Constitutional Court is presided by the idea of jurisdictionalization of the state’s reaction through the Constitutional Court.” Therefore, it is a matter of politicization of justice as, even having political channels, the intention is to reach the same outcomes turning away from said channels and choosing the judicial channel, and even creating a judicial channel where one did not previously exist (as is effected by Article 92.4 LOTC).

Opinion of the Venice Commission

The European Commission for Democracy through Law (Venice Commission), a body of experts of the Council of Europe, has had the opportunity to give its opinion on the LOTC reform in its session of 9th March 2017.²³ The opinion of the Venice Commission was requested by the Monitoring Committee of the Parliamentary Assembly of the Council of Europe, which had received a complaint due to the reform of the Constitutional Court Law.

In synthesis, the Committee observes that the responsibility of the CC to guarantee the execution of its own judgments is the exception in comparative law, and requests that this competency be reconsidered.

The Committee does not deem problematic that the CC urge the Spanish government to undertake actions for the execution of its sentences, or that it request information on

these points. On the other hand, it does consider two items to be questionable: the capacity to levy criminal economic penalties on a reiterated basis, and the disqualification from their duties of the officials who refuse to execute the Court’s decisions. On the latter point, it states: “The personal scope of the suspension from office remains unclear and should be specified. It could be problematic if it were to include directly elected officials, who are not excluded by the “wording of Article 92”.

In short, the Venice Commission rejects the Executive’s charging the CC with the responsibility to see to the fulfillment of its own judgments. It states that, although it may seem that the reform has given the CC more power, it is actually damaging its independence. The Venice Commission expressly states that “Attributing the overall and direct responsibility for the execution of the Constitutional Court’s decision to the Court itself should be reconsidered, in order to promote the perception that the Constitutional Court only acts as a neutral arbiter, as judge of the laws.” It adds that in this non-binding report, that “the Court should not act on its own motion but only upon request by a party in exercising the execution powers under the Amendment.” The Commission believes that measures to ensure enforcement of the judgments are legitimate, but it does not believe it possible to assign this responsibility to the CC. In fact, it states that in comparative law, the formula in force in Spain is the exception, as, by general rule, this task is attributed to the state power.

It must be noted that regarding this pronouncement of the Venice Commission, the central government has studied the application of Article 116 of the SC if necessary to halt the Catalan process. In fact, the document of allegations that the central executive sent to the Venice Commission states, “if the situation were more serious” and it could not be resolved with other tools, such as Article 155, then Article 116, which refers to states of alarm, exception and siege, could be applied.²⁴ This is the most extreme measure that can be adopted in any democratic system.²⁵

²³ European Commission for Democracy Through Law (Venice Commission), Spain, Opinion, On the act of 16 October 2015 amending the organic law no. 2/1979 on the Constitutional Court, CDL(2017)009, 13th March, 2017.

²⁴ European Commission for Democracy Through Law (Venice Commission), Position of Spain regarding its new legislation (Organic Law 15/2015 of 16th October) aimed at the effective enforcement of the constitutional court judgments, Executive summary and report, CDL-REF (2016)034, 29th September, 2016.

²⁵ In reaction to this information, the independent UN expert Alfred de Zayas has stated in an interview that Spain cannot use the state of siege to destroy the right to self-determination: <http://www.vilaweb.cat/noticies/de-zayas-spain-cannot-invoke-the-state-of-siege-to-destroy-the-right-to-self-determination/>

3. REGRESSION IN RIGHTS AND FREEDOMS IN CATALONIA

This report will not attempt to cover all of the regression and violations in the realm of rights and freedoms that have taken place over recent years in Catalonia. In the areas of social policies, public administrations and taxes, territorial policies, consumer affairs, public safety and justice, participation, universities, culture and language, reference can be made to everything that was already stated in the last report made by the Catalan Ombudsman to Parliament.²⁶ In all matters regarding the competencies inherent to the Catalan Mechanism for the Prevention of Torture, reference is made to the most recent annual report, with special emphasis on the unsuitable interpretation of the European directive on the detainee's right to information.²⁷ Although they will not be examined in this report, it is worth mentioning recent judgments of the Constitutional Court that prioritize a debatable interpretation of the competency distribution between State and autonomous communities, ahead of an analysis focused on the effective guarantee of rights.²⁸

In this second part of the report, discussion will center on the criminal prosecution of local and autonomous regional elected officials in the framework of eminently political actions. The analysis will center on the suits for disobedience and malfeasance lodged as a consequence of the independence consultation of November 9, 2014 or for allowing the parliamentary process that had been forbidden by the Constitutional Court. As will be shown, in this point Judgment 42/2014 is of special importance, as it was the starting point to attribute judicial effects to a parliamentary resolution to generate political momentum, something the CC had never accepted until then. Reference will also be made to cases of disobedience offenses committed at the local level.

First, an examination of a number of examples of poor democratic quality witnessed in recent years, that have affected political and institutional figures from Catalonia as well as Spain.

3.1. DETERIORATION OF DEMOCRATIC QUALITY

True democracy goes well beyond exercising the right to vote. But it is clear that being able to vote in free, regular elections, in conditions of equality and without any illegitimate interference, is a fundamental pillar of a democratic state.

In recent years, the Catalan Ombudsman has denounced a number of situations that exemplify serious deficiencies in electoral processes that have taken place in Spain, including elections to the Parliament of Catalonia.

For example, the Catalan Ombudsman began an ex-officio action in 2014 following a number of leaks of alleged reports from the Economic and Tax Crime Unit (UDEP) of the Judiciary Police that pointed to involvement of Catalan politicians in cases of corruption. The leaks not only had no factual basis whatsoever, they also came to light at the same time as electoral processes were taking place, with a clear will to influence the elections. Therefore, it could be an electoral offense as outlined in the Organic Law on the General Electoral System. The investigation was transferred to the Spanish Ombudsman's Office, which, after a number of interventions, closed it without finding any irregularities. The origin of the leak has never been ascertained, nor have political responsibilities been clarified.

Following those events, for the past year, a number of media organizations²⁹ have published items on a police and covert intelligence operation against the sovereignty process in Catalonia. The consequences of this operation have been

²⁶ *Informe al Parlament 2016* (2016 Report to Parliament), Síndic de Greuges de Catalunya (Catalan Ombudsman).

²⁷ *Informe anual del Mecanisme Català per a la Prevenció de la Tortura*, (Annual Report of the Catalan Mechanism for the Prevention of Torture), 2016, pp. 129-130.

²⁸ This is the case of the 2015 judgments on the Catalan Ombudsman Act, as regards the Catalan Authority for the Prevention of Torture, or that of 2016, regarding the Energy Poverty Act, among others.

²⁹ Margarita Batallas, "Un informe policial confirma que hi havia una 'operació Catalunya'". (Police Report Confirms Existence of 'Operation Catalonia'). *El Periódico*, 11th July, 2016 Other media (*eldiario.es*, *Ara*, *elnacional*, etc.) have also run stories on these operations.

numerous and very diverse, but their common thread is the lack of respect for dissidence, freedom of expression and the separation of powers in Spain.

Perhaps the case most shocking for public opinion was the revelation of conversations with conspiratory content between the former Minister of Home Affairs, Jorge Fernández Díaz, and the former director of the Anti-fraud Office of Catalonia, Daniel de Alfonso, published by the newspaper *Público* in June, 2016. The meetings took place a few days before the independence consultation of November 9, 2014. In the conversations, Fernández Díaz asked the head of the Anti-fraud Office to discover incriminatory evidence against the brother of Oriol Junqueras, leader of the pro-independence party *Esquerra Republicana de Catalunya* (ERC). They also discussed how to obtain information that would allow them to discredit or judicially accuse the leaders of ERC and (pro-independence party) *Convergència Democràtica de Catalunya* (CDC). Furthermore, Fernández Díaz insinuated that the president of the government, Mariano Rajoy, was apprised of the conversations.

The Catalan Ombudsman opened an ex-officio action on this case and transferred the proceedings to the Spanish Ombudsman and the Prosecutor's Office of the Supreme Court, as did the representatives of a number of political parties. The Prosecutor's Office declined the case, while the Criminal Chamber of the Supreme Court has closed (with the prosecutor's report arguing in favor of this termination) the complaint lodged by the *Partit Demòcrata Català* (PDCat, formerly CDC) against the former Minister of Home Affairs, Jorge Fernández Díaz, and the former director of the Anti-fraud Office of Catalonia, Daniel de Alfonso Laso. As the evidence was collected by illegal means (a bug in the Minister's office), the termination of the case may have been foreseeable. Nevertheless, a highly unusual change is apparent in the absence of any record of how the evidence was unduly, and criminally, obtained. Further, the Government has shown no interest in explaining what happened to public opinion, which makes for a clear example of maladministration, aside from the possible criminal responsibilities of these events. In the current legislature, an investigative commission has been established

in the Spanish Parliament, and it may shed some light on these events, although at the moment the agreement of the parliamentary groups of PP and PSOE prevents the appearance of senior police officers directly involved in the matter.

In this context, it is also worth mentioning that in 2015—in which there were municipal, Catalan and general elections—the Catalan Ombudsman issued a resolution in which he described a number of shortcomings in electoral processes:

- Difficulties in voting by mail, both from within Spain and foreign countries. Specifically, as refers to voting from a foreign country, the implementation of the “pleaded vote” system as of 2011 has generated voting deadlines that are practically impossible to meet (which has significantly curtailed participation by voters residing in foreign countries).

- Discrimination against persons with disabilities exercising their right to vote, especially visually-impaired or blind individuals, those with reduced mobility, and above all, individuals declared legally incompetent with judicial sentences that unnecessarily limit this right.

- The malpractice of electoral blocks on public television channels and the fact that, to the contrary, the private television channels do not respect a minimum weighting in the participation of different political sensibilities. In this specific area, the Catalan Ombudsman published *l'Informe sobre el dret de vot, igualtat i proporcionalitat en la campanya electoral* (Report on the Right to Vote, Equality and Proportionality in Election Campaigns) (September, 2015), in which data were given that showed a bias of private television channels markedly in favor of the major traditional parties at the state level before and during the election campaign.

- During the Catalan elections of September 2015, the violation by a private television channel of the Electoral Law, in its prohibition of legal entities other than parties and candidates from “conducting election campaigns as of the date on which elections are called.” The Provincial Electoral Board of Barcelona found evidence of this violation, but did so the same day as the elections and did not open any disciplinary proceedings.

Some of the shortcomings indicated in that report could be considered to be of a technical nature, and are in the process of being resolved (the limitations on voting restrictions in cases of legal incompetency, for example; or, in certain media outlets, the issue of electoral blocks). Nevertheless, the most serious interferences with democratic quality in electoral processes (leaks of phony reports in the midst of the campaign, reporting biases, violation of the Electoral Act) have not generated even a minimal response from competent authorities (Prosecutor's Office and electoral boards, as relevant).

The same lack of democratic quality can be attributed to the insufficient support for democratic memory policies in Spain and Catalonia (especially, certain municipalities that block removal of pro-Franco symbols). Over these years, the Catalan Ombudsman has taken action, at the behest of third parties and on an ex-officio basis, in a number of cases associated with the recovery of democratic memory. In 2016, on occasion of the 80th anniversary of the outbreak of the Spanish Civil War, an ex-officio action was launched to underscore the most relevant sections of the Report of the Special Rapporteur of the UN, Pablo de Greiff, on the promotion of truth, justice, reparation and guarantees of non-recurrence, in which it was shown that Spain has not faced up to its past, or done sufficient justice.

According to de Greiff, "The most serious shortcomings are to be found in the spheres of truth and justice. No State policy was ever established with respect to truth; there is no official information and no mechanisms for elucidating the truth".³⁰

The Rapporteur's report was written with relation to the basic principles and directives regarding the rights of victims who suffered clear violations of international human rights laws and that exist in consonance with recognition of the following rights: the right to truth, the right to justice, the right to reparation and guarantees of non-recurrence (Resolution 60/147, of 16 December, of the General Assembly of the United Nations).

For this purpose, the report recommends the State "show a firm commitment (...) to fully implement, as a matter of priority, the (above-mentioned) rights." Furthermore, de Greiff states that it is necessary to "rigorously assess the implementation of the Historical Memory Act and its use by victims with a view to adapting models and measures to victim's claims, and establishing communication channels between the competent authorities, the victims and the associations," and that "the shortage of resources (...) cannot justify inaction with respect to such measures." This position of the UN contrasts with policy of successive Spanish governments (lack of open pits, cancellation of courts martial, etc.), whose symbolic expression is preserved in the monumental Valle de los Caídos (Valley of the Fallen).

As shown, the apparent deterioration of democratic quality is not exclusive to the institution of the State. In early 2017, the Catalan Ombudsman began two ex-officio actions following statements made by Catalan political authorities which, at the very least, could be deemed unfortunate. First, statements made by a pro-independence senator who confirmed, among other details, that the Government of Catalonia had lists of independence sympathizers and opponents, in addition to protected data on citizens of Catalonia, such as tax information. The response from the Autonomous Ministry of Economy, aside from denying that these remarks bore any semblance of truth, was to subject the Tax Administration of Catalonia to a data protection audit. However, contrary to the Catalan Ombudsman's criteria, it has not deemed it necessary to take any legal action to defend the prestige of the Autonomous Government of Catalonia (the Generalitat).

Second, the remarks made by the Autonomous Minister of Governance, in which she encouraged Generalitat civil servants to request a floating holiday to support former senior members of the Catalan government on the first day of their trial for the 9N independence consultation. Despite the public apology made by the Minister, the Catalan Ombudsman has stated that it is inadmissible for a political authority to issue such

³⁰ Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff Mission to Spain. Doc. A/HRC/27/56/Add. 1, of 22 July 2014.

instructions to the Generalitat's corps of civil servants, and received a clear answer from the Department in the sense of not having issued, or planning on issuing any instruction or official recommendation on this matter.

3.2. CERTAIN RECENT CASES OF JUDICIALIZATION OF POLITICS

As indicated in the first part of this study, ECHR case law demands there be a special protection of the freedom of expression for individuals who hold representative offices. For this reason, this second part of the report will focus on the judicial proceedings involving politicians for acts committed in the exercise of their duties.³¹

Before analyzing the specific cases, attention must be devoted to the special importance of Judgment 42/2014 as it was the starting point for attributing legal effects to a parliamentary resolution of a merely political character.³² This judgment made for a transcendental change in constitutional case law, as previously, it had always been defended (Judgment of the Constitutional Court 40/2003) that parliamentary decisions made on political bases did not have legal effects, and were not jurisdictionally challengeable. By changing this criterion, Judgment 42/2014 allows parliamentary decisions of a strictly political nature to be subject to jurisdictional control, as will be shown in the following passages.

2.1. The accusation and sentencing of the former president of the Generalitat of Catalonia and three ministers of his cabinet has been worthy of attention even from UN human rights supervisory bodies.³³

On September 27, 2014, Artur Mas, president of the Generalitat, signed Decree 129/2014, calling the popular, non-referendary consultation on the political future of Catalonia, pursuant to the Law on Non-Referendary Popular Consultations and Other Forms of Citizen Participation, approved one day beforehand. The consultation was called for November 9, 2014.

In response to the decree, a special cabinet meeting of the Spanish government was held in la Moncloa (Spanish prime minister's official residence) on September 29 (Saturday) and following the mandatory report of the Council of State (which met on Sunday) complaints of unconstitutionality against the consultation Law and Decree announcing the consultation were filed with the Constitutional Court, which met exceptionally (on Monday), for the first time since its creation, to accept the complaints for consideration. By accepting the complaints, the Law of Consultations and the Announcement Decree were automatically suspended on a cautionary basis for five months.

This judicial suspension led then-president Artur Mas to verbally announce on October 14th, from the Palau de la Generalitat de Catalunya, a citizen participation process that included a consultation with the same question, and that would be conducted on the same day as indicated in the suspended Announcement Decree.

In response to this political declaration, the Spanish government filed with the CC a new complaint that led to cautionary court order of November 4, 2014; a legal instrument that would be used later for the criminal accusation of the elected officials.

³¹ Political actors are not the only ones whose freedom of expression has been affected. In this sphere, it is worth recalling that on March 9, 2017, the Supreme Court rejected a claim from judge Àngels Vivas for having been passed over by the General Council of the Judiciary for appointment as president of the Provincial Court of Barcelona, as they chose another, clearly less qualified, candidate. The Supreme Court expressly stated that, notwithstanding the judge's freedom of opinion and expression, her having openly taken a position in favor of the so-called *right to decide* had consequences. Further, that "no one could expect favorable treatment" if they "publicly expressed their opinions on socially controversial matters, and less so on political initiatives of doubtful constitutional compliance." The Supreme Court did not weigh the judge's condition as a woman, nor the obligation to strike a gender balance in public offices.

³² Joan Víntró, "El Tribunal Constitucional y el derecho a decidir de Cataluña: una reflexión sobre la STC de 25 de marzo de 2014", (The Constitutional Court and Catalonia's Right to Decide: reflection on the judgment of the CC of 25th March, 2014) *Blog Revista catalana de dret públic*, 2 April, 2104.

³³ This concern has been expressed by the United Nations through the independent expert on promotion of democratic and equitable international order, Alfred de Zayas. In a note published on January 30, 2017, he expressed his concern about "'Operation Catalonia', the defamatory campaign against Catalan political leaders" and the fact that "trials against former leaders who organized the referendum continue".

It must be noted that, although the Executive had urged the judges of the CC to warn the President of the Generalitat in their judgment regarding his obligation to comply with the suspension, and the liabilities and offenses that would be incurred if he ignored it, no such warning appears in the cautionary court order.

This marks the beginning of the criminal dimension of the conflict, which is what the Catalan Ombudsman considers to be of most doubtful legitimacy, and where the influence that the Executive has over the Prosecutor's Office is most apparent.³⁴ The incident played out in public, and made for a major institutional crisis of the Prosecutor's Office because at first, **the prosecutors of the High Court of Justice of Catalonia concluded that there were no legal grounds to accuse the members of the government.**

The prosecutors of the High Court of Justice of Catalonia argued that the cautionary suspension of the consultation was automatic, as it is so established by law when the Government challenges the decision of an autonomous government, and they stated that **the Constitutional Court did not hand down any explicit order on the scope of its prohibition.** Further, they stated that the CC's suspension did not include any requirement or express prevention that warned the authorities associated with the organization of the November 9th consultation that they should not cooperate in it, nor of the criminal liabilities that could be incurred if they did so.

Nonetheless, given the hierarchical nature of the institution, the senior prosecutor of Catalonia had to sign the complaint by order of the general prosecutor of Spain.³⁵

A year and a half later, during the debate preceding the failed investiture of the 11th Legislature, the Prosecutor's Office requested that the High Court of Justice of Catalonia propose that the Supreme Court investigate

former autonomous minister of the Generalitat Francesc Homs, then an MP, for the role he had played in the organization of the November 9th Consultation. The punishment sought for all investigated officials was disqualification from the exercise of political office.

At the time this report was written, the oral proceedings had been completed, and the sentences of the two cases had been handed down. In these oral proceedings, an absurd circumstance arose; the exchange of witnesses in both trials, as persons investigated before the SC testified as witnesses before the High Court of Justice of Catalonia, and at the same time, persons investigated before the High Court of Catalonia had to testify as witnesses in Madrid.

On March 13, 2017, the High Court of Justice of Catalonia handed down a guilty sentence for the crime of disobedience for Mas (two years' disqualification and a fine of 36,500 euros), Ortega (one year and nine months of disqualification and a fine of 30,000 euros) and Rigau (one and a half year of disqualification and a fine of 24,000 euros), while they were acquitted of malfeasance. On another note, on March 22, 2017, the Supreme Court found Homs guilty, sentencing him to a year and a month of disqualification and a fine of 30,000 euros.

It is worth noting that, in the opinion of the doctrine, the sentences depart from the undisputed (until now) case law of the Supreme Court, as regards the need for a specific, personal and direct order, as well as a formal requirement, to appreciate the crime of disobedience.³⁶

The existence of two sentences for the same deeds, but with different defendants before instances between which there is a relationship of jurisdictional hierarchy is, at least, complex. In light of the announced lodging of an appeal against the High Court of Catalonia's sentence,

³⁴ It must be remembered that the Prosecutor's Office is a hierarchical institution, controlled by the General Prosecutor of the State, a Government-appointed office. These incidents gave cause to questions regarding the Prosecutor's independence and impartiality in cases of interest to the Government.

³⁵ One year prior, in March, 2013, the then-high prosecutor of Catalonia, Martín Rodríguez Sol, was forced to resign when he stated that the Catalan consultation "could be legal". Also significant is the fact that one month after imposing the complaint, in December 2014, the General Prosecutor of Spain himself resigned because, among other reasons, he disagreed with the pressure exerted by the Government on the Prosecutor's Office on account of the November 9 consultation.

³⁶ Jaume Alonso-Cuevillas: "Ni desobediència, ni prevaricació" (Neither Disobedience Nor Malfeasance), *La Vanguardia*, 11 de febrer de 2017.

which must necessarily be heard in the Second Chamber of the Supreme Court (which is the court that has judged and sentenced Francesc Homs), it must be ensured that the effective composition of the court is not the same as the one that has judged another person for the same deeds.

Regardless of the sentences, it is most unusual to have judged a political action, without legal effects, and that only gave a result of political value and the expression of citizens. It is disproportionate that these deeds could end up having criminal effects, when as a response, an active political action from the governments and from the political parties should have taken place.

2.2. Resolution 1/IX of 9th November 2015

vproclaimed the Parliament of Catalonia as the “repository of sovereignty” and confirmed the undertaking of a constituent process of “democratic disconnection” outside the will and authority of State institutions. The Resolution, of a political nature, and within the exercise of the parliamentary duty of generating political momentum, was appealed by the Spanish Government before the CC, which, following the way opened in Judgment 42/2014, accepted the Spanish Government’s complaint and thus, agreed to definitively enter the process of judicialization of politics in the Catalan case. The order from the high court included the stipulation to expressly notify the president of Parliament, which was published in the official bulletins a few days later.

This notwithstanding, on January 20, 2016, the Parliament of Catalonia passed a new Resolution 5/XI, directly linked to the underlying content and purposes of the resolution that had been previously challenged. It called for the creation of a commission to study the constituent process. From this point on the State Legal Service brought an interlocutory application for enforcement of Judgment 259/2015, which was upheld by the CC in the interlocutory decree of July 19, 2016. The interlocutory decree warned “the powers involved and their office-holders, especially the Presiding Committee of Parliament, under its responsibility, of its duty to block or halt any initiative that implied ignoring or eluding the outlined orders,” in reference to the conclusions of the aforementioned Study Commission. At this point, it should be remembered that the CC’s capacity to execute its own judgments was

given to it by Organic Law 15/2015, approved in the Spanish Parliament in urgent proceedings at the end of the 10th Legislature.

Despite the warning, on July 20, 2016, the conclusions of this study commission on the constituent process were published in the Official Bulletin of the Parliament of Catalonia. Later, the President allowed them to be included in the agenda for the plenary session of July 27th, 2016, at the request of two Parliamentary groups (Junts X Sí and the CUP) which, after the pertinent votes, gave rise to a new resolution, number 263/XI. **The Prosecutor’s Office, in its complaint 10/2016, considers that the president of the Catalan Parliament should not have authorized these votes**, nor the publication of the Study Commission’s findings in the *Official Bulletin*, as she has the authority to block such actions (together with the Presiding Committee) and the obligation to do so, having been expressly notified by the Constitutional Court.

On February 22nd, 2017, complying with the order of the Constitutional Court, the High Prosecutor of Catalonia presented a **new complaint** against Carme Forcadell for the approval in Parliament on October 6th of the resolution regarding the celebration of the referendum on the political future of Catalonia. The Prosecutor has requested that the High Court of Justice of Catalonia expand the ongoing investigation into the president of Parliament for this new action. Furthermore, it requested that the vice-chairman of the Presiding Committee, Lluís Corominas, the first secretary, Anna Simó, and the fourth, Ramona Barrufet also be investigated. They are accused of crimes of disobedience and malfeasance.

The complaint attaches special relevance to the role of Forcadell and indicates that she was “aware” of the CC’s judgment that overturned Resolution 1/XI of November 9, 2015, and that her conduct in allowing the vote on the resolution regarding the referendum “is additional evidence of her obstinate and permanent will to disobey constitutional mandates.” It makes the same statement regarding the rest of the defendants, as regards the offense of disobedience.

On the other hand, the complaint excluded the third secretary of the Presiding Committee of Parliament, Joan Josep Nuet (EUiA) although he voted twice in favor of including the vote on the referendum resolution in the plenary session of

October 6th, 2016. It states that Nuet “did not mean, as did the other defendants, to violate the mandates of the CC, nor promote a political project with complete contempt for the Constitution.” The Prosecutor took the MP’s past career into account when excluding him from the complaint. The writ states that his years as an MP “demonstrate no will to join a political project of unilateral break with the constitutional system.” For that reason, the Prosecutor believed that Nuet did not act with a will to disobey the CC like the rest of defendants, but rather, acted “under the erroneous belief that he was fulfilling his duties as a member of the Presiding Committee of Parliament.” These statements have been publicly denied by Joan Josep Nuet.

The judge has suppressed the difference in personal treatment of criminal prosecution for the same acts, in these cases it must be stated that the actions of the President of Parliament and the members of the Presiding Committee were protected by the prerogative of parliamentary inviolability. As stated by professor Mercè Barceló, Article 57 of the Statute states that **MP’s and senators—including those of autonomous governments—will enjoy inviolability** for the opinions expressed in the exercise of their duties. Obviously, these opinions include the votes made within the house of parliament to which they belong (CC Judgment 36/1981).³⁷ The votes of the defendants were cast in the exercise of this office, as President or members of the Presiding Committee of Parliament; it was in this context that the acts and votes of the defendants took place. Along these lines, it must be emphasized that the decisions of the President and Members of the Presiding Committee in these cases are actions with political, not merely administrative, content, as the determination of the agenda and acceptance of initiatives are essential elements for the formation of the free will of Parliament. The Parliament is a body of free will in the deepest teleological sense that the Constitutional Court gives the prerogative of inviolability.

2.3. In the municipal sphere, a number of criminal charges have been brought against elected officials associated with the offenses of disobedience and freedom of expression. In the case of the **mayor of Berga**, the deeds date back

to the campaign for the Catalan elections of September 27 and the general elections of December 20, 2015, during which the starred Catalan *estelada* flag (as a symbol of the independence movement, not a party) remained hanging from the facade of the Berga town hall, despite notifications from the Electoral Board demanding it be taken down until after the elections.

It is worth noting that the law regulating the presence of flags on institutional buildings, Law 38/1982, of October 28, requires the presence of the official Spanish flag and also, if relevant, the autonomous and municipal flags, without ruling out the presence of other symbols or flags. Therefore, as long as the local council fulfills the required presence of official flags, nothing in the law keeps it from adding other symbols, as often occurs (LGBT pride flags, flags with slogans in favor of refugees or against male violence against women, etc.).

Twice summoned to testify for these acts, on both occasions the mayor refused to appear. In the end, examining magistrate’s court no. 1 of Berga handed down an interlocutory decree in which it ordered the arrest of Montserrat Venturós on the grounds of Article 487 LECrim. The next morning, around 7:30 am, the Mossos d’Esquadra police force came to her home and took the mayor to the court. She went without offering any resistance.

On March 1, 2017, the judge of Berga terminated the case against Montserrat Venturós, as he deemed that refusing to take an *estelada* flag down from the town hall balcony did not constitute a crime, as it cannot be understood as an act of electoral advertising. The Prosecutor has announced his intention to appeal the termination of the case.

In the opinion of this institution, an optimum weighing between the legal assets to protect—in this case the neutrality of public spaces in an electoral campaign as a guarantee for citizens that they will follow their proper course—makes advisable a limitation on the use of criminal law to only those serious cases that jeopardize the truly peaceful conduct of an elections campaign, and also for actions that could falsify vote counts or the coercion of voters. For all other cases, administrative disciplinary

³⁷ Mercè Barceló, “La inviolabilitat parlamentària” (Parliamentary Inviolability), *El Periòdic*, March 5, 2017.

measures proportional to the damage caused should be sufficient. Legislation in this spirit would be much more aligned with the concept of criminal law as the last resort of the State that has been defended by the Spanish Constitutional Court as well as the European Court of Human Rights.

2.4. Still within the municipal sphere, mention must be made of the accusation of Vic councilor **Joan Coma**, which, despite the case's recent dismissal by the Spanish High Court on April 3, 2017, may continue as a malfeasance case in the courts of Vic.

In the plenary session held December 9, 2015, councilman Coma proposed that they “not subject the decisions of our institutions to the decisions of Spanish institutions, especially the Constitutional Court, which completely lacks legitimacy and competency.” Further, he made a call for disobedience, adding that, “If you want to make an omelet, you have to crack the eggs,” a classic Catalan saying with which he assumed the consequences and risks of disobedience.

The Prosecutor's complaint against Joan Coma is based on Article 548 of the Criminal Code, to wit, provocation, conspiracy and proposition (i.e. preparatory acts) to commit sedition. That said, upon analysis of the definition of this crime, it is found that the Criminal Code defines it as a variant of the crime of rebellion, which implies an uprising carried out in a “public, tumultuous manner, by force or outside legal channels, the application of laws or any authority, official corporation or public civil servant, the legitimate exercise of their duties or compliance of administrative or judicial agreements or resolutions.”

Without a doubt, the councilor made an appeal for disobedience as a channel to keep Spanish authorities and certain judicial resolutions from stopping the process, even in the event that the process violated the legal framework in force. That said, it seems far-fetched to state that his intention was to articulate this proposition through a public disorder that could be termed “tumultuous”, a word that can be related with mutiny, confusion or disturbances associated with the noisy agitation of a crowd.

None of the actions in this case make it possible to point to a risk of tumultuous disorder, or that the statements made by Joan Coma were made along such lines. In this regard, it should be considered that the statements made by Coma in the area of freedom of expression, a framework in which anyone can assess whether or not they are appropriate, if they constitute speech coherent with someone who firmly believes in the process, or if advocating disobedience constitutes an irresponsibility by a public office-holder. All things considered, believing these statements to be of criminal interest is excessive.

Once again, even though it has ended in dismissal, the fact that a criminal case has even been opened on such meager grounds constitutes an attack on freedom of expression, and a means of pressure toward self-censorship in public discourse.

Another dimension of the case, also present in that of Montserrat Venturós, is Joan Coma's failure to appear following receipt of the judicial summons. In this case, the judge of the High Court of Spain ordered his arrest and transfer to Madrid to testify. After his testimony, he was released, his passport was withdrawn and he was ordered to appear before the court every time he was summoned.

As indicated, in the cases of Venturós and Coma, it so happens that the defendants have the right to not testify before the judge. Nevertheless, following a very traditionalist interpretation, which should now be rejected, the defendant is ordered to be arrested and brought before the judge—including costly, bothersome travel to Madrid in the second case—in order for the defendants to express they wish not to testify, as is their right, or they make a political statement and are then released. The individuals being investigated are neither witnesses nor experts. They are under no obligation to actively cooperate with the court, as they are supported by their right to silence and not testify against themselves. It would be a different matter if there were a flight risk, which is something no one has adduced.³⁸ In these situations, consideration should be given to the possibility of allowing the defendants who do not wish to appear voluntarily to notify the court, making it

³⁸ Jordi Nieva: “Judicializar la política” (Judicializing Politics), *Agenda Pública*, 8 January, 2017.

possible to continue with the trial and proceedings without having to make any arrests.

2.5. Last, the focus will be turned to the controversy that arose in the case of the **Badalona city councilors** for events that took place on October 12, 2016. This case demonstrates the great sensitivity that exists in society and the media around symbols, such as el Día de la Hispanidad (Columbus Day), and what could also be considered an overreaction by the Spanish government (through the Catalonia Delegation of the State Legal Service), which in this case was not accepted judicially.

The time-line of events is as follows: on May 2, 2016, the Local Council of Badalona handed down a resolution on the workday calendar for the municipal government that allowed public employees who wished to do so to work on October 12, changing the holiday of that day for another of their choice between April 1, 2016 and October 9, 2016. Months later, on October 10, 2016, the delegate of the Spanish government in Catalonia handed down a resolution in which she declared she would seek judicial review in court against the Badalona municipal resolution. Law 18/1987, of October 7, declared October 12th the National Holiday of Spain. On another note, Article 37.2 of the National Labor Relations Act situates this date among the few holidays that must be respected “in all cases”, even making it unavailable for the central Government to transfer the holiday to Monday if it falls on a weekend.

On October 10th, the State’s Attorney filed for judicial review in which, among other items, he petitioned for the adoption of extremely precautionary measures with no hearing provided to the other party. The next day, the judge presiding over the Judicial Review Court no. 14 of Barcelona handed down an interlocutory decree that featured as an extremely precautionary measure the suspension of all effectiveness of any administrative action of the Badalona municipal government, including the de facto procedure, that would involve opening its premises or facilities to the public or public employees dependent on the local council on October 12th.³⁹

On October 12th, around 8:30 am, the two councilors under investigation in the case turned up in front of the Viver building, where they invoked the right to disobey to protect “municipal sovereignty” before the courts of the State. Then they tore up the interlocutory decree from the previous day and entered the lobby of the building. A few hours later, around 1:45 pm, the Popular Party of Badalona filed a complaint in the police court on duty for these acts, in which they requested “the immediate closure of City Hall” as a cautionary measure. The on-duty police court requested that the Mossos d’Esquadra verify the acts reported in the complaint. The law enforcement agency responded that City Hall was closed.

In the dismissal interlocutory decision, the judge presiding over examining magistrate court no. 4 of Badalona stated that the acts reported in the complaint could only constitute a crime of disobedience as described in Article 410 of the Criminal Code, but that the facts proven do not meet the criteria for this category. In reality, in the view of the judge, the councilors’ acts constituted a “performance” and artistic shows with certain degrees of improvisation are not the object of criminal prosecution. The judge added that all of the elements were too well-calculated: only entering the lobby of the building without activating its various mechanisms, that no one could enter unless accompanied by a councilor, the dates of municipal stamps (the 13th, not the 12th), forbidding the presence of any public employee in the Viver, etc. The councilors put on a grand show, stating they were disobeying, but they never intended to cross the line of legality. For that reason, the judge concluded his interlocutory decree requesting unrestricted dismissal of the case.

It is understood that the councilors were free to carry out their performance as a political action in the framework of freedom of expression, and that no criminal laws had been broken. This notwithstanding, the affair is still pending definitive resolution, in light of the appeal lodged by the Prosecutor’s Office.

³⁹ On October 11th, at approximately 15.30, the first deputy mayor, under investigation for these acts, sent an e-mail to all municipal employees in which they were informed that, pursuant to the aforementioned interlocutory decree from the court, Badalona city hall would not open its doors to the employees the next day. In other words, they were to stay home. He added at the end of the e-mail: “This notwithstanding, the political representatives of the Badalona municipal government will serve citizens in front of the Viver building,” (FJ 2n).

4. CONCLUSIONS AND RECOMMENDATIONS

4.1. GENERAL CONCLUSIONS

- Spain is suffering democratic regressions that affect fundamental rights and freedoms recognized in the national and international legal frameworks, with special impact being experienced in Catalonia.
- The democratic regressions taken up in this report have their origin in laws approved by the Spanish parliament—such as the most recent reform of the Organic Law on Citizen Security or the Criminal Code—in the manner the courts interpret them, the ambiguity and lack of specificity of certain criminal categories, and the use of the Criminal Code as a deterrent.
- At the institutional level, a number of international pronouncements—GRECO, Venice Commission, and the special rapporteur of the United Nations—have petitioned for reforms to guarantee the separation of powers.
- In recent times, there have been clear examples that make obvious a weakening in the separation of powers in Spain. One of the most relevant is the reform of the Organic Law on the Constitutional Court that allows the CC to apply executive measures to oblige all other powers to comply with its judgments.
- Delays in the fulfillment of the European court rulings also involve damages to the rights of many citizens.

4.2. FREEDOM OF EXPRESSION

- Freedom of expression is one of the basic foundations of democratic society. Therefore, it is an essential right for the protection of democratic, European public order in the sphere of human rights.
- Freedom of expression is one of the rights that has few, and very strict, constitutionally-allowed limitations. According to the case law of the European Court of Human Rights, the restrictions established in Article 10.2 of the European Convention must be justified

only in situations of special seriousness, as in the information or ideas in question potentially bringing about a real and serious risk or damage.

- The LOSC is drafted in a vague, unspecific way that allows the Executive excessive room for interpretation in the restriction of individual freedoms, including the freedom of expression. At the same time, it is markedly focused on repressing political protest and dissidence in a context of growing social conflict on the streets without there existing an increase in punishable behavior that justifies such a need.
- Excessive intervention of criminal law in social life brings about a reduction in the sphere of individual freedom and is especially serious when used against political representatives and elected officials. In Spain, there are clearly illustrative cases of disproportionate use of the Criminal Code to coerce the free exercise of the right to freedom of expression and to try to criminally punish voices that conflict with the official discourse of governmental bodies.
- There is an abuse of criminal categories of glorification of terrorism and crimes for hate speech in social media which, because of their ambiguity and lack of specificity come into conflict with the freedom of expression.

4.3. WEAKENING OF THE SEPARATION OF POWERS

- In a democratic country, scrupulous respect for the principle of separation of powers is essential. Additionally, Spain appears to especially curtail this principle as none of the eleven measures proposed by the GRECO to better fight corruption among MP's, judges and prosecutors have had a satisfactory response; six of them have not even been implemented.
- In general terms, the measures recommended by the GRECO focus on achieving greater independence for the judiciary, Prosecutor's office and giving parliamentary activity more transparency.
- One of the greatest examples of the blurred separation between powers in Spain has been the reform of the Organic Law on

the Constitutional Court that gives sanctioning power to the CC, a formula that is an exception in comparative law given that, as a general rule, this task is attributed to another state power.

- The Venice Commission rejects the notion that the Executive allocate to the CC the responsibility to ensure compliance with its own judgments, and proposes a reconsideration of this competency to promote the perception of the court as a neutral referee.

4.4. REGRESSIONS IN RIGHTS AND FREEDOMS IN CATALONIA

- In recent times, this institution has been a witness to examples that clearly show a deterioration in democratic quality, such as the case of the deficiencies detected in electoral processes that have taken place in Spain, and that have not received even a minimal response from the bodies competent in each case.

- Another case that reveals the lack of democratic quality is the insufficient political momentum generated for democratic memory policies in Spain and in Catalonia, which led the special rapporteur of the UN to state that Spain has yet to face up to its past, and has not done enough justice.

- There have also been a number of court cases aimed at politicians for acts committed in the exercise of their duties, in which the influence of the Executive over the Prosecutor's Office has been apparent. The accusation and sentencing of the former president of the Generalitat of Catalonia and three ministers of his cabinet has been worthy of attention even from UN human rights supervisory bodies.

- A change has been observed in the case law of the Constitutional Court, as it now allows parliamentary decisions of a strictly political nature to be subject to jurisdictional control.

4.5. RECOMMENDATIONS

- Possible interpretations must be sought oriented to avoiding the use of criminal proceedings to solve political conflicts. In this context, measures against individuals, especially those holding elected office, should be limited as much as possible to scenarios of violence, turmoil and in general, any true risk to the integrity of the State.

- Criminal law should only enter where it is indispensable, as other branches of the legal framework can offer better protection and guarantees for citizen and collective rights.

- The Catalan Ombudsman echoes the recommendation of the Spanish Ombudsman on application of the LOSC in that its application be limited to truly serious disturbances of public order.

- The scope of crimes that protect institutions of the State must be delimited insofar as the attacks made against them that may conflict with the freedom of expression.

- It is necessary to review the legislation in force and case law doctrine to achieve a perfect balance with hate crimes, glorification of terrorism and freedom of expression.

- The Catalan Ombudsman seconds the eleven measures proposed by GRECO to better fight corruption among MP's, judges and prosecutors.

- The immediate implementation of European court rulings must be ensured. Particularly, regarding the "floor clauses", the judgment of the Court of Justice of the European Union must be applied to all affected people and the future law of real estate contracts should fully adapt to this judgment.

- Guaranteeing the independence of the Constitutional Court vis-à-vis other powers of the State is indispensable.

■ Ordinary jurisdiction must take the responsibility for ensuring execution of the Constitutional Court's judgments. Therefore, it is recommended that the latest reform of this body be overturned.

■ In light of scandals such as the revelation of conspiratory conversations between the then-Minister of Home Affairs and the previous director of the Anti-Fraud Office of Catalonia, the Spanish government must adopt all measures necessary to investigate what transpired, without prejudice to determining any criminal or political liabilities that may arise.

■ Interferences and shortcomings in electoral processes must have an appropriate answer from competent bodies (Prosecutor's Office and electoral board, depending on the case).

■ The State must show a firm commitment to fully develop the rights of victims of

clear violations of the international rules of human rights.

■ There must be a return to traditional constitutional case law, in which parliamentary resolutions for political momentum did not have legal effects, and were not jurisdictionally challengeable.

■ Measures must be taken to guarantee the Prosecutor's independence from the Executive.

■ Political actions must only have political actions as responses from governments and political parties.

■ Consideration must be given to the possibility of allowing the defendants who do not wish to appear voluntarily to notify the court, making it possible to continue with the trial and proceedings without having to make any arrests.

SÍNDIC

EL DEFENSOR
DE LES
PERSONES

Síndic de Greuges de Catalunya
Passeig Lluís Companys, 7
08003 Barcelona
Tel 933 018 075 Fax 933 013 187
sindic@sindic.cat
www.sindic.cat

