THE VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS ARISING FROM THE CRIMINAL JUSTICE REACTION FOLLOWING OCTOBER 1, AND APPLICATION OF ARTICLE 155 OF THE SPANISH CONSTITUTION

MAY 2018

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EL DEFENSOR DE LES PERSONES

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Síndic de Greuges de Catalunya (Catalan Ombudsman)

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INTRODUCTION

The Catalan Ombudsman, exercising his statutory and legal duty to protect and defend the rights and freedoms recognized by the Spanish Constitution and the Catalan Statute of Autonomy, has repeatedly expressed his deep disappointment regarding what he describes as human rights regressions in Spain, in general and as already described in an April 2017 report. This concern has only heightened following the call and holding in Catalonia of a popular ballot on October 1, 2017, and a number of subsequent events, noteworthy among which is the application of Article 155 of the Spanish Constitution and criminal justice reaction of the State.

The Catalan Ombudsman believes it appropriate to engage in a joint consideration process regarding this situation and, with this purpose in mind, has written this report, which is structured in three parts: (i) first, a contextualization of the situation in which the application of Article 155 of the Constitution has taken place, and the State's reaction to the pro-sovereignty political process in Catalonia; (ii) second, an examination of the impact on fundamental rights caused by the State's application of exceptional measures, such as Article 155 SC, and (iii) third, an analysis of the impact derived from police and judiciary actions taken, especially the criminal justice reaction of the Prosecutor's Office and various judiciary bodies. This report concludes with the figures available to the Catalan Ombudsman's Office on April 30, 2018.

1. CONTEXT

The Parliament of Catalonia approved, within the framework of the pro-sovereignty process promoted by the parliamentary majority resulting from the September 2015 elections, laws 19/2017, of September 6, on the self-determination referendum, and 20/2017, of September 8, on judiciary transition and founding of the Republic of Catalonia. Both laws were challenged in the Constitutional Court (CC), which automatically suspended them by applying Article 161.2 of the Spanish Constitution (SC). Members of the Parliamentary Presiding Board, Government and Electoral Syndicate of Catalonia, appointed by the Parliament following approval of Law 19/2017, were served personal notices reminding them of their duty to block or halt any initiative contrary to the suspensions decreed. Later, both laws were ruled unconstitutional and null by the CC with rulings 114/2017, of October 17, and 124/2017, of November 8, respectively.

The Convening Decree for the referendum (139/2017, of September 6) and the Implementing Rules Decree (140/2017, of September 6), published in the DOGC (Official Bulletin of the Generalitat) on the 7th, were likewise challenged by the Spanish government and automatically suspended by the CC through decisions handed down September 7, and published in the BOE (Official Bulletin of the Spanish State) on September 8. Both decisions stipulated personal notification (regarding the Implementing Rules Decree, in addition to the members of the Government, 60 public officials of the Autonomous Government of Catalonia [Generalitat] and all mayors of Catalonia) and the reminder of their duty to not take any action contrary to the suspension. On the same day, September 7, the Catalan Parliament appointed the Electoral Syndicate of Catalonia by means of Decision 807/XI, which was challenged by the Spanish government and suspended by the CC by a decision of September 7, published in the BOE on September 8, including the order for personal notification to be served to a number of officials and individuals, including those already mentioned, and the reminder of their duty to not take any action contrary to the suspension. At the urging of the Spanish government, the CC, by means of interlocutory order 126/2017, of September 21, levied a periodic penalty against the members of the Electoral Syndicate, as they found that on September 8 they had committed acts that fell within the scope of the suspension. The members of the Syndicate resigned from their posts and the CC lifted the penalties by means of an interlocutory order dated November 14, 2017.

After the ratification of the Referendum Act and the Convening Decree, the Spanish government placed the finances of the Autonomous Catalan Government in administration, first imposing a requisite certification that payments were not to finance "any activity not permitted by law, or contrary to decisions of the courts"[1] and the later unavailability of budgetary credits and the placement in administration of payments of the Autonomous Catalan Government.[2] Around the same time, the Senior Prosecutor of Catalonia handed down instructions by which he appointed a senior official of the Spanish Ministry of Home Affairs for the coordination of Spanish law enforcement agencies with the Police of the Generalitat - Mossos d'Esquadra regarding the police system to block the referendum.[3]

[1] Order HFP/878/2017, of 15 September, which published the Agreement of the Spanish Government Delegate Committee for Economic Affairs, of September 15, 2017, by which "measures in defense of the general interest and to guarantee public services in the Autonomous Community of Catalonia", BOE September 16, 2017, are adopted.

[2] Order HFP/886/2017, of September 20, which declared the unavailability of budgetary credits in the budget of the Autonomous Community of Catalonia for 2017, BOE, September 21, 2017. This and the previous measure were expressly justified under the Organic Law on Budgetary and Financial Stability, despite the fact that neither their purpose nor the procedures followed were compliant with the law, as the Catalan Ombudsman already stated in his September 22, 2017 report: http://www.sindic.cat/ca/page.asp?id=53&ui=4713&prevNode=408&month=8

[3] Instruction 4/2017, of September 22, addressed to Spanish law enforcement agencies and the Mossos d'Esquadra (police of the Autonomous Catalan Government). The prosecutor did not have the competency to direct the activities of the judiciary police in the matter of disobedience of the CC's orders and its judicial and criminal law ramifications when Instruction 4/17 was handed down, because this is the exclusive competency of the examining magistrate who was familiar with the case. Further, the prosecutor did not have the competency to direct the governmental police for public order control of the incidents arising from the referendum, because under no circumstances does the prosecutor hold such governmental competencies. The prosecutor's

Additionally, as of that time the police activity to prevent the referendum from being held intensified. The effort was led by the Spanish National Police and Civil Guard, with agents expressly stationed in Catalonia for this purpose, searches of companies, private homes and other premises, and even an attempt to enter the headquarters of a political party with parliamentary representation, the seizure of various voting materials and the closure of websites, among other actions, which also included the prohibition of public events regarding the referendum and the arrest of a number of individuals, including senior officials and other officers of the Autonomous Catalan Government. For the most part, these actions were carried out within an investigation begun by Examining Court no. 13 of Barcelona, in February, 2017, following a complaint filed by an extra-parliamentary, ultra-right wing political party called Vox and by a private citizen following statements made by a senator at a number of public events on the preparations that, in his view, were being made for the referendum in Catalonia.

On October 1 the ballot took place, without an Electoral Syndicate, voting cards or prior designation of election committees. The electoral committees were formed mostly by individuals who were already at the polling stations, many of whom had been there since the night before. Votes were cast using ballot boxes and a universal electronic roll. The police, in compliance with the court order of September 27, 2017,[4] which established a number of measures to prevent the referendum from being held, closed throughout the day 250 schools (approximately 160 by the Mossos d'Esquadra and 90 by the National Police and Civil Guard). Even though the court order stated that the referendum ballot had to be blocked "without affecting normal civic order" throughout the day there were numerous incidents due to baton charges and interventions of Spanish state law enforcement agencies to block or halt the voting, with the result of 991 persons injured.[5] Regarding these incidents, the Catalan Structure of Human Rights, made up by the Catalan Ombudsman and the Human Rights Institute of Catalonia, has demanded an objective, clarifying investigation concluding in the determination of responsibilities with respect to the violation of fundamental rights stemming from the allegations of excessive use of force by Spanish law enforcement agencies. The Council of Europe and the United Nations have also entered like requests, and the Spanish government has agreed to comply before the secretary general of the former organization.[6]

On October 10th a plenary session was held in the Parliament of Catalonia. The day's agenda called for the "appearance by the President of the Generalitat to inform on the current political situation," as a substitute for one the CC had suspended for October 9th to discuss the results of the referendum.[7] In that session, President Puigdemont stated: "I assume, by presenting here the results of

appointment of the authority that exercised this control had no legal basis. The coordination and planning of law enforcement agencies is the competency of legally established bodies, organized pursuant to the law, over which the prosecutor has no preeminence, or decision-making, leadership or representation capacity. This competency is held, in any event, by the Spanish Minister of Home Affairs, the civil governors (Spanish government delegates since Law 6/97), the Autonomous Minister of Home Affairs (previously Governance), the Catalonia Security Council and even mayors on the local security councils. This competency has never been attributed to the prosecutor (see Law 2/86, art. 48-50; RD 769/87, art. 32 and 33, and Law 4/2003, art. 4, 6 and 8).

[4] Interlocutory order of September 27, handed down by the examining magistrate of the Civil and Criminal Law Chamber of the High Court of Justice of Catalonia (TSJC), in inquiry 3/2017, which consolidated two suits filed by the Senior Prosecutor of Catalonia against members of the Autonomous Catalan Government, based on "the Executive's negligence of rulings of the Constitutional Court, which had administratively accepted the appeals filed by the State Legal Service against Decrees 139/2017, for the convening of a self-determination referendum, and 140/2017, on Implementing Rules for this ballot, and also against the Referendum Act (Law 19/2017), with its consequent suspension, by three decisions of last September 7, of the three laws in question, with respect to which, furthermore, the Constitutional Court issues a special reminder to members of the Government, who have been personally served, that they refrain from conducting any action that allows the preparation or holding of the referendum planned for next October 1."

[5] CatSalut. 2017. *Report on the Incidents of October 1-4, 2017. Patients treated throughout election day and later days as a result of baton charges by State law enforcement agencies* http://premsa.gencat.cat/pres_fsvp/docs/2017/10/20/11/15/232799c8-755f-4810-ba56-0a5bbb78609c.pdf

[6] http://www.sindic.cat/site/unitFiles/5080/EDHC_declaracio_1Oct.pdf

[7] CC Interlocutory order 134/2017, of October 5, which establishes this precautionary measure in the administrative acceptance of the actions for infringement of fundamental rights and freedoms, presented by the Socialist Group of the Parliament of Catalonia, on October 5.

the referendum, before all of you, and before our fellow citizens, the mandate from the people: that Catalonia become an independent state as a republic,". Immediately thereafter, he said: "with the same solemnity, the Government and I propose that the Parliament suspend the effects of the declaration of independence so that in the coming weeks we may engage in a dialogue, without which it is impossible to reach a negotiated solution".[8] After this parliamentary session, the deputies of the Junts pel Sí (Together for Yes) and CUP (Popular Unity Candidacy) parties published a declaration of the representatives of Catalonia, with content typical of a declaration of independence.[9]

Following this session and declaration, the Government of the State launched the process to apply Article 155 of the Spanish Constitution, through an order[10] sent to the President of the Generalitat by which he was to confirm whether any authority of the Generalitat had declared the independence of Catalonia, or whether the October 10 declaration implied a declaration of independence, whether or not it was in force at that time. If the answer was affirmative, he was ordered to revoke the declaration and order the cessation of any activity meant to configure Catalonia as an independent state, and to comply with the rulings of the CC. It was added that any response other than a mere "yes" or "no" would be taken as an affirmation. The president of the Generalitat responded with two letters,[11] in which, following several considerations on the political situation in Catalonia, he requested a meeting with the president of the Spanish government to begin a process of dialog, and allowed for the possibility that the Parliament, if the lack of dialog persisted, could proceed, if deemed opportune, to vote the formal declaration of independence that it did not vote on during the October 10 plenary session.

The Spanish government's understanding was that these letters did not answer the order that had been served, and therefore it had gone ignored. On October 21, the Spanish government agreed to request Senate approval for a number of measures in application of Article 155 SC,[12] with the aim to "restore constitutional and statutory legality, ensure institutional neutrality, maintain social welfare and economic growth and ensure the rights and freedoms of all Catalans." The measures were articulated in five areas: (A) president of the Generalitat, vice-president and government; (B) Administration of the Generalitat; (C) certain areas of administrative activity; (D) the Parliament of Catalonia; (E) cross-sectoral measures. The most significant authorized measures are outlined in Chart 1. Plans call for this package of measures to remain in force until the inauguration of the new government of the Generalitat resulting from the elections called, and that during their validity, the Spanish Government may propose modifications to the Senate, or call for cessation of the measures.

[8] Full text (DSPC-P-83, October 10, 2017).
[9] https://www.ara.cat/2017/10/10/Declaracio_Independencia_amb_logo_-1.pdf.
[10] Order served by Agreement of the Council of Ministers of October 11, 2017.
[11] Letters of October 16 and 19, 2017, addressed to the President of the Spanish Government.
[12] Agreement of the Committee of Ministers of October 21, 2017, by which, in application of the terms of Article 155 of the Spanish Constitution, the order sent to the R.H. President of the Generalitat of Catalonia, for the Generalitat of Catalonia proceed to comply with its constitutional obligations and the cessation of actions in severe opposition to the general interest, is considered ignored, and the package of measures necessary to guarantee compliance with the constitutional obligations and protect the general interest are proposed to the Senate.

Chart 1. Measures proposed by the Spanish Government in application of Article 155 SC

(A) Dismissal of the president, vice-president and government and their substitution for the exercise of their duties by the bodies or authorities appointed or created by the Spanish government. Especially, the Catalan Government President's competency to call elections is conveyed to the President of the Spanish Government.

(B) Placement of the Administration of the Generalitat under the directives of the bodies created or designated by the Spanish Government and the empowerment of the these bodies to approve the provisions, acts and orders necessary to exercise their competencies. The subjection of the actions of the Generalitat to a system of prior communication or authorization, with the consequence of annulment if any actions are taken without fulfilling this requisite, and with the provision that, in the case of the acts that require prior communication, the bodies created or designated by the Spanish Government may present a binding objection to them; the designation and dismissal or temporary replacement or any authority, public official and personnel of the Administration of the Generalitat and any of its affiliated bodies and entities; the requirement of disciplinary accountability of any Generalitat personnel in case of violation of the provisions, acts and orders adopted by the bodies appointed by the Spanish state government.

(C) Adoption of several special measures in public safety and order subject matter (placement of the Mossos d'Esquadra-Police of the Generalitat under the orders of the authorities and bodies designated by the Spanish state government; the replacement of Mossos by members of Spanish state law enforcement agencies); economic, financial, tax and budgetary management (exercise of competencies of the Generalitat in these areas by bodies designated by the Spanish state government, especially with the aim to ensure that the funds transferred by the State and the revenue obtained by the Generalitat not be destined to "activities or purposes related with or linked to the process of secession, or that in any way violate the measures" contained in the Agreement for application of Article 155); on telecommunications, and electronic and audiovisual communications (exercise of the Generalitat's duties in the area of telecommunications, digital services and information technologies by the bodies appointed by the state government; and to guarantee, with respect to the news media of the Catalan Corporation of Audiovisual Media, of the "broadcast of a true, objective and balanced information that is respectful of political, social and cultural pluralism, the territorial balance and with the knowledge of and respect for the values and principles contained in the Spanish Constitution and Catalan Statute of Autonomy."

(D) Prohibition of the Parliament of Catalonia investing a new President of the Generalitat until the constitution of a new Parliament arising from elections called by the president of the Spanish government; exclusion from the functions of Parliamentary supervision regarding the actions of bodies appointed by the government, with this follow-up and control role being attributed to the Spanish Senate; the bodies appointed by the Spanish government being prohibited from directing political and governmental promotion proposals; the establishment of a prior control mechanism for parliamentary initiatives of a legislative and non-legislative character, by a body appointed by the Spanish government, which must provide prior approval for the Catalan Parliament to start any proceedings regarding them.

(E) Competency of the judicial monitoring of any measures adopted by the bodies appointed by the Spanish state government (which specifies that they must be in keeping with the state or autonomous legislation in force) depending on such bodies' rank; the prohibition of any act by the Generalitat that contravenes the measures adopted, under punishment of being declared null and void; the prior intervention by the bodies appointed by the Spanish Government in publication of acts in the *Official Bulletin of the Generalitat of Catalonia* and the *Official Bulletin of the Parliament of Catalonia*, with the consequence that the provisions and acts published without authorization or against what these bodies agree would have no validity or efficacy, respectively; the creation of bodies and the appointment of authorities to exercise duties and ensure compliance with the measures adopted and the consideration of non-compliance with the measures as a breach of due loyalty to the Constitution and the Statute, for disciplinary purposes.

While the Spanish Senate was processing the authorization for application of Article 155, on October 26 and 27, the Parliament of Catalonia held a plenary session to carry out a "general debate on the application of Article 155 of the Spanish Constitution in Catalonia and its possible effects." At the end of the plenary session, on October 27, the Parliament approved a joint motion for a resolution presented by the Junts pel Sí and CUP parliamentary groups, which replicated the Representatives of Catalonia Declaration that the deputies had signed on October 10.[13]

On another note, on October 27, the Senate authorized the measures proposed by the Spanish government,[14] with certain modifications and conditions, the most significant of which were:

- direct attribution to the Spanish state government, or the authorities and bodies it creates or appoints, of the duties in substitution of the President of the Generalitat and dismissed members of the Catalan government;

- exclusion of the terms relative to the public audiovisual services of the Generalitat (CCMA media);

- elimination of prior supervision of parliamentary initiatives;

- the mandate to employ the approved measures in a "proportionate and responsible" manner, "considering the evolution of events and seriousness of the situation".

On October 27, the agreements of the Committee of Ministers and of the Senate from October 21 and 27, respectively, were published in the Official Spanish State Bulletin. The next day, the first measures of the Spanish government in application of the powers authorized by the Senate were published, chiefly:

- the firing of the president of the Generalitat,[15] the vice-president and all other members of the government;[16]

- the dissolution of the Parliament of Catalonia and the calling of elections for December 21;[17]

- the elimination of numerous bodies of the Generalitat (the offices of the president and vice-president, Advisers Council for the National Transition, Special Committee on the Violation of Fundamental Rights in Catalonia, the Patronat Catalunya-Món-DIPLOCAT (Public Diplomacy Council of Catalonia), Catalan Government delegations in foreign countries, except that of the European Union) and the firing of the heads of the eliminated bodies;[18]

- the appointment of bodies and authorities to implement application of the measures authorized by the Senate, especially as regards replacement of dismissed Catalan authorities. This appointment was made in favor of the President of the Spanish government, the Vice-president, the Council of Ministers and the Ministers;[19]

- the removal of various senior officials of the Generalitat (the Catalan government delegate in Madrid, the standing representative before the European Union, secretary general of the Department of Home Affairs, director general of the police[20] and *major* [chief] of the Mossos d'Esquadra).[21]

As a complement to these measures, in the following days the elimination of other bodies of the Generalitat

[13] The decision was approved by 70 votes in favor, ten against and three abstentions. The deputies of the Socialist, Citizens (Ciutadans) and Popular parties walked out of the session prior to the vote.
[14] Agreement of the Senate in Plenary Session, of October 27, 2017, approving the measures required by the Government, under Article 155 SC. The two agreements were published in the Official Spanish State Bulletin no. 260, of October 27, 2017.
[15] RD 942/2017, of October 27.
[16] RD 943/2017, of October 27.
[17] RD 946/2017, of October 27.
[18] RD 945/2017, of October 27.
[19] RD 944/2017, of October 27.
[20] RD 945/2017, of October 27.
[21] Order INT/1038/2017, of October 28.

administration was also approved, as well as the firing of their heads and the temporary staff attached to the ousted office-holders, a situation that was repeated later on several occasions.[22]

The elections called by the president of the Spanish state government under Article 155 were held on December 21, 2017. With the highest voter turnout ever reached in Catalan Parliamentary elections since the reinstatement of the Generalitat in 1980 (79.09% of the eligible electorate), the results gave an absolute majority to the pro-independence candidacies (70 of 135 deputies). Following the constitution of the Parliament, the process to invest the President began, in which the President of the Parliament proposed Carles Puigdemont as the candidate. This candidacy was challenged by the Spanish government in the Constitutional Court which, without giving a specific opinion on the administrative acceptance of the appeal, adopted as a precautionary measure the suspension of any investiture session that did not meet the conditions previously set by the CC itself:

- that the candidate be physically present;

- that the investiture debate and vote for Carles Puigdemont not be carried out via telematic media, or with a proxy candidate standing in;

- that the candidate not be invested without judicial authorization, even if they appeared before the chamber, if a search and imprisonment warrant was in force for them;

- that members of the parliament subject to an arrest and imprisonment warrant could not delegate their vote to other members of parliament.[23]

In light of the impossibility to comply with these requirements, on March 6 the President of Parliament subsequently proposed the deputy Jordi Sànchez, currently incarcerated in pretrial custody, as candidate for the presidency of the Generalitat. His request for special leave to attend the plenary investiture session was denied by the examining magistrate of the Supreme Court (SC) by an interlocutory order of March 9 on the grounds of suspected criminal recurrence. This decision has been appealed in the Criminal Law Chamber of the SC and Jordi Sànchez has lodged a formal complaint on the matter before the Human Rights Committee, which is established within the International Covenant on Civil and Political Rights.

Next, the President of Parliament proposed Jordi Turull as candidate for the presidency of the Generalitat and the first investiture debate was held on the afternoon of March 22. Turull was not voted in. The second debate, scheduled for 48 hours later, could not be held because the candidate had been placed in pretrial custody by the examining magistrate of the SC.

Lastly, the President of Parliament again proposed the investiture of Sànchez (April 9), but the candidate's request to attend the plenary investiture session or at least, participate in it via video conference was again denied by the examining magistrate (April 12).

Aside from the situations described up to this point, it must be noted that as a consequence of holding the October 1 ballot, and the declaration of October 27, the Spanish state launched a number of criminal law actions that also severely affect citizens' rights and freedoms.

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[22] RD 954/2017 of October 31 (BOE November 2). According to the report *Inventari de Danys* (Inventory of Damages), by the group ServidorsCAT, as of February 15, 2018, 254 individuals had been removed from their posts (https://www.servidorscat.cat/inventari-de-danys/inventari-de-danys-document-complet/). Other firings have followed, such as the secretary for Dissemination and Citizen Services or the Director of the Public Safety Institute of Catalonia.

[23] In his statement of January 30, 2018, the Catalan Ombudsman made it clear that the CC had adopted precautionary measures that had not been sought, and that were not provided for in the SC or the organic law governing the CC, all within a procedure (appeal of autonomous regulations) not foreseen therein. These precautionary measures have a direct impact on the rights of a deputy elected in the recent December 21 elections, on the right to popular representation in the Parliament, and also, in general, on the rights to political participation of all citizens of Catalonia. Further, they had been adopted without giving the parties involved in the procedure a hearing.

These actions have targeted members of the ousted government, the chair and three members of the Presiding Board of Parliament, including the former President of Parliament, the leaders of the two main pro-independence associations (Jordi Sànchez and Jordi Cuixart), dozens of senior officials of the Autonomous Catalan Government (such as the chief of the Mossos d'Esquadra, Josep Lluís Trapero; intendant Teresa Laplana; and Secretary General of the Catalan Autonomous Ministry of Home Affairs, and Executive Director of Police, Pere Soler), over 700 mayors, and personnel from companies that rendered services related with the ballot, among others. The crimes they are accused of range from rebellion and sedition to misuse of public funds, including disobedience of CC rulings, among others. In this context, several individuals who protested against the actions of the Spanish National Police and the Civil Guard on October 1 have been accused of hate crimes.

For over six months and in an extraordinary show of strictness, four of the accused—now indicted—individuals have been subject to the precautionary measure of deprivation of liberty. Most members of the ousted government have been subject to this situation, and all of them, as well as the members of the presiding board were released on bail, and barred from leaving Spanish territory. The situation worsened when, on occasion of the investigated individuals' notification on the bill of indictment handed down by the examining magistrate of the SC (March 23), regarding the provisional measure of communicated pretrial custody without bail for four former ministers and the former President of Parliament.

Although the events the indicted and investigated individuals are accused of occurred within Catalan territory, and furthermore, several of them enjoyed parliamentary immunity before the High Court of Justice of Catalonia (HCJC), both the SC and the Spanish High Court (Audiencia Nacional - AN) are investigating the most relevant cases. The SC, those targeting the Presiding Board of Parliament, the members of the ousted government, the former president of the Catalan National Assembly and the current president of Òmnium Cultural; the AN, those of the former leaders of the Mossos and the Autonomous Ministry of Home Affairs. The rest of the suits are being investigated by Examining Court no. 13 of Barcelona, while the cases against the mayors who allegedly supported the October 1 ballot, are dispersed over various examining courts of Catalonia.

As will be analyzed in the following sections, this judicial activity is having a severe impact on such relevant rights as parliamentary immunity, the rights of the judge predetermined by law, the right to defense, the "no punishment without law" principle, individual freedom, due process of law, the freedom of expression and information, and the freedom of assembly and demonstration, among others. Additionally, as will be shown, almost none of the court rulings handed down regarding the events of October 1 and 27 provide an analysis that properly weighs the impairment of the rights involved.

Regarding this situation, and to properly define the context of the events that give rise to this report, certain additional considerations must be made.

In the first place, it must be noted that the crime of calling or organizing referendums by authorities without competencies to do so was expressly excluded from the Criminal Code, which had introduced this category of violation, through a reform of the Code two years before.[24] It is significant that the opening statement of the Organic Law justifies the repeal of these crimes because "they refer to behaviors that do not have sufficient entity to warrant criminal reproach, even less so if the punishment established is imprisonment." It also adds that "(...) the behaviors that these criminal categories describe do not meet the criteria required to proceed towards their incrimination. The Constitution and the whole of the legal framework already offer

[24] Organic Law 2/2005, of June 22, on modification of the Criminal Code, repealing articles 506 bis, 521 bis and 576 bis, which had been entered into the Criminal Code through Organic Law 20/2003, of December 23.

instruments sufficient and suitable to ensure respect for legality and the democratic institutions, and to guarantee the peaceful co-existence of all citizens."

Second, indeed, the Spanish legal framework already has a wide range of judicial instruments with which to face any possible infringements of the Constitution and other laws. This is especially the case, with respect to the possible violations of the Constitution, of the appeal mechanisms of the CC, among which are challenges of provisions and acts of autonomous communities by the Government, for any reason, with the effect of its automatic suspension (art. 161.2 SC), an instrument that has been widely and effectively used, as is shown in chart 2.

It must also be remembered that there was a recent and extraordinary reinforcement of the powers of the CC to enforce its rulings through Organic Law 15/2015, of October 16, which empowers it to levy coercive fines, order enforcement of alternative measures, "deduce testimony" for criminal law effects (urge the Prosecutor to open criminal proceedings against another party) and even decide the precautionary disqualification of authorities and public employees.[25]

Chart 2. Interventions of the Constitutional Court at the behest of the Spanish state government during the Catalan crisis (March 2017-April 2018)

- Complaint of unconstitutionality filed by the Spanish Government on March 31, 2017 against the Generalitat's 2017 Budget Act, decided by CC judgment (STC) 90/2017, of July 5, which declares unconstitutional and null several items of the Budget Act if they are earmarked for financing the referendum on the political future of Catalonia.
- Complaint of unconstitutionality filed by the Spanish government against the reform of the Regulations of the Parliament of Catalonia of July 26, 2017, on the processing of laws by the single-reading procedure, decided by STC 139/2017, of November 29, which deemed the reform of the Regulations to be compliant with the Constitution as long as it does not block the presentation of amendments.
- Complaint of unconstitutionality presented by the Spanish government against the Catalan Parliament's Self-determination Referendum Law, decided by STC 114/2017, of October 17, which declared it unconstitutional and null.
- Challenge by the Spanish government of the appointment of members of the Catalan Electoral Syndicate by the Parliament, decided by STC 120/2017, of October 31, which invalidated the appointments. Previously, the CC levied a coercive fine on the members Syndicate as it understood that they had committed acts contrary to the suspension ordered (ITC [Constitutional Court Interlocutory Order] 126/2017, of September 20), which they later lifted (ITC of November 14, 2017) once they had renounced their posts. In the same way, the court levied, and later lifted, coercive fines on various public officials responsible for the Electoral Administration of Catalonia (ITC of September 21 and ITC of November 8, respectively).
- Challenge by the Spanish government of the decree calling the referendum, decided by STC 122/2017, of October 31, which declared it unconstitutional and null.
- Challenge by the Spanish government of the implementing rules for the referendum, decided by STC 121/2017, of October 31, which declared it unconstitutional and null.

[25] New article 92 of the Organic Law on the Constitutional Court. The new powers of the CC as regard the enforcement of its own rulings, especially those allowing the suspension of public officials, have been harshly criticized by the Venice Commission, as the Catalan Ombudsman stated in his report *Human Rights Regression in Spain*, and, more recently, among others, Costa-Tulkens-Kaleck-Simor, *Catalonia Human Rights Review Judicial Controls in the Context of the 1 October Referendum*, of December 19, 2017.

- Complaint of unconstitutionality presented by the Spanish government against the Law on Judiciary Transition and Founding of the Republic of Catalonia, decided by STC 124/2017, of November 8, which declared it unconstitutional and null.
- Interlocutory application for enforcement presented by the Spanish government with respect to the Declaration of the Representatives of Catalonia, approved by the Parliament on October 27, 2017, and also the "Constituent Process" declaration, ratified on the same date, which was decided by the CC (ITC 144/2017 of November 8, 2017) and that invalidates the aforementioned declarations because they contravened several prior decisions of the CC (especially Ruling 114/2017, which invalidated the Referendum Act, and the decision that administratively accepted and suspended the Judiciary Transition Act).
- Challenge by the Spanish government of the candidacy of Carles Puigdemont as president of the Generalitat, which gave rise to the Constitutional Court, before deciding whether to administratively accept it, establishing the suspension and a number of precautionary measures, as is explained in the upcoming section (ITC of January 27, 2018). The final administrative acceptance came about through a CC interlocutory order of April 26, 2018.

In all of the cases outlined in this chart, the challenged provisions and acts were automatically suspended as of the administrative acceptance of the challenge by the Spanish government, by virtue of the special powers conferred to it by Article 161.2 SC. Additionally, the CC ordered that personal notifications and warnings be served, instructing the notified parties to refrain from any attempt to block or halt any action tantamount to ignoring or eluding the suspension, underscoring the threat of criminal liabilities in case of non-compliance.

Likewise, a number of interlocutory applications for enforcement have been presented before the CC regarding sentences and interlocutory orders previously handed down by the CC to stop parliamentary sessions or block the processing of certain parliamentary initiatives. One notable example of this are the interlocutory orders of September 19, 2017 which invalidate the agreements of the Presiding Board of the Catalan Parliament that allowed the vote of the Referendum and Judiciary Transition laws, and that brought the actions of the President of Parliament to the Prosecutor's attention.[26]

It also bears mentioning that, through actions for infringement of fundamental rights filed by certain deputies of the Parliament of Catalonia, the CC has adopted measures with respect to certain actions of Parliament and has suspended a number of sessions.[27]

All of these actions show that there exist judicial instruments to handle possible acts against the constitution, and their effectiveness to block (even on a preemptive basis), review, and correct them, if necessary, with the liabilities that could be derived therefrom (in terms of disobedience) if any decisions handed down by the CC are contravened.

Throughout this process, the Catalan Ombudsman has reiterated his profound concern regarding the violations of fundamental rights and public freedoms that have been possible. He has expressed this concern in numerous statements (Chart No. 3).

[26] ITC 123 and 124/2017, of September 19. See also the CC decision of September 7, 2017, by which various agreements of the Presiding Board of Parliament were suspended.
[27] Actions for infringement of fundamental rights filed by the Socialist Parliamentary Group on October 5, 2017, against the Parliamentary agreement to hold a plenary session on October 9 to evaluate the results of the October 1 referendum, and that of October 27, to block the processing of two joint motions for resolution presented by the Junts pel Sí and CUP groups. With respect to the requested suspension of the plenary session, the CC did not grant it because it had already been held that day (October 27).

Chart 3. Notices and statements released by the Catalan Ombudsman over the September 2017 - April 2018 period

- Letter from the Catalan Ombudsman (September 15, 2017)http://www.sindic.cat/site/unitFiles/4701/Carta%20SG%20v%203.CAT-corrdocx.pdf
- Notice from the Catalan Ombudsman (September 20, 2017) http://www.sindic.cat/ca/page.asp?id=53&ui=4711&prevNode=408&month=8
- Report by the Catalan Ombudsman (September 22, 2017) http://www.sindic.cat/site/unitFiles/4713/Informe%20del%2022%20de%20setembre%20de%202017.pdf
- Notice from the Catalan Ombudsman (September 26, 2017) http://www.sindic.cat/site/unitFiles/4716/comunicat_fiscalia_set17.pdf
- Participation of children and adolescents and pluralism in schools (September 29, 2017) http://www.sindic.cat/site/unitFiles/4727/La%20participació%20dels%20infants%20i%20adolescents%20i%20pluralisme.pdf
- Actions of the Spanish state's law enforcement agencies on October 1st (October 2, 2017) http://www.sindic.cat/site/unitFiles/4730/Comunicat%201-O-rev-FINAL.pdf
- Proposal for dialog and mediation before the current context (October 4, 2017) http://www.sindic.cat/ca/page.asp?id=42
- The European Commissioner for Human Rights notifies the Catalan Ombudsman that he has requested that the police baton charges of October 1 be investigated (October 9, 2017) http://www.sindic.cat/ca/page.asp?id=53&ui=4753
- The Catalan Ombudsman states that the independence movement cannot be criminalized, makes appeal for political dialog (October 18, 2017) http://www.sindic.cat/ca/page.asp?id=53&ui=4773
- Notice from the Catalan Ombudsman (November 3, 2017), http://www.sindic.cat/ca/page.asp?id=53&ui=4818&prevNode=408&month=10
- The Catalan Ombudsman investigates the events surrounding the October 1 referendum, monitors application of Article 155 of the Spanish Constitution and studies the actions of the Central Electoral Commission concerning the elections of December 21st (December 1, 2017) http://www.sindic.cat/ca/page.asp?id=53&ui=4894&prevNode=408&month=11
- The Catalan Ombudsman asks for guarantees of participation rights for candidates in pre-trial custody in the December 21 elections (December 5, 2017), http://www.sindic.cat/ca/page.asp?id=53&ui=4902&prevNode=408&month=11
- The Catalan Ombudsman repeats before the Central Electoral Commission and the Commissioner for Human Rights, the need to reconcile the passive voting rights of incarcerated candidates with their situation of deprivation of liberty (December 15, 2017) http://www.sindic.cat/ca/page.asp?id=53&ui=4920&prevNode=408&month=11
- The Catalan Ombudsman demands respect for election results and that all deputies be able to exercise their duties without limitations (January 22, 2018) http://www.sindic.cat/ca/page.asp?id=53&ui=4976&prevNode=462&month=0
- The Catalan Ombudsman defends citizens' rights before possible alterations of the judicial framework in force and contravention of the rule of law (January 30, 2018) http://www.sindic.cat/ca/page.asp?id=53&ui=4993&prevNode=462&month=0
- Catalan Structure of Human Rights urges the state to urgently investigate the police actions of October 1, as it agreed to do before the Council of Europe (March 2, 2018) http://www.sindic.cat/ca/page.asp?id=53&ui=5080&prevNode=462&month=2
- The Catalan Ombudsman warns that barring Jordi Sànchez from exercising his political rights is a severe attack on the principles that sustain the rule of law in Spain and the European Convention on Human Rights (March 9, 2018) http://www.sindic.cat/ca/page.asp?id=53&ui=5097.

- The Catalan Ombudsman asks police and judicial authorities to act with proportion and measure when prosecuting possible crimes of dissidence with the unity of Spain (April 10, 2018) http://www.sindic.cat/ca/page.asp?id=53&ui=5212&prevNode=462&month=3
- The Catalan Ombudsman repeats that blocking the investiture of Jordi Sànchez violates his political rights and contravenes the independence of the Parliament of Catalonia (April 12, 2018), http://www.sindic.cat/ca/page.asp?id=53&ui=5214&prevNode=462&month=3

In general terms, the Catalan Ombudsman believes that, in light of the severity of the events, an overall view must be given of the impairment of fundamental rights stemming from the application of Article 155 and in application of criminal legislation to the events surrounding October 1 and 27. As demonstrated, the state has a rich armamentarium of judicial resources to respond to any acts that may contravene the Constitution. Furthermore, they have shown their effectiveness for intervention in the situations that have arisen. But instead of limiting itself to these resources, the reaction has been to resort to exceptional measures in application of Article 155 of the SC that impair fundamental rights and judicial actions of a criminal nature, promoted by the Spanish Prosecutor's Office, which force the application of criminal law and affect fundamental rights recognized by the Spanish Constitution and international treaties that Spain has signed. This disproportionate application of criminal law, for which Article 155 cannot give legal coverage, may have caused a situation of wide-ranging "suspension" of fundamental rights without resorting to any of the exceptional states constitutionally established for such a scenario (Art. 55.1 and 116 SC), as will be shown in the next section. Therefore, the situation lacks the pertinent notice of suspension of fundamental rights to the secretary general of the Council of Europe.

2. THE STATE'S REACTION (I): MEASURES ADOPTED IN APPLICATION OF ARTICLE 155 THAT IMPAIR FUNDAMENTAL RIGHTS AND PUBLIC FREEDOMS

Two of the main measures adopted in application of Article 155 (the dissolution of Parliament and firing of the president of the Autonomous Catalan Government, the vice-president and all members of the government) directly impair the right to political participation recognized in Article 23 SC in two ways: on one hand, the rights of ousted public officials and representatives whose dismissal followed the premature dissolution of the Parliament are impaired; and, on the other, citizens' rights to political participation, in general, are also impaired as the representatives they have elected have not been able to take office to serve the terms for which they were elected.[28]

Furthermore, dissolution of the Catalan Parliament and firing of the Catalan government can hardly be considered alternatives that Article 155 makes possible, for two key reasons: on one hand, it seems clear that if measures of such exceptional nature are to be applied, they must be expressly stipulated in the Constitution, as is done in certain constitutional systems.[29] In Spain, however, not only are they not planned, but they were rejected, on up to three different occasions, in the constituent process during the parliamentary discussion of Article 155.[30] On another note, Article 155 does not allow the suspension or limitation of fundamental rights, something that could only be done, at the collective level, with the application of the exceptional states described in Article 116 SC and, at the individual level, in the terms established by Article 55.2. Therefore, application of Article 155 cannot impair fundamental rights, among which is the right to political participation, recognized in Article 23 SC.

Indeed, in the terms in which it has been interpreted by the CC itself, Article 23.2 SC includes as an integral part of the right to access in equal conditions to public offices and duties, the *ius in officium* principle, by which public officials, once they have taken office, can remain and exercise their duties without disturbance. This is because, in an opposite scenario, if once the access to the public office has been respected, their exercise could be influenced or blocked, the constitutionally-recognized right would lose its effectiveness.[31] Specifically, the CC has stated that it includes the right of persons who occupy public offices to remain in conditions of equality in the offices they have taken, from which they cannot be dismissed, if not for the causes set in and pursuant to legally-established procedures.[32] In this regard, it must be stated that the grounds for dismissal of the president of the Generalitat and of the members of government, and also the grounds for termination of the terms of members of parliament are established in the Statute of Autonomy of Catalonia and, pursuant to this rule, in Law 13/2008, of November 5, on the presidency of the Generalitat. As for the members of parliament, the grounds are outlined in the Regulations of the Parliament of Catalonia. Early dismissal from their posts of the persons occupying them, on grounds and with procedures that are not established in law, constitutes a violation of the fundamental rights recognized by Article 23.2 of the SC.

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[28] At this point it is important to mention the complaints of unconstitutionality filed by over 50 deputies of the Confederal Unidos Podemos-En Comú Podem-En Marea (Spanish) Parliamentary Group, and by the Parliament of Catalonia, which additionally challenges the provisions handed down in application of these measures.

[29] Thus, the constitutions of Austria (art. 100), Italy (art. 126) and Portugal (art. 236).

[30] Art. 12, of dissenting vote cast by Alianza Popular (Fraga Iribarne) in Title VII of the Draft Constitution; amendment no.736, of Unión de Centro Democrático (Ortí Bordas) in the Draft Constitution, and amendment no. 957, of Unión de Centro Democrático (Alberto Ballarín), in the Constitution Project approved by the Spanish Parliament.

[31] STC 5/1983, of February 4; 32/1985 of March 6; 161/1988, of September 20; 27/200 of January 31; 203/2001, of October 15; and 298/2006 of October 23, in addition to many others.

[32] STC 10/1983 of February 21, and 298/2006, of October 23, among others.

The violation of the *in officium* right of public officials also impairs the right to political participation of citizens, recognized in clause 23.1 SC, because as the CC itself has ruled, "the right that Article 23.1 SC recognizes for citizens would be devoid of content or ineffective if the political representative were deprived of the right, or its exercise were disrupted".[33] There is a close connection between citizens' right to political participation and the right of public representatives and officials to exercise without disruption and for the time necessary, the duties inherent to the post, in such a way that their dismissal outside the legally-established grounds is also a violation of citizens' rights to participation in general, as their exercise of them is thereby frustrated. Because there can be no doubt that the greatest impairment that could be suffered by public officials' right to exercise their duties is that they be forcibly removed from office, or be obliged to cease in the exercise of their duties ahead of the expiry of their term, on grounds and with procedures not established in law.

The right to political participation (art. 23 SC) was also affected by the acts that, after the elections of December 21, blocked some of the candidates who had been elected, and who were in possession of their political rights, from standing as candidates for the presidency of the Generalitat, in the process of investiture meant to form a new government.

Thus, in the first place, consideration must be given to the irregularity brought about by the CC, before deciding whether it administratively accep ted the Spanish government's appeal, adopting precautionary measures that made for a de facto prohibition of Carles Puigdemont being able to stand before the Parliament as a candidate for the presidency of the Generalitat.[34] The significance of the decision, mandatory but not binding, made by the Council of State of January 25, 2018 should not be overlooked. It stated that there were no legal grounds to challenge the possibility of Puigdemont standing as a candidate for investiture.[35] According to the Council of State, given the legal soundness of the proposal, such a challenge would be merely preemptive, and for this reason contrary to Constitutional Court case law. The possible defects in the parliamentary processing of the proposal have channels for later rectification through the CC itself. The CC interlocutory order by which at last it administratively accepted the Spanish government's appeal, of April 26, 2018, makes no mention in its 33 pages of the Council of State's decision.

Second, the Catalan Ombudsman, as he has already stated in notices of March 9 and April 12, 2018, believes that it is especially egregious that the SC judge examining special case no. 20907/2017 denied Jordi Sànchez's request for the furloughs necessary to participate, as a candidate, in the investiture session called by the President of the Parliament of Catalonia.

In effect, Article 23 of the Constitution and Article 3 of Additional Protocol no. 1 of the European Convention on Human Rights, wherein the rights of active and passive suffrage are recognized, determine that persons who have not incurred in any cause for disqualification may be elected as popular representatives. However, passive voting rights are not limited to the right to be voted for or elected, but also activate, once elected, the right to carry out the duties of representation for which they have been elected. It was so expressed by the European Commission of Human Rights in 1984, as they stated, "it is not enough that a person has the right to be a candidate, they should also have the right to exercise as a parliamentarian once elected. Adopting an opposite opinion would mean voiding the meaning of the right to be a candidate in elections.".[36] In the case of Catalonia, the Statute (art. 67) establishes that in order to be a candidate

[33] STC 203/2001 of October 15, among others.

[34] ITC of January 27, 2018.

[35] Proceedings 84/2018 https://www.boe.es/buscar/doc.php?id=CE-D-2018-84.

[36] Case M. against the United Kingdom, decision of the Committee of March 7, 1984 no. 10316/83.

and become president of the Generalitat, it is necessary to be a member of parliament. Therefore, deputy status generates a potential right to become president of the government, if one has the support of a majority of the house. This can only be confirmed, and therefore, decided, by the president of the Parliament, after a round of consultations with parliamentary groups. The Judiciary cannot supplant this democratic role.

Therefore, notwithstanding the very clear differences between the two situations-–especially from a procedural standpoint-–it must be remembered that in 1987, having received a petition for release, the Court of Pamplona allowed the candidate for president of the Basque Parliament for the Herri Batasuna party, Juan Karlos Yoldi, to participate in the plenary investiture session of the Basque Parliament.

The examining magistrate's refusal to allow a deputy's participation in an investiture session in which they are the proposed candidate is a flagrant violation of these rights, and is contrary to the case law of the European Court of Human Rights (ECHR) which holds that "the role of judiciary bodies cannot thwart the expression of the people" (ECtHR Judgment Kerimova v. Azerbeijan, September 30, 2010). This case law recognizes that the political rights of persons deprived of freedom are not absolute, and may be limited, pursuant to the principle of proportionality, and the electoral legislation of the states. Once more, however, the interlocutory order handed down by the Supreme Court did not make any sort of modulation regarding the personal, unique situation of the deputy, to whom each and every one of the measures proposed to participate in the sessions of the Parliament are denied. Additionally, in this case the right to political participation of all citizens was impaired, as in Article 23.1 of the Constitution this right is not limited to the election of candidates in elections, but rather, as already mentioned, it includes the right of persons who have been elected to hold the office and exercise the duties it entails.

In his March 6 interlocutory order, the examining magistrate indirectly includes (Legal Bases 13 and 14) an opinion or calculation of a political nature that seems inappropriate in a judicial sentence. Specifically, the difference of treatment between the Yoldi and Sànchez cases is based on the fact that in the former, the parliamentary support for his investiture was "an eventuality" while in the latter it was a "reasonable possibility".

Additionally, the UN Human Rights Committee, in its confirmation of registration of the communication submitted by Sànchez for alleged violation of Article 25 of the International Covenant on Civil and Political Rights (Communication no. 3160/2018), requested that Spanish authorities "take all necessary measures to ensure that Mr. Jordi Sànchez i Picanyol can exercise his political rights in compliance with article 25 of the Covenant." This warning was made within the framework of Article 92 of the Committee's Rules of Procedure, which enables this body to "inform (the) State of its views as to whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation."

Likewise, it bears mentioning that the examining magistrate of the SC has not granted the deputies in pretrial custody leave to attend the parliamentary opening and investiture vote sessions of the president of the Generalitat. Instead of this, and taking a role in the interpreting of the Regulations of Parliament that belongs to the bodies of Parliament, it decided to authorize the delegation of their votes. Given this background, and despite there being no formal alteration of the composition of the Parliament resulting from the elections, there is a severe impairment not only of deputies' rights to exercise the duties for which they were elected—without their situation of pretrial custody implying any legal deprivation of their political rights—but also the deliberative function, which is inherent and essential to any parliament.

Last, regarding application of Article 155 SC, it must be emphasized that the CC has made a de facto refusal to give an opinion on the constitutionality of the measures adopted by the State while they are in force, and thereby refuses to review them in due time. This is the direct consequence of the CC's decision to suspend the processing of the complaints of unconstitutionality submitted by the Confederal Unidos Podemos-En comú Podem-En Marea parliamentary group by the

Parliament of Catalonia against the agreements of the Council of Ministers and the Senate in application of Article 155 SC, until the government of the Autonomous Catalan Government could submit allegations.

Considering that the CC refused an appeal by the Autonomous Catalan Government, presented shortly before the Senate's agreement to approve the measures proposed by the government, on grounds that it was premature,[37] and that the Application of Article 155 SC is planned until there is a new government of the Generalitat, this decision, which could be seen to bestow guarantees, is in fact a denial of justice.

[37] ITC 142/2017, de 31 d'octubre.

3. THE STATE'S REACTION (II): POLICE AND JUDICIAL ACTIONS THAT VIOLATE RIGHTS

The Catalan Ombudsman has repeatedly underscored the disproportion employed by the Spanish Prosecutor's Office and various involved judiciary bodies in classifying in criminal terms the acts that form the subject matter of this report, as well as the consequences derived therefrom for many of the investigated individuals, including the precautionary measure of deprivation of liberty. With all due respect for the actions of the Spanish Prosecutor and the Judiciary, the Catalan Ombudsman has expressed his concern regarding the way in which the disproportionate application of the Criminal Code to certain acts may represent a violation of fundamental rights and freedoms recognized in the international constitutional framework. Reference is made to the grounds for this concern over the following pages.

3.1. Parliamentary immunity

The report presented in April 2017 already stated that Article 57 of the Statute establishes that "the members of Parliament shall be immune in their votes and opinions expressed in the exercise of their offices," a principle confirmed by consolidated case law begun with Ruling 36/1981 of the CC.[38] Therefore, it has been underscored that the decisions of the former President of the Parliament and members of the Presiding Board in the determination of the agenda, and administrative acceptance of initiatives, are actions of a political dimension and transcendence, and not of a merely administrative nature. This is because they are essential elements in the formation of the free will of the Parliament, and it is this free formation of will, in the deepest teleological sense, to which the CC must grant the privilege of immunity.

With even more justification, the vote by the Parliament in Plenary Session of any type of text, even one that is manifestly unconstitutional and anti-statutory such as the unilateral declaration of independence, cannot have any type of criminal consequences for the deputies who took part in it. If, as has been stated in court, that declaration had a symbolic value, its criminal irrelevance would be evident. But even if it did have legal value, the only possible consequence should have been a challenge of it and the eventual declaration of its unconstitutionality.

Additionally, attention must be devoted to the growing limitations of parliamentary immunity (understood in the broad sense as parliamentary autonomy, participation rights of members of Parliament and immunity for the votes and opinions given) recently being suffered in Catalonia. These limitations are especially manifested in a number of decisions by the CC that impose or threaten to impose administrative or criminal penalties, especially for crimes of disobedience, on the members of the Presiding Board and anyone who ignores its rulings, and even those who do not block initiatives that contravene those rulings.

A good example of this is interlocutory order 6/2018, of January 30, which in its sixth legal base, denies an allegation by Parliament that stated that the control applied by the Court to the Presiding Board's interpretation of the Regulations of Parliament violated "the parliamentary autonomy and immunity of the members of parliament." The CC's refusal is based, with no further reasoning, on the allegedly irrefutable statement (that does not weigh the rights of the deputies), that this control is the result of the powers attributed to it by the new article 92 of the Organic Law of the Constitutional Court (LOTC) to "preserve their jurisdiction and compliance with its decisions" and to "guarantee the SC." Interlocutory orders 24 and 123/2017 (LB 9 and 8 and 9, respectively) can be interpreted in the same light.

In Ruling 185/2016 (LB 10a) the matter of the possible impact of the CC's new competencies in the area of parliamentary

[38] *Report Human Rights Regression in Spain: Elected Officials' Freedom of Expression and the Separation of Powers, April 2017, p. 27..*

autonomy and the rights of deputies was addressed. The CC did not deny that problems could emerge in some cases, but it stated that they should be judged "case by case and not in the abstract." Thus, on a case by case basis, it must be noted that in recent months, in the cases related with the Catalan process, the CC's application of the enforcement competencies granted to it by the new article 92 of the Organic Law on the Constitutional Court has made everything that the Court considers to be disobedience of its rulings into a justification to enter and control parliamentary acts previously protected from external interference to impose or threaten to impose (with the consequent deterrent effect) administrative and criminal penalties to deputies who disobey the aforementioned rulings.

Non-criminal conduct, and even conduct protected by fundamental rights, such as parliamentary immunity or the right to political participation become criminal behaviors through the convenient procedure of the CC prohibiting the Parliament from debating certain matters with the sole argument of them previously being declared unconstitutional.

This procedure undermines the most basic foundations of parliamentary democracy (such as unrestricted freedom of parliaments to debate any matter they consider relevant) and perverts the very essence of criminal law in liberal democracies, as it ceases to act as the ultimate sanctioning resort as soon as it is able to "add" criminal penalties to or make into criminal behavior any action that the CC deems to contravene a declaration of unconstitutionality handed down by the same court.

A very recent example is the interlocutory order of the examining magistrate of the SC of March 21, 2018, prosecuting, among others, the members of the presiding board of the Parliament for disobedience of the CC's decisions, without weighing or so much as mentioning the concurrence and evident impairment in this case on deputies' right to immunity.

3.2. Judge predetermined by law

The right to an ordinary judge predetermined by law implies the requirement for jurisdictional bodies to be legally determined—and therefore known to citizens—before the case they are to try.

This requisite of Article 24.2 SC and Article 6.1 of the European Convention of Human Rights (ECHR), which is additional to the requirements of independence and impartiality, aims to avoid the organization of a judicial system in a democratic society being left to the free discretion and arbitrariness of the executive. The "court established by law" concept "reflects the principle of rule of law, inherent to all systems of the Convention and its protocols. Indeed, a body not established in compliance with lawmakers' will necessarily lacks the legitimacy required by a democratic society to be aware of litigation among individuals".

The expression "established by law" refers not only to the legal base that grants the court its existence, but also the composition of the instance in each specific case."[39] This requisite also includes any other internal regulation that, in the event it is not respected, could imply an irregularity in the case of participation by one or more judges in the review of a matter.[40]

In this case, the allegedly seditious or rebellious crimes are being tried in three different judicial instances (aside from the judicial dispersion of the 700 mayors), mainly the SC, which took the competency from the High Court of Justice of Catalonia, the court originally trying the cases against individuals with special privilege due to their status as deputies of the Parliament of Catalonia.

The absorption of the competency by the SC and High Court of Spain (Audiencia Nacional) is a procedural contrivance that, objectively, has no other purpose than preventing the High Court of Justice of Catalonia from being comprehensively apprised of the Catalan process case. The High Court of Justice of Catalonia is competent to do so pursuant to

[39] Judgment Lavents v. Latvia, of November 28, 2002. para. 114.

[40] Judgment Coeme v. Belgium, of June 22, 2000. para. 99.

Article 57.2 of the Statute of Catalonia, and is therefore the judge predetermined by law.

Indeed, article 57.2 of the Statute of Catalonia establishes that in cases against deputies, the High Court of Justice of Catalonia shall be competent, and outside the territory of Catalonia, criminal liability is to be tried in the same terms in the Criminal Law Chamber of the SC.

The interlocutory order of October 31, 2017 took over the competency for the action brought by the suit filed by the state public prosecutor for the crimes of rebellion, and subsidiarily, sedition and related crimes, on the grounds that the definitive competency judgment must be conducted accumulating the personal criteria (the deputy status of some of the investigated parties) with another geographical criterion, in other words, the place where the offense was committed. This geographic reasoning is developed in a two-fold definition. On one hand, regarding the extraterritoriality with respect to the jurisdiction of the HCJC, in reference to deeds with legal or political effects in Spain, but outside Catalonia, and on the other hand, in terms of extraterritoriality with respect to deeds supposedly committed in foreign jurisdictions.

The scope of the offense in Spanish territory, beyond Catalonia, is deduced by the fact that disobedience, qualified as rebellious or seditious, undermines the authority of the CC, the scope of whose competencies is Spanish, and thus states, "the crime of rebellion acquires an unquestionable territorial nature projected over the entirety of the State." This is argued with the statement that, "the damage to the constitutional process and the integrity of the jurisdictional body that deals with it constitutes a transcendental fact with which to confirm the extraterritorial projection, with respect to the area of the autonomous community, of the crimes that form the basis of the accusation".

This notwithstanding, it is clear that the alleged criminal behavior of disobedience of the CC must take place, if at all, in the place where the disobedient party fails to comply with the order received, and the place where the order was given, or where the person who gave it is, is irrelevant. Further, it is clear that the disobedience and the referendum took place in Catalonia.

That is why, in their lawsuit, the SC, in the interlocutory orders of October 31, 2017 and December 18, 2017, seek another argument to justify the absorption of the competency. To complete the two-fold argument of "geographic" competency, the Court states that the existence of an action committed outside Spain, tending to further pro-independence goals, makes it possible to satisfy the geographic reference to which article 57.2 of Statute of Autonomy of Catalonia associates the competency of this chamber. This extraterritorial scope is deduced in the prosecutor's suit regarding Article 18 of Decree 140/17 of the Autonomous Catalan Government, which regulates the Implementing Rules for the Conduct of the Referendum, in which under the heading, "Custody of Votes of Catalans Living in Foreign Countries" it states that the documents and votes must be sent to the Generalitat delegations in foreign jurisdictions.

In his action, the Spanish state prosecutor outlines in detail the actions of the Generalitat in foreign countries.[41] It is particularly relevant that the prosecutor has not been possible to identify any specific behavior involving rebellious or seditious violence, or intentionally determinant of such violence, committed in foreign countries.[42] The action only described activities of propaganda, lobbying, "biased information" and even ICT support of the referendum from foreign countries. But

[41] III.29. p. 89 a 92.

[42] The state public prosecutor's lawsuit describes the pro-independence activities without identifying any behavior related with rebellious or seditious violence. It reads as follows: "In every stage, the Autonomous Catalan Government (Generalitat) has carried out specific actions, either in foreign countries, or with agents and operators of third-party countries third parties, with the purpose of creating an international image that positions it in a position of strength to achieve its ultimate objective. These actions are outlined in section III, sub-section 29 of this lawsuit (role of the Generalitat delegations in foreign countries, international Generalitat image campaign, creation of international websites, activity of delegations in foreign countries on the day of the illegal referendum, activity of Diplocat, international dimension of the referendum logistics, internationalization of the conflict through pressure for mediation and supra-community and international effects)"".

once again, the decriminalization of the illegal referendum brought about by Organic Law 2/2005, and the right to prepare or defend concepts that aim to modify the very foundations of constitutional order, must not be overlooked.[43] Nothing in the lengthy account of events in the state prosecutor's lawsuit amounts to behavior that involves the essential elements for them to fit the criminal categories of rebellion or sedition. The orderly, civic behavior entailed in preparing, publicizing, promoting and conducting the actions of voting, looking after the ballots and sending them to Barcelona does not constitute rebellious violence or seditious disturbance. Further, said actions would not even constitute autonomous disobedience susceptible to a separate criminal category. They would only form an inseparable part of an activity that is complex, multi-subjective, protracted in time and space, planned and begun in Catalonia, and also concluded in Catalonia, with the count of the ballots, without any record, nor any investigation of, the alleged offenders identified as individual coordinators acting in specific sites of foreign countries.

On the other hand, the simple regulatory enactment of Article 18 of Decree 140/17, evidently does not constitute a crime. It would be necessary for some later punishable action to be committed, in compliance with the Decree. That is why judge Lamela of the AN (Audiencia Nacional) deemed it necessary to complete the alleged extraterritoriality argument, marking Diplocat (Public Diplomacy Council of Catalonia) as the body, "in charge of promoting in foreign countries actions designed to generate support and sympathy for the secessionist cause to seek international recognition and international expansion of the conflict." This promotion of sympathies and recognitions cannot be framed within any criminal precept. Therefore, the two-fold argument of extraterritoriality espoused by the SC does not have a solid basis. And without this argument, the condition of extraterritoriality that would determine the exclusion of the competency in favor of the judge predetermined by law, which is the High Court of Justice of Catalonia, disappears.

For all of these reasons, the absorption of the competency by the SC and High Court of Spain (Audiencia Nacional) is a procedural contrivance that, objectively, has no other purpose than preventing the High Court of Justice of Catalonia from being comprehensively apprised of the Catalan process case. The High Court of Justice of Catalonia is competent to do so pursuant to Article 57.2 of the Statute of Catalonia, and is therefore the judge predetermined by law.

3.3. Right to defense

Although Spain is a country that abides by the rule of law, and that individuals accused of crimes enjoy the right to defense in conditions compliant with European standards, in the course of the criminal law cases described above, certain events have occurred that justify fears for the impairment of this right. Specifically:

1. In the proceedings of the case being handled by Examining Court no. 13 of Barcelona, complaints have been lodged regarding certain situations of powerlessness such as the fact that the case began for certain particular actions (remarks made by Senator Santi Vidal) and has ended up as something of a generalized suit against the independence movement, including a number of actions that took place months after the investigation had begun. This is also true regarding the type of court order in which judicial decisions are handed down, as a decision, (providencia) when due to their content, they should be interlocutory orders (auto interlocutorio). Handing down decisions as providencias hinders the possibility of filing appeals or conducting broader parallel investigations of the judiciary police, separately from the examining magistrate. Furthermore, in some cases, the investigated individuals have complained that they had to testify without a clear idea of the offenses for which they were being investigated.

[43] STC 48/2003: "The application of the basis for the imposition of penalties founded upon the subsumption of deeds that are outside the possible definition of the terms of the applied rule not only violates the fundamental right to sanctioning legality. Those that lead to solutions essentially opposed to the material orientation of the rule, and therefore of unforeseeable consequences for their addressees, are also constitutionally objectionable (STC 54/2008, of April 14; 199/2013, of December 5, LB 13; 29/2014, of February 24, LB 3, and 185/2014, of November 6, LB 5)".

2. Actions of the High Court of Spain (Audiencia Nacional) Jordi Sànchez and Jordi Cuixart were summoned to testify without knowing the complaint of the Prosecutor's Office (October 6). At a second hearing (October 16) pretrial custody without bail was ordered.

The members of the government were summoned within less than 48 hours of their hearing (with a bank holiday in the midst of that time), clearly insufficient time to prepare their defense for crimes as serious as those they were accused of. The result was that pretrial custody without bail was ordered for all of them (except Santi Vila, for whom 50,000 euro bail was set, although even so he spent the night in jail).

3. At first, the actions of the SC were more respectful of the right to defense, as shown by the fact that, while the High Court had not provided enough time to prepare the statements of the accused, the SC summoned them one week later.

Nonetheless, in the course of the proceedings there have been incidents that could be considered limitative of the right to defense, such as the fact that the attorney of one of the individuals accused by default, former President Puigdemont, was denied access to the case file (until Puigdemont's arrest in Germany). It must be noted that, when on March 23 the individuals accused of rebellion were served their bill of indictment (68 pages), they were given only two hours before beginning the hearing that, eventually, concluded with the examining magistrate's decision to order the precautionary measure of deprivation of liberty for all of them.

The ECtHR has made several statements on the right to defense on numerous occasions in the third section of Article 6, ECHR, which lists the minimums of specific procedural rights guaranteed to an accused individual. The right of any accused individual to be informed in the shortest possible time of the nature and grounds of the accusation made against them. The ECtHR has issued reminders that the demands of paragraph 3 a) of Article 6 represent special aspects of the right to a fair and public hearing guaranteed in paragraph 1, and also special attention to what should be included when a bill of indictment is observed. Along these lines, it has stated: "The notification of the "accusation" (...) plays a crucial role in the criminal process: in that it is from the moment of their service that the suspect is formally put on notice of the factual and legal basis of the charges against him. The accused must be made aware "promptly" and "in detail" of the cause of the accusation, that is, the material facts alleged against him which are at the basis of the accusation, and of the nature of the accusation, namely, the legal qualification of these material facts. The Court considers that in criminal matters the provision of full, detailed information concerning the charges against a defendant is an essential prerequisite for ensuring that the proceedings are fair".[44] Further, it concluded that a violation of paragraph 3 a) and b) of Article 6 of the ECHR, combined with paragraph 1 of the same regulation, as it stated the following: "(In the present case) the defense was confronted with exceptional difficulties. Given that the information contained in the accusation was characterized by vagueness as to essential details concerning time and place, was repeatedly contradicted and amended in the course of the trial (...)".[45]

The Court therefore considers that, in using the right which it unquestionably had to recharacterize facts (it) should have afforded the applicants the possibility of exercising their defense rights (...) giving them the necessary time (and) adjourning the hearing once the facts had been recharacterized, (to) give the applicants the opportunity to prepare their defense to the new charge.[46] DThe applicants' right to (...) adequate time and facilities for the preparation of their defense (implies having adequate time to duly prepare themselves).

The Catalan Ombudsman believes that the summons in early October of Jordi Sànchez

[44] Judgment Mattoccia v. Italy, July 25, 2000, paras. 58 and 59.

[45] Judgment Mattoccia v. Italy, July 25, 2000, paras. 71 and 72.

[46] Judgment Sadak and others v. Turkey, of July 17, 2001, paras. 57 and 58.

and Jordi Cuixart by the High Court of Spain, without their knowing the action of the Spanish Prosecutor's Office, the summons of all members of the Catalan government only 48 hours in advance, not providing access to the case file to the attorney of one of the persons accused in default until his detention, and serving bills of indictment to individuals accused of rebellion only two hours before the hearing began, among other actions, violate and impede the relevant defense rights.

3.4. "No punishment without law" Principle

An analysis of the applicability of criminal law to the facts must begin, as stated in the first section, and as was stated in the *Summary Report on the Events of October 1-O,* regarding the fact that holding popular votes that do not have legal backing has no criminal relevance. The previously mentioned opening statement of the Organic Law 1/2005, states:

"Criminal law is governed by the principles of minimal intervention and proportionality, as stated by the Constitutional Court, which has reiterated that it cannot deprive a person of their right to freedom unless it is absolutely indispensable. In our legal framework there are means for control of legality other than criminal law. Therefore, the exercise of competencies to call or promote consultations by those who do not hold the legal competency to do so, is perfectly controllable by means other than criminal law."

In the absence of this criminal category, the Prosecutor's Office and the various courts that are handling the criminal cases mentioned above are attempting to fit the facts into other offenses. This classification, which could eventually be found in other criminal categories of lesser intensity, is completely inappropriate when it is attempted to categorize the facts within the categories of sedition or rebellion and others, as previously indicated.

The "no punishment without law" principle was contravened from the moment in which the courts (High Court of Spain, High Court of Justice of Catalonia and Supreme Court) accepted the theses of the state public prosecutor, who categorized as prima facie evidence the facts as crimes of rebellion and sedition. The "no punishment without law" principle covers "the fundamental individual right of specified sanctioning categorization specified in the principle of taxativity (*lex certa*), which is specified in the requirement for regulatory predetermination of illegal behaviors and the relevant penalties." This requirement affects lawmakers and jurisdictional actors (STC 146/17) and in any event must be "consistent with the essence of the offense and could reasonably be foreseen" Judgment of the ECHR, Rio v. Spain, para. 92). The interpretation proposed by the state public prosecutor and accepted by the judiciary bodies is suspiciously new, and therefore is not reasonably foreseeable. Additionally, it is not coherent with the possible meaning of the historical framework in force of the legal provision contained in the text of the articles that describe and punish the crimes of rebellion and sedition.

The "no punishment without law" principle is also broken in its requirement for proportionality, when judicial bodies assume the state public prosecutor's initial qualification, which attributes criminal liabilities to political and civic leaders based on criminal precepts of the greatest punitive severity, such as the crimes of rebellion and sedition, punished with sentences much longer than those for other crimes much more reprehensible in social or humanitarian terms.[47]

3.4.1. Rebellion

The basis for attribution of the crime of rebellion is the description of an alleged concept of violence, an essential element for rebellion to exist, which consists of a violent and public uprising to achieve, among others, the objective of declaring the independence

[47] Leaders of a rebellion can be sentenced to 15 to 25 years of prison, subordinate commanders to 10 to 15 years, and mere participants to 5 to 10 years. If on occasion of the rebellion "public funds have been diverted from their legitimate investment", the sentence would be from 25 to 30 years. For a proper appreciation of the absence of proportionality in these sentences, it is worth remembering that homicide bears a prison sentence of 10 to 15 years, murder, from 15 to 25 and rape, from 6 to 12 years.

of part of the national territory (Article 472 CC). The formal objective of the process, pursuant to article 472, must be a public and violent uprising. This notwithstanding, the real objective of the investigation and prosecution carried out by the State Public Prosecutor, the High Court of Spain and the SC is pro-independence political and civic activity, as the examining magistrate specifically acknowledges.[48]

The facts described by the prosecutor and examining magistrates to support this specific goal of investigation and prosecution are arguably contrived, and do not sufficiently match the real events as they occurred.[49]

If the public uprising to achieve this purpose had been carried out without violence, the elements of the criminal category would not be fulfilled. In other words, there would be no crime of rebellion. Another matter is whether in the course of this demonstration, there occurred deeds susceptible to criminal reproach, such as damages, injuries or public disorders, attributable to their perpetrators, but not attributable to the organizers and participants in the demonstration who had nothing to do with any hypothetical subsequent crimes. Nonetheless, it is worth insisting: the political, civic or parliamentary activity aimed at achieving the independence of part of the territory of the State does not, on its own, constitute a crime. This can be deduced from the doctrine of the CC (STC 42/14).[50]

According to the CC, the pro-independence movement has a place in the framework; in other words, in the judicial political, parliamentary and civic frameworks. When the CC states that an attempt to achieve effective independence may only be conducted through Constitutional reform procedures, it is obviously referring to the parliamentary procedures established in articles 166 and following of the SC, in other words, procedural channels. With this statement, it does not prohibit any other constitutionally valid activities that

[48] (1). The examining magistrate specifies the objective of his investigation when in the interlocutory order of January 22, 2018 (LB 2, para. 5) he denies the Prosecutor's request to activate the international arrest warrant for Puigdemont in Denmark. The examining magistrate argues that the strategy of Puigdemont is to "achieve in the investiture the vote that he cannot receive in parliamentary terms (...)" Further, "these proceedings are meant to put an end (...) to this unconstitutional and illegal strategy (...)". Clearly: according to the examining magistrate, the proceedings are not meant to investigate and, if necessary punish, the alleged violence as an illegal means of political intervention, but to put an end to a political and parliamentary activity that is simply illegal, though not necessarily punishable.

[49] The following excerpt is especially illustrative of the biased, tendentious nature of the description of facts to be found in the interlocutory order: "The tumultuous mobilizations and assemblies arranged in opposition to the orders of the judicial authorities, the massive calls to hinder the agents of authority in the completion of their duties, the harassment in the form of demonstrations against members of the National Police and Civil Guard in the places of their work and rest, exemplify how the accused did not wish to simply gain the support of the citizenry to carry out their pro-independence project within constitutional legality, which would not be the object of any accusation, but rather wished to make direct or indirect calls, through pro-sovereignty organizations, to a popular or citizen mobilization as an intimidatory and violent means of achieving their secessionist purpose. The attitude of open opposition against the legal and constitutional order of a multitude of mobilized individuals created intimidatory force enough to, on its own, keep the established law enforcement personnel from acting or deterring them, in light of the danger of this insurrectionist movement of the multitude degenerating into open violence, as did occur in certain described episodes, in which the agents of authority had to retreat to prevent these undesired consequences. Indeed, the members of State law enforcement agencies, in addition to finding themselves in front of a frenzied crowd that deployed all the force of its numerical superiority, or before demonstrations pressuring them to keep them from meeting their obligations, were also subject to acts of material violence with damage to police vehicles, and physical violence such as on the day of October 1, on which, in addition to this compulsive violence, accompanied by cries and insults, violent acts, also described, were committed, such as kicks delivered to law enforcement officers, and the throwing of chairs and rocks at them. The state public prosecutor, in pages 58 to 66 of his criminal action, lists and describes the incidents that, pursuant to his criteria, constituted acts of physical violence against agents of the Spanish National Police and the Civil Guard.".

[50] "Nonetheless, the precedence of the Constitution must not be confused with a demand for positive adhesion to the fundamental law, because in our constitutional framework there is no place for a model of 'militant democracy', in other words, 'a model that imposes not respect for but positive adhesion to the [...]

precede or accompany such a process, and that are conducive to the same objective, in the framework of the right to assembly, freedom of expression, etc. These are only susceptible to criminal reproach when prepared or defended in violation of democratic principles, fundamental rights or constitutional mandates legally provided for as legal rights under the protection of criminal law. Consequently, for the CC, the criminalization of pro-independence strategies by itself is not admissible. For all of these reasons, the state public prosecutor built his case on the basis of violence that would fulfill the requisites of rebellion, an indispensable condition to reach the maximum punitive consequences.[51]

The exaggerated punitive pretensions of the state public prosecutor have been confirmed in the decisions of the examining magistrate, all prefigured or corroborated by police reports of the Civil Guard and ratified by the SC. This concept of *violence*, essential to constitute the crime of rebellion, implies a clear, extensive interpretation incompatible with the requirement of article 4.1 of the Criminal Code and article 4.2 of the Civil Code. It stands for an interpretation of the concept of *violence* that is contradictory, erratic and distorted. It indistinctly covers disparate situations. On some occasions it refers to minor reactive violence to the notoriously disproportionate intervention of law enforcement officers. In other instances it even states that it is not necessary for there to be damages or injuries against persons or property for a public uprising to be violent. Thus, an extensive concept of moral or intimidatory violence is constructed that surpasses the legal definitions and case law interpretation consolidated until now. It alludes to the intimidatory of a crowd that could degenerate into open violence. It also refers to the "frenzied crowd that deployed all the force of its numerical superiority.[52]

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legal framework, and first and foremost, the Constitution" (STC 48/2003; LB 7; doctrine reiterated, inter alia, in STC 5/2004, of January 16, LB 17; 235/2007, LB 4; 12/2008, LB 6, and 31/2009, of January 29, LB 13). This Court has acknowledged that there is a place in our constitutional framework for any ideas whose defense is sought and that, "there is no regulatory core inaccessible to the procedures of constitutional reform" (inter alia, STC 31/2009 LB 13).

The approach to concepts that seek to alter the very bases of constitutional order have a place in our legal framework, as long as they are not prepared or defended by an activity that violates democratic principles, fundamental rights or any other constitutional mandates, and the attempt for their effective achievement is performed in the framework of Constitutional reform procedures, as the respect for these procedures is, at all times and in any event, imperative (STC 103/2008, LB 4)."

[51] It must not be overlooked that Article 472 of the Criminal Code now in force, which defines the crime of rebellion, was the object of intense parliamentary debate when the so-called *Criminal Code of Democracy* was drafted in 1995. That debate resulted in a transcendental modification of the precedent articles 214 and subsequent that had been in force until that time. Until the 1995 reform there had been two types of rebellion, which were called "rebelión propia" (art. 214) and "rebelión impropia" (art. 217). To meet criteria for its "propia" form, it was only required that there be "a public uprising" for the planned purposes, among which was "declaring the independence of part of the national territory." An "impropia" rebellion was committed by "those who, without rising up against the government, by trickery or any other means, perpetrated any of the crimes described Article 214." The 1995 reform did away with the term "rebelión impropia" and, at the transactional proposal of the IU-IC parliamentary group, added the requisite of violence to that of public uprising.

[52] Looking closely at the legal concept of *intimidation* it should be borne in mind that article 1,267 of the Civil Code defines intimidation as an action that generates a rational, well-founded fear of suffering an imminent and serious harm to one's person or property. The Sentence of the SC February 8, 2007 states that "violence is understood as the use of physical force, and therefore, as reiterated by Judgment 1546/2002, of September 23, it has been stated that it is equivalent to the commission, coercion or material imposition and involves real, more or less violent aggression, or by striking, pushing, twisting, etc., in other words, exerting force that is effective and sufficient enough to overcome the will of the victim (STS of October 18, 1993, April 28 and May 21, 1998, and 1145/1998, of October 7). On the other hand, intimidation is of psychic nature and requires the use of any force of coercion, threat or intimidation with rational, well-founded intent of harm (STS 1583/2002, of October 3). In either case, they must be fit and proper with the requirement of the victim not being able to act according to the criteria derived from their right to self-determination. This fit and proper compliance will depend on each specific case, as it is not sufficient to examine the characteristics of the individual's conduct, but rather, it must be related with the circumstances of all types that surround their actions. It seems inconceivable that this moral force could be exerted over the State or its institutions, due to the psychic nature the victim is required to have. The capacity to suffer rational, well-founded fear for imminent and severe harm cannot be attributed to the State, given the circumstances of clear inequality between the allegedly intimidatory violence and the patent superiority for self-protection possessed by the institutions of the State.

In the interlocutory order of January 5, 2018 the SC confirms and fortifies the criterion of the examining magistrate, with an argument that could be termed imaginative, ensuring the future viability of this classification, profiling and qualifying the concept of *violence*. According to SC, there was violence from the moment in which (the President and government) acted by intending to declare independence, placing themselves outside the rule of law, and doing so "from the exercise of power, which explains why they did not need to use violence to attack it at that time as a step prior to the execution of the plan" (second legal base). The court further defined this conceptualization of violence when in its interlocutory order of January 5, 2018 it stated that "a frontal disobedience of the legality in force is deduced, and with the incitement of their supporters to mobilize on the streets, to the point of confrontation, even of a physical nature, with the purpose of forcing the State to recognize the independence they proclaim (...)". Another equally worrisome and novel piece is added to this new case law contribution, consisting of introducing a kind of eventual criminal intent regarding the future violence exercised by third parties, even if it is reactive to the intervention of law enforcement agents, with an energy that, according to the SC, should also have been foreseen by the indicted individuals.[53]

The SC completes this contrived reasoning with an outlandish construction of violence without violence, so-called "bloodless violence." It assumes as plausible a contribution made in the state public prosecutor's complaint (p. 103), that points to a part of case law doctrine espoused in a very different scenario, as is the attempted coup d'état that took place in Madrid on February 23, 1981. In that sentence of (STS of April 22, 1984), the SC stated that rebellion is violent even if it is bloodless because "what is planned as bloodless becomes violent and belligerent as soon as resistance or opposition is offered to the rebels' plans." The SC referred to certain examples of military proclamations in Spain's recent history, such as those of Pavia (1884), Martínez Campos (1875) and Primo de Rivera (1923). The comparison of these coup-staging generals, or the behavior of Tejero (2-23-81) and his accomplices, with that of the individuals accused for the acts of the Catalan process is disproportionate, distorted, unfair and alarming.[54]

3.4.2. Sedition

Once the investigation phase of the SC and HC had concluded, the relevant bills of indictment were handed down. On March 21, 2018 the examining magistrate of the SC

[53] In LB 2, point 4, it states the following: "As a member of the government of the Generalitat of Catalonia, (Junqueras) (...) has incited his supporters to oppose the action of the State as it attempted to stop the enactment of his plan. This manner of proceeding implies, by its very nature, that those in favor of this option had to come to defend it through these actual channels, as their own strategy excluded the reference to law as a useful means of achieving their proposed objective. It is clear that the appellant knew that (...) the State would have to act to prevent, through faits accomplis, the objective from being achieved. In these conditions (...) it was foreseeable that, with a high probability, there would be clashes between the officers of State law enforcement who sought to ensure compliance with the laws in force, and it was also foreseeable, and highly probable, that these would degenerate into episodes of violence. This occurred, among other dates, on September 20 and 21, and on the very day of the referendum, October 1." The court order continues to read thereafter: "It is true that no record exists of the appellant participating by personally perpetrating specific acts of violence. Nor is there evidence that he gave direct orders along these lines. But, through the public advocacy of unilateral independence, and outside any consideration and respect for the State laws in force (...) he has motivated the supporters of his position to publicly mobilize, and occupy public spaces, with the aim of making effective the unilateral declaration of independence. Clearly, the appellant and others knew that the State could not and cannot consent to this type of acts, that ignore and impede the application of the laws governing the democratic rule of law, and that it would act through the means available to it, among which is the legitimate, and therefore proportionate and justified, use of force. In this situation, it was foreseeable that, with high probability, clashes would take place in which violence would appear".

[54] This is all the more relevant considering that, in his appearance before the Senate on January 18, 2018 the Spanish Minister of Home Affairs presented the facts of the criminal investigation as organized passive resistance, never as a violent uprising.

indicted the persons investigated for crimes of rebellion, disobedience and misuse of public funds. On April 4, 2018 the Central Investigating Judge No. 3 of the High Court of Spain indicted other individuals for the same facts, which it qualified as crimes of sedition and criminal organization. The next day, on April 5, the ruling of the High Court of Justice of Schleswig-Holstein (Germany) was handed down, provisionally refusing the arrest and extradition warrant issued by the judge of the Spanish SC against Puigdemont for the crime of rebellion. The German court ruled that the violence was of insufficient magnitude to topple the State. The SC confirmed the indictment handed down by the examining magistrate (April 17), though it took the opportunity, in legal base four, point 2, to express its disagreement with the decision of the German court, which it disputed in an untimely, inconsiderate manner.

In the bill of indictment of Investigating Judge No. 3 of the High Court of Spain, of April 4, 2018, it is categorically stated that there was no violence in the events of September and of October 1.[55] Further, the SC, in its interlocutory order of April 17, which confirms the bill of indictment of March 21, admitted as a possibility "the scenario in which the element of violence were not sufficiently proven in the specific case" (LB 4, point 3). With this approach, it took up the position of the Prosecutor's Office, which in its initial complaint had proposed the alternative qualification of sedition, facing the high probability that the judicial qualification of the facts the of September 20 and 21 and October 1 as a crime of rebellion not be sustainable in the end, due to the inconsistency of the contrived argument of violence.

According to article 544 of the Criminal Code, those who, without being committed to the crime of rebellion, stage a public, tumultuous uprising to impede by force, or outside legal channels, any authority, official body or public civil servant from exercising their duties, or complying with their agreements or administrative or judicial decisions.

Therefore, there are two ways to commit sedition by impeding the authority or its agents from fulfilling their duties: either by force or any way outside legal channels. Once force or violence has been discarded, as the High Court of Spain (AN) did, or as the SC eventually admitted, the qualification of the events of September 21 and 22 and October 1 as crimes of sedition could only be in application of article 544 of the Criminal Code which consists of "impeding by force". It could only qualify if the other definition were applied, that consisting of acting "outside legal channels."

Demonstrations and occupying public spaces to express the pro-independence will, or to claim or demand it, does not constitute acting outside the legal channels. It is an essential part of the right to assembly as established in article 21 of the SC. None of the numerous judicial decisions that express the reasons for the criminal prosecutions underway mention grounds of the alleged illegality because the demonstrators were carrying weapons, or that the authorities had prohibited the demonstrations because they caused danger to persons or property, the only scenarios in which the right to meet and assemble can be limited.

3.4.3. Other disproportionate criminal characterizations

1. Criminal organization

The bill of indictment of Chamber 3 of the High Court of Spain (AN) has impinged on lawmakers' role by creating a new type of aggravated sedition not established in the Criminal Code. At the same time, it has impinged on the SC's jurisdiction by denying the existence of violence in the same facts that the SC claims do constitute violence, although in the end it acknowledges the

[55] The interlocutory order features this reasoning: "The sentence of the Supreme Court of 1991.07.03 states that 'rebellion tends to attack the normal conduct of primary legislating and governing functions, and sedition tends to attack secondary functions of administering and judging,'. This is not an obstacle to judicially describe the facts as sedition when, without concurrence of the element of violence (required for there to be rebellion ex art. 472 (CC), the aim of the participants in the uprising is not only to impede the application of laws, the legitimate exercise of the duties of authorities, official bodies or civil servants, the compliance of their agreements or administrative or judicial rulings, but also, illegally declare the independence of part of the national territory".

possibility that this may not be sufficient. This invasion of other bodies' jurisdictions can also be observed in the criminal exaggeration resulting from the indictment for criminal organization: "it has been possible to observe the existence of a complex, heterogeneous organization united for the purpose of achieving the secession of the autonomous community of Catalonia and its proclamation as an independent republic, which would disrupt the political organization of the State, and with it the form of government, causing a clear contravention of the constitutional and statutory order. To achieve their purpose, the members of this organization have developed a premeditated, perfectly coordinated strategy, pursuant to a common plan with distribution of roles and responsibilities among governmental, parliamentary and civil authorities, mainly through pro-independence associations, such as the ANC and Òmnium" (Facts, 3rd paragraph).

It is a nearly unanimous opinion that the crimes of rebellion and sedition are criminal categories whose accomplishment comes about without the need for the ultimate objective of the perpetrators to have materialized. Therefore, the organization and distribution of roles in the group are an integral part of the typical behavior. The provisions common to the two crimes (art. 546 and 549, which refer to art. 474 and 479 to 484) expressly establish the existence of an organization, known or alleged leaders, and the participation of authorities and civil servants. These typical terms show that organization is an essential part of the criminal categories of rebellion or sedition. For this reason, the SC, referring to the same facts, did not indict for criminal organization, and explains that "the crime of rebellion is a tendentious crime with a multisubjective configuration or that requires multiple interventions that makes rebellion a criminal reality essentially in accordance with the distribution of tasks among its various participants. Further, the performance of contributions that are partial, but relevant and essential for its execution, involves a functional control over these actions that leads to liability when accompanied by the intellectual and intentional content of the criminal category."

It is impossible that the same facts be evaluated judicially and criminally by three examining magistrates, of the SC, AN and Court No. 13 of Barcelona, as if they were different facts, with the risk, already consummated, that their evaluations be different. It is not even a case of continuous offense of Article 74 (acting according to a preconceived plan and violating equal or similar precepts). It is a multi-subjective, convergent behavior, that requires a union of wills for the achievement of a common purpose. Without this convergence of wills, rebellion or sedition are impossible. The qualification of sedition and, furthermore, criminal conspiracy is, therefore, redundant and violates the non bis in idem rule (no legal action can be instituted twice for the same cause of action).

All of this brings about severe legal insecurity: 1. In the description of the facts. 2. In the determination of the crimes that make up the cause of action. 3. In the accusation of indicted persons for the facts. 4. Last, in the determination of the competent judge.

The clear objective of this punitive reduplication is not only to increase the severity of the criminal prosecution. Above all else, it is a matter of constructing the necessary record to enable the automatic detention and extradition of indicted individuals who are not now available to the Spanish judiciary. The examining magistrate of the SC, following a number of procedural vicissitudes that are not relevant to this report, issued an arrest and extradition warrant for Puigdemont and other indicted individuals. Law 23/14, which incorporates into Spanish legislation the Framework Decision of mutual recognition of judicial decisions in the European Union, establishes in its article 47.1 that when a European warrant is issued for any of the crimes listed in article 20.1, "extradition shall be agreed without verification of the double criminality of said crimes." The first crime of the long list in article 20.1 is criminal organization. If the courts of the recipient countries accept the existence of a criminal organization, extradition to Spain of the persons sought would be undeniable and immediate.

The change of qualification by the AN (Spanish High Court), without any modification of the facts, appears to be an abuse of rights meant to dodge the reasoning of the German court. But it could make for a qualitative change in the procedure, if there are new arrests in

foreign countries, extradition to the Spanish judiciary, and the consequent pretrial detentions.

2. Terrorism

Organic Law 2/15 modified the handling of terrorism in the Criminal Code with wording so ambiguous that, from ultra-repressive standpoints, the application of the crime of terrorism to the causes of action now being tried in the SC and AN has been suggested.

The article 573 now in force punishes anyone who commits a serious crime against life, physical integrity, freedom, and other interests, with the aim, among others, of subverting constitutional order. Article 573 bis establishes the penalties applicable according to the severity of the damaging result. In its fourth point it establishes a penalty of 10 to 15 years' imprisonment when "another injury" is caused. These ultra-repressive suggestions purport that the injuries suffered by law enforcement officers on October 1 are sufficient for the acts of October 1 to fulfill the criteria for the crime of terrorism, which furthermore, is among those that entails immediate extradition pursuant to article 20.1 of Law 23/14.

This ultra-repressive perspective is unsustainable. The application of a specific-intent crime, punished with such severity, requires the conduct causing the result to be directly attributable to the accused individual, and for this person to act with direct criminal intent. Levying an accusation so severe against an individual who is only accused of mobilizing persons who could cause the damaging effects is disproportionate and unlawful. On the other hand, the initial terms of article 573 require that a serious crime be committed, a condition not fulfilled by the injuries suffered by the officers.

The application of the crime of terrorism to the individuals accused of the events of October 1 is unacceptable, above all, because it does not correspond to the spirit of Organic Law 2/15. In the opening statement of this Organic Law, it is stated that it responds to a Decision by the Security Council of the United Nations 2178 (2014) of September 24, that reflects the deep concern of the international community as regards the intensification of terrorist activity, especially international jihadist terrorism, with new and cruel forms of aggression. Using legal terms meant to prosecute the worst terrorist crimes to prosecute nearly always non-violent political behavior is an unacceptable distortion of the Criminal Code, and an unfair use of an international will for self-protection that in the hypothetical, and undesired event that such a case were tried in a Spanish court, it would bring about the unanimous condemnation of the international community.

3.5. Pretrial detention, personal freedom, ideological liberty and political rights

Article 6 of the ECHR establishes that "everyone is entitled to a fair (...) hearing" and, specifically, that "Everyone charged with a criminal offense shall be presumed innocent until proved guilty according to law." Likewise, Article 5.3 of the ECHR acknowledges the right "to be entitled to trial within a reasonable time or to release pending trial.": it is not a matter of choosing between judging and releasing, but rather that a detained person must be released as of the time in which keeping them deprived of liberty is no longer reasonable.[56]

From this perspective, which the SC shares, pretrial detention—prior to a criminal sentence of deprivation of liberty—as it makes for a very serious infringement of the fundamental right to individual freedom, can only be understood with an absolutely exceptional character when one of the legally-described scenarios, which must be restrictively interpreted, exists. risk of flight, criminal recurrence, of destruction or concealment of evidence, and to prevent the accused from acting against the victim's property.

In this same vein, it must be noted that for decades the CC has been following a consolidated doctrine—which today in relation to the Catalan process seems

[56] Judgment of Neumeister v. Austria, of June 27, 1968, para. 4.

forgotten—in which they declared that in applying the described causes that justify pretrial detention, judicial bodies had to weigh "the coincidence of the interests at stake: the freedom of the person and their presumption of innocence, on one hand; the administration of justice and prevention of criminal acts, on the other." Further, it added that pretrial detention could only be justified if the judiciary bodies applying it understood it as "an applicable measure that was exceptional, subsidiary, provisional and proportionate to the achievement of the constitutional objectives that justify it" (see STC 128/1995, 66/1997, 44/1997). Furthermore, and significantly, the CC added that "those grounds that do not weigh the rights and interests in conflict in the manner least onerous for freedom cannot be considered grounds (for pretrial detention)" (STC 165/2000 LB 6).

However, in the cases analyzed in this report, nine pretrial custody rulings have been handed down, as the judge observes flight and criminal recurrence risks, deviating from the criteria repeatedly set by the CC. Furthermore, another cause for the deprivation of liberty has been added; the political ideology of the prisoners, that not only is not legally established, but goes against the right to ideological freedom.

Therefore, for example, criminal recurrence is applied despite the investigated/indicted persons having been fired or resigned from the posts from which they allegedly committed the crimes they are indicted for, and despite having expressed clearly and repeatedly in court their decision to not carry out the actions they are on trial for. In some interlocutory orders, recurrence is merely based, not on the actions of the indicted individuals, but on the hypothetical and future acts of third persons. The same weakness can be found, as of the constitutionality criteria established by the CC, in the arguments relative to flight risk: it does not appear that the examining magistrates have considered the extraordinary and subsidiary nature of pretrial detention, or that they have weighed the concurring interests and rights, and even less so that they have deliberated the requirement for the application least onerous for the right the freedom.

What is even more egregious, however, is the aforementioned instance of the examining magistrate arguing the risk of criminal recurrence based on the political ideology of the imprisoned individuals and part of society.[57] This ideology–the independence of Catalonia–is neither punishable nor illegal, as is clearly inferred from Judgment 42/2014 of the CC. In that ruling, the CC confirmed that all ideas fit within the constitutional framework, even those that sought to alter the very foundations of the constitutional order, and that they could conduct preparatory activities to fulfill this objective.[58]

These same reproaches can be applied *mutatis mutandis* regarding the precautionary measures adopted by the examining magistrates and the CC itself, which disproportionately limit the political rights of the imprisoned members of Parliament or who are in foreign countries.

In ECtHR case law, the deprivation of liberty of a person accused of a crime is justified when there is evidence that makes it plausible to believe that the person would attempt to flee and elude justice, and detention appears as the only means by which to guarantee the proper conduct of the trial and the individual's appearance in court, given their personality, the nature of the offense for which they are accused and the seriousness of the punishment they face. It is necessary, however:

"For the reasons cited by the authorities to justify the application of deprivation of liberty be completed with specific factual elements referring to the suspect. In other words, it is necessary that the grounds cited by the authorities be, in the circumstances of the action, compelling and relevant (...). In the case of the plaintiff (...), the authorities have not examined the possibility of applying less intrusive measures established in internal law (...), order (the suspect) to be brought to court by the police, (...) set bail (...), the personal bond of a third party (...),

[57] For all of them, interlocutory order of April 12, 2008, LB 6.

[58] *Summary report of actions taken by the Síndic de Greuges (Catalan Ombudsman) regarding the day of October 1*, November 2017, p. 18.

place them under police surveillance. The Court states the Code of Criminal Procedure requires the judge to first explore the application of less severe measures than the deprivation of liberty and, in the event the latter is chosen, to clearly explain the reasons that justify it".[59]

It does not appear that these criteria are being respected in the decisions to impose precautionary measures of liberty deprivation, and even less so as regards the requests for special leave to attend the plenary sessions of the Parliament of Catalonia.

The decision to keep an individual in provisional detention must be duly and sufficiently grounded, especially when there has been a succession of requests for conditional release and repeated denials by the tribunal. On every occasion, the judicial authorities must correctly evaluate the arguments invoked by the interested party. The risk of the indicted individual eluding the action of the judiciary, that they might exert pressure on witnesses or alter evidence, the danger that they could repeat the offenses that they are accused of, the complexity of the case or needs for examination that could justify detention and maintenance of detention, in any event in the initial stages, but once time has passed such matters change and the grounds that initially justified the measure lose consistency, and are no longer relevant and sufficient.

Invoking the seriousness of the offense and imperatives of public order may be a relevant element in an initial phase of detention, but it will not be later on if it is not made evident that public order was indeed threatened. The risk of flight cannot be appreciated only through the seriousness of penalties that could be levied on the indicted individual, and regarding the risk of criminal recurrence, the simple reference to their criminal record is not sufficient to justify the denial of conditional release.[60]

Another matter related with pretrial detention is the moving of persons deprived of liberty, either with enforceable sentences or on a precautionary basis, to penitentiary centers near their family homes. Although the ECHR does not recognize the right to choose a prison in which to serve one's sentence, here the Additional Protocol 12, which states that "the enjoyment of any right set forth by law shall be secured without discrimination on any ground such as (...) political or other opinion" could come into play.

From this standpoint, to the degree in which the closeness of persons deprived of liberty to their places of residence forms part of the guiding principles of the Law and Penitentiary Regulations, the case of the persons who have been deprived of liberty in the framework of the process and who remain in penitentiary centers located in the Autonomous Community of Madrid could be interpreted as a discriminatory measure contrary to article 1 of Additional Protocol 12, from the time in which they request transfer to Catalan prisons, and especially, as of the time in which there is no more evidence to be gathered or reasons for them to be immediately available to the examining court, in this case the SC.

3.6. Judicial impartiality

Several situations that have arisen during the Catalan conflict have seriously compromised the impartiality that must characterize the judiciary, which constitutes an essential element of the right to due process of law recognized in the Constitution (art. 24.2),[61] and that is also specifically recognized as part of the right to a fair trial in the ECHR (art. 6.1). This judicial impartiality is all the more important when criminal proceedings of extreme seriousness—as is the case of sedition and rebellion—are underway.

Judicial impartiality has two sides, as both the CC[62] and the ECtHR have acknowledged. The CC has distinguished between the subjective dimension of impartiality, by which judiciary bodies may not have what the CC has generally qualified as spurious

[59] Judgment of Ambruszkiewicz v. Poland, May 4, 2006, paras. 29 and 32.

[60] Judgment of Richet v. France, of February 13, 2001, paras. 61 to 64.

[61] As part of the rights recognized in article 24.2 SC (summary in STC 149/2013, of September 9).

[62] STC 149/2013, of September 9, LB 3.

relations between the parties; and another is the objective impartiality, by which the judge may not handle a case if they have a previously established position regarding it.

The ECtHR, for its part, has also developed the concept of *independent judge*. This concept is rooted in the premise of absolute freedom of the judge, and the absence of subordination to any type of authority. This statement translates into the existence of safeguards against outside pressures by legislative and executive authorities in the appointment procedure of judges and magistrates, the duration of their terms of office, their non-removability, the composition of the bench, and in the provision and application of safeguards against outside pressures, which include the preservation of their appearance of independence.[63] As for the concept of *impartiality of the tribunal*, "impartiality normally denotes absence of prejudice or bias." Its analysis (first involves) "a subjective approach, that is endeavoring to ascertain the personal conviction" and personal conduct "of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect.[64]

In the first (subjective) test, the personal impartiality of the judge is always presumed to exist, unless there is proof to the contrary.[65] It is a matter of the judge having the capacity to take the distance necessary, and to avoid falling under any sort of subjective influence. The ECtHR states that the discretion imposed on the authorities who have the task and responsibility to judge equally extends to their relations with the media, even to responding to provocations, as it is so determined by the superior imperatives of justice, and the magnitude of their duty. Specifically, "the act of publicly using (by the president or member of the tribunal which is to decide on an action) expressions that could imply a negative appreciation of the case by one of the parties is incompatible with the requirements for impartiality of any court, enshrined in Article 6.1 of the Convention".[66]

Therefore, from these numerous vantage points, situations have arisen that contravene judicial impartiality.

From a subjective viewpoint, this occurred, for example, as regards the CC itself when, as was publicly recognized,[67] direct contacts took place between the judges and members of the State government in the midst of their deliberations on the administrative acceptance of the Government's challenge to Carles Puigdemont's candidacy for the Presidency of the Generalitat, in a relationship that compromises, at least, the appearance of independence and impartiality.

From an objective point of view, judicial impartiality has been compromised when, from the most senior ranks of the judiciary, including the President of the SC, public statements have been made in the spirit of considering that the judiciary's mission (along with the other powers of the State, it is said) is to guarantee the unity of Spain,[68] This results in their openly taking a stand against the political positions held by the individuals indicted in the still-open court cases, and neglects the doctrine made explicit by the CC regarding the non-militant nature of democracy established in the Constitution and the legitimacy of all political aspirations, including those that make for deep constitutional changes, as long as they respect fundamental rights and their practical implementation respects

[63] Judgment Kleyn and others v. the Netherlands, of May 6, 2003, para. 190.

[64] Judgment Piersack v. Belgium, October 1, 1982. para. 30.

[65] Judgment Hauschildt v. Denmark, of May 24, 1989, para 47. 47.

[66] Judgment Lavents v. Latvia, of November 28, 2002. para. 118.

[67] News of this incident was published in a number of newspapers with circulation throughout Spain, such as El País: "Government Warns Constitutional Court: Puigdemont's Attempt a 'Serious Matter'" (January 29, 2018) https://politica.elpais.com/politica/2018/01/28/actualidad/1517164077_657245.html.

[68] Speech of the President of the SC in the opening of the 2017-2018 judiciary year: "When Article 2 (of the SC) situates its constitutional base in the indissoluble unity of the Spanish nation, it does not do so as the frontispiece to a program, but rather as the ultimate, essential and irreducible bedrock of an entire state's legal system. It is, therefore, a direct legal mandate that the judiciary, along with the rest of the State's powers, must guarantee; in short, a duty of imperative compliance for all of us."

legality.[69] In this peculiar legal appraisal, Article 2 SC ("The Constitution is founded on the indissoluble unity of the Spanish nation (...)") takes precedence over any other provision of the Constitution itself, especially including Article 1, in which, among the "highest values of the legal framework" there is no reference to national unity: "Spain is constituted as a social, democratic country under the rule of law, which espouses as the highest values of its legal framework liberty, justice, equality and political pluralism."

Likewise, the examining magistrate of the SC, in some of his interlocutory orders,[70] appears to feel personally offended by the alleged crimes he is investigating, and thus shows a lack of impartiality that impairs his capacity as a judge, even as an examining magistrate.

3.7. Right to due process of law

Aside from its constitutional dimension, the day of October 1 triggered an avalanche of criminal complaints of every color in different examining courts of Catalonia. Complaints were filed for injuries allegedly caused by the actions of the Spanish National Police and Civil Guard as well as for the alleged negligence of officers of the Police of the Generalitat-Mossos d'Esquadra (PG-ME) corps, in their obligation to block the holding of the ballot. The most notorious example is that of Examining Court no. 7 of Barcelona, which has accumulated 257 complaints against the police for injuries. Most of these courts are processing these complaints under normal conditions. But it bears mentioning that three of these courts have closed or dismissed provisionally all or most of these complaints, as has occurred in examining courts no. 5 of l'Hospitalet (five complaints closed or dismissed), no. 2 of Sabadell (2) no. 4 of Amposta (97 of the 99 complaints received) and no. 1 of Bisbal d'Empordà (4).[71] In all of these cases, the right to due process of law is compromised by denial of access to justice.

A relevant case of possible violation of this right has come about with the recent reform of the Organic Law of the CC, that enables the highest authority for interpretation of fundamental law to impose severe economic and institutional penalties, without the necessary procedural guarantees. As was stated in the *Report on Rights Regression in Spain*, the Venice Commission discouraged in a timely manner the central executive from endowing the CC with this responsibility. The Venice Commission expressly stated 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." In fact, it states that "as the comparative overview has shown, (the formula in force for Spain) is rather exceptional (because, as a general rule) the task (of monitoring the execution of their judgments) is assigned to a specific organ or body.

A recent report led by former president of the ECtHR, Jean Paul Costa, echoes the Venice Commission's opinion and highlights the lack of clarity of the provisions regarding penalties for non-compliance and the fact that, "whilst the Constitutional Court claims that the penalties do not have a criminal character" (Judgment of the CC 185/2016), (...) "they are so severe that they must be considered equivalent to criminal punishment," and pursuant to the case law of the ECtHR, they must have "the full protection of Article 6" ECHR.[72]

The risks referred to by the Venice Commission in its report on the reform of the LOTC have already become reality, with the imposition of exorbitant fines (up to

[69] STC 42/2014, of March 25 (LB 4.c), with specific citation of other previous judgments.

[70] Significantly, the ITS of April 12, 2018, denying Jordi Sànchez's request for conditional release to attend the investiture session for the Presidency of the Generalitat.

[71] These figures, updated for the last time on January 24, 2018, can be consulted on the website of the General Council of the Judiciary: http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Noticias-Judiciales/Diligencias-previas-abiertas-en-los-juzgados-de-Cataluna-a-24-de-enero.

[72] Jean-Paul Costa - Françoise Tulkens - Wolfgang Kaleck - Jessica Simor: *Catalonia Human Rights Review. Judicial controls in the context of the 1 October referendum*, p. 40-45. Full text: https://www.elnacional.cat/uploads/s1/38/83/74/3/final-opinion.pdf

12,000 euros daily) by the CC on the members of the Electoral Syndicate for alleged disobedience of the rulings meant to prevent the celebration of the referendum. The Catalan Ombudsman believes that these fines could make for a violation of article 6 of the ECHR, especially the audi alterem partem principle. This punitive character does not depend on the legal denomination, or the class of process that drives them, but their materially afflictive nature. The proof is found in the fact that the amount of the fine is grounded in the severity of the alleged violation and the level of authority of the sanctioned officials (see ATC-P court order of 21-9-2017). This is what occurs, for example, in the case of the coercive fines levied by the Administration, which, as administrative acts, must follow the established procedure and can be reviewed in a jurisdictional setting, or the courts themselves. On the other hand, the CC's coercive fines are levied:

- *Inaudita parte*: they can be levied ex-officio by the government, without even listening to the sanctioned parties. The report to be requested from them is to inform on compliance with the CC ruling by which they are being sanctioned (Art. 92.4 OLCC) and therefore does not meet the minimum conditions of a prior hearing. But, furthermore, fines can be levied in some cases without even having to produce this report (Art. 92.5 OLCC). The latter case is what has happened to some of the individuals who have been fined by the aforementioned court orders.

- Without any possibility of later judicial review, as the rulings of the CC cannot be appealed. Even in the case that a reversal appeal were allowed (which is not expressly provided for either), this could not be considered an appeal that would allow judicial review of the challenged act, given the contamination of the entire body if the fine has been levied by the court in plenary session (as is the case). The fact that in some cases the fines do not have a sanctioning or punitive nature does not mean they are exempt from judicial review. This is even more relevant if the fines have been levied without following any procedure in which the sanctioned parties have been able to exercise their right to defense, or even be heard.

- Additionally, the request for a report on compliance with the decisions of the CC could, in itself, contravene the right to defense if criminal proceedings have been begun in parallel, as is the case at hand, because then the individual would be obliged to testify against themselves, which would mean a direct violation of the rights recognized in Article 24 SC (not testifying against oneself).[73]

3.8. Freedom of expression, assembly and demonstration

In his April 2017 report, the Catalan Ombudsman dealt broadly with the constitutional and European framework of freedom of expression. In that report, he stated, among other things, "Freedom of expression is one of the basic foundations of democratic society. The restrictions established in Article 10.2 of the European Convention must be justified only in cases of extraordinary seriousness. To justify these restrictions in accordance with the European Convention, it is imperative to establish that the causal information or ideas could bring about a true and serious risk or damage (not a simply hypothetical one) for the "protection of reputation or rights on behalf of others, national security, the dissemination of confidential information or the authority and impartiality of the Judiciary. It is necessary for it to be a matter of objective, not merely subjective, seriousness, decided from governmental or judicial bodies".[74]

The unjustified restrictions on the freedom of expression and assembly that Amnesty International denounced in its 2016/2017 annual report have been repeated this year:

[73] *Summary report of actions taken by the Síndic de Greuges (Catalan Ombudsman) regarding the day of October 1*, November 2017, p. 12

[74] *Report Human Rights Regression in Spain: Elected Officials' Freedom of Expression and the Separation of Powers*, April 2017, p. 7.

"Following the Constitutional Court decision of 7 September aimed at preventing the referendum, some authorities disproportionately restricted the rights to freedom of expression and peaceful assembly."[75]

These excessive limitations are not exclusive to the Catalan process, but they have a clear impact in this context. In all cases, it is reprehensible that none of the decisions features an analysis of proportionality between the restriction of freedom of expression and the (legitimate) aims for which this limitation could be employed. In other words, that restrictions to the freedom of expression are adopted without assessing whether they are truly necessary, or the scope they are to have.

Perhaps one of the most egregious transgressions of freedom of expression and assembly can be found in the police and judiciary investigation of the facts attributed to all of the individuals being investigated by the Prosecutor's Office. The proceedings include within the crime of rebellion (which includes violence as a typical component) the September 11th demonstrations, which have been peacefully conducted over recent years. Equally alarming are the allusions to eventual and future popular demonstrations which under no case can be presumed to turn violent.[76] These assertions[77] could be interpreted as a criminalization of the freedom of expression and demonstration, which are indispensable rights of political participation in a democratic state.

Another violation of the freedom of expression occurred in the confiscation of t-shirts, scarves and other yellow garments (in addition to signs and t-shirts with political messages such as "freedom") at the King's Cup football final, held in Madrid on April 21, 2018. Additionally, before the match, the Police filmed and photographed the supporters sitting in the stands designated for FC Barcelona fans, apparently to capture footage and pictures of the moment in which the Spanish national anthem would be booed.[78]

Another symptom of threatened, if not directly violated, freedom of expression is the fact that the Prosecutor's Office has filed complaints, and that some courts have opened criminal proceedings, for hate crimes related to certain actions and statements of individuals who have expressed their protest or rejection of the police action of October 1, when under no reasonable concept would it be possible for the law enforcement agencies of a state to be considered a vulnerable group susceptible to being the victim of hate crimes.

Regarding these affairs, the ECtHR, repeating previous case law,[79] has recently stated[80] that "limits of acceptable criticism are accordingly wider with regard to a politician acting in his public capacity than in relation to a private individual", and has warned against undue use of the figure of hate crimes. Along these lines, a politician "lays himself open to close scrutiny of his

[75] *2017/2018 Amnesty International Report* p. 188. *The Summary Report of October 1* lists some of these administrative and jurisdictional prohibitions.

[76] Statement of the Catalan Ombudsman of December 5, 2017.

[77] The examining magistrate uncritically assumes the Civil Guard reports and, among others, makes the following statements: "[...] popular or citizen demonstrations are understood as an intimidatory or violent means of achieving the secessionist aim. The attitude of open opposition against the legal and constitutional order of a multitude of mobilized individuals created intimidatory force enough to, on its own, keep the established law enforcement personnel from acting or deterring them, in light of the danger of this insurrectionist movement of the multitude degenerating into open violence, as did occur in certain described episodes, in which the agents of authority had to retreat to prevent these undesired consequences".

[78] LLaw 19/2007, against violence, racism, xenophobia and intolerance in sport defines as acts of violence or those that incite violence the exhibition of "signs, symbols, emblems or captions that, due to their content or the circumstances in which they are exhibited or used in some way incite or abet violent or terrorist behaviors, promote such behaviors or constitute an act of manifest contempt for the persons participating in the sport spectacle." Any chants that incite violence, terrorism or aggression in sport facilities (...) are also prohibited". The Catalan Ombudsman has asked the Spanish Ombudsman to investigate these confiscations and the filming of fans, to determine whether the facts meet these legal provisions or whether they are actually violations of the freedom of expression.

[79] Judgment Castells v. Spain, of April 23, 1992, para. 46.

every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance, especially when he himself makes public statements that are susceptible of criticism.[81]

Likewise, the Catalan Ombudsman rejects the use of insults and collective disqualifications, such as those used by some institutional senior officials and leaders of different political parties. These expressions are an obstacle to social, political and institutional dialogue, as well as being offensive to broad sectors of society. However, this cannot be confused either with the crime of hate speech, as discussed above, nor can it trivialise phenomena that are seriously damaging to fundamental rights such as racism or xenophobia.

It is in this same regard that the actions on the educational system of Catalonia should be confined to the educational community, avoiding the irresponsible temptation of partisan and electoral approach.

In any event, the purpose, and intimidatory and deterrent effects for the future exercise of the freedom of expression that are derived from these abusive accusations of hate crimes, and unjustifiable restrictions of the rights of assembly and demonstration, are extremely alarming.

3.9. Freedom of information

On September 12, the High Court of Justice of Catalonia notified several individuals, including the management of the Catalan Audiovisual Media Corporation (CCMA-TV3 and Catalunya Ràdio) of the ruling by the plenary session of the CC suspending Law 19/2017, which also prohibited "informing on any agreement or action that would allow the preparation and/or celebration of the self-determination referendum of Catalonia." The court also warned of possible criminal punishments in case of disobedience.[82] On another note, in the month February, 2018 it became known that the Civil Guard considered media company owner Jaume Roures to be a member of the "Executive Committee" of the "process" and a "capital element for the dissemination of the pro-independence message.[83]

According to the ECtHR, freedom of information has a two-fold meaning, of imparting and receiving; that is, the press have the right to impart information and ideas and the public has a right to receive them. There are information and ideas that deserve to be considered of public and general interest, which does not necessarily mean they are of political interest. It is clear that the possibility to communicate information and ideas, and to criticize public institutions with complete freedom is of utmost importance for the political and democratic life of a country. The ECtHR has stated: "Whilst the press must not overstep the bounds set, inter alia, for the 'protection of the reputation of others', it is nevertheless incumbent on it to impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them".[84]

The right to receive information includes the right to search for them and gather them from all of the legal sources available

[80] In the recent Judgment Stern Taulats and Roura Capellera v. Spain, of March 13, 2018, the ECtHR states that burning photos of the King of Spain is a statement of political criticism protected by the freedom of expression and that including this action within the discourse of hate would jeopardize pluralism, tolerance and an open spirit without which there can be no democratic society.

[81] Judgment Oberschlick v. Austria (1), of May 23, 1991, para. 59.

[82] *Summary-report of October 1*, p.7.

[83] This news item was published, in addition to other media, inhttp://www.ccma.cat/324/la-guardia-civil-situa-jaume-roures-en-el-comite-executiu-del-proces-sobiranista/noticia/2838026/

[84] Judgment Ligens v. Austria, July 8, 1986, para. 41.

and willing to impart them. Therefore, "the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him.[85] Article 10 applies "not only to the content of information but also to the means of transmission or reception since any restriction imposed on the means necessarily interferes with the right to receive and impart information".[86] Thus, in a general manner, in addition to the press, all radio, television, cinema and video recordings and Internet communications, must be considered as included.

[85] Judgment Leander v. Sweden, March 26, 1987, para. 74.

[86] Judgment Autronic AG v. Switzerland, May 22, 1990, para 47.

4. CONCLUSIONS AND RECOMMENDATIONS

From the strictly judicial perspective, which is that of this report, the contravention of rules of a constitutional and statutory rank by the Catalan institutions, especially as of September, 2017, could be responded to, as indeed happened, through the usage of various ordinary instruments available to the state, especially before the CC.

On the other hand, the reaction of the three powers of the State has been characterized by resorting to exceptional measures such as application of Article 155 SC (interpreted, furthermore, on an extensive basis) and the forced application of criminal law, beyond the offense of disobedience of the CC, which was explicit and patently clear. The measures adopted in this framework have significant impaired fundamental rights and constitutional principles, which have suffered restrictions devoid of legal provision, legitimate aim and proportionality. All of these impairments have been examined in this report and it can be concluded that the most noteworthy are those having to do with the rights and principles of personal freedom, political participation, freedom of expression and rights of assembly and demonstration, the "no punishment without law" principle, and due process of law.

Indeed, the restriction of personal freedom of various political and social leaders by an abusive, disproportionate use of the cautionary measure of pretrial incarceration is perhaps the most flagrant violation of fundamental rights in the context of the facts that have been described in this report.

Furthermore, the dissolution by article 155 of the Parliament and the removal of over 250 senior officials of the government, including the president of the Generalitat and the entire Executive Council, have a direct impact on the right to political participation recognized in Article 23 of the Constitution, in two ways: on one hand, the rights of ousted public officials and representatives whose dismissal followed the premature dissolution of the Parliament are impaired; and, on the other, citizens' rights to political participation, in general, are also impaired as the representatives they have elected have not been able to take office to serve the terms for which they were elected.

The right to political participation (art. 23 SC) was also affected by the acts that, after the elections of December 21, blocked some of the candidates who had been elected, and who were in possession of their political rights, from standing as candidates for the presidency of the Generalitat, in the process of investiture meant to form a new government.

Freedom of expression and the rights of assembly and demonstration are also suffering a regression that the Catalan Ombudsman has not been alone in decrying. These regressions are not limited to pro-independence expressions or demonstrations in Catalonia, but are of a wider scope, and are being applied to different forms of protest and dissidence.

Within the framework of the criminal proceedings underway in various judicial instances for actions derived from the October 1 referendum and the October 27 declaration, the possible impairments of fundamental rights are extremely alarming. One of the more notable impacts is the one that refers to the principle of "no punishment without law" when disproportionate accusations are made, based on clearly distorted facts, without the inseparable typical legal provision. This violation of the "no punishment without law" principle in the processing of crimes such as rebellion, sedition, terrorism or criminal organization, among others, seems to seek punishments that set an example and a deterrent effect over certain future political positions.

Furthermore, from a procedural standpoint, the possible violations of fundamental rights to the judge predetermined by law, the right to due process of law and the right to defense, as well as the public demonstrations that have taken place in recent years, all of which questions the necessary judicial impartiality.

Last, on several occasions throughout the period covered in this report, and especially on October 1, 2017, the Civil Guard and the National Police Corps acted in a manner that could be considered disproportionate, and caused damage greater than that which they supposedly sought to prevent, with interventions before persons with pacific attitudes that did not respect the principles of congruence, opportunity and proportionality taken up in the laws that regulate the activities of law enforcement agencies and corps.

Especially serious is the fact that on October 1 State law enforcement agencies used rubber bullets, which caused at least one serious injury. The Parliament of Catalonia completely prohibited these weapons as of April 30, 2014, at the proposal of the Study Commission for Security Models and Public Order and the Use of Anti-riot Materials in Mass Events. For this reason, the Catalan Ombudsman believes that this prohibition must be respected by all law enforcement agencies acting in Catalonia.

In this context, the **Catalan Ombudsman makes the following recommendations**:

One. The immediate release of the individuals indicted for the crimes of rebellion and sedition who are in pretrial custody while the trial is not held with full guarantees and there is an enforceable judgment.

Two. We find ourselves facing historical conflicts of an imminently political nature that have impacts on fundamental rights. Therefore, the start of constructive dialog is necessary to achieve a political solution to the conflict. This dialog must not be limited only to the political and institutional realms, but must also take place between the civil societies of Catalonia and the rest of the State, on one hand, and representatives of all political and social sensitivities in Catalonia, on the other.

Three. In the current context of rights regression, which is not exclusive to the immediate context of Catalonia, it is necessary to strengthen the democratic guarantees that ensure the exercise of the rights and fundamental freedoms, such as the freedom of expression, assembly and demonstration.

Four. The possible offenses that have been committed (such as disobedience of the Constitutional Court) must be faced in the framework of the strict, constitutionally-established principle of "no punishment without law".

Five. In light of the disproportion of the criminal law handling of all these affairs, it is necessary to recommend the recovery, by the state public prosecutor and all institutions that make up the judiciary, of the democratic principles of minimal intervention and proportionality in the strict application of the Criminal Code in relation to the description of punishable facts associated with the political conflict in Catalonia.

Six. The determination, as requested by international bodies (Council of Europe and the United Nations) of responsibilities for the violence employed on October 1. Along these lines, it is necessary to claim strict respect for the principle of proportionality by law enforcement agencies and corps that have to intervene in citizen demonstrations, and especially, the need to respect the prohibition of rubber bullets.

Seven. The complete re-establishment of self-rule in Catalonia, without intervention in its administration or its finances.

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